



Case Number: D 0018/97

D E C I S I O N
of the Disciplinary Board of Appeal
of 10 February 2000

Appellant: McGuire, Paul
c/o Baur & Wolhändler
Maria-Theresia-Strasse 13
D-81675 München (DE)

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
R. Menapace
A. Armengaud
Ch. Bertschinger

Summary of Facts and Submissions

- I. The appellant sat the European Qualifying Examination (EQE) in 1991, 1992 and 1993, at which he took all four papers, earning in 1993 a grade 3 in paper A and a grade 4 in paper B. In 1994 he resat the examination as regards papers C and D, passing paper C, but failing paper D with a grade 6. He resat paper D in 1995 and 1996, with a grade 5.
- II. The appellant requests that the decision under appeal be set aside and that he be declared to have passed the European Qualifying Examination (EQE). He relies on decision D 1/93, claiming that he is entitled to have the Disciplinary Board of Appeal make a so-called borderline case assessment of his results, compensating the grade 5 in paper D by his results in the other papers, viz. the grade 3 in paper A.
- III. The arguments of the appellant may be summarised as follows:

Decision D 1/93, which extended the borderline assessment principle to the 1992 EQE, should apply equally to the 1996 EQE. The law applicable to the 1992 EQE was essentially the same as it is under the Regulations on the European qualifying examination as in force since 1994 (REE 1994) and its Implementing Regulations (IP 1994). Decision D 8/96 (OJ EPO 1998, 302) which was actually based on the same legislation as was applicable in the D 1/93 case is too severe on candidates who sat several examinations under the previous legislation, like himself. The principle of proportionality would require that he be treated like the candidate in D 1/93. The compensation allowed under Rule 10 of the IP 1994 does not rule out that further exceptions could be made. Even if the Board is not

competent to change the grades given, it is not prevented from declaring the candidate to have passed the EQE. - Although referring to the fact that there were no transitional provisions in the REE 1994, and that this was not uncommon, D 8/96 could still have decided that appeal differently, as can the Board in the present case.

- IV. The President of the European Patent Office and the President of the Council of the Institute of Professional Representatives before the EPO have been given the opportunity under Article 12 of the Regulation on discipline for professional representatives to comment on the appeal. The former was represented at the oral proceedings held on 10 February 2000.

Reasons for the Decision

1. The appeal is admissible.

2. Under the legislation applicable during the years 1991 to 1993, in which the appellant underwent the entire examination, the possibility of a partial resit was limited to one sitting. Contrary to this, the REE 1994, which apply to the present case, allow unlimited partial resits. The distinction made in D 8/96 with respect to earlier examinations therefore had a legal basis. Although the appellant is correct in pointing out that the legislation from 1992 onwards was largely the same as the 1994 regime, this difference is substantial. It must have been clear to candidates that the intention of the legislator behind the 1994 REE was to abandon the previous limitation to just one partial resit. Apparently as a sort of counterbalance, Rule 14 IP 1994 lays down in clear and unmistakable language,

which leaves no room for interpretation, that a candidate who resits the examination partially must pass each paper, which is another distinction compared to the previous legislation. The condition to be passed had been questioned by candidates because of the wording of the relevant provision in force before 1994 that could be seen as ambiguous.

3. The above peculiarities in the development of the legislation is the main reason why D 1/93 is to be seen as an exception allowing for a margin of appreciation in the early days of the new system, emerging from 1992 onwards. This decision could in fact be seen as providing the transitional measure referred to in decision D 8/96, cushioning candidates. Transitional provisions however cannot apply indefinitely. The limit was set by D 8/96 which established that candidates who resat the examination partially as late as 1995 could no longer benefit from a borderline assessment. The law is clear on this point, Article 17(1) REE 1994 in conjunction with Rule 10 and Rule 14 IP 1994. Article 17 REE 1994 is exhaustive in itself, see D 8/96, point 4 of the reasons, and does not leave any room for further compensation opportunities than those provided for in the legislation itself, ie. Rule 10 IP 1994.

4. The argument that the principle of proportionality requires that the appellant benefit from a borderline assessment is not convincing for the very reasons just mentioned, ie. the limit to only one partial resit and the somewhat unclear language in the previous legislation which gave room for some interpretation. Since 1994, the opportunity to resit only one paper is no longer limited in number. This constitutes a

substantive relief for candidates in comparison to the previous system and there is neither a good reason nor a legal basis for accumulating the advantages of the old and the new Regulations.

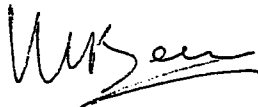
5. Contrary to the appellant's assumption, the board is neither free to go back to a borderline assessment, nor can it declare the appellant to have passed the EQE, unless the conditions of the REE 1994 and the IP 1994 are met. The board has to apply the 1994 REE, according to which at a partial resit a candidate must have passed each paper in order to pass the EQE (Article 17(1) REE 1994 and Rule 14 IP 1994). This condition is not fulfilled in the present case. In any event, the Board is not empowered to change the grades or pass the appellant, unless the conditions mentioned in decision D 1/92, OJ EPO 1993, 357 were met, which they are not in the present case.

Order

For these reasons it is decided that:

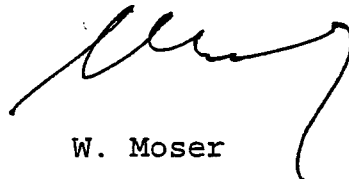
The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



W. Moser





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Date of decision	10 Februar 2000	Case number	D 0018/97 - DBA
Application number			
IPC		Procedure Language	EN
Title of the application			
Applicant name	N.N.	Opponent name	
Headnote		Articles and Rules	
Keywords		Cited Decisions	
Catchwords:			

- *Images are not displayed in the following full text*
- *Bilder sind in dem folgenden Voll-Text nicht dargestellt*
- *Le texte complet suivant de la décision ne comprend pas les images*

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II. The appellant requests that the decision under appeal be set aside and that he be declared to have passed the European Qualifying Examination (EQE). He relies on decision D 1/93, claiming that he is entitled to have the Disciplinary Board of Appeal make a so-called borderline case assessment of his results, compensating the grade 5 in paper D by his results in the other papers, viz. the grade 3 in paper A.

III. The arguments of the appellant may be summarised as follows:

Decision D 1/93, which extended the borderline assessment principle to the 1992 EQE, should apply equally to the 1996 EQE. The law applicable to the 1992 EQE was essentially the same as it is under the Regulations on the European qualifying examination as in force since 1994 (REE 1994) and its Implementing Regulations (IP 1994). Decision D 8/96 (OJ EPO 1998, 302) which was actually based on the same legislation as was applicable in the D 1/93 case is too severe on candidates who sat several examinations under the previous legislation, like himself. The principle of proportionality would require that he be treated like the candidate in D 1/93. The compensation allowed under Rule 10 of the IP 1994 does not rule out that further exceptions could be made. Even if the Board is not

competent to change the grades given, it is not prevented from declaring the candidate to have passed the EQE. - Although referring to the fact that there were no transitional provisions in the REE 1994, and that this was not uncommon, D 8/96 could still have decided that appeal differently, as can the Board in the present case.

IV. The President of the European Patent Office and the President of the Council of the Institute of Professional Representatives before the EPO have been given the opportunity under Article 12 of the Regulation on discipline for professional representatives to comment on the appeal. The former was represented at the oral proceedings held on 10. February 2000.

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1. The appeal is admissible.

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3. The above peculiarities in the development of the legislation is the main reason why D 1/93 is to be seen as an exception allowing for a margin of appreciation in the early days of the new system, emerging from 1992 onwards. This decision could in fact be seen as providing the transitional measure referred to in decision D 8/96, cushioning candidates. Transitional provisions however cannot apply indefinitely. The limit was set by D 8/96 which established that candidates who resat the examination partially as late as 1995 could no longer benefit from a borderline assessment. The law is clear on this point, Article 17(1) REE 1994 in conjunction with Rule 10 and Rule 14 IP 1994. Article 17 REE 1994 is exhaustive in itself, see D 8/96, point 4 of the reasons, and does not leave any room for further compensation opportunities than those provided for in the legislation itself, ie. Rule 10 IP 1994.

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ORDER ▲

For these reasons it is decided that:

The appeal is dismissed.

Remarks:

O.J. EPO issue:

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