



**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 0020/05

D E C I S I O N
of the Disciplinary Board of Appeal
of 26 January 2006

Appellant: N.N.

Decision under appeal: Decision of the Examining 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 appealed, by a notice of appeal both dated and received by fax on 18 November 2004, against the decision, posted by registered letter on 8 October 2004, of the Examination Board that he had been unsuccessful in paper A of the 2004 European Qualifying Examination ("EQE"). The written statement of the grounds of appeal was both dated and received by fax on 20 December 2004.
- II. By letters from the Board of 10 February 2005, the President of the European Patent Office and the President of the Institute of Professional Representatives were invited, pursuant to Articles 27(4) REE and 12 RDR, to comment on the case. Neither President replied.
- III. The appellant's arguments can be summarised as follows. First, he submits that, if three factors were to be taken into consideration together, the Examination Board could, in exercising its discretion under Article 7(3) REE, decide that he has passed. Those three factors are:
- (i) the fact that, if the best marks awarded by each examiner were taken into consideration, his overall mark would be 49 which is closer to the pass mark of 50 than the 48 marks he was actually awarded;
- (ii) that, in previous attempts, he has also achieved marks close to 50, namely 48 in 2003 (which would again have been 49 if the highest marks of each examiner were used) and 47 in 2001; and

(iii) that he is a "borderline case" and an overall analysis of his position should be taken into account.

- IV. The appellant's second argument is that the grade "compensatory fail" works to the greater advantage of candidates who sit the EQE in its modular form. He observes that, if he had sat the examination in two modules (papers A and B in 2001 and papers C and D in 2002), the "compensatory fail" he would have received for paper A in 2001 would have allowed him to pass. The appellant thus concludes that there is an unfair disadvantage for those taking the non-modular approach.
- V. The appellant's last argument is that, as someone practising in the field of electronic engineering, he is disadvantaged compared with others in the fields of chemistry or mechanics in that they have special papers devised for their needs. He concedes this issue was decided in a manner which would go against him in D 14/95 of 19 December 1995 but that case concerned a biochemist candidate and paper C, whereas paper A requires claim drafting in a field which some candidates may not be familiar with from their everyday work.
- VI. The Examination Secretariat also received a faxed letter, both dated and sent on 30 December 2004, from Mr C., a partner in the firm where the appellant works, saying he wanted to support the appeal. The letter in effect contains an additional argument that the "compensable fail" grade system is arbitrary because the appellant would otherwise have passed the EQE since he has on three occasions achieved marks in paper A

which, at a first sitting, would have allowed him to pass the EQE. The writer also refers to the appellant's high marks in other papers and says this is an exceptional case.

VII. In a communication dated 14 October 2005, the Board notified the appellant of its provisional opinion that the appeal would have to be dismissed and invited the appellant to make any further submissions within the following two months. The reasons given for that opinion were very substantially as set out below. The appellant replied by a faxed letter sent on 23 December 2005 in which he said he would make no response to that communication.

VIII. Neither the notice of appeal nor the statement setting out the grounds of appeal contains any requests. However, in view of the arguments summarised above, the Board concludes that the appellant requests that the decision of the Examination Board be set aside and that he be found to have passed paper A. No request is made for oral proceedings.

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 3-5 and D 6/92 (OJ 1993, 361), Reasons, points 5-6.) The Board must assess the appellant's arguments in the light of this principle.

3. As regards the appellant's first argument, namely that if the three factors mentioned in paragraph III above are taken into account together, the Examination Board could, in exercising its discretion under Article 7(3) REE, consider him to have passed. To show such a discretion exists the appellant refers to paragraph 4 of D 4/03 of 19 July 2004. The Board can agree that this refers to such a discretion but also observes that, in the same paragraph of that decision, it was held that in circumstances not dissimilar to the present there had been no misuse of that discretion.

4. As to factor (i) (the "best marks" argument), the appellant himself observes that in D 3/00 (OJ EPO 2003, 365) it was held that a candidate is not *per se* entitled to claim for each answer the highest mark awarded by one of the examiners. As to factor (iii) (the "borderline case" argument), the candidate again cites four earlier decisions of this Board (D 2/96 of 8 July 1998, D 4/96 of 24 March 1998, D 2/97 of 16 March 1998 and D 8/98 of 20 May 1999) which all dismiss such an argument (which did succeed in the even earlier case D 1/93, OJ EPO 1995, 227). Factor (ii) (the "previous close marks" argument) appears to the Board to be no more than a variant on the "borderline case" argument. One may have sympathy with a candidate who has come close to passing an examination on three occasions but three close misses provide no basis for alleging that the Examination Board has misused its discretion. In the Board's view, these three factors, whether taken separately or together, show no mistake or error which could lead to the decision under appeal being set aside.
5. The Disciplinary Board also disagrees with the appellant's second argument (see paragraph IV above). The modular approach allows a candidate sitting the EQE for the first time to take the examination in two modules of two papers each, and a candidate who sits the first module again (which would only occur if he or she did not pass the papers in that module) together with the second module is treated as sitting the EQE for the first time (Article 14(1) REE). To pass the EQE a candidate must pass in each of the four papers or, in the case only of the first time the EQE is sat, must obtain the minimum grades required under the

- Implementing Regulations to the REE ("IPREE"). Rule 4(4) IPREE provides for the "compensable fail" grade to be awarded to a candidate who is awarded between 45 and 49 marks in a paper when sitting the examination for the first time and Rule 5 IPREE allows this to count towards an overall pass if a candidate has at least two "pass" grades, no "fail" grades and total marks of at least 200.
6. It is clear that these provisions apply only to first time candidates, so to give effect to the appellant's argument would mean re-opening the results of the 2001 and 2002 examinations for which the appeal periods have long expired. It is also clear that these provisions apply equally to modular and non-modular candidates. The only difference, as the appellant observes, is that a candidate who chooses the non-modular approach has the arguably more difficult task of taking all four papers together. However, the choice is that of a candidate - no doubt the modular system was introduced to permit candidates to spread the burden of taking examinations over two or more years. While that may appear to some to be an advantage, others may see the prospect of taking all four papers together, and possibly passing the examination sooner, as preferable. What is clear is that there is no discrimination as to the use of the "compensable fail" grade between the two approaches.
 7. As regards the appellant's last argument (see paragraph V above) the Board does not agree that D 14/95 can be so easily distinguished as the appellant suggests. It is to be noted that in that decision the Board first observed quite generally that there was no inequality

of treatment and that differences in specialisation between candidates were inherent and not discriminatory and only then applied that statement of principle to paper C.

8. Turning to the letter of 30 December 2004 from Mr C. (see paragraph VI above), this was filed after the time for filing the grounds of appeal but, even if the Board were to hold it admissible, it would not appear to assist the appellant's case. The Board acknowledges that this case may be exceptional in that the appellant has achieved good marks or better in three papers and come close to passing the fourth on several occasions. However, there is no basis in the REE or its implementing provisions for allowing such a candidate to "carry over" a close fail in order to secure a pass. Since it is clear, as mentioned above (see paragraph 6), that the "compensable fail" system only applies to the first time the EQE is sat, there is no arbitrariness in only applying it to first time candidates. If it is considered to have disadvantages in practice, for example by denying a pass to otherwise deserving candidates, the way to change it is by amending the relevant legislation. As long as the present legislation is being fairly operated, the Disciplinary Board cannot intervene.

9. The Disciplinary Board cannot find any basis for reviewing the exercise by the Examination Board of its discretion. The decision which the Examination Board has made is one to which it was entitled to come and which shows no obvious mistake. That the appellant does not like the decision and holds a different opinion from the Examination Board is quite understandable but

such differences of opinion are reflections of value judgments which are not, in principle, subject to judicial review (see D 1/92, *supra*, paragraph 2). Accordingly the Disciplinary Board has no alternative but to dismiss the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann