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D E C I S I O N
of 23 September 1993

Case Number: D 0001/93

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Appellant:
N.N.

Opponent:
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Headnote:
"The aim of the qualifying examination is to determine whether the candidate is "fit to practice before the EPO". Therefore, Article 12(3) REE should be interpreted so as to leave the Examination Board the possibility to appreciate whether in borderline cases the candidate is "fit to practice" although he failed one paper at the resit."



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Boards of Appeal

Chambres de recours

Case Number: D 0001/93

D E C I S I O N
of the Disciplinary Board of Appeal
of 23 September 1993

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the European
Qualifying Examination dated 9 October 1992.

Composition of the Board:

Chairman: C. Payraudeau
Members: L.C. Mancini
J.-C. Saisset
Ch. Bertschinger
A. Armengaud

Summary of Facts and Submissions

I. Having obtained the grades A: 5, B:4, C:5, D:2 at the European Qualifying Examination for Professional Representatives held in April 1991, the Appellant resat for papers A and C at the Examination held in April 1992.

II. By registered letter of 9 October 1992, the Chairman of the Examination Board for the European Qualifying Examination, hereinafter referred to as the "Board", notified the Appellant of his performance in said two papers; the grades obtained by the Appellant were the following:

Paper A: 3 (good)
Paper C: 5 (inadequate).

Therefore the combined results in the joint examination for 1991 and 1992 were:

Paper A: 3 (good)
Paper B: 4 (pass)
Paper C: 5 (inadequate)
Paper D: 2 very good.

The Appellant was informed that in accordance with the Implementing provisions under Article 12 REE, the "Board" had decided that he had not been successful in the European Qualifying Examination as well as of the possibility for him to apply for enrolment for a future qualifying examination.

III. By letter dated 16 November 1992, the Appellant filed an appeal against this decision requesting that the decision under appeal be set aside and that he be

declared having passed the examination. As an auxiliary request, he asked for oral proceedings.

IV. In the Statement of Grounds and in the complementary submissions filed later on, the Appellant essentially argued that the appealed decision had infringed point I of the Implementing provisions under Article 12 REE.

According to the provision of this point I, the Examination Board has to decide for each paper whether "on the evidence of his answer to this paper, the candidate (is) fit to practice as a professional representative before the European Patent Office in the field covered by this paper".

According to Article 12(b) REE, candidates shall be declared to have passed the examination if they pass at least half of the examination papers, provided they obtain the minimum grades required under the Board's rules.

Under point VII(a) of the Implementing provisions, under Article 12, a candidate is successful if he has failed only one paper, which has been awarded a grade 5, and that grade is offset by a grade 3 or better in at least one other paper.

It should not be correct to consider the candidate who resits part of the examination differently from the candidate who obtains the same grades at the first sit since the criterion of fitness to practice is to be taken as a whole.

Since the grade 5 obtained by the Appellant in paper C was offset either by the grade 2 obtained in paper D or by the grade 3 obtained in paper A, he should have been declared as having passed the examination.

- V. Since the Board decided not to rectify its decision the case was forwarded to the Disciplinary Board of Appeal.
- VI. Both the President of the Council of the Institute of Professional Representatives before the EPO (EPI) and the President of the EPO were consulted under Article 12 of the Regulation on Discipline for Professional Representatives in conjunction with Article 23(4) REE.
- VI. On the 28 June 1993, the President of the EPO presented the following comments to the Chairman of the Disciplinary Board of appeal:
- "I would like to draw your attention to the fact that the Appellant misinterprets Article 12 REE and the implementing provisions under Article 12 REE by combining the results of two subsequent examinations. In the case of normal (full) resits, your Board has ruled in numerous cases in the past that candidates cannot compensate inadequate grades in the last examination sat by good grades obtained in previous examinations. In the case of partial resits, the same rule should apply. This also follows clearly from Article 12(3) REE which states that a partial resit candidate has to pass all the papers he resits in order to pass the examination. Compensation is only possible when the candidate resits the complete examination. Partial resit candidates may do so if they choose."
- VII. In accordance with the candidate's request, oral proceedings were held on 23 September 1993. The President of the EPI, duly summoned, was not represented. The President of the EPO was represented by a member of his staff.

Reasons for the Decision

1. The appeal complies with the provisions of Article 23(2) REE and is admissible.
2. According to the former version of Article 12 REE, the candidate having failed at the qualifying examination had to resit all the papers. In such cases, the Disciplinary Board of Appeal in a constant jurisprudence has considered that the principle of the full resit was ruling out that the candidate could compensate inadequate grades obtained in the last examination sat by good grades obtained in previous examinations.
3. The version of Article 12 REE applicable to the present case is however the text amended by decision of the Administrative Council of 7 December 1990 which entered into force on the same date (OJ EPO 1991, 15) and the corresponding new Implementing provisions under Article 12 REE (OJ EPO 1991, 88).
4. Paragraph (3) of the new Article 12 REE states "the Board may lay down in his rules that a candidate who has failed the examination, under certain circumstances, need resit at a subsequent examination only the papers he has failed; **he shall be declared to have passed the examination if he passes these papers**" (emphasis added). The German and French texts are slightly different and at least the German text is less explicit ("... wenn für diese Arbeiten eine ausreichende Bewertung erzielt wird." - "...Si le candidat obtient à ces épreuves une note suffisante").
5. The former jurisprudence of the Disciplinary Board of Appeal is therefore no more applicable to the cases arising under these new provisions since the principle is now written in the Regulation and its Implementing provisions that the grades obtained in the first

examination have to be considered as still valid for the subsequent examination.

6. The question raised by the present case is whether the candidate has to pass at the second examination both papers he failed at the first one or whether, in certain circumstances, the candidate may be declared as having passed although he again failed in one of these two papers.
7. According to the opinion given by the President of the EPO, the last sentence of Article 12 REE should be interpreted as requiring that a candidate who resits two papers should in all cases be declared as having been unsuccessful if he only obtains a 5 in one of these papers.
8. As pointed out by the Appellant, the aim of the qualifying examination is to determine whether the candidate is "fit to practice before the EPO" as clearly stated in point I of the Implementing provisions under Article 12 REE. It is thus necessary to examine whether a literal interpretation of the provision of Article 12(3) REE is in conformity with the aim of the qualifying examination.
9. According to such an interpretation a candidate should be declared unsuccessful in all and every cases where he obtains a 5 in one of the two papers which he resits whatever his results in the other papers. At the limit, a candidate with the grades 1, 1, 1, 5 after the resit should therefore automatically be declared unsuccessful. This means that the "Board" could not "decide whether a candidate has passed or failed" (Article 5(3) REE) but must without any discretion declare the candidate unsuccessful, whatever the circumstances of the case. The "Board" would be therefore deprived of any power of

appreciation in the borderline cases and this would contravene the recognised principle that the role of the "Board" is essentially to appreciate such borderline cases.

10. The Disciplinary Board of Appeal considers therefore that Article 12(3) REE should be interpreted so as to leave the "Board" the possibility to appreciate whether in such borderline cases, the "candidate is fit to practice" although he failed one paper at the resit. More precisely, although the REE and its Implementing provisions clearly require that the unsuccessful candidate admitted to resit should pass **all** the papers he failed, the Disciplinary Board of Appeal considers that, in principle, a case where a candidate who resits fails one of the two papers which he resits is a borderline case where the "Board" will have to appreciate whether the candidate is nevertheless fit to practice. To decide on this question, the "Board" will have to analyse the results obtained by the candidate in all four papers, taking into account not only the grades obtained but also the arithmetical sum of the grades obtained, the nature of the examination papers and the results obtained in each part of the papers.

11. For these reasons, the Disciplinary Board of Appeal judges that a literal interpretation of Article 12(3) REE would not only lead, in cases like the present one, to a violation of the provisions of the REE relating to the aim of the qualifying examination but would also deny any power of appreciation by the "Board".

12. In the present case, the "Board" did not give any reason for its decision that the Appellant had not been successful, except the grades obtained. The Disciplinary Board of Appeal could therefore remit the case to the "Board" with the order to give a reasoned decision based

on the above developed principle. However, such a decision of remittal would be contrary to the legitimate interest of the Appellant to have his case decided as promptly as possible. Moreover, the Disciplinary Board of Appeal has sufficient information in the file to decide itself the case without having to reconsider the entire examination procedure on its merits.

13. The question to be decided is whether the grade 5 obtained in paper C by the Appellant is compensated by the other grades obtained in the other papers the arithmetical sum of his grades being 14, which is a better overall result than that of a candidate having obtained grade 4 in all four papers. As stated in Article 10 REE, the examination comprises four papers: A, B, C, D. The papers A and B concern the drafting of claims and the reply to an official letter and are essentially of technical nature whereas paper C concerns the drafting of a notice of opposition which therefore comprises both technical and legal aspects and paper D relates essentially to legal questions.

14. On the technical aspects of the questions, the Appellant obtained a 3 in paper A and a 4 in paper B. The Disciplinary Board of Appeal considers therefore that technical insufficiencies of paper C would be compensated by the good results obtained in paper A. For identical reasons, legal deficiencies of this paper C should be also considered as compensated by the very good grade (2) obtained in paper D.

15. On the basis of the above considerations, the Disciplinary Board of Appeal considers that the Appellant should be declared as having passed the examination.

16. Article 23(4) REE states that "if the Board of Appeal allows the appeal ..., it shall order reimbursement in full or in part of the fee for appeal if this is equitable in the circumstances of the case". In the present case, the Disciplinary Board of Appeal considers the fact that the decision of the "Board" was not reasoned as being a sufficient ground for it to decide the reimbursement of the appeal fee.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The Appellant is declared as having passed the European Qualifying Examination in 1992.
3. The reimbursement of the appeal fee is ordered.

The Registrar:



M. Beer

The Chairman:



C. Payraudeau