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PATENTAMTS

BOARDS OF APPEAL OF
THE EUROPEAN PATENT
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CHAMBRES DE RECOURS
DE L'OFFICE EUROPEEN
DES BREVETS

Case Number: D 0010/95

D E C I S I O N
of the Disciplinary Board of Appeal
of 16 February 1998

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the European
Qualifying Examination dated 13 October 1994.

Composition of the Board:

Chairman: P. Messerli
Members: L. C. Mancini
J. Stephens-Ofner
Ch. Bertschinger
J. Neukom

Summary of Facts and Submissions

I. The appellant took the EQE (European Qualifying Examination) for professional representatives for the first time, in 1991, and failed. He failed also in the subsequent years and finally did succeed in 1995.

This appeal relates to EQE 1994.

II. He was notified on 13 October 1994 that he had, once more, been unsuccessful in the EQE held from 13 March to 15 April 1994, having received the following grades:

Paper A: -	Paper C: passed
Paper B: -	Paper D: 5

III. With the EQE 1994 Notification the appellant was informed of these results of the partial resit, and that only copies of his answer and marking sheets of the failed Paper D would be submitted to him.

IV. With a letter of 27 October 1994 the appellant requested the Chairman of the Examination Board to furnish a full copy of his examination file, particularly the grade and marking of Paper C that he had passed, and the reasoning which led to the impugned decision, so as to enable him to substantiate any appeal he might wish to make.

V. To this request the Examination Board, by a letter dated 23 November 1994 replied as follows:

"The new Implementing provisions to the Regulation on the EQE entered into force on 19 May 1994, and were therefore

in force, just like the new Regulation itself, when the Examination Board decided on the 1994 results. According to Rule 9(2) second sentence of the Implementing Provisions, resitting candidates shall receive only the answers and marking sheets of the failed papers. When resitting, a candidate has to pass each of the examination papers in order to pass the examination. Therefore, the results in Paper C are irrelevant to the decision that you have failed the examination on the basis of having an insufficient grade in Paper D."

VI. Notice and grounds of appeal were filed by the candidate on 2 December 1994. The appeal fee was duly paid. The appellant requested that the decision of the Examination Board be set aside and that he be declared to have been successful in the 1994 EQE.

VII. The appellant's preliminary argument was that since the "New Regulation" published in OJ EPO 1-2/1994, pages 7-18 was in force only in part as to the EQE 1994, the Appeal should mainly be governed by the "Old" Regulation (published in OJ EPO 1-2/1991, pages 79-87). Furthermore, his main contention was that the fact that the Examination Board by virtue of the New Regulation, applicable only in part, had favoured him by a partial resit, (Articles 17 and 18 of the New Regulation), should not alter its "obligation" to apply the ratio decidendi of case D 1/93 (OJ EPO 4/1995) to his own case, thereby accepting his to be a "borderline case".

VIII. The President of the Council of the Institute of Professional Representatives 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, and have not made any comment.

Reasons for the Decision

1. The appeal is admissible.
2. As already indicated, Appellant's preliminary argument centers on the allegedly harsh and premature effects of the changes in the REE promulgated on May 1994, thereby justifying his request to have the decision of the Examination Board set aside and to decide that he had been successful in the 1994 EQE.
3. Admittedly the relevant provisions of the REE as promulgated on December 1990 had enabled the Examination Board to deal with "borderline cases" under paragraph VII, and in the case of initial failure, under paragraph IX. Thus, both paragraphs had recognised the principle of compensation for failed papers by papers in which success at a particular grade had been attained.
4. Moreover, the provisions of the REE as amended on 1 January 1993 preserved the right of initially unsuccessful candidates to attempt a number of partial resits, so that they did not need to resit the entire examination, but only those papers in which they had failed. In particular, paragraph X allowed candidates who failed one or two papers in a partial resit, a further partial resit, subject to certain numerical aggregate conditions: the principle of allowing credit for papers accepted in earlier attempts was

thus expressly kept into effect.

5. It can thus be appreciated that the Appellant was in a rather complicated situation that needs to be duly interpreted and, that such situation may be rather common whenever new legal provisions affecting the same matters are promulgated in a rapid succession, so that fundamental legal principles may be altered or even misinterpreted, if there are no express and specific transitional provisions.
6. However, having considered the sequence of previous and subsequent provisions, and their scope of applicability one has also to appreciate that, between December 1990 and May 1994 (time of enactment of the new provisions) the principle of compensating partial failure by invoking earlier successful marks achieved in the first full and subsequent partial resits of the examination had been gradually eroded, and then finally abolished by the new provisions, then issued and meant to apply to all candidates at the time of evaluating all 1994 results.
7. In view of the foregoing, one must consider whether, irrespective of the applicability of old and new regulations or of new regulations alone, the candidate can legitimately apply the actual facts and therefore merits of case D1/93 to the facts and merits of his own case, in order to have his own case considered and treated as a "borderline" case.

In this respect, one must consider the respective total scores or "combined results" of both candidates in the case D1/93 and in the present case. In D1/93 appellant's total scores or combined results gave total grades of 14 and

namely:

Paper A: 3

Paper B: 4

Paper C: 5

Paper D: 2

It should be appreciated that such a total score has not been matched by that of any other of the many appellants who have claimed the applicability to themselves of the principles of D1/93, without giving the necessary consideration to the significant difference in actual total scores or combined results in their own examinations and those of the appellant in D1/93.

Indeed the total scores or combined results by the present appellant gave total grades of 16, namely

Paper A: 4

Paper B: 4

Paper C: 3

Paper D: 5

8. It is therefore clear that the ratio decidendi of D1/93, strongly relied upon by the appellant, cannot be relevant to deciding the allowability of this particular appeal. Even if a new and rather complicated situation occurred by the sequence of various interwoven new rules, with consequently diverging opinions and interpretation, the fact remains that the total scores or combined results do not admit of differences or distortion in their evaluation since these numbers constitute an objective means to express "fitness to practice".

Consequently, this appeal must be dismissed. Given the factual circumstances there are no legal grounds to reimburse the appeal fee.

Order

For these reasons it is decided that:

The appeal is dismissed.

The appeal fee cannot be reimbursed.

The Registrar: The Chairman:

M. Beer

P. Messerli