



**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 0014/05

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 3 February 2006**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board for the  
European Qualifying Examination dated  
29 September 2004

**Composition of the Board:**

**Chairman:** B. Schachenmann  
**Members:** C. Rennie-Smith  
P. Gendraud

## **Summary of Facts and Submissions**

- I. The appellant, who was a successful candidate in three of the four papers of the European Qualifying Examination ("EQE") held in March 2004, appealed, by a notice of appeal both dated and received by fax on 5 November 2004, against the decision, posted by registered letter on 8 October 2004, of the Examination Board that he had been unsuccessful in paper C. The written statement of the grounds of appeal was both dated and received by fax on 7 December 2004.
- II. By letters from the Board of 14 January 2005, 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 ("REE") and Article 12 of the Regulation on Discipline for Professional Representatives, to comment on the case. Neither President replied.
- III. The appellant advanced three arguments in support of his case which are summarised in paragraphs IV to VI below. In a communication dated 25 May 2005, the Board gave its provisional opinion on the appellant's arguments and indicated that, subject to any further submissions by the appellant, it considered the appeal unlikely to succeed. The Board's views were substantially as set out in the "Reasons for the Decision" below. The appellant made further written submissions in letters dated 6 and 19 October 2005 and 9 January 2006. Oral proceedings were held at the appellant's request on 3 February 2006.

IV. The appellant's first argument began by quoting from the Examiners' Report for the EQE 2004 the sentence:

"Many candidates came to the right conclusion but failed to provide the correct legal basis."

The appellant said this showed that marks were awarded for providing legal basis in support of answers to legal issues raised in paper C. However, the Instructions to Candidates (Supplement to OJ No. 12/2003 - hereafter "the Instructions") only mentioned a need to provide legal basis in relation to paper D and made no such mention in relation to either paper C or the General Provisions applicable to the whole EQE. The appellant accordingly argued that he had followed the Instructions by not providing extensive legal basis in his answers to paper C and concluded that he had been penalised for doing so because marks had been withheld for that reason. Accordingly, the Instructions had been infringed by the examiners since they had awarded marks for something candidates had not been told they had to do. Support for this argument was to be found in D 10/02 (OJ EPO 2003, 275) in which it was held that one of the fundamental principles of a fair procedure is the right of parties to a procedure to know its basic rules in advance; and in D 17/04 (of 11 February 2005) and D 8/04 (of 23 August 2004) in which the Board had criticised the Instructions concerning the Qualifications required for Enrolment for the EQE (see OJ 1994, 599; OJ 1996, 357; and OJ 1999, 92) as lacking in clarity and not being transparent and predictable. The appellant also observed that the Instructions had been used in

unamended form in 2005 but the Examiners' Report for that year had said

"Candidates were expected to refer to G 1/91."

This showed that, in the following year as well, marks had been awarded for legal basis in paper C even though the Instructions had made no mention of this.

- V. In his second argument the appellant alleged an infringement of Rule 4(2) of the Implementing Provisions to the REE (hereafter "IPREE") which states:

"A mark of 50 or more shall be awarded where, on the merits of that paper alone, a candidate can be considered fit to practice as a professional representative before the European Patent Office."

He argued that the only purpose of paper C is to produce a notice of opposition which should be admissible and have a reasonable chance of achieving revocation and that the notice of opposition he had supplied in his examination answer was such, being substantially the same as that in the Possible Solution printed in the Compendium. Therefore he was fit to practice so the award of less than 50 marks infringed Rule 4(2) IPREE.

- VI. In the third and final argument presented by the appellant in his grounds of appeal, he questioned why he had only achieved the low marks he did for "Use of Information" and "Argumentation" and made this the basis for a request that he be supplied with more details of the marking of his script (a request not

maintained at the oral proceedings). The appellant provided no evidence in this respect but simply stated that, having considered his script, the Examiners' Report and the Possible Solution, he was left "wondering why" he had only achieved the marks he did. At the oral proceedings, the appellant said this was not a separate argument but only support for his other arguments.

- VII. The appellant requested that the decision under appeal be set aside and that he be declared to have passed the EQE 2004, and that the appeal fee and the enrolment fee for the EQE 2005 be reimbursed.

### **Reasons for the Decision**

1. The appeal is admissible.
2. It is well established by the jurisprudence of the Disciplinary Board that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or a provision implementing the REE. This follows inexorably from Article 27(1) REE which is the basis of the Board's jurisdiction in EQE matters and which reads:

"An appeal shall lie from decisions of the Board and the Secretariat only on grounds of infringement of this Regulation or of any provision relating to its application."

Thus the Disciplinary Board may only review Examination Board decisions for the purposes of establishing that

they do not infringe the REE, its implementing provisions or a higher-ranking law. It is not the task of the Disciplinary Board to reconsider the examination procedure on its merits nor can it entertain claims that papers have been marked incorrectly, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. (See, for example, D 1/92 (OJ 1993, 357), Reasons points 3 to 5 and D 6/92 (OJ 1993, 361), Reasons, points 5 to 6.)

3. The appellant, whose arguments must be seen in the light of this principle, is clearly aware of it since he largely presented his arguments as alleged infringements of provisions relating to the application of the REE, namely the Instructions and IPREE (see paragraphs IV and V above).
4. As regards the argument concerning alleged infringement of the Instructions (see paragraph IV above), if it were established to the Board's satisfaction that the Examination Board had indeed acted contrary to the Instructions, such that a candidate who followed the Instructions had been penalised, then an infringement of the REE or one of its implementing regulations might well be found. However, the Board is far from being so convinced for a number of reasons.
5. The starting point of the appellant's argument appears unsound - the sentence he cites and relies on from the Examiners' Report relates only to one of five documents supplied as part of the question paper. The cited statement comes from a section of the Examiners' report entitled "Specific Comments" and is one of twenty such

comments, the other nineteen relating to other issues arising in paper C, and all of which are in addition to a further eleven "General Comments". Further, the quoted statement does not say many candidates failed to provide legal basis but that they failed to provide the correct legal basis. It appears therefore that, albeit incorrectly in some cases, other candidates did provide legal basis and appreciated that they were required to do so. The Board thus finds it difficult to draw the same conclusions from the quoted statement as does the appellant.

6. It is also significant that the Examiners' Report on which the appellant relies is most definitely not an implementing provision of the REE but only a commentary - indeed, a collection of comments - on the examination produced after the event. It would certainly be incorrect to read the Report, let alone one expression used in one "comment" therein, as if it were legislation requiring precise interpretation. However, what the appellant in effect asks the Board to do is to find retrospective fault with the Instructions on the basis of just one expression used once in the Examiners' Report. That the examiners may not have ascribed any particular significance to their use of the words "legal basis" in relation to one out of their thirty-one comments is, if anything, reflected by the appellant's own observation regarding the following year's EQE. In respect of that, the Examiners' Report for 2005 does not use the words "legal basis" but simply mentions, again in relation to only one of many comments, the legal authority (G 1/91) to which the examiners considered candidates should have referred.

7. If the words "legal basis" had not been used in the 2004 Report, the appellant would have had no evidence at all on which to base his argument. As it is, the evidential foundation of his argument is so minimal as to be unreliable - the Board cannot conclude from an isolated remark in a document produced after the event that, first, the Instructions were, whether deliberately or not, prepared in a less than complete manner and then that, second, they were deliberately disregarded by the examiners. The position in the cases cited by the appellant, D 8/04 and D 17/04, could not be more different. In those cases, the implementing provisions in question - the Instructions concerning the Qualifications required for Enrolment for the European Qualifying Examination - were in themselves so unclear that they could not be interpreted so as to deal meaningfully with the position of the candidates in question.
  
8. In the present case, the Instructions are clear. They are to be read in a common-sense manner by persons - candidates and examiners - who already are, or should be, familiar with the syllabus and format of the EQE as provided in Articles 12 and 13 REE. Therefore candidates reading the Instructions know they concern an examination in patent law and cannot plausibly suggest that they are not required to demonstrate knowledge of such law. That the very words "legal basis" are only used in relation to one paper out of four cannot mean that legal basis is to be ignored in three quarters of the EQE. The Instructions are, in relation to all four papers, replete with information which makes it clear beyond doubt that knowledge of the relevant law must be demonstrated. The appellant's

- examination script shows that he himself possesses such knowledge and used it in his answers. The Board notes that, in fact, the appellant was awarded 8 marks out of 18 for "Legal Aspects" of paper C, a higher percentage of marks than he achieved in the other two categories, "Use of Information" and "Argumentation".
9. In this respect, the appellant sought to draw a distinction between legal knowledge - an appreciation of the provisions of the law - and legal basis - the exact citation of a legal provision, such as an Article of the EPC. While such a distinction can be made, it is in the present context otiose - "legal basis" is merely a detailed part of "legal knowledge" and, if knowledge is required in all papers of the EQE, then the more detail a candidate shows of such knowledge, the more marks he or she is likely to gain.
  10. While the Board accordingly rejects the argument that there was an infringement of the Instructions, this case does indicate that it would be possible to improve the wording of the Instructions. Even though common-sense dictates that, where appropriate, legal basis should be provided in the answers to all four papers of the EQE, there is no reason why this should not be stated in so many words in the Instructions.
  11. Turning to the appellant's second argument (see paragraph V above), the Board is unable to accept that there was an infringement of Rule 4(2) IPREE. Whether or not the appellant's notice of opposition would be adequate or not is a question of opinion, and one on which quite clearly he and the examiners hold different opinions. Rule 4(2) IPREE could not more clearly make

the award of 50 or more marks dependent, and solely dependent, on a candidate's performance in a paper - that is the only possible meaning of the words "on the merits of that paper alone". The assessment of a candidate's performance - or, to use the language of Rule 4(2) IPREE, of the merits of a paper - is a matter for the examiners and in the present case they have concluded, as they are perfectly entitled to, that the appellant's paper merited less than 50 marks.

12. At the oral proceedings, the appellant said the third argument presented in his grounds of appeal was not a separate argument as such but only support for his other arguments. Had it remained a separate argument, the Board would have also found it unpersuasive since, yet again, it merely shows a difference of opinion between the candidate and the examiners, albeit on this occasion without any firm expression by the candidate of any reason for his opinion.
  
13. Despite the appellant's presentation of his principal arguments as alleged infringements of the REE or its implementing provisions, the Disciplinary Board is unable to find any such infringement or any obvious mistake of the examiners (see paragraph 2 above). It is impossible for the Board, on the evidence before it, to conclude why the examiners gave this candidate the marks they did - all that can be said is that those marks reflected their opinion of his answers. Accordingly, the present appeal will have to be dismissed.

**Order**

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

The appeal is dismissed

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann