



Case Number: D 0011/07

D E C I S I O N
of the Disciplinary Board of Appeal
of 14 May 2009

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
13 August 2007.

Composition of the Board:

Chairman: P. Messerli
Members: J.-P. Seitz
T. L. Johnson

Summary of Facts and Submissions

I. The appellant sat the European qualifying examination for professional representatives held from 6 to 8 March 2007.

II. By letter dated 13 August 2007 he was notified of the decision of the Examination Board that he had not been successful in the examination as his performance in the various papers had been marked as follows.

A: 48 - compensable fail

B: 36 - fail

C: 36 - fail

D: 51 - pass.

III. Notice of appeal against the decision was filed on 5 September 2007, the appeal fee was paid on the same day. The statement setting out grounds for appeal was also filed on 5 September 2007.

IV. The appeal relates to Paper A only, and in this respect the appellant's submissions can be summarised as follows:

(A) The mark was broken into three sections, namely:

- "independent claim" of which 20 marks out of a maximum of 40 marks were awarded for "device" and 5 marks out of a maximum of 10 marks were awarded for "method"

- "dependent claims" of which 15 marks out of a maximum of 35 marks were awarded.
 - "description" of which 8 marks out of a maximum of 15 marks were awarded.
- (B) According to former case law (reference being made to D 7/05) where a section of a paper constitutes nearly half the marks available, the initial marking sheet is deemed to be seriously inadequate, contrary to Rule 6(1) of the Implementing Provisions of the Regulation on the European qualifying Examination for professional representatives (REE).
- (C) In the case in suit a mark of 20 out of 40 provided with no further breakdown for the part of paper A related to the device claim, is inadequate and does not allow the candidate to verify the assessment of the examination decision.
- (D) The appellant argues that this appears to be contrary to the provisions of Rule 6(1) of the Implementing Provisions of the REE.
- (E) He further argues that it is however its conviction that a more detailed schedule of mark does exist which would satisfy the requirements of said Rule 6(1), in line with point 11 of the reasons in D 7/05 *mutatis mutandis*.
- (F) Then in points 13 to 30 of his statement of grounds of appeal the appellant addresses the

merits of the marking assessment in respect of this part of his paper.

V. The rapporteur asked the Examination Board whether a more detailed breakdown of marks in respect of Paper A was

- (1) possible,
- (2) actually implemented.

On 8 September 2008 the Examination Board confirmed that no further schedule of marks existed.

VI. In response to a communication of the Board dated 15 October 2008 the appellant, duly informed of the answer of the Examination Board, brought forward that he believed the Disciplinary Board of Appeal missed the point which is that he was not put in a position enabling him to verify the decision of the Examination Board.

Precisely as indicated in decisions D 7/05, point 8 and D 12/82, point 4, one of the purposes of Rule 6(1) of the Implementing provisions (IP) of the Regulation of the European Qualifying Examination for professional representatives (REE) is to allow the candidates to individually verify the correctness of their markings, and therefore to make decisions of the Examination Board verifiable.

A violation of this essential right can constitute a defect that may entail setting the contested decision aside.

VII. In the present case in light of the high number of potential marks relating to the elaboration of the working of the device claim of Paper A, which constitute nearly half of the highest possible marking of the whole paper, the appellant could have reasonably expected some subdivision of said marking.

The mark awarded relating to the device claim in Paper A has been marked out of 40 without any specific breakdown, which is seriously inadequate and unusable for the purpose of verifying the Examination Board decision since it becomes impossible to cross-reference it with the examiner's report.

In respect of this it is noted that the rapporteur in the case in suit requested to know from the Examination Board in an e-mail dated 31 August 2008 if a detailed breakdown of marks was (1) available, (2) effectively implemented. As the first of these questions was answered in the negative and no reply given to the second, it follows that the Examination Board did not implement an effective marking schedule since it remains for the candidate impossible to determine how the mark awarded was calculated.

VIII. Such a marking procedure cannot be considered correct and in fact rather highlights the lack of a method to provide the required accountability to meet the requirements of Rule 6(1) IP. Thus said Rule has been infringed since the marking sheet is unusable for the purpose of verifying the examination decision.

In the case in suit as the appellant could not verify the correctness of the Examination Board decision since

the absence of a specific breakdown of marking provided no explanation of why only 20 marks of 40 possible were awarded to his paper in respect of the device claim although the claim drafted by the appellant was substantially in line with the solution published in the examiner's report.

From the discrepancy between the actual marking and the one expected (emphasis added by the Board) it is clear that an abuse of discretion occurred.

IX. It is also not clear how the Board of Appeal "cannot identify any serious and obvious mistake affecting the marking" as set out in point IX of their communication without referral to a detailed marking schedule which according to the Examination Board in itself does not exist.

In such circumstances the Board of Appeal is entitled to refer the matter back to the first instance for it to rectify the marking. If such a remedy were not available, there would be no recourse for candidates who provided the right solution that had been awarded no marks at all due to a clerical error, an hypothetical case which is not far removed from that of the appellant.

The appellant then refers to a possible infringement of the provisions of Article 27(3) REE in that the Examination Board failed to consider whether the grounds he submitted justified setting the impugned decision aside, before remitting the case to the Disciplinary Board for further processing of the appeal.

- X. Indeed the Examination Board would have had to review the device claim drafted by the appellant in Paper A in order to justify the low mark. As the first instance has indicated that neither a detailed breakdown of marks nor an explanation is available to explain the low mark in respect of said device claim one has to conclude that they have not correctly followed the review procedure.

Therefore the present Board of Appeal must refer the case back to the Examination Board with the order to provide a further breakdown and an explanation for the mark awarded accordingly.

Otherwise it would lead to the paradoxical situation where the Examination Board erroneously fails to correct a marking error that the present Board of Appeal is prevented to correct due to case law prohibiting consideration of the merits of the marking (see point 20 of D 7/05; point 4 of D 12/97).

- XI. The appellant further relies on an alleged second infringement of the provisions of Rule 4(2) IP of REE in that the impugned decision wrongly applied the "fit to practice as a professional representative" requirement.

The claim he drafted was only awarded 20 marks of a possible maximum of 40. As there is no clear reason behind the loss of the half of the possible marks he tried to identify possible reasons.

The first being that the examiners have not duly taken into account Articles 69 and 84 EPC while assessing the merits of the drafted claim.

The second possible reason being that his paper could well have been marked by examiners not familiar with his native language.

XII. Summarising his reply he maintained that the claim he drafted was substantially in line with the solution provided in the examiner's report and that it is therefore clear that serious and obvious mistakes occurred affecting the marking as there is a substantial discrepancy up to 20 marks between the marks awarded and those that might be expected based on the examiner's report.

Such a loss cannot be justified because no explanation or detailed schedule of marks have been provided, contrary to Rule 6(1) IP REE.

XIII. He then requested that the present Board:

- refers the matter back to the Examination Board for rectification if the Board of Appeal agrees with the appellant's submission that there is no justification for loss of 20 marks in respect of the device claim, and as the Examination Board has been unable to explain such loss; or
- refers the matter back to the Examination Board to provide a detailed schedule of marks and an explanation for the loss of 20 marks in respect of the device claim; and/or

- refers the matter back to the Examination Board to commission an Examination Committee to undertake a new marking of the appellant's paper taking into account the interpretation of the claims in the context of the examination paper as a whole, if the Board of Appeal agrees that the examiners have based their marking on the legally false premise of a non-recognition of Articles 69 and 84 EPC, and further taking into account the native language of the examiners.

Reasons for the Decision

1. The appeal is admissible.
2. It is established jurisprudence of the present Board that it only has jurisdiction in EQE matter to establish whether or not the Examination Board has infringed the REE or a provision implementing it. This follows necessarily from the provisions of Article 27(1) REE which is the basis of the present Board's jurisdiction "*ratione materiae*" in European Qualifying Examination matters and which reads

"An appeal shall lie from decisions of the (Examination) Board and the Secretariat only on grounds of infringement of this Regulation or of any provision relating to its application".
3. Thus the Disciplinary Board may only review Examination Board decisions for the purpose of establishing that they do not violate the REE, its implementing

provisions or a higher-ranking law. It cannot be the duty of the Disciplinary Board to reconsider the examination procedure on the merits, nor can it entertain the claims that a paper has been marked incorrectly, save to the extent of mistakes which are so serious and so obvious that they may be established without re-opening the entire marking procedure. All other requests based on the grounds that papers have been marked incorrectly do not fall under the jurisdiction of the present Board.

Value judgements and substantive assessments are not, in principle, subject to judicial review (see D 1/92 (OJ 1993, 357); D 6/92 (OJ 1993, 361); and D 23/97, unpublished).

4. The appellant is himself well aware of this principle as much as he refers in point 33 of his statement of grounds to the fact that "the Appeal Board cannot normally re-open the marking procedure".
5. In the present case the Board does not intend to depart from this principle. In this respect the arguments of the appellant demonstrate that his opinion on the merits of his paper differs from that of the examiners.

The Board cannot identify any serious and obvious mistake effecting the marking. What the appellant seeks is in fact a reconsideration of his answers and the substitution by higher marks.

6. Neither can the Disciplinary Board identify any breach of the provisions of Rule 6(1) of the Implementing provisions of the REE since having no competence to

assess the merits of the marking it cannot have competence to assess the correctness of the weight given by the Examination Board in terms of marking to each different part of the paper (D 13/02, point 5 of the reasons).

7. Furthermore, after due enquiries by the present Board, the Examination Board on 8 September 2008 informed the rapporteur that no other more detailed schedule or marks existed in respect of the failed paper.
8. Decisions of the Examination Board informing candidates that they have failed need not be reasoned since the Regulation on the European Qualifying Examination do not require it at all (cf. D 7/05, OJ EPO 2007, 378, 392; D 12/97, OJ EPO 1999, 566; D 3/03 of 20 April 2004 not published).

Nevertheless, Rule 6(1) IP REE requires that the marking sheets have to contain the details of the marking for the purpose of allowing the control of Examination Board's decisions by the candidates (cf. D 7/05, OJ EPO 2007, 378, 388).

9. In the case in suit the marking sheet of the appellant contains an indication of the maximum possible marks (hundred) and a schedule of the sub-marks for each question of Paper A. The same sheet also shows the table of sub-marks awarded by the two examiners individually for each question answered by the candidate, and finally the overall mark (48) recommended by the Examination Committee I and followed by the Examination Board.

10. This marking sheet together with the documents contained in the compendium enabled the appellant to verify the correctness of the Examination Board's decision in respect of his paper, as required in D 7/05 (OJ EPO, 318, 388). Unlike the present case, in case D 7/05 the marking sheet for Part II of Paper D was inadequate and unusable for purposes of verifying the examination decision since an outsider would have been unable to determine which elements of the candidate's answer had been respectively assigned the marks in section A, B, C and D of the marking sheet.

This also allowed in the present case the appellant to compare his answers with the "possible solution" and duly verify whether the mark attributed to each answer might have been the result of an obviously incorrect estimation by the markers, open to review by the present Board (see D 3/03, of 23 April 2004, point 4 of the reasons).

11. In view of the requirements of uniform marking and equal treatment of all candidates the scheduled breakdown of mark in respect of Paper A cannot be modified by this Board, all the more when the Examination Board confirms that no further breakdown existed.

12. As reaffirmed under point 2 above decisions of Examination Board are open only to limited judicial review (cf D 7/05, D 13/02, D 16/02, D 6/04, D 20/96).

It follows that in the absence of an obvious error which can be established without reopening the whole marking procedure, like in the case in suit, the actual

marking of the performance of the appellant as reflected in his respective answers in Paper A, in terms of how many mark each deserves cannot be subject to review by this Board. Nor can be subject to review the criteria the Examination Board considered for determining in advance the weighting of the expected answers to the proposed questions. That would, contrary to the provision of Article 27(1) REE, amount to a second evaluation on the merits which the Board has no jurisdiction for. And as there is no obvious basis in the whole appeal procedure of an abuse by the Examination Board in exercising its discretion, none of the requests of the appellant is well founded.

Therefore the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

P. Messerli