



**Europäisches  
Patentamt**

Beschwerdekammer  
in Disziplinarangelegenheiten

**European  
Patent Office**

Disciplinary  
Board of Appeal

**Office européen  
des brevets**

Chambre de recours statuant  
en matière disciplinaire

**Case Number:** D 0018/04

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 28 January 2005**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Secretariat dated  
16 July 2004 refusing the application for  
enrolment for t he EQE 2005.

**Composition of the Board:**

**Chairman:** B. Schachenmann  
**Members:** B. Günzel  
C. Onn

## Summary of Facts and Submissions

- I. The appeal is from the decision of the Examination Secretariat of 16 July 2004 refusing the appellant's application for enrolment for the European qualifying examination in 2005.

As reasons for refusal the Examination Secretariat indicated that the appellant's university qualification was a "List B qualification". At the date of the examination, the period of the appellant's professional activity as required under Article 3 of the Instructions concerning the qualifications required for enrolment for the European qualifying examination would be 4 years, 8 months, instead of 6 years. A reduction of the period of professional activity (Article 11 REE) could only be considered in the case of advanced specialised studies or training courses as mentioned under Article 4.2 of the Announcement of the European qualifying examination 2005 (OJ EPO 3/2004) of which the "Master of Science in Intellectual Property" of the University of Malmö was not a part and could thus not be accepted.

- II. On 13 August 2004 the appellant appealed the decision of the Examination Secretariat and paid the appeal fee. The grounds of appeal were filed on 13 September.

- III. The submissions of the appellant can be summarized as follows:

From his previously filed university certificates it was evident that his university qualification was that of a Master of Science in Intellectual Property based

on a Bachelor of Science in Chemical Engineering. The main field of study for this university qualification was chemical engineering. 120 credits of a total of 160 credits were purely technical courses and courses for engineers. 40 credits corresponded to a full academic year. Moreover, the specialisation "Intellectual Property" had contained a project course of 10 credits, which in his case had substantially had a technical character. Therefore, the appellant possessed the required level of technical knowledge and the conditions of Article 10(1) REE were fulfilled.

According to the objectives set out in Chapter I, section 9 of the Swedish Higher Education Act it was necessary to study not only technical courses, but also subjects of other areas to obtain a Masters degree in Engineering. Therefore, the degree of Bachelor of Science in Chemical Engineering in combination with the degree of Master of Science in Intellectual Property met the requirements of the Swedish Higher Education Act for a Masters degree in Engineering and was consequently to be considered as corresponding to a university-level scientific or technical qualification according to Article 10(1) REE.

It was also not justified that the Examination Secretariat had refused to grant a reduction of the period of professional activity. Article 4.2 of the Announcement of the European qualifying examination 2005 stated that the Examination Secretariat will grant a reduction of the period of professional activity (Article 11 REE) to candidates having successfully completed the courses listed therein. However, the fact that his Masters degree was not listed there did not

mean that the Examination Secretariat could refuse a reduction based on this reason alone, because pursuant to Article 10(2) REE the Secretariat had a discretion to grant a reduction of up to one year on the periods of professional activity required to candidates having successfully completed advanced specialised studies or training courses in the field of industrial property in any of the Contracting States. The Industrial Property program resulting in the university qualification Master of Science in Intellectual Property was initiated, developed and carried out under the influence of European Patent Attorneys and was to be considered as advanced specialised studies in the field of intellectual property.

- IV. The Presidents of the European Patent Office and of the Institute of Professional Representatives were invited to file observations on the matter. The President of the Institute of Professional Representatives informed the Board that he did not intend to file observations. The President of the European Patent Office submitted an annex to his letter, said annex containing comments on the case. In the annex it was pointed out that the burden of proof lay with the appellant and that the appellant's qualification was a "List B" qualification, an undergraduate diploma completed after only two years of technical studies. The Examination Secretariat had come to this conclusion by using international databases providing information on recognition of diplomas. However, no evidence was furnished.
- V. As main request the appellant requests that the decision of the Examination Secretariat be set aside and his application be approved.

As auxiliary request the appellant requests that the decision be set aside and that a reduction of the period of professional activity (Article 11 REE) of at least 4 months be granted, so that the appellant can be admitted to the European Qualifying Examination in 2006 at the latest.

### **Reasons for the Decision**

1. According to Article 10(1) REE candidates shall be enrolled for the examination on request provided they possess a university-level scientific or technical qualification or are able to satisfy the Secretariat that they possess an equivalent level of scientific or technical knowledge, and fulfil the conditions specified in paragraph 2 (which are the required periods of full-time professional activity). Pursuant to Article 7(4) REE the Examination Board shall draw up instructions concerning the qualifications or knowledge required for enrolment.

Accordingly, Articles 2 and 3 of the decision of the Examination Board of 19 May 1994 adopting Instructions concerning the qualification required for enrolment for the European qualifying examination (in the applicable, consolidated version published in "Ancillary Regulations to the European Patent Convention 2004", edited by the European Patent Office, Article 134(8), page 196) lay down in further detail when a candidate will be considered to have "the necessary qualification" (Article 2) and when he will be considered to possess a level of scientific or technical knowledge equivalent to a university-level

qualification (Article 3), the most important difference between the two being that in the case of a sole qualification under Article 3 the candidate must have three additional years' experience in the patent or another appropriate field in order to be entitled to enrol for the examination.

2. The only sentence produced by the Examination Secretariat to justify its finding that the appellant's degree did not qualify as a university-level scientific or technical qualification within the meaning of Article 10(1), first alternative REE, is that his qualification was a "List B qualification". No further explanation is given as to the meaning of this remark nor was the said List B added to the decision nor was any indication given as to where the appellant could inform himself about the contents of said List B or why his qualification was considered a "List B" qualification. The term "List B" is used in Article 5(1) of the Instructions which provides that the Secretariat shall maintain lists of educational establishments in the contracting States as mentioned in Article 2 (List A) and Article 3(a) (List B).

2.1 Pursuant to Article 7(4) REE a set of instructions, including a list of recognised qualifications, shall be published annually. According to Article 9(2)(b) REE the Examination Secretariat shall be responsible for publication of the instructions mentioned in Article 7(4) REE. However, in contravention of said articles, only the text of the Instructions but no such list has been published, at least not for the year 2004, in which the appellant enrolled. The December 2003 publication of the "Instructions" in the Supplement to

OJ 12/2003, page 17, only reproduces the text of the "Instructions" as such. No mention of or reference to the availability of any list is made. In the 2004 "Announcement of the European qualifying examination 2005", OJ EPO 2004, 119, it is said under II. 3. "Qualifications" that the requirements as to qualifications remain unchanged. However, besides that this passage contains at least outdated publication references, the most recent publication of the (full text of the) "Instructions" being the December 2003 publication, again no list is reproduced nor is there any reference made to the availability of such a list. Under I. "General" of the said publication reference is made to the website "<http://eqe.european-patent-office.org/>". In this website it is explained under item "Admittance and enrolment" that for each contracting State two lists (A and B) have been drawn up. To illustrate the contents of these lists, for List A basically the text of Article 2 Instructions is reproduced and the contents of Article 3(a) Instructions for List B, but again no mention whatsoever of any publication or availability of said lists for the candidates is made. The website is said to have been last modified on 23 September 2003.

From the recent decision D 0008/04 of 23 August 2004 of the Disciplinary Board of Appeal it transpires that the Examination Secretariat appears to consider these lists as being for internal use only (IV. (ii) of the Facts and Submissions). As there is no trace of said lists to be found in a way which is accessible for third persons it might even be doubted whether these lists continue to be maintained. This would clearly be contra legem, as is the fact that they are not published.

2.2 Thus, the only sentence produced by the Examination Secretariat as reason for its finding, which is of decisive impact on the appellant's right to enrol (see 1., last paragraph above) that the appellant's degree does not qualify as a university-level scientific or technical qualification within the meaning of Article 10(1), first alternative, REE, relies on facts (here the contents of said List B referred to) the accuracy of which can neither be verified by the appellant nor by the Board on the basis of available material.

Even if Rule 68(2) EPC may not be directly applicable to the decisions of the Examination Secretariat, it is a general principle of law in a democratic environment that decisions of an administrative body which are adverse to a person, and which are subject to judicial review, must be reasoned. As can be derived from Article 22 REE this also applies at least to decisions of the Examination Secretariat refusing enrolment which were not preceded by a statement of grounds within the meaning of that article. If the Examination Secretariat does not issue such a statement of grounds for refusal but, as in the present case, directly takes a decision refusing enrolment that decision has to be reasoned in a manner allowing the candidate concerned and the Disciplinary Board of Appeal to decide whether the decision of the Examination Secretariat was correct as to substance. It is a condition therefore that the facts on which the Examination Secretariat relies must be available or made available at least with the decision. It flies in the face of the principles of lawful administrative action to take a decision against



a person on the basis of facts which are kept secret from him.

That decisions which are adverse to candidates do not have to be reasoned has been accepted in the jurisprudence of the Disciplinary Board of Appeal for decisions of the Examination Board informing candidates that they have failed the examination (D 12/97, OJ 1999, 566, point 2. of the reasons) to the extent that they do not involve any exercise of discretion with respect to the decision over pass or fail but only constitute the result of the number of marks awarded to the individual papers. By contrast, for the so-called "borderline cases" under previous law involving the exercise of discretion it was acknowledged that reasons had to be given (D 1/93, OJ EPO 1995, 227, point 12. of the reasons, see also D 8/96, OJ EPO 1998, 302, point 6. of the reasons, D 12/97 loc. cit., it being questionable whether the term "exceptionally" has been rightly used in said decision). Also, if one looks into the decisions of the Disciplinary Board concerning questions of enrolment published in "Case law of the Boards of Appeal of the European Patent Office", 4th edition 2001, VIII.2.2, it becomes apparent that the decisions of the Examination Secretariat underlying the appeals were indeed reasoned, so that the Disciplinary Board of Appeal was put in a position to examine whether or not the reasons given justified upholding the first instance decision.

Therefore, in the present case the fact alone that the sole reason given by the Examination Secretariat for not accepting the appellant's degrees under Article 10(1) REE was based on a document not made

available to the appellant, the "List B", entails as a consequence that the decision under appeal has to be set aside. Moreover, in view of the apodictic statement in the annex to the letter of the President of the EPO that the burden of proof was on the appellant, the Board observes the following: If the Examination Secretariat finds that a candidate's qualifications do not fulfil the requirements for enrolment it is at first to the Examination Secretariat to give reasons therefore. Only then can the burden of proof shift to the candidate.

3. The present case is particularly urgent. The appellant has applied to be enrolled for the 2005 examination, which will take place from 8 March 2005 onwards. The appeal was only forwarded to the Board by the Examination Secretariat by letter dated 3 November 2004, the statement setting out the grounds of appeal having been filed on 13 September 2003. The Board is well aware of the considerable overall amount of work involved for the Examination Secretariat in the annual processing of a great number of candidates. However, it is also clear that cases like the present one must be dealt with outside the routine processing. The candidate's right to take part in the March 2005 examination, should the Board find in his favour, can only be preserved if any action in the processing of such an appeal is performed without delay. In view of the tight time schedule involved, it appears excessive that it takes seven weeks just for coming to the conclusion not to rectify the decision, because there is then hardly sufficient time left for the Board to process the appeal properly and so that any decision in

favour of the appellant can be reached in time before the date set for the next qualifying examination.

In view of the foregoing reasons and because the Board has sufficient information on file to decide itself the case, the Board has decided to do so and not to remit the case to the Examination Secretariat (see D 1/93, OJ EPO 1995, 227, point 12. of the reasons).

4.1 Article 2 Instructions seeks to further define what constitutes a university-level scientific or technical qualification as required by Article 10(1), first alternative REE, by giving examples of degrees recognised as fulfilling this requirement as does Article 3 Instructions for degrees which are considered to require a prolonged period of professional activity. The appellant's qualification is not one of these examples but by classifying the appellant's qualification in the alleged List B the Examination Secretariat has decided that the appellant's degree falls under Article 3 Instructions. This is contested by the appellant.

4.2 In its recent decision D 0008/04 of 23 August 2004 the Disciplinary Board of Appeal has pointed to the inconsistencies in the examples contained in Articles 2 and 3 Instructions which would give the false impression that the examples contained in each article respectively were comparable to each other, and to the difficulties to determine whether or not degrees not mentioned corresponded to those mentioned. This will not be repeated here.

4.3 In the context of having to examine a Swedish combined masters' degree in engineering and management, also classified by the Examination Secretariat as a "List B qualification", under Article 4 Instructions the Board said that the question to be asked was whether the engineering part of the degree was of a level equivalent to an "engineering only" degree. If it was, then the appellant qualified for EQE enrolment under Article 2, Instructions (point 14. of the reasons).

In the case underlying that decision the appellant had acquired a master's degree in engineering and management from Chalmers University of Technology in Gothenburg, Sweden. The Board came to the conclusion that this degree had to be recognised under Article 4, first sentence, Instructions as being of a level equivalent to the requirements of Article 2 Instructions (point 16. of the reasons), because the university also offered a three year programme leading to a degree called "Bachelor of Engineering" and, according to the Board, it seemed that, at this particular university, three years study may lead to an engineering degree (point 15.2 of the reasons). Reference was also made to the fact that his certificate supported that he was entitled to the professional title "Civil Engineer" which suggested that the qualification had provided him with all the necessary training and information to practice as an engineer regardless of the other, non-engineering content of the degree (point 15.3 of the reasons).

4.4 The present case differs from the one underlying decision D 0008/04 in the following respects:

The appellant has not obtained a unitary masters degree in combined fields. Instead he has first done three years study in the field of chemical engineering and with respect thereto obtained the "Diplom" "Bachelor of Science (BSC) in Chemical Engineering, 120 credits" from the University of Malmö. From the explanations given by the appellant and as confirmed in the official certificate of the Swedish National Agency for Higher Education filed in the case D 0008/04 the Board is satisfied that 120 credits mean three years full-time study of the subject-matter concerned, one Swedish credit point requiring one week full-time study and one academic year consisting of 40 weeks. The same is to be derived from the internet site of the National Agency of Higher Education. Under item "Degrees and diplomas" (<http://www.eng.hsv.se/en/CollectionServlet?pageid=490&view=0&expandtree=119>) it is explained that according to the Higher Education Ordinance a "Bachelor of ..." requires at least 120 credit points, or in other words (sic!) three years of full-time study. Thus the statement in the annex to the President's letter - which annex is anonymous but can be assumed to originate from the Examination Secretariat - that the appellant's bachelor degree was completed after only two years of technical studies, is clearly wrong, as is the Examination Secretariat's statement in said annex that the appellant "claimed that his degree could be translated into English as "Bachelor of Science (BSc) in Chemical Engineering, 120 credits".

The copy of the original Swedish version of the "Diplom" filed by the appellant and certified by a Swedish notary public to be a true copy of the original document presented to him already contains under the

Swedish title of the "Diplom" the following "The Degree of Bachelor of Science (BSc) in Chemical Engineering, 120 credits". It was thus crystal clear from the documents submitted by the appellant that he did not claim a "translation" which would be justified in his eyes but that the Swedish university of Malmö itself classified the "Diplom" obtained as a Bachelor's degree, in accordance with the Swedish Higher Education Ordinance.

Following his Bachelor's degree, the appellant has obtained a "Master of Science in Intellectual Property" (based on 40 credits), also from the University of Malmö corresponding to one year full-time study.

- 4.5 In the view of the Board there is no justification for treating the present case in a different manner than the one underlying D 0008/04 as this would mean denying the present appellant enrolment merely for the reason that the present appellant has done in two steps what the appellant in D 0008/04 did in one step, namely three years of full-time study of the technical subject-matter at a university and additional studies of a subject-matter in a discipline not mentioned in Article 2, resulting in a Bachelor's degree first and subsequently in a Master's degree.

It is not entirely clear whether in the present case the appellant can be said to (also) possess a Masters degree in Engineering based on the two degrees he has obtained. There is no real evidence for that on file. The appellant did not submit a certificate showing that directly but he argued that according to the objectives set out in chapter I, section 9 of the Swedish Higher

Education Act it was necessary to study not only technical courses, but also subjects in other areas to obtain a Masters degree in Engineering. The degree Bachelor of Science in Chemical Engineering in combination with the degree Master of Science in Intellectual Property met the requirements of the Swedish Higher Education Act for a Masters degree in Engineering. This appears to the Board to be at least not unplausible since, in the Swedish educational system, the degrees mentioned here are awarded as a result of having obtained a required number of points ("credits") for the courses successfully completed during the studies. No additional final examen is to be passed.

In the view of the Board this is, however, not decisive here. What is decisive is that the appellant has done the same kind of combined technical/other discipline studies at a Swedish University, eventually concluded with a Masters degree, as the appellant in the case underlying D 0008/04.

The present appellant's additional studies for his Masters degree lasted less long - 1 year instead of 18 months - but their subject-matter "Intellectual Property" is much more closely linked i. e. is directed to acquiring knowledge and skills expected from a future professional representative. These additional studies are thus a much more suitable qualification for enrolment for the European Qualifying Examination than management studies. In the view of the Board it would be an arbitrary distinction if an appellant who has, in addition to his three years full time technical studies at university level confirmed by a Bachelors degree, an

additional Masters qualification in Intellectual Property equally at university level, was not allowed by the Board to enrol, while an appellant having an additional "Management" Masters qualification has been declared entitled to enrol by decision D 0008/04.

- 4.6 As the Examination Secretariat has refused enrolment only for the reasons mentioned here the Board may conclude that otherwise the conditions for enrolment are fulfilled. With respect to the full-time training period required under Article 10(2) REE the Examination Secretariat has stated in its decision that at the date of examination the appellant's training time will be 4 years and 8 months.

## **Order**

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

1. The decision under appeal is set aside.
2. It is ordered that the appellant be enrolled for the European Qualifying Examination 2005.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann