



Case Number: D 0017/97

D E C I S I O N
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
E. Klausner
A. Armengaud

Summary of Facts and Submissions

I. The appellant sat the European qualifying examination in 1996 with the following results:

Paper A: 4 passed,
Paper B: 4 passed,
Paper C: 4 passed and
paper D: 5 failed.

The appellant was accordingly informed of the Examination Board's decision that he had not been successful in the examination.

II. The appellant requests that the decision under appeal be set aside and that he be declared to have passed the European Qualifying Examination 1996, and, if this request is granted, that his enrolment fee in respect of the European Qualifying Examination 1997, DEM 400, be refunded.

III. The appellant's arguments in respect of the appeal may be summarised as follows:

- On receiving a copy of his answer papers, the appellant noticed that in respect of question 11 in paper D a pre-printed total of 3 marks was present in both marking columns, and that this number corresponded to the maximum possible marks for that question. It appeared that the Examination Board had addressed the irregularity in paper D (some candidates had received copies of this paper with only 10 questions in them) by automatically awarding each candidate full marks. Although this might seem to be consistent with Article 16 REE, in view of the original inconsistency in the examination in respect of

which the appellant was an innocent party, this action infringed this Article, since it produced a discriminatory outcome. Therefore the examination as a whole infringed upon general principles of equality.

- Candidates who only had received 10 questions nevertheless received full marks without having to spend any time attempting question 11. The appellant had attempted question 11 and thereby spent time which he could have devoted to question 10 instead, a question for which he had not had enough time to formulate a substantial answer. Given the approximate length of his answers to the questions of paper D, the answer to question 11 amounted to about 9.5 % of this paper. A more equitable approach would be to mark him on the basis of his ten best answers and to allot him full marks for his worst answer, since this was in effect what had been done for candidates who had received only 10 questions. The appellant should therefore be awarded full marks for question 10 and two or three marks for question 11.
- Since Rule 10(1)(a) REE (OJ EPO 1994, 595 ff) was applicable to his case and the appellant was only a few marks short of a grade three in papers A, B and C, he deserved the benefit of the doubt.

IV. The president of the EPO and the president of the EPI were given the opportunity under Article 12 of the Regulation on discipline for professional representatives (OJ 1978, 91), in conjunction with Article 27(4) REE to comment on the appeal, however they did not do so.

Reasons for the Decision

1. The appeal is admissible.
2. The background to this appeal is, as in a number of appeals against decisions not to declare candidates to have passed paper D of the 1996 European qualifying examination, that question 11 was missing in some, but not all, of the copies of this examination paper which were handed out to candidates. Unfortunately, the error was discovered only after the examination.
 - 2.1 A number of hypothetical possibilities to redress problems arising from the mistake may be envisaged, for example that all candidates be declared to have passed paper D, regardless of their answers. This alternative, however, disregards the object of the European examination, namely to ensure that professional representatives have the necessary qualifications to properly represent patent applicants before the EPO (Rule 3 of the Implementing Regulations to the REE, OJ EPO 1994, 595). It would be equally possible to consider that the principle of equality requires that the entire paper D be declared invalid, and to give every candidate a new opportunity to sit this paper at no extra cost. This would however not be fair to those candidates who had earned a pass grade even discounting their answer to question 11. A further possibility would be to grade each candidate in accordance with his or her answers as if question 11 had not been included in paper D, which would again discriminate against those candidates who were not given question 11. Considering these and other alternatives, the Disciplinary Board of Appeal is of the opinion that, even if the choice made cannot give every candidate full satisfaction, the measure taken of giving every candidate full marks for question 11 was reasonable in

the circumstances.

- 2.2 With regard to the appellant's argument that he should have been given full marks for his answer to another question to make up for time needlessly spent on question 11, the Disciplinary Board of Appeal would draw the appellant's attention to decision D 14/95 of 19 December 1995, according to which absolute equality cannot be ensured. A certain "bandwidth" of inequality is therefore not always reprehensible, provided that it is moderate and justified under the circumstances and that the Examination Board did not take a decision before the examination which deliberately set out to discriminate a certain group of persons (see for example D 3/95 of 21 January 1997, point 3). On the other hand, it can hardly be justified to compensate an unintentional mistake by making a deliberate error in marking another part of the candidates' same paper.
- 2.3 The assumption that the appellant could have earned better marks for question 10 if he had been able to spend more time on it, is hypothetical in the sense that it is not possible to establish what a specific candidate would have done under other circumstances or, if he had indeed spent more time on precisely that question, whether his answer would have been successful or not.
3. Since in effect the appellant was sitting all four papers of the European qualifying examination for the first time in 1996, Rule 10 of the Implementing Regulations to the REE is indeed applicable to his results. However, in order for a candidate who has been awarded a grade 5 in one paper to be declared having passed, this provision requires that this grade be compensated by a grade of 3 or better in another paper,

or in the appellant's case that the grade 5 in paper D be compensated by a grade 3 or better in either of the papers A, B or C. Since his grade in each of these papers was a 4, Rule 10(1)(a) of the Implementing Regulations to the REE is not satisfied.

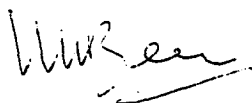
4. The request to be declared having passed the European Qualifying Examination 1996 can therefore not be allowed. Being conditional upon the allowability of the first request, the further request for a refund of the enrolment fee for the 1997 European Qualifying Examination cannot be entertained.

Order

For these reasons it is decided that:

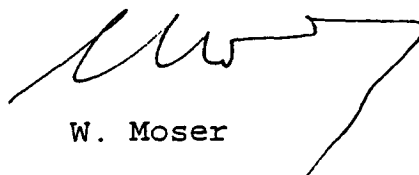
The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



W. Moser

