



Case Number: D 0014/99

DECISION
of the Disciplinary Board of Appeal
of 27 April 2001

Appellant: N. N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
23 September 1998.

Composition of the Board:

Chairman: P. Messerli
Members: V. Di Cerbo
B. Schachenmann
Ch. Kaloniarou
Ch. Onn

Summary of Facts and Submissions

- I. By notice of appeal received by fax on 29 October 1998, an appeal was filed against the decision, posted by registered letter on 29 September 1998, of the Examination Board stating that the appellant had not been successful in papers C and D of the European Qualifying Examination ("EQE") held in April 1998. The written statement of the grounds of appeal was incorporated in the notice of appeal.

- II. The appellant's arguments and requests can be summarised as follows:

When, after the communication of the above decision, he received the copy of his answer papers together with the details of the marking, he found out that the copy of the answer to paper C, which had been sent to him, was not complete. In particular one, or more likely two pages were missing. These circumstances were confirmed by the Examination Secretariat for the European Qualifying Examination according to which the original file indeed contained two more pages (ie pages 19 and 20). The appellant questions whether the grade 5 awarded for paper C was based on the whole paper (ie containing the missing pages) or on a paper missing two pages, according to the copy he had received. In the latter case he requests having his grade for paper C reviewed.

Should the requested revision result in awarding paper C a pass grade, the appellant requests the Board to reconsider the grade 5 obtained in paper D "for the purpose of determining whether said paper too could pass".

- III. By letters from the Board of 22 February 1999, the President of the European Patent Office and the President of the Institute of Professional Representatives were invited, pursuant to Article 27(4) of the Regulation on the European qualifying examination for professional representatives (REE) together with Article 12 of the Regulation on discipline for professional representatives, to comment on the case. By letter dated 18 March 1999, the President of the EPO informed the Board he did not intend to comment. The President of the Institute did not reply.
- IV. By letter dated 20 October 1999 the appellant informed the Board that in the meantime he had passed paper D and therefore the object of the appeal should be limited to the request related to paper C.
- V. By a communication, sent on 20 January 2000 pursuant to Article 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal of the European Patent Office, the Board pointed out:
- (a) that in its letter to the Disciplinary Board of Appeal dated 28 January 1999 the Examination Board confirmed that pages 19 and 20 of the Appellant's paper C had been taken into account for the marking;
 - (b) that the original examination paper C, included in the appeal file, contained all the pages (ie 1 to 20) written by the appellant.
- VI. By letter dated 17 February 2000 the Appellant filed his comments on the above quoted communication and requested oral proceedings. In particular he submitted that the mere fact that the original paper C in the file is complete does not allow the conclusion that the

two pages at issue (ie 19 and 20) have actually been corrected. It is indeed possible that the copy sent to the examiners for correction did not contain said pages, in the same way as the copy sent to the Appellant did not contain them. The burden of proof concerning the above issue is on the Examination Board; in the absence of such a proof any doubts should be resolved in favour of the candidate (ie the Appellant). Should the Board come to the same conclusion the appellant requested that the appealed decision be set aside and that, given that he had already passed paper D in 1999, he be declared to have passed the European Qualifying Examination. With reference to the latter request he maintained that a decision of the Board to remit the case to the Examining Division would be contrary to the legitimate interest of the appellant to have his case decided as promptly as possible. Furthermore it is not possible for the Examining Division to determine *a posteriori* in an objective way the impact of the two missing pages on the grading of the whole paper C. However the contents of the missing pages allow the conclusion that if they had been taken into account during the marking, a grade 4 would have been awarded by at least one or very likely both the examiners.

VII. Following a request of the Board, the Examination Secretariat, with letter 14 June 2000, supplied the Board with more information relating to the marking procedure both in general and in the case under consideration.

In particular it was stated:

- (a) that two employees of the Secretariat (... and ...) clearly remember that pages 19 and 20 were dispatched at the markers' request during the marking proceedings;

(b) that before forwarding the appeal to the Disciplinary Board of Appeal the Examination Board proceeded to another marking of paper C in order to be absolutely certain that the two pages had been taken into account for the marking. The conclusion was that pages 19 and 20 had indeed been taken into account for the marking.

VIII. By paper received by fax on 12 September 2000 the appellant filed his comments on the above quoted letter of the Examination Secretariat and repeated his requests.

IX. The oral proceedings, initially scheduled for 22 February 2001, were deferred to 27 April 2001 due to sickness of a member of the Board.

In the meantime, following a further request of the Board, the Examination Secretariat provided statements of the two original markers concerned with the appellant's examination and gave some information with reference to the way the second marking of the paper C (referred to in the letter dated 14 June 2000) had been carried out. A copy of said documents was sent to the appellant.

X. At the oral proceedings, the representative of the President of the EPO gave some more details with reference to the marking procedure.

After the discussion the appellant confirmed his requests that the decision under appeal be set aside and that he be declared to have passed the 1998 paper C and therefore to have passed the European Qualifying Examination.

Reasons for the Decision

1. The appeal complies with Article 27(1) and (2) REE. Thus it is admissible.
2. The first issue to be judged by the Board is whether the procedure concerning appellant's paper C marking was correct.
 - 2.1. It is not disputed that the Examination Secretariat sent the appellant, pursuant to Article 25(2) REE, a copy of his answers concerning paper C and that said copy was not complete, since pages 19 and 20 were missing. Indeed the original paper C (ie the paper written by the candidate, which remains with the Secretariat) had twenty pages.
 - 2.2. According to the appellant's submissions the above circumstance gives rise to doubts whether or not the paper C marking has been carried out taking into account the whole paper (ie including pages 19 and 20). Indeed the fact that in the copy of paper C sent to the appellant two pages were missing can undoubtedly be considered as suggesting the possibility that the marking has not been carried out, by at least one of the two markers, on the basis of the whole paper C.
 - 2.3. The Board is satisfied that the factual evidence resulting from the documents in the file as well as from the admissions of the EPO President's representative during the oral proceedings fully justify the appellant's doubts.

Firstly, the letter dated 14 June 2000, sent to the Board by the Examination Secretariat, has to be taken into consideration. In this letter, written following a request of the Board, the Examination Secretariat gave

some information relating to the marking procedure both in general and with reference to the case in suit. In particular it stated that after the holding of the examination each answer paper is copied twice. The original paper remains with the Examination Secretariat whilst the two copies are dispatched to the markers. At the end of the marking procedure the markers return their copies to the Examination Secretariat. One of the copies is kept in the candidate's file until the expiry of the appeal period and the other is transmitted to the candidate pursuant to the above quoted Article 25(2) REE. If the markers do not receive, because of a mistake, the whole answer paper, in most cases they realise themselves that one or more pages are missing. They then contact the Examination Secretariat which forwards them the missing pages, copied from the original. In the case in suit two members of the Secretariat remember that pages 19 and 20 were dispatched at the request of the markers during the marking procedure. According to the Secretariat this explains why the pages 19 and 20 of the paper C copy returned by one of the markers (ie the copy which is kept in the candidate's file) have been copied on paper different from that of the pages 1 to 18. Furthermore in the above quoted letter it is maintained that an explanation why the candidate received an incomplete copy of paper C is that one of the markers, having received the two missing pages separately from the first eighteen pages, forgot to attach them when returning his copies to the Examination Secretariat. The Secretariat then dispatched this incomplete copy to the candidate.

The Board observes that the allegation of the Examination Secretariat, that both markers have carried out the candidate's paper C marking having taken into

account the whole answer paper and therefore also pages 19 and 20, is based on a series of assumptions which, when considered as a whole, seem to be doubtful:

- (a) Both copies of the original paper C, which have been sent to the markers, did not contain the last two pages;
- (b) Both markers realized that the paper was incomplete and requested from the Secretariat the missing pages;
- (c) One of the markers, having received the two missing pages and allegedly having taken them into consideration for the marking, sent back to the Secretariat only pages 1 to 18 and forgot to send back the later received pages 19 and 20;
- (d) The Examination Secretariat, notwithstanding the peculiarity of the situation, did not notice that one of the copies received back from the markers was not complete and sent it to the candidate pursuant to Article 25(2) REE.

Moreover it has to be stressed that neither of the written declarations of the markers fully support the Examination Secretariat's allegation. In particular, one of the markers (Mr. ...) has declared that he doesn't remember what happened with any certainty. He only expressed an opinion that, if it would have been clear that pages were missing, this would have been noticed and the pages requested. Moreover he declared that he has full faith in the Secretariat that when they say that the missing pages were sent for marking, this actually did happen. The second marker (Mr. ...) has declared that he has considered the whole paper C (ie including pages 19 and 20) as far as he remembers. In short: one of the markers doesn't remember anything

and the other confirms the allegation of the Examination Secretariat, although he implicitly expresses some doubts. In the Board's view even if the latter declaration is considered (notwithstanding the doubts expressed therein) as full evidence that one of the markers has taken into consideration the whole paper C, this is no sufficient proof that the marking procedure was correct in its entirety since at least for one of the markers there is no evidence that he took into consideration the originally missing pages 19 and 20.

The above conclusion is furthermore supported by the consideration that it was not self-evident that the answer papers originally sent to the markers were not complete since, as correctly stressed by the appellant, page 18 (ie the last page of the paper copy originally dispatched to the markers) is complete in itself and has no indications that there are other pages following.

Finally the EPO President's representative admitted, during the oral proceedings, that no written records exist relating to the factual circumstances relevant for the case in suit. In particular, notwithstanding the obvious interest, on the one hand of the candidates concerned and on the other hand of the public, that the marking procedure within the European qualifying examination for professional representatives is carried out in a correct and transparent way, there are no records relating to the incident referred to above. More specifically, there are no minutes of the marking proceedings (which would be very important for the case that a marker suspects that the paper received for marking is not complete); no records of the markers request to have the missing pages; and no records of the Secretariat of the forwarding of the two missing pages.

2.4. In the Board's view in a case such as the one under consideration the burden of proof is on the Examination Secretariat. Indeed, given that, as shown above, a number of irregularities occurred in the marking procedure of the appellant's paper C, the Secretariat has to give evidence that, notwithstanding such irregularities, the right of the appellant to a correct marking of his paper has been safeguarded.

Such evidence has not been given. On the contrary, it follows from the above considerations that it cannot be excluded that the appellant's right has not been safeguarded. Accordingly the marking of the appellant's paper C has to be considered as invalid.

2.5. Finally, for the decision to be taken, the allegation of the Examination Secretariat appears to be irrelevant that a new marking was carried out after the filing of the appeal (in order to consider, pursuant to Article 27(3) REE, whether the appeal was well-founded) with the outcome that, in view of the points awarded within the new marking, it must be inferred that pages 19 and 20 had indeed been taken into account also during the original marking.

However, in the Board's view this new marking was flawed by the fact that one of the original markers (Mr. ...) took part in it (see point 3).

3. However, despite of the invalidity of the marking, the appellant's request that he be declared to have passed the European Qualifying Examination cannot be granted.

Indeed, in order to grant said request, the Board would have to carry out an autonomous evaluation of paper C either in its entirety or with reference to the pages 19 and 20, which is undoubtedly beyond its powers. According to the established case law, in

matters pertaining to qualifying examinations the Disciplinary Board of Appeal is not empowered to reconsider the examination procedure and the marking therein on its merits (see, for example, D 4/98, Reasons point 3.).

It follows that the only possible consequence deriving from the invalidity of the marking in the case in suit is that a new marking of the whole paper C shall be carried out by the relevant Examination Committee. Furthermore, in order to guarantee that said new marking is carried out in an objective way, without any possible influence deriving from the previous marking, it shall be performed by two members of the Examination Committee which have not been involved in previous markings of said paper.

4. The appeal fee has to be reimbursed pursuant to Article 27(4), last sentence, REE, since the Board considers it equitable in the circumstances of the case. Indeed the reasons for the appeal to be filed are to be found solely in the above described irregularities in the marking procedure carried out under the responsibility of the Examination Board.

It has to be stressed that it is not necessary for the reimbursement of the appeal fee that a request was submitted by the appellant, since the above quoted provision does not consider such a request as a requirement for the reimbursement.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board for the purpose of carrying out a new marking of paper C by the relevant Examination Committee; the new marking has to be performed by two members of the Examination Committee that have not been involved in previous markings of said paper.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

M. Beer

P. Messerli