



**Europäisches
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Beschwerdekammer
in Disziplinarangelegenheiten

**European
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Disciplinary
Board of Appeal

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Chambre de recours statuant
en matière disciplinaire

Case Number: D 0039/07

D E C I S I O N
of the Disciplinary Board of Appeal
of 13 February 2008

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
8 October 2007.

Composition of the Board:

Chairman: J.-P. Seitz
Members: B. Günzel
N. M. Lenz

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Secretariat for the European qualifying examination of 8 October 2007 refusing the appellant's application for enrolment for the European qualifying examination 2008.
- II. The decision is based on the ground that the application was only received on 4 October 2007 and thus after the closing date for enrolment for the European qualifying examination 2008 which was 21 September 2007.
- III. On 15 October 2007 the appellant appealed the decision. The appeal fee was paid the same day. The statement setting out the grounds of appeal was filed on 4 December 2007.
- IV. On 18 December 2007 the Examination Secretariat decided not to rectify its decision and forwarded the appeal to the Disciplinary Board of Appeal.
- V. By a communication dated 28 December 2007 the Board informed the appellant that in order to be able to reach a decision in time before the EQE 2008 the Board intended to hold oral proceedings irrespective of the possible outcome of the appeal. In view of the short time span remaining before the date set for the EQE 2008 this was, however, only possible with the appellant's agreement to a notice of summons being issued less than 2 months before the oral proceedings. The appellant was furthermore asked to indicate whether he agreed to his appeal being dealt with in consolidated proceedings with another appeal.

- VI. The appellant gave his consent and oral proceedings were scheduled for 13 February 2008. The Examination Secretariat was asked for information on its practice of exercising discretion, if any, in cases of late receipt of applications for enrolment. The President of the EPO and the President of epi were given the opportunity to file observations.
- VII. In a communication dated 15 January 2007 accompanying the summons to oral proceedings the Board informed the appellant of its doubts whether there was a legal basis for regarding the Examination Secretariat as having discretion or as being obliged to accept late filed applications for enrolment by applying in an analogous manner the principles as foreseen in the EPC for cases of late filed documents or procedural acts. If any, such applicable criteria could be at best the criteria of re-establishment, if fulfilled. A more lenient attitude, in particular, by applying the principles for further processing did not appear conceivable. As regards the issue of all due care the Board at present did not think that all due care was observed by the appellant. It was both necessary and easy for a candidate wishing to sit next year's examination to be aware of the closing date for next year's enrolment said closing date being published in the OJ and being available via the Internet as early as March of the preceding year and being furthermore individually indicated in the letter addressed by the Examination Board to the unsuccessful candidate. As regards the appellant's argument that in 2007 the closing date for enrolment was set one month earlier than in the

preceding years there was no legitimate assumption that the closing date was the same point in time, every year.

VIII. The President of the EPO did not file observations. The President of epi observed that in order to practice as a representative before the EPO, it was necessary to be aware of deadlines and to ensure that deadlines were met. This involved finding out when they change. Looking up the relevant information only after the deadline showed a lack of the level of professionalism required of a professional representative. Therefore the preliminary view of the Board should be followed.

IX. By letter dated 4 February 2008 the Head of the Examination Secretariat explained its practice that non-compliance with the deadlines for enrolment results in the refusal of applications received after these deadlines. Allowing candidates to enrol - even shortly - after the closing date would oblige the Examination Secretariat to allow this for all candidates. This would result in a shift of the deadline and, as an ultimate consequence, might make the organisation of the examination impossible. Nevertheless, the Examination Secretariat examines if the circumstances of the non-compliance with the deadlines may constitute or be comparable to a case of "force majeure". "Force majeure" is defined by the Examination Secretariat as being an exceptional event or effect that can be neither foreseen nor controlled and that could not reasonably be avoided. Moreover, the "force majeure" must have prevented the candidate to act and enrol within the deadlines.

This was not so in the present case. The change of the deadline was published in March 2007 in the OJ and, as regards unsuccessful candidates of the EQE 2007 was indicated to them in the result letters addressed to the candidates. It was expected that candidates open their result letters even if they were already informed of their results electronically. It was clearly specified that the results published in the Internet might not be accurate and only the results notified in writing were legally binding. The circumstances of the present case did thus not constitute a case of "force majeure".

- X. The submissions of the appellant can be summarised as follows:

The appellant had filed his application as soon as he became aware of the deadline. As compared with the last five previous EQEs, in 2007 the deadline for enrolment had inexplicably been moved forward by a month, from October to September. Such a substantial change might have been better publicised to IP Practitioners. Certainly, none of the partners in his firm nor the other trainee were aware that the deadline had been brought forward which resulted in the appellant missing the deadline. The decision of the Examination Secretariat made reference to OJ EPO 3/2007 and this was the first time the appellant was made aware of this notification. The appellant had not observed the paragraph in the letter of the Examination Board of 13 August making note of the date for EQE 2006 enrolment since on receiving the letter he was more concerned with the breakdown of the marks from EQE 2007. As regards information on the EQE candidates from

outside the London network of trainees, in particular in smaller firms, were prejudiced, as possible information via word of mouth from other trainees was not available to them.

The Examination Secretariat was entitled to exercise discretion and common sense in circumstances where a genuine mistake was made. In the light of the EPC 2000 making further processing the standard remedy for missed time limits further processing or some other remedy should also be available for candidates when enrolling for the EQE. The appellant's application was received some 13 days late in respect of examinations which were due to be held in around six months time. The next opportunity to become qualified being March 2009 this "punishment" did not really fit the "crime" and was exceedingly harsh.

The appellant requests that the decision of the Examination Secretariat be reversed in its entirety. By letter of 6 February 2008 the appellant informed the Board that he would not be attending the oral proceedings and he requests that a decision be given in writing.

- XI. Oral proceedings before the Board were held on 13 February 2008 in the absence of the appellant and the decision was given orally.

Reasons for the decision

1. It is not disputed by the appellant and is established jurisprudence of the Disciplinary Board of Appeal that

the provisions governing the EQE, in particular the Regulation on the European qualifying examination for professional representatives (REE) and the Implementing provisions (IP), are *lex specialis* for the EPC, and that the EPC applies in connection with them only where they expressly refer to it (see D 7/05, OJ EPO 2007, 378, point 17. of the reasons, and the further decisions cited in that decision). None of the provisions of the EPC governing whether and when the missing of a time limit can be regarded as excused is referred to in the provisions governing the EQE. As a consequence, it is indicated in point 4. of the Announcement of the EQE 2008 published in the OJ EPO 3/2007, 150, and even highlighted in bold that applications received after the closing date **will** be refused. It is furthermore indicated that Articles 121 and 122 EPC are not applicable.

2. The appellant has not further explained why, i.e. on what legal basis or for which legal grounds the Examination Secretariat ought to accept late filed applications for enrolment by granting some kind of further processing. That the "punishment" for having been late "some 13 days" would appear exceedingly harsh the next opportunity to become qualified being the EQE 2009, as the appellant submits, does not form a proper legal basis. The appellant appears to be saying that late filed applications should be accepted to the extent that they would still provide enough time for the Examination Secretariat to process all of the candidates' applications.

3.1 Article 20 REE provides for the publication of a notice of the examination specifying inter alia the dates by

which applications for enrolment must be filed. This appears to express the legislator's intent to afford a stringent nature to the deadline for enrolment. Hence, missing of the closing date for enrolment appears to be conceivable as being excused only under very exceptional circumstances, if any. Even though not being allowed to sit one year's EQE may have an adverse effect on a candidate's career perspective, it is not evident that the consequence thereof ought to be that some lenient standard for allowing late filed applications could be applied. It could also be argued that, in the overall interest of safeguarding a proper preparation of the EQE, possible exceptions, if any, have to be very narrowly defined.

- 3.2 Setting a closing date for enrolment which is binding for the candidates is both justified and necessary in view of the legitimate purpose and overwhelming importance of ensuring timely and orderly preparation of the European qualifying examination (EQE) in the interest of all the many yearly candidates.

In the year 2007 1809 candidates sat the Examination, 1071 of them being resitters. According to the Examination Secretariat 2.228 candidates have been enrolled for the EQE 2008. As these figures show, the number of candidates sitting each year's examination is enormous and is ever increasing. Clearly, to the extent that late filed applications are accepted from individual candidates that has to be done for all candidates. Thus, when it comes to defining under which conditions, if any, the Examination Secretariat ought to accept late filed applications it is to be considered that broader admission of late filed

applications could severely harm the well functioning of the EQE.

3.3 Therefore, if some kind of general principles were to be applied on the modalities under which late filed applications for enrolment ought to be accepted, in the view of the Board there are good reasons to think that these ought not to be more liberal than the standard applied at present by the Examination Secretariat, which is to accept late filed enrolments in cases of "force majeure" only. In any case, in view of 3.2 above, the minimum standard which would have to be required in order to justify the acceptance of late filed applications would appear to the Board to be that the candidate has missed the deadline despite of all due care having been observed by him, personally.

4. However, that need not be decided in the present case because the appellant's behaviour cannot be qualified other than negligent. Therefore, the Board does not see any justification for enrolling the appellant for the EQE 2008.

4.1 It is correct that in 2007 the closing date for enrolment was set one month earlier than in the preceding years without the date of the EQE having been moved forward substantially. However, it is also clear that the more the number of candidates sitting the examination increases the more time the Examination Secretariat needs to prepare the examination properly (compare the number of candidates having sat the examination in 2007 with the number of candidates having enrolled for the EQE 2008). There is thus no legitimate assumption that the closing date for

enrolment is the same point in time of the year, every year.

- 4.2 It is both necessary and easy for a candidate wishing to sit next year's examination to get himself informed in time about the closing date for enrolment which is not only published on paper in the Official Journal but also on the Internet, as early as in March for next year's examination. There is thus no need for any information via mouth and no prejudice is done to candidates outside London or those being based in smaller firms.

Furthermore, the closing date for enrolment for next year's examination is individually indicated, the date being highlighted in bold, in the letter addressed by the Examination Board to the unsuccessful candidate. It is to be expected from any candidate wishing to become a European representative that he or she reads official documents addressed to him or her carefully as soon as they are received.

5. Therefore, the Board concludes that the Examination Secretariat has rightly refused the appellant's application for enrolment for the EQE 2008.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J. P. Seitz