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Boards of Appeal

Chambres de recours

Case Number: D 0015/97

DECISION
of the Disciplinary Board of Appeal
of 8 December 1998

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
25 September 1996.

Composition of the Board:

Chairman: W. Moser
Members: C. Holtz
B. Schachenmann
A. Armengaud
E. Klausner

Summary of Facts and Submissions

I. The appellant sat paper D of the European qualifying examination in 1996. The examination board decided that he was not successful in the examination since he had been given a grade 5 (failed) for this paper. This decision has been appealed.

II. The appellant requests the following:

"1) The Disciplinary Board of Appeal to set aside under Art. 27(4) the decision which is impugned for the reasons presented in any one of grounds I, II, III, and to be declared to have passed paper D at grade 4 in Examination of 1996.

2) Failing 1) The Disciplinary Board of Appeal to set aside under Art. 27(4) the decision which is impugned for the total of reasons presented in grounds I, II, III together, and to be declared to have passed paper D at grade 4 in Examination of 1996."

With respect to grounds of appeal I, the appellant further requests:

"3) A statement confirming that the application of the "necessary marking instructions given to the members of the Examination Committees" requires that the whole text of a candidate's memorandum answer in paper D II must be considered irrespective of any subheadings used.

3.1) In view of its relevance to all future candidates, that the statement in 3) above indicate that this requirement applies even in cases such as the present one where subheadings identical with but inappropriate to marking points (I(a)-(c), II) have been used."

With respect to grounds of appeal III the appellant further requests:

"4) A statement in the decision confirming whether or not comments made by the Receiving Section on hypothetical situations can be considered to constitute a landmark decision of EPO case law of the Boards of Appeal in the sense of Art. 12 REQE."

III. The arguments of the appellant may be summarised as follows (using the term "ground" and roman lettering given to them by the appellant):

Ground I: Part II of paper D consisted of four subheadings, marked I (a)-(c) and II, respectively. Although the appellant in his memorandum answer used the same headings as a structure, some of the answers relevant to a specific subheading appeared under another heading. For example, part of the appellant's answer regarding EPO landmark case law (which was the subject of subheading II) appears under subheading I a) I ii). The appellant was given only 5 and 4 marks, respectively, for his answer to subheading II, which is reason for him to believe that his answer under subheading I a) I ii) was not considered at all. Under Article 16 REQE (i.e. REE), however, in order to meet the condition of uniform marking, the examiners must award grades for the entire memorandum content, irrespective of where the answers appear. Starting from the assumption that the total number of lines in the model answer for paper D in 1996, i.e. 110, corresponds roughly to the maximum marks possible for part II, i.e. 55, one mark is to be awarded for every two lines. By counting the number of lines of those parts of his answer to part II which were not awarded any marks, the appellant should have been given a further 2.5 to 3 marks for this answer.

Ground II: Part II was supposed to be an answer to questions from a client regarding how a patent application could be accorded a filing date in spite of the fact that the claims were missing and whether features of a device could be considered as having been made available to the public. The appellant supplied an answer based on an assessment of the EPO case law which he believes to be more correct than the assessment made in the model answer from the EPO. The appellant should therefore have been given a further 2.5 to 3 marks for his correct answer in this respect, a result which would have brought his total marks above the pass level of 55.5 % for paper D. There have been examples in the past of the Examination Board accepting that a candidate's alternative answer deserved no less merit, giving him additional marks.

Ground III: All candidates were given the full three marks for question 11 of part I of paper D in the 1996 examination, regardless of whether they had not answered the question at all, only attempted part of it, had not had this question in their copy of paper D or, as the appellant, had devoted time to it and answered it fully and correctly. In comparison to the other groups of candidates, the appellant had been discriminated, since his answering of this question had been a waste of time. The award of full marks to every candidate was therefore a violation of Article 16 REE. The appellant was aware that a mistake had occurred, presumably by the printers, but this did not justify the subsequent action by the Examination Board. Of possible alternatives to redress this mistake, for example to invalidate paper D entirely and give all candidates the opportunity to sit it again under equal conditions, to give no marks at all for this question, or to grade the answers as if no mistake had happened, the latter alternative would in the appellant's view have been more justified, for the reasons that all

candidates had been informed in the invitation that part I would consist of 11 questions and that the same information was printed on the front page of the paper itself, which should have alerted those candidates who had only 10 questions in the paper to the fact that something was amiss. These candidates should therefore have informed the invigilators, which would have made it possible for them to see to it that complete exam copies were distributed.

- IV. Pursuant to Article 12 of the Regulation on discipline for professional representatives (OJ EPO 1978, 91) in conjunction with Article 27(4) REE, the President of the EPO and the President of the EPI have been given the opportunity to comment on the appeal. The President of the EPO appointed a representative who was present in the oral proceedings held on 8 December 1998 before the Disciplinary Board of Appeal.

Reasons for the Decision

1. The appeal complies with Article 27(1) and (2) REE, thus it is admissible.
2. *Reopening the examination*

Article 27(1) REE does not give the Disciplinary Board of Appeal the power to reopen the examination. Only fundamental errors which can be corrected without such a reopening can therefore be corrected (D 1/92, OJ EPO 1993, 357). These errors are comparable to errors which can be corrected under Rule 89 EPC (cf. D 23/97 of 16 March 1998, point 5 of the reasons) which limits the powers of the Disciplinary Board of Appeal considerably.

3. *Failure to mark the entire answer ("Ground I")*

3.1 The Examination Board organises and conducts the European qualifying examination, according to Article 2(1) REE, adopted in 1993 and entered into force on 1 May 1994 (OJ EPO 1994,7). This means that the Examination Board has some discretionary powers, as long as the provisions of the REE or other legal principles of fundamental importance are not violated. As remarked by the appellant, Article 16 REE obliges the examiners to mark candidate's papers in a uniform manner, and it is the duty of the Examination Board to adopt such procedures as to ensure this. To aid in carrying out the examination and marking of papers, the Examination Board has a number of examination committees at its disposal (Article 4 REE). The duties of the examination committees are listed in Article 8 REE and include the preparation of the examination papers, the marking of candidates' answers and giving the Examination Board proposals for grades to be awarded.

3.2 The Disciplinary Board of Appeal must presume that, when examiners are instructed in their duty to mark answers, they are told to mark all answers, regardless of in which order questions are answered. However, the Board notes that part II of paper D was especially directed to a mock situation in which a written memorandum was to be prepared, inter alia setting out the status of a number of patent applications and likely protection as well as the necessary measures to ensure patent protection. The way in which the memorandum answer was structured may therefore have

influenced the marking, for example if the memorandum was considered less clear as a result of the order in which different elements were dealt with. There is however no evidence provided that the examiners disregarded any of these answers.

3.3 As said above, point 2, the Disciplinary Board of Appeal can only correct an error if this is possible to do without reopening the examination. This presupposes that the error is readily quantifiable, for example that the adding of marks was incorrect. The appellant's arguments, however, are exactly directed towards a reopening of the examination, as they focus on the merits of the candidate's answers, in an attempt at convincing the Disciplinary Board of Appeal that the examiners overlooked them, misjudged them or should have awarded them higher marks because of their content.

3.4 A remarking of the appellant's paper D, part II, can therefore not be done on the basis of the arguments under "ground I".

4. *Assessment of EPO case law ("Ground II")*

The argument under this "ground" is based on the contention that the appellant was unjustly misjudged with regard to his answer in relation to EPO case law. Again, the Disciplinary Board of Appeal has to note that the argument is directed towards trying to convince the Board that the examination should be reopened in order to reassess the candidate's answer, possibly awarding him further marks. As this is beyond the powers of the Disciplinary Board of Appeal, the appeal cannot be allowed on the basis of this argument either.

5. *Question 11 ("Ground III")*
- 5.1 The background to this argument is, as in a number of appeals against decisions not to declare candidates to have passed paper D of the 1996 qualifying examination, that question 11 was missing in some, but not all, of the copies of this examination paper which were handed out to the candidates. Unfortunately, the error was not discovered until after the examination was terminated. As submitted by the appellant, cf. point III above, a number of hypothetical alternatives was available to the Examination Board, which however chose to give every candidate full marks for question 11, regardless of whether the question had been answered or not, correctly or incorrectly, or had not even appeared in the paper. The Disciplinary Board of Appeal is of the opinion that, even if this choice could not give every candidate full satisfaction, the measure taken was reasonable in the circumstances. The appellant's opinion that those candidates who did not have this question in their copies should have alerted the invigilators would not be reasonable, given that they were justified - even though the cover page of the paper contained the information that the paper included 11 questions - in assuming that their copies were identical to those of their fellow candidates. To have invalidated the entire paper D examination would also seem unreasonable, at least with regard to those candidates who had passed this paper anyway, not counting their answer to question 11.
- 5.2 The appellant further argues that his spending time on question 11 was a waste of time and that, therefore, he was discriminated against by the decision of the Examination Board to award everybody full marks. He should therefore be compensated by being given a number of marks corresponding to the time that he could have

spent on other questions. This time, about 10 % of the total answering time, would have given him the possibility to earn the further 2.5 or 3 marks required for him to pass paper D.

5.3 The Disciplinary Board of Appeal cannot follow this line of argument. Firstly, it is impossible for the examination bodies to estimate what a candidate might do in a hypothetical situation. Secondly, even if the Board could assume that the extra time would have been usefully spent on other questions, the resulting answers would not automatically be such that it must be assumed that the candidate would have earned full marks for them. Thirdly, as this Board has already said in another decision, D 14/95 of 19 December 1995, point 8 of the reasons, a certain "bandwidth" of inequality is not to be seen as a violation of the principle of equality before the law. Given that candidates are different persons, coming from different backgrounds and therefore have different experiences, such inequality cannot always be avoided and is acceptable, provided that it is moderate and justified by the circumstances. For example, there is no possibility of fully compensating those candidates who do not have any of the official EPO languages as their mother tongue, although an attempt is made through the instruction to examiners to examine such candidates' papers with an open mind and not unduly to deduct marks for poor language (Rule 4 of the Implementing Regulations to the REE, OJ EPO 1994, 595). What would always be a violation of this principle is a decision deliberately directed at discriminating a certain group of candidates.

5.4 The Disciplinary Board of Appeal cannot find that the Examination Board exceeded its powers in this respect, nor that the appellant was unduly discriminated against by the decision taken after the examination to award

all candidates full marks for question 11. The calculations made by the appellant to convince the Board that he should be awarded full marks are hypothetical and can therefore not be taken into account. Such an exercise would in any event amount to a reopening of the examination.

5.5 Hence, the requests to be declared to have passed paper D (ie requests 1 and 2) cannot be allowed.

6. *Requests 3, 3.1 and 4*

These requests are not requests in the procedural, legal sense of the word, but rather pleadings that the Disciplinary Board of Appeal issue instructions to examiners on how to conduct the marking of papers. However, this is a task for the Examination Board as already noted in point 3 above. The responsibility to carry out the examination, including the adoption of necessary instructions, rests solely with the Examination Board, which issued the current Instructions to the Examination Committees for marking papers (OJ EPO 1993, 73) in order to fulfill this task. Accordingly, the Disciplinary Board of Appeal is not competent to issue such instructions, cf. Article 27(1) REE, which empowers it to examine appeals only on grounds of infringement of the REE itself or of any provision related to its application. Whereas a request that the decision under appeal should be set aside for the reason that the instructions issued had been violated when applied could be entertained by this Board, a request for this Board to issue such instructions itself could not. - Finally, since reasons for a decision never have any legal effect, any opinion

that this Board might consider to include in its reasoning on the appropriate content of such instructions for the future would not be binding *per se*.

For these reasons, requests 3, 3.1 and 4 cannot be examined in this appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Beer

W. Moser