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

Case Number: D 0021/08

D E C I S I O N
of the Disciplinary Board of Appeal
of 9 July 2009

Appellant: n.n

Decision under appeal: **Decision of the Examination Board for the European Qualifying Examination dated 11 August 2008**

Composition of the Board:

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

Summary of Facts and Submissions

I. By letter dated 11 August 2008, the appellant was informed of the decision of the Examination Board of 1 August 2008 that he had not been successful in the European qualifying examination (hereafter "EQE") held from 4 to 6 March 2008.

His performance had been marked as follows :
paper D: 49

II. Notice of appeal against this decision was filed on 11 September 2008, requesting that the decision be set aside and that the grade PASS be awarded to the appellant's paper D. Reimbursement of the appeal fee was also requested as well as, should the appeal not be allowed in its entirety, oral proceedings. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 9 October 2008.

III. The appellant's submissions in his ground of appeal can be summarised as follows.

(a) In his first line of argument, the appellant submitted that the marking sheets supplied with the impugned decision did not provide all relevant details to allow him to verify said decision, in particular since the marking sheet for paper DII only gave 3 divisions of marks, contrary to what is required under Rule 6(1) of the Implementing provisions to the Regulation on the European qualifying examination for professional representatives (Supplement to OJ 12/2007, p. 15, hereafter "IP REE") and in breach of the

principles of equity and equality of the parties. Reference was also made to decision D7/05, where the appellant was provided with the detailed marking sheets of his paper.

(b) In his second line of argument, the appellant raised that for papers which have a total score just under the passing grade, the answer had to be reviewed in detail but that in the present case it was impossible for him to verify whether this had been done and, if so, what the criteria were and how they were applied. In this line, he referred to a revision under "fit to practice criteria" which, according to informal reports from members of the Examination Committees, should be even more severe for re-sitters.

(c) In his third line of argument, the appellant raised that the total scores for DI and DII by the two markers were not consistent in breach of Article 16 of the Regulation on the European qualifying examination for professional representatives (Supplement to OJ 12/2007, p. 1, hereafter "REE") which requires uniform marking. In more details, he submitted that even if both markers reached the same total mark of 48,5, DI marks being 27 and 25,5 and DII marks being 21,5 and 23 respectively, that illustrated that the two markers could not agree on a uniform total for each of these parts and revealed a difference of 1,5 point in each part, highly significant in the present case in view of his final mark of 48,5. He referred again to the absence of further information and details on the implementation,

which prevented him to further verify how his paper was evaluated and marked.

(d) In his fourth line of argument, the appellant submitted that since it was impossible in practice for a candidate to score 100 points in paper D, the passing grade for that paper had to be adapted in particular on the basis of 50% of the *de facto* maximum of points, i.e. the best note obtained by a candidate for DII.

(e) In his fifth line of argument, the appellant raised that the absence of indication of the relative importance of the individual sub-questions in DII was a breach of Article 8(a)REE.

(f) In his sixth line of argument, the appellant raised that, in order to correctly answer question 1 of DII, it was necessary to know that India was a member state of the Paris Convention at the relevant date. However, that information was not in any of the materials referred to or listed in Article 12 REE or section 4.2 of the Instructions to candidates concerning the conduct of the examination (Supplement to OJ 12/2007, p.23, hereafter "the Instructions"). Only in item (i) appeared the Paris Convention itself, but in item (j) were only mentioned lists of the contracting states to the EPC and to the PCT.

(g) In his seventh line of argument, the appellant referred to recent appeal cases relating to paper C of the EQE 2007, in which the Disciplinary Board ruled that in compliance with Rules 4(2) and (3)

IP REE, it is legally prescribed that the exam should not be marked as if there is only one correct answer but that answers which deviate from the scheme, when remaining reasonably and completely substantiated, should be fairly marked. He then compared some of his answers with the Possible Solution presented in the Compendium and claimed additional marks based on their relevance.

IV. By letters from the Board dated 21 November 2008, the Presidents of the European Patent Office and of the Council of the Institute of Professional Representatives were respectively invited, pursuant to Article 27(4) REE and Article 12 of the Regulation on discipline for professional representatives, to comment on the case. No such comments were received.

V. In a communication dated 29 April 2009 annexed to summons to oral proceedings, 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.

VI. In a letter dated 9 June 2009, the appellant requested more information on the marking process and more details on the marking of his copy. No new argument was raised nor any legal basis provided supporting these additional requests.

VII. In accordance with the Appellant's request, oral proceedings were held before the Board on 9 July 2009. During the oral proceedings, no new argument was presented nor any additional legal basis provided. The former requests were maintained.

Reasons for the Decision

1. The appeal is admissible.

2. It is well established by the jurisprudence of the Disciplinary Board of Appeal 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 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 implementation."

Thus the Disciplinary Board cannot 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, points 3-5 of the reasons and D 6/92, OJ EPO 1993, 361, points 5-6 of the reasons).

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, above cit., point 4 of the reasons). It is not within the competence of the Board to reconsider the examination procedure itself on its merits, i.e. the quality of the candidate's work.

Further, the burden of establishing serious and obvious mistakes necessarily lies with the appellant who alleges it (D46/07 of 21 July 2007, unpublished in the OJ EPO).

The appellant's arguments must be seen in the light of these principles based on the legal rule.

The Board also refers to the established case-law according which the marking of a paper and the evaluation of a candidate's performance is a unitary process for each marker and therefore the evaluation by a marker of part of a candidate's answer cannot be isolated from its context which is the value judgment of this marker on the merits of the candidate's answers as a whole (D 3/00, OJ 2003, 365, point 3 of the reasons and D 4/03 of 19 July 2004, unpublished, point 2 of the reasons).

3. In his first line of argument, the appellant basically alleged that it was impossible for him to verify the impugned decision in the absence of detailed marking sheets allowing a precise analysis of the marking. In this context he cited D 7/05 (OJ EPO 2007, 378).

In that decision, the Board referred to Rule 6(1) IP REE, which requires that the marking sheets contain details of the marking, one of the purposes of this rule being specifically to make individual decisions individually verifiable for the candidate (point 8 of the reasons, also citing D12/82, OJ EPO 1983, 233, point 4 of the reasons). Details of the marking were deemed by the Board to include sufficient sub-divisions

of the achievable mark and of the candidate's overall mark into sub-marks, and an indication of the substantive and legal issues for which those sub-marks were awarded (point 9 of the reasons). That decision related to part II of paper D of the EQE 2004, where 2 global questions were submitted, absent any numbering and clear subdivisions, and for which the marking sheet split the global note for said part II of paper D in sections A,B,C and D. In that specific case, the Board considered that in the light of the paper's structure and the compendium's "Possible Solution", an outsider would have been unable to determine which elements of the candidate's answer had been assigned the marks in sections of the marking sheet (point 10 of the reasons). Therefore, the Board arranged for the appellant to be given access to his detailed schedule of marks. However, the Board also explicitly mentioned that it did not imply that there was always an obligation on the examining bodies to produce and publish a schedule of marks with minute sub-divisions into as little as half a mark for individual aspects such as were included in the internal schedules ultimately handed over in the case (point 13 of the reasons). The schedules must leave some room for manoeuvre and -merely- be sufficiently detailed to constitute details of the marking within the meaning of Rule 6(1) IP REE (point 13 of the reasons).

Already in D12/82 (above cited and cited in D 7/05), the Board considered that the candidate did not have a right to greater transparency so as to afford him a clearer indication of where and how he was wrong, the purpose of the EQE being to establish that a person is qualified and not to provide him with the requisite

training (point 6 of the reasons).

D3/03 (23 April 2004, unpublished) also related to part II of paper D, in that case of the EQE 2002, where 3 questions were submitted, numbered from 1 to 3, and for which the marking sheet split the global note for part II of paper D in corresponding sections 1 to 3. In that case, the appellant also complained on the basis of Rule 6(1) IP REE that he had not been able to verify his marking. However, the Board considered that the candidate was in a position to compare each note by each marker for each answer with each corresponding maximum note, which constituted a sufficiently detailed marking in the meaning of Rule 6(1) IP REE (point 4 of the reasons).

The present case concerns part II of paper D of the EQE 2008, where 3 questions were submitted, explicitly numbered from 1 to 3 and the marking sheet mentioned corresponding splitting of marks in parts 1 to 3. In the compendium, the examiner's report and the candidate's answer are also based on the same splitting in parts 1 to 3. The Board is therefore of the opinion that the circumstances of the present case are closer to the ones of D 3/03 than to the specific ones of D 7/05. Hence, the Board considers that the appellant has been provided in the present case with sufficient details of the marking which, in combination with the compendium, have allowed him to verify the marking and the decision within the meaning of Rule 6(1) IP REE (see also D 11/07 of 14 May 2009, not published).

4. In his second line of argument, the appellant referred to the special situation of a global note just under the "pass" grade.

The appellant did not provide any argument and the Board has no reason to doubt that in the present case the two markers, after independent marking, have compared and confirmed their global notes and the resulting grade, in line with the practices cited in decisions D 12/97 (OJ EPO 1999, 566) and D 4/03 (19 July 2004, unpublished). The Board sees no reliable fact nor any legal basis to support the content of the further alleged informal reports from members of the examination committee. Finally, it appears that the Examination Board has reviewed and confirmed the impugned decision, during its meeting of 31 October 2008, on the basis of the appeal (letter of remittal to the Board dated 7 November 2008). That confirms the examination committee global evaluation of the candidate's answer in paper D as a whole not justifying a "pass" grade.

5. In his third line of argument, the appellant raised a lack of uniform marking of his copy.

As above mentioned (see 2.), the competence of the Board is restricted to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. In the present case, the Board does not see any such demonstration by the appellant.

Otherwise, differences of opinion with regard to the number of marks to be awarded for a given answer are a

reflection of value judgements part of the examination procedure itself which are not, in principle, subject to judicial review (see 2.).

As to the differences between the markers for sub-parts of paper D of the candidate, the Board also reminds that the marking and the evaluation of the merits of a candidate is a unitary process on the basis of each paper as a whole (see 2. and cited jurisprudence). Again, the appellant does not raise any objection of any error nor does he substantiate his objection of inconsistency. In the present case, the fact that the number of marks awarded by the markers differed (of maximum 1 point) for some sub-parts does not in itself establish an inconsistency or a lack of uniform marking.

As to the lack of a complete information on how exactly the markers, the examination committee and the Examination Board have reviewed the candidate's copy in view of the differences between the respective sub-marks of the markers, the Board sees no legal basis to require such a complete information nor, consequently, any breach of the REE or of any provision relating to its implementation in not providing the candidates therewith.

6. In his fourth line of argument, the appellant required an adaptation of the "pass" grade level on the basis of the best note obtained by a candidate.

In the EQE system, it is the competence of the Administrative Council to adopt provisions governing the conduct of the EQE (Article 134(8) EPC 1973). On the basis of Article 7(6) REE, it is to the competence

of the Examination Board to draw up implementing provisions to the REE (IP REE). On the other hand and as already mentioned, the jurisdiction of the Board in EQE matters is very strictly defined in Article 27 REE (see 2.). Hence, it is clearly not under the competence of the Board to amend the present marking system duly established.

7. In his fifth line of argument, the appellant complained about the lack of indication of the relative importance of the individual sub-questions in part II of paper D.

The Board first points that Article 8(a) REE makes the examination committees responsible for indicating, where relevant, 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 validity of the correction. In the present case, no specific element is provided by the appellant supporting his argument concerning his paper D.

8. In his sixth line of argument, the appellant raised the need for candidates to know that India was member of the Paris Convention.

Section 4 of the Instructions lists under 4.2 the documents the candidates are advised to bring for the examination. Further, section 4 explicitly mentions that the candidates are free to bring any additional material or documents (except...(part not relevant here). It is then clear that the list under section 4.2 is not exhaustive for what should be necessary or useful during the examination. On the other hand, Article 12(a)(ii) REE clearly requires from the candidates a thorough knowledge of the Paris Convention. Section 23 of the Instructions also informs the candidates that they will be expected to demonstrate, in a legal opinion, their ability to deal with a complex industrial property situation involving fundamental issues (...) as defined in (...) the Paris Convention. From these elements, it is clear to the Board that the candidates have not only to know the substance of the Paris Convention, i.e. relevant articles but also, in order to be aware to apply them or not in a specific case, to establish (by their knowledge or by supporting documents) if they were in force for a specific country at a specific date. Moreover, in the present case, the candidate having duly assumed that India was a Contracting party to the Paris Convention at the relevant date, the Board sees no clear prejudice to him.

9. In his seventh line of argument, the appellant referred to recent appeal cases relating to the paper C of the EQE 2007 and to the requirement also to allow marks to answers deviating from the scheme but remaining reasonably and completely substantiated.

In these decisions, the Board also reminded the established case law (see 2.) according which it "is prevented from reviewing the marking of an examination paper as to whether the marks (especially in the form of the award of points within the meaning of Rule 4 IP REE) are objectively justified or not. Consequently, requests for higher marks than those awarded and/or a statement or decision that the appellant has passed the EQE 2007 (...) cannot be granted within the context of the appeal procedure" (point 3 of the reasons). In the cited cases, the Disciplinary Board decided that, the Examination Board having recognised that the examination committees were wrong not to award marks for an incorrect yet logical and justified attack, had to remit the cases to the examination committees for a new marking. The present case is substantially different in that no error in marking was recognised by the Examination Board. Further, it appears that the candidate does not allege of any error serious and so obvious that it can be established without re-opening the entire marking procedure but only of differences of opinion with regard to the number of marks to be awarded for a given answer, which are a reflection of value judgements not subject to judicial review by the Board (see 2. above and cited jurisprudence).

10. In his submissions dated 9 June 2009, the appellant requested even more information and details. The Board has already given the reasons why it considers that the appellant has no right to further information or details on the marking of his copy in the present case. Absent any new element, this applies a fortiori to any further request in the same direction.

11. Consequently, on the grounds of appeal before the Board, the appeal is to be dismissed.

12. The condition for the possible reimbursement of the appeal fee under Article 27(4) REE is therefore not fulfilled.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

The Registrar: The Chairman

E. Görgmaier J. P. Seitz