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Beschwerdekammer in Disziplinarangelegenheiten | Disciplinary Board of Appeal | Chambre de recours statuant en matière disciplinaire

**Case Number: D 0002/07**

# D E C I S I O N
# of the Disciplinary Board of Appeal
# of 26 June 2008

**Appellant:** n.n.

**Decision under appeal:** **Decision of the Examination Board for the European Qualifying Examination dated 22 September 2006.**

**Composition of the Board:**

**Chairman:** J.-P. Seitz
**Members:** E. Dufrasne
T. L. Johnson

## Summary of Facts and Submissions

I. By letter dated 28 September 2006, the appellant was informed of the decision of the Examination Board of 22 September 2006 that he had not been successful in the European qualifying examination (hereafter "EQE") held from 7 to 9 March 2006.

His performance had been marked as follows:
paper A: 23
paper B: 65
paper C: -
paper D: 45

II. Notice of appeal against this decision was filed on 25 October 2006, requesting that the decision be set aside and that the grade "PASS (50-100)" be awarded to the appellant's paper D. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 27 November 2006.

III. The appellant's submissions in his ground of appeal, completed in his letters dated 31 October 2007 and 14 March 2008, can be summarised as follows.

(a) First, the appellant argued that the sum of the best marks awarded in each question should be the correct manner to decide the final mark of his paper D.

Further, from a comparison between best and worst marks awarded to his paper B, he suggested that the markers should have had a discretion of at least five points in their judgements, so as to

ensure a uniform marking. Without that benefit, he considered that his paper D had not been marked in a uniform manner pursuant Article 16 of the Regulation on the European qualifying examination for professional representatives (Supplement to OJ 12/2005, p.1, hereafter "REE").

The appellant raised that the absence of the legal certainty of the correction and the non-uniform marking of the papers are proven by the ten points that have been given to the candidates that sat paper C in 2007.

He also submitted that the failure to indicate the relative importance of the individual questions and the points associated therewith was a violation of Article 8 REE, that it affected the legal certainty of the correction and the uniform marking.

According to the appellant, the correct solution had to be decided before the examination and should be made public immediately after the examination.

He further submitted that the award of a grade "COMPENSABLE FAIL" under Rules 4(4) and 5 of the Implementing provisions to REE (Supplement to OJ 12/2005, p.14) for marks between 45 and 50 only to candidates sitting the examination for the first time does not comply with the requirement of uniform marking under Article 16 REE nor with the principle of fair assessment embodied in decision D 1/93.

Finally, he observed that one of the possible solutions in part II of paper D, which seemed to be the withdrawal of a priority right, contravened paragraphs 3 and 23 of the Instructions to candidates for preparing their answers (Supplement to OJ 12/2005, p.25) which implied acceptance of the facts and considering the situation as described.

(b) In his second line of argument, the appellant raised the point of the linguistic competence, which should not be a condition for enrolment for the EQE.

He argued on the "linguistic handicap" for candidates like him not having one of the three official languages as their mother tongue and who consequently needed more of the limited time available for reading papers, understanding them and writing answers. He basically referred to Article 15(2) REE, stating that "the three official languages shall always be equally represented", to Article 16 REE, which concerned the marking of the candidates' answers in a uniform manner, and to Rule 4(2) of the Implementing provisions to the REE which subordinated the award of the grade "PASS" to marks of 50 or more.

He also raised that this "linguistic handicap" was reinforced by the already mentioned absence of indication of the marks associated with each question.

He finally made suggestions to overcome such "linguistic handicap".

(c) As a third line of argument, the appellant presented his two previous lines of arguments in combination.

IV. In a communication dated 15 January 2008, the Board informed the appellant of its preliminary opinion that, on the grounds of appeal presented before it, the appeal would have to be dismissed.

## Reasons for the Decision

1. The appeal is admissible.

2. As regards the appellant's first line of argument, it has to be kept in mind that, according to its well established jurisprudence, the Disciplinary Board of Appeal only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or its Implementing provisions. This follows from Article 27(1) REE which reads:

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

Thus the Disciplinary Board of Appeal may only review Examination Board decisions for the purpose 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 of Appeal to reconsider the examination procedure on its merits nor can it entertain claims that papers should have been marked differently, 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 e.g. D 1/92, OJ EPO 1993, 357, Reasons, points 3-5 and D 6/92, OJ EPO 1993, 361, Reasons, points 5-6). Otherwise, differences of opinion with regard to the number of marks to be awarded for a given answer are a reflection of value judgements which are not, in principle, subject to judicial review (see D 1/92, Reasons, point 4). The appellant's arguments must be seen in the light of this principle based on the legal rule.

The Board also refers to its established jurisprudence according which the marking of a paper and the evaluation of a candidate's performance is a unitary process for each examiner and therefore the evaluation of an examiner of part of a candidate's answer cannot be isolated from its context which is the value judgment of this examiner on the merits of the candidate's answers in a paper as a whole (D 3/00, OJ 2003, 365, Reasons, point 3 and D 4/03, 19 July 2004, Reasons, point 2). In particular, candidates are not entitled always to claim for each part of a paper the highest mark awarded by one of the examiners (D 3/00, above cited, Reasons, point 3 and D 20/05, 26 January 2006, Reasons, point 4).

In the present case, the marking by the two examiners of the candidate's paper D is consistent (only two

points of difference) and the appellant does not raise against it any objection of inconsistency or mistake. Therefore, the Board sees no basis for its reconsideration in the present appeal.

Further, Rule 4 of the Implementing provisions to the REE provides that each answer paper shall be awarded on the merits of **that paper alone** (emphasis added). Therefore, the Board sees no legal or even simply logical basis for a broader approach on which a comparison or a deduction concerning the candidate's paper D could be made starting from his paper B, since these two different papers are on different matters and marked by different examiners, with consequently unavoidable differences. Again, a paper, here paper D, is examined and marked as a whole, but independently of the other ones of the same candidate. Consequently, the Board cannot follow the appellant in his request for a discretion of at least 5 points to be left to the markers in their evaluation on his paper D based on an analysis of the marking of his paper B.

The appellant further raised a similar argument based on a decision concerning EQE 2007 which awarded candidates 10 extra points in paper C. On the same reasoning as developed here above, the Board sees a fortiori no legal or even simply logical basis for a possible comparison or deduction from the specific situation of paper C of EQE 2007 to the candidate's paper D of EQE 2006.

As regards the lack of indication of the marks associated with each question, the Board first points that Article 8(a) REE makes the Examination Committees

responsible for indicating, **where relevant** (emphasis added), the relative importance of the individual questions. That means that some freedom is left to the Examination Committees in appreciating whether such an indication is relevant or not, i.e. required or not. The mere fact that the relative importance of the individual questions had not been indicated at the time of the examination is consequently not a violation of Article 8(a) REE. Further, the Board does not see how the absence of indication of the relative importance of the individual questions should by itself unavoidably affect the legal certainty of the correction and the uniform marking of a paper. In the present case, no specific element is provided by the appellant supporting his argument concerning his paper D. Moreover, the freedom left to the Examination Committees under Article 8(a) REE is not in marking but in indicating or not the relative importance of the individual questions. On the marking itself, it clearly appears from the candidate's examination file that the marks have been awarded by the 2 independent markers by reference to predetermined marks ("Maximum possible") for parts I and II and corresponding sub-parts of his paper D (In part II Claim 1: 9, claim 2: 6,...).

As to the appellant's position that the correct solution has to be decided before the examination, he has provided no element supporting that it would not have been the case for paper D of the EQE 2006.

Finally, as to the appellant's request that this correct solution should be made public immediately after the examination, the Board sees in the sole absence of such an immediate publication no

infringement of the REE, of its Implementing provisions or of a higher-ranking law which would fall under the Board's jurisdiction.

As to the "COMPENSABLE FAIL" grade and its possible favourable consequence for the candidates under Rules 4(4) and 5 of the Implementing provisions to REE, it is clearly stated in those provisions that they only apply to candidates sitting the examination for the first time. They create an objective distinction between the candidates sitting the examination for the first time and the others, which equally applies to all candidates, on the basis of their personal choice of sitting for the first time the whole examination or only some papers (D 20/05, above cited, Reasons, points 5 and 6). Therefore, the Board sees no lack of uniform treatment in these provisions nor in their application. Further, the Board's severely circumscribed competence does not extend to considering general challenges to the fairness of the examination system nor to amend the existing provisions (D 30/05, 24 November 2006, unpublished, Reasons, point 9).

Finally, the appellant pointed out that the withdrawal of a priority right would have been contrary to the Instructions to candidates for preparing their answers which implies under paragraphs 3 and 23 acceptance of the facts as given and, for paper D, considering the situation as described. On that issue, the Board is of the opinion that claiming a priority right or not is not a fact. The date of an earlier filing is a fact, to be accepted, but its use to claim a priority right is the responsibility of the applicant, here of the candidate according to paragraph 3 of the Instructions

to candidates for preparing their answers, second sentence.

3. As his second line of argument, the appellant raised that the linguistic competence should not be a requirement for enrolment to the EQE. More exactly, his argument concerned the possible linguistic requirements for passing the EQE. On this matter, it has to be basically kept in mind that English, French and German are the official languages of the European Patent Office, that the European patent applications have to be filed (or translated, under EPC 2000) in one of these languages, which shall in principle be used as the language of the proceedings in all proceedings before the EPO (Article 14 EPC). As to the EQE, the Implementing provisions to REE provide in their Rule 4(2) that the PASS grade shall be awarded to candidates considered fit to practice as a professional representative before the European Patent Office. In considering these provisions in combination, it clearly appears that some linguistic competence is required to practice before the European Patent Office and, accordingly, to pass the EQE.

As regards the incidence of the mother tongue on the linguistic competence required for passing the EQE, the Disciplinary Board of Appeal considered in D 2/95 (22 April 1996, unpublished, Reasons, point 6) that it was not an infringement of the existing legislation that the time allowed inconveniences candidates whose first language is not one of the official languages. Further, the Disciplinary Board of Appeal decided in D 9/96 (9 March 1998, unpublished, Reasons, point 3.6) that the inevitably different circumstances of

candidates whose native language is not one of the official languages do not justify any additional bonus to be given to candidates whose mother tongue is not one of the official languages.

These decisions were confirmed in D 30/05 (above cited, Reasons, point 4), and the Board sees no basis to depart therefrom in the present case.

The appellant also submitted that this "linguistic handicap" should be reinforced by the absence of indication of the marks associated with each question. Neither of these arguments appearing by itself convincing to the Board, there is no reason in the present circumstances that their combination can lead to a different conclusion.

As to the appellant's suggestions to overcome the alleged "linguistic handicap", in the absence of any infringement of the REE or its Implementing provisions, the Board sees no need for any measure or amendment to the existing provisions which ,anyway, would not fall under the Board's competence (D 30/05, above cited, Reasons, point 9).

4. As a third line of argument, the appellant requests that the Board considers his two previous lines of arguments in combination. Since, as above developed under items 4 and 5, neither of these lines of arguments appears to be by itself convincing to the Board, their combination cannot lead in the present circumstances to a different conclusion.

5. Therefore, on the grounds of appeal before the Board, the appeal is to be dismissed.

## Order

## For these reasons it is decided that:

The appeal is dismissed.

The Registrar : The Chairman

P. Martorana J.P. Seitz