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Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: D 0009/96

DECISION  
of the Disciplinary Board of Appeal  
of 9 March 1998

Appellant:

N.N.

Decision under appeal:

Decision of the Examination Board for the  
European Qualifying Examination dated  
25 September 1995.

Composition of the Board:

Chairman: L. C. Mancini  
Members: B. Schachenmann  
M. Lewenton  
Ch. Onn  
J. Neukom

## Summary of Facts and Submissions

I. The appellant sat the European qualifying examination for professional representatives held from 29 to 31 March 1995.

II. By notification dated 25 September 1995 the Chairman of the Examination Board for the European qualifying examination informed the candidate of the decision that he had not been successful in the examination. The candidate was also informed that his papers had been marked as follows:

Paper A: 5 failed

Paper B: 3 passed

Paper C: 4 passed

Paper D: 5 failed

Subsequently, copies of the answer papers and the marking sheets were sent to the candidate.

III. By letter dated 7 November 1995 the candidate appealed against the above decision and filed grounds of appeal. At the same time he paid the appeal fee. After the exchange of several communications of the Board and replies by the appellant, oral proceedings were held on 9 March 1998.

IV. The appellant's submissions which, in the course of the proceedings, were amended several times can be summarized as follows:

- (i) The appellant's answer paper C had been awarded 58.5 marks corresponding to grade 4. Had it been awarded 60 marks (i.e. only 1.5 marks more from a total of 100), he would have obtained grade 3 for paper C and passed the examination papers. This situation clearly qualified as a borderline case, all the more so as the total of the marks

obtained in the four papers lay above the total of successful candidates. Nonetheless, he was declared unsuccessful by "automatic" application of the minimum grade regulation according to Article 17(1) REE and Rule 10 of the implementing provisions to the REE. However, this way of assessing the appellant's papers contravened the recognised principle that the role of the Examination Board is mainly to decide borderline cases. Nothing in the wording of Rule 10 of the implementing provisions to the REE allowed the conclusion that its provisions constituted the only way to assess whether, in borderline cases, a candidate was "fit to practise". In contrast, the provisions referred to above, interpreted in the light of Article 7(3) REE and Rule 3 of the implementing provisions to the REE, require the Examination Board to decide, in each borderline case, whether the candidate was fit to practise as a professional representative before the EPO. Thus, the Examination Board should examine each borderline case and give a reasoned decision if the same adversely affects the candidate.

- (ii) The appellant's mother tongue is Spanish. Even if candidates might, according to Article 15 REE, submit their answers in any language being an official language of a Contracting State, the examination papers were drawn up only in the three official languages of the EPO, i.e. English, German and French. Hence, candidates whose mother tongue was not an official language of the EPO were, in any case, at a disadvantage with respect to candidates whose mother tongue is English, German or French. The language regime provided for by the REE contravened the principle of equal treatment of the candidates

and was therefore incompatible with European Law prohibiting all discrimination by reason of nationality and language. It would only be compatible if candidates, whose mother tongue was not English, French or German, were given the benefit of the doubt in borderline cases as the present one.

(iii) Concerning the present proceedings, it was the appellant's intention to bring the issue of discrimination by reason of language before a EU Court or any other European instance, as the Human Rights Tribunal of the Council of Europe. It was therefore appropriate for the present Board to suspend the proceedings and to set a time limit in order for him to provide proof that he had opened proceedings before the relevant European Court. If the Disciplinary Board neither allowed the appeal nor stayed the proceedings, the proceedings should at least be continued in writing so that he could carefully study the newly introduced arguments. In this context, the appellant referred to the decision T 248/92 of the Boards of Appeal.

(iv) Finally, the appellant pointed out that, if the language issue was not taken into account in a way favourable to him, he "reserved the right" to challenge the decision of the present Board in order to seek appropriate compensation for the disadvantages caused him by his writing the examination papers in a language other than his mother tongue.

V. 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 27(4) REE, and have not made any comment. However, the President of the EPO appointed a representative to be present at the oral proceedings of 9 March 1998 (Article 14 of the Regulation on discipline for professional representatives).

Questioned by the Disciplinary Board during the oral proceedings, the representative of the President explained that it was the constant practice of the Examination Board to review, on an individual but anonymous basis, the proposals of the Examination Committees for the grades to be awarded each candidate. In particular, the Examination Board considered whether any upgrading was justified if a candidate had not quite achieved the conditions of Rule 10 of the Implementing provisions to the REE. However, once the grades were determined by the Examination Board, Rule 10 of the Implementing provisions to the REE was applied in order to decide whether or not a candidate should be declared to have passed the examination.

VI. The appellant criticized such proceedings as contravening the principle of legal certainty. Neither were the criteria for such upgrading known to the candidates nor did the Examination Board give any reasons if upgrading was denied in an individual case.

VII. At the end of the oral proceedings the appellant confirmed the following requests:

**Main request:**

The decision under appeal be set aside and he be, declared to have passed the examination papers.

**First auxiliary request:**

The proceedings before the Disciplinary Board be suspended and a time limit be set to him in order to provide proof that he had opened proceedings before the relevant European Court concerning the issue of discrimination by reason of language.

**Second auxiliary request:**

The proceedings be continued in writing if the Disciplinary Board did not intend to take a favourable decision.

**Reasons for the Decision**

1. The appeal is admissible.
2. According to the appellant's first line of argument, it was the role of the Examination Board to decide, pursuant to Article 7(3) REE, whether a candidate has passed or failed. Thus, in borderline cases, the Examination Board should not base its decision only on Rule 10 of the implementing provisions to the REE without giving a reasoned decision setting out why the candidate was not considered to be fit to practise.
  - 2.1 The former jurisdiction of the Disciplinary Board concerning "borderline cases" was based on Articles 5(3) and 12(3) of the 1983 and earlier versions of the REE (see OJ EPO 1983, 282). According to the provisions referred to above the Examination Board could, in particular, examine borderline cases, i.e. cases in which a candidate had passed only part of

the examination papers. The Examination Board then had to consider the papers "as a whole" which allowed certain discretion in respect of the question which papers could offset one another (see decision D 01/86, D 02/86, D 03/86, OJ EPO 1987, 489).

2.2 However, the legal situation is no longer the same under the presently applicable REE (OJ EPO 1994, 7) and the corresponding implementing provisions (OJ EPO 1994, 595). According to Article 17(1) of the applicable REE, candidates sitting the examination for the first time who have not passed each paper may be declared to have passed the examination if they obtain the minimum grades required under the implementing provisions. By drawing up Rule 10 of the implementing provisions, the Examination Board converted its discretion under Article 7(3) REE, as concerns the former borderline cases, into explicit provisions. Thus, Rule 10 defines which grades may offset one another thereby taking into account that all four papers should be considered as a whole in such cases. When making use of this Rule the Examination Board acted within its competence according to Article 7(6) and 17(1) REE (see also decision D 1/96 of 18 July 1997).

2.3 Even if Rule 10 of the Implementing provisions to the REE provides for a general system of compensation for failed papers by papers in which success at a particular grade has been attained, it does not deprive the Examination Board of its power to review the proposals of the Examination Committees for the grades to be awarded each candidate. Indeed, as was explained by the representative of the President during the oral proceedings, the Examination Board considers whether any upgrading was justified if a candidate had not quite achieved the conditions of Rule 10 of the Implementing provisions to the REE (see point V, above).

It cannot, therefore, be seen that the Examination Board, by not allowing any other compensation for failed papers than that provided for in Rule 10, infringed Article 7(3) REE or acted against Rule 3 of the implementing provisions.

2.4 The appellant further submitted that, since the Examination Board did not issue a reasoned decision, the criteria applied by it were not transparent to a candidate who failed the examination. The appellant never contested to have duly received, according to Rule 9(2) of the Implementing provisions to the REE, the marking sheets containing details of the marks filled by the examiners. These marking sheets have been adopted by the Examination Board as the basis of its decision that the candidate has failed. The appellant was enabled, by consulting the marking sheets, to gain some understanding of the grounds on which the Examination Board has based its decision. Thus, the appellant's objection that the decision of the Examination Board was not reasoned, does not appear to be well-founded.

3. The appellant's second line of argument refers to the fact that his mother tongue is Spanish and that he was therefore discriminated against vis-à-vis candidates whose mother tongue is an official language of the European Patent Office.

3.1 Before considering this issue it is to be mentioned that, according to Article 27(1) REE and to the jurisprudence of the Disciplinary Board, decisions of the Examination Board may in principle only be reviewed for the purpose of establishing that they do not infringe the REE, the provisions relating to its application or higher ranking law (see D 1/92, OJ EPO 1993, 357; D 6/92, OJ EPO 1993, 361).



The appellant did not claim that, in the circumstances of his case, the provisions of Article 15 REE concerning the languages to be used in the examination had been infringed. However, he submitted that the linguistic regime provided for by the REE contravened the principle of equal treatment of the candidates and was therefore incompatible with European (EC) Law prohibiting all discrimination by reason of nationality and language. Since this objection raises the issue of equal treatment which is a principle of higher ranking law, the Disciplinary Board is competent to consider it.

- 3.2 In view of the appellant's reference to EC law, it is necessary to mention that the European Patent Organisation is not an institution of the European Community. It is an international organization which, in its proceedings, applies as laws those enshrined in its legal system as set out in the Convention establishing the Organisation or drawn up by the latter's competent organs (see Article 125 EPC and D 3/89, OJ EPO 1991, 257).
- 3.3 Notwithstanding this factual and legal situation, the principle of equal treatment of parties, being a principle of procedural law generally recognized in the Contracting States, of course applies in proceedings before the EPO (G 1/86, OJ EPO 1987, 447). This is especially true for the treatment of the candidates in the European Qualifying Examination as the Disciplinary Board has recognized on several occasions (cf. D 7/82, point 3 of the reasons, OJ EPO 1983, 185; D 1/86, point 4 of the reasons, in fine, OJ EPO 1988, 26).

The principle of equal treatment requires that "similar situations shall not be treated differently unless differentiation is objectively justified" (see G 1/86, point 13 of the reasons, referring to case 810/79 before the Court of Justice of the EC, OJ EPO 1987, 447).

- 3.4 The linguistic regime of the European qualifying examination is governed by Article 15 REE. It provides that the examination papers shall be drawn up in the three official languages of the EPO (English, German, French) and that all candidates shall receive them in all three languages. The candidates' answers should be given in one of the three official languages but may as well be given, upon request, in another language being an official language of a Contracting State. In the latter case, the Secretariat shall have a translation made in one of the official languages of the EPO and submit the translation together with the original answers to the examination committees.

Even if the provisions referred to above guarantee that all candidates may give the answers in their mother tongue, the examination papers are only drawn up in the three official languages of the EPO. Thus, it cannot be denied that, in the latter respect, not all candidates are treated equally since not all of them receive examination papers in their mother tongue.

- 3.5 However, it has to be taken into account in this context that the differentiation referred to above is a direct consequence of the linguistic regime of the European Patent Convention itself. According to Article 14(1) EPC the official languages of the European Patent Office are English, German and French and European patent applications must be filed in one of them. The language of filing will be the language of the proceedings in all proceedings before the EPO

(Article 14(3) EPC). Each professional representative is inevitably confronted with documents and notifications in the language of the proceedings, i.e. one of the three official languages of the EPO. Thus, any professional representative must be expected, in the public interest and the interest of his clients, to understand at least one of the official languages of the EPO and to be able to work on documents and notifications drafted in this language.

- 3.6 Taking into account that the purpose of the European qualifying examination is to establish whether a candidate is fit to practise as a professional representative before the EPO (Rule 3(1) of the Implementing provisions to the REE), it therefore appears that the differentiation referred to in point 3.4, supra, is objectively justified by the very purpose of the European qualifying examination.

For these reasons the Board comes to the conclusion that the provisions of Article 15 REE do not violate the principle of equal treatment of the candidates, it being noted that Rule 4 of the Implementing provisions to the REE explicitly provides that the examiners must not penalise faults of grammar or style in the candidates' answers. Thus, there is neither a legal basis nor, in the light of the above considerations, a justification for any additional bonus to be given to candidates whose mother tongue is not an Official Language of the EPO.

4. According to the appellant's first auxiliary request the proceedings before the Disciplinary Board should be suspended and a time limit should be set in order for him to provide proof that he had opened proceedings before the relevant European Court concerning the issue

of discrimination by reason of language. The request was based on Rule 13 EPC which, in the appellant's view, applied by analogy to the present proceedings. However, the request cannot be allowed for the following reasons:

Neither the REE nor part IV of the Regulation on discipline for professional representatives applying, pursuant to Article 27(4) REE, *mutatis mutandis* to the present proceedings, contain any provision concerning suspension of proceedings.

However, given that the provisions of Rule 13 EPC applied to the present proceedings by analogy, they would in any case require that proceedings before a competent court had been opened. The appellant, though having been referred in writing to this aspect in due time, did not provide any proof to this effect nor even indicated what court was, in his view, competent to deal with the legal issue referred to above. Thus, the request for suspension of the proceedings could not procedurally be entertained.

5. According to the appellant's second auxiliary request the proceedings should be continued in writing after the oral proceedings so that he could study carefully the newly introduced arguments. However, in the circumstances of the present case no new arguments were introduced during the oral proceedings which could have taken the appellant by surprise. In this respect the present case clearly differs from case T 248/92 referred to by the appellant in which new arguments crucial for the decision were submitted for the first time during oral proceedings. Thus, the Board is

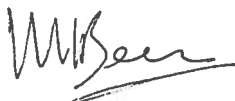
satisfied that the appellant was given sufficient opportunity to present his comments on the grounds on which the Board based the present decision and which, in essence, were set out already in four preliminary communications.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



L. C. Mancini

R. Mancini  
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B. Schr.