



Case Number: D 0022/08

D E C I S I O N
of the Disciplinary Board of Appeal
of 18 January 2010

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: G. Weiss
Surgrañes Moliné

Summary of Facts and Submissions

I. The appeal lies from the decision of the Examination Board, posted by registered letter of 11 August 2008, that the appellant had failed paper D of the 2008 European Qualifying Examination (EQE).

II. The appellant resat paper D of the 2008 EQE and was awarded the mark "48 fail". The Examination Board decided that, having failed that paper, he had failed the EQE under Article 17(1), first alternative, of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 1994, 7 et seq., OJ EPO 2002, 565 et seq.)

Copies of the appellant's answer papers had been forwarded to him. The relevant marking sheets of the two members of Examination Committee III and the record of the candidate's results in the 2008 EQE were enclosed with the contested decision of the Examining Board.

III. By letter received by fax on 3 September 2008, the appellant filed a notice of appeal. The appeal fee was paid on 3 September 2008. A statement setting out the grounds of appeal was received by fax on 9 September 2008.

IV. The Examination Board did not allow the appeal and, by letter of 7 November 2008, remitted it to the Disciplinary Board of Appeal (DBA).

V. The appellant's submissions can be summarised as follows:

First, he submitted that the mark awarded for his answer to question 1 of paper D-II had to be reconsidered and that more than 11 out of 22 points should have been awarded.

Second, regarding question 2 of paper D-II, he submitted that "it appears that answer 2) is mostly correct by recommending action concerning

1. restitutio for EP2,
2. interruption at EP-BEP,
3. purchase of FR BEP and EP BEP,
4. cross-license with BS because of mutual exposure, but admittedly fails to do so concerning
5. introduction of missing pages in EP1 from priority document DK1".

He considered that "item 5 weighs more heavily than some others. There are minor omissions in item 1, which doesn't discuss the interplay of EPC 1973 and EPC 2000, and item 2, which lacks detail about the resumption of time limits." For these reasons, he submitted that more than 6.5 out of 26.5 points should have been awarded.

VI. The appellant originally requested that a mark of 50 or more, and so the grade "PASS", be awarded. He also filed an auxiliary request for oral proceedings.

VII. By letters from the Board of 21 November 2008, the President of the EPO and the President of the Institution of Professional Representatives (epi) were invited, pursuant to Article 27(4) REE and Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 1978, 91 et seq., OJ EPO

2008, 14 et seq.), to comment on the case. Neither President replied.

VIII. In a communication dated 2 July 2009, the Board informed the appellant of its preliminary opinion that, based on the grounds of appeal before it, the appeal would have to be dismissed.

IX. In a written reply to this communication, the appellant withdrew his request concerning question 1 of paper D-II. Furthermore, he declared that he would not maintain his request for oral proceedings. His additional submissions concerned question 2 of paper D-II and can be summarised as follows:

Question 2 was formulated inconsistently with Rule 4(2) of the Implementing Provisions of the REE (IREE). Inconsistently formulated questions are an "infringement" of Rule 4(2) IREE and cannot test whether a candidate is fit to practise as a professional representative. The EQE is aimed at testing at speed the candidate's understanding of the EPC as a whole, and not at focusing his answers on novelties introduced by the EPC 2000. He requested "the DBA marginally to test whether the system of marking properly fits Question 2"; the 5 recommendations listed in the given answers appear to be supported by the "Examiner' Report - Paper D 2008 - Part II". The system of marking "weighs recommendation 5 about introducing missing pages too heavily, this recommendation 5 being a novelty due to the introduction of EPC 2000."

Furthermore, the DBA should "marginally test" whether a proper marking of the answer to question 2 could

plausibly produce fewer than 50 points overall for paper D. Considering that the absent recommendation 5 (introduction of missing pages in EP1 from priority document DK) should weigh more heavily than recommendation 3 (purchase of FR BEP and EP BEP) and given other less serious omissions, the answer deserves fewer than 4 out of 5, which would be 80%, and perhaps even a mark as low as 50%. No system of marking, however, should produce 6.5 out of 26.5, a mere 25%.

Reasons for the Decision

Admissibility

- 1.1 Pursuant to Article 27(2) REE, a notice of appeal must be filed in writing with the Examination Secretariat within one month of the date of notification of the decision appealed against. Notice of appeal shall not be deemed to have been filed until the fee for appeal specified pursuant to Article 19 REE has been paid. Within two months of the date of notification of the decision, a written statement setting out the grounds for appeal must be filed.
- 1.2 In the present case, the time limits for filing the notice of appeal and the statement of grounds of appeal ended on (Monday) 22 September 2008 and 21 October 2008 (Article 27(2) REE in conjunction with Articles 21(2) and 24(1) RDR and Rules 126, 131, 134 EPC).
- 1.3 The written notice of appeal was filed and the required fee paid on 3 September 2008. The written statement

setting out the grounds of appeal was received at the EPO on 9 September 2008.

1.4 Therefore, the appeal is admissible.

Scope of jurisdiction

2. In accordance with the consistent case law of the DBA, in particular D 1/92, OJ EPO 1993, 357, and D 6/92, OJ EPO 1993, 361, decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application or higher-ranking law. In these two cases, the DBA therefore concluded that its functions did not include reconsidering the examination procedure on its merits. Accordingly, the Examination Board's value judgment concerning the number of marks that an examination paper deserves is not subject to review by the DBA. Only if the appellant can show that the contested decision is based on serious and obvious mistakes may the DBA take this into account. The alleged mistake must be so obvious that it can be established without re-opening the entire marking procedure, for instance if an examiner is alleged to have based his evaluation on a technically or legally incorrect premise on which the contested decision rests. Any further claims regarding alleged defects in the assessment of candidates' work fall outside the DBA's jurisdiction, since value judgments are not subject to judicial review (see Case Law of the Boards of Appeal, 5th edition 2006, p. 671, ch. VIII.2.6.2, with further references).

Requests

- 3.1 The object of the qualifying examination is to establish whether the candidate is fit to practise as a professional representative, which essentially also involves acting as a legal adviser or lawyer. Possession of the requisite knowledge and abilities is demonstrated by the examination results alone. Paper D tests only the candidate's legal knowledge and his abilities as a legal adviser or lawyer. A candidate incapable of achieving a high enough mark to satisfy the examination standards is not fit to practise as a professional representative. This is reflected in the provisions relating to the EQE especially Rule 4(2) IREE which provides that "A mark of 50 or more shall be awarded where, on the merits of that paper alone, a candidate can be considered fit to practise as a professional representative before the European Patent Office. The grade "PASS" shall be awarded for that paper."
- 3.2 The appellant requests in essence that question 2 of part II of paper D be reviewed in the light of Rule 4(2) IREE with the result that the marking of his answer to that question be reconsidered. In the Board's judgment, this request must be interpreted as a prerequisite for the desired declaration that paper D must be graded a PASS and that the appellant has thus passed the examination. However, this would require a re-opening of the examination procedure, which does not lie within the DBA's scope of competence (cf. D 1/92, OJ EPO 1993, 357; D 17/05 of 19 July 2005, point 2 of the reasons; D 11/07 of 14 May 2009, point 3 of the reasons).

3.3 Examination Board decisions on EQE performance are subject only to limited judicial review. As set out in D 7/05 (OJ EPO 2007, 378, 394 et seq.), the DBA can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure. The DBA does not have the power to reconsider the entire examination procedure on the merits and set its evaluation of the merits above that of the Examination Board. The power to conduct a technical review of the marking of an answer in terms of whether it is objectively correct or appropriate is denied to the DBA by virtue of Article 27(1) REE. On appeal, the Board can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure, for example where the two examiners differ so widely in their marking that the difference in marks alone suggests an infringement of the principle of uniform marking, or where a question is inconsistently or incomprehensibly formulated (D 13/02 of 11 November 2002, point 4 of the reasons), or where the examiners based their marking on a technically or legally false premise on which the contested decision is based (D 16/02 of 16 July 2003, point 3 of the reasons, D 6/04 of 16 July 2003, point 3). The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Appeal Board; nor are the Examination Board's criteria for determining the weighting of the expected answers (cf. D 20/96 of 22 July 1998, point 9 of the reasons to the examination questions (D 13/02 of 11 November 2002, point 5 of the reasons)).

- 3.4 As the aspects of the marking of the answer paper are not subject to review by the DBA, the Board cannot concern itself with the substance of the appellant's arguments. There is no obvious basis for reviewing the Examination Board's exercise of its discretion. The decision taken by the Examination Board is one which it was entitled to reach and which shows no obvious mistake.
- 3.5 The appellant submits that the question 2 cannot test whether a candidate is to be considered fit to practise as a professional representative. At the same time, he contests the marking of his answer to question 2, which he considers too oriented to the EPC 2000. The DBA considers that the thrust of this submission is *de facto* that the examiners awarded his paper D an incorrect and insufficient number of points under Rule 2(4) IREE. The appellant believes that an evaluation of his answers under Rule 2(4) IREE should have led to his being awarded higher grades and thus passing the examination. His arguments are confined to his view of the meaning and the degree of correctness and completeness or at least acceptability of his answers to paper D and to substantiating why they deserved more marks than the examiners actually awarded. What is involved are differences of opinion between the appellant and the examiners over the "correct" marking of the appellant's papers. As these aspects of the marking of the answer paper are not subject to review by the DBA, as stated above, the DBA cannot concern itself with the substance of these arguments. That the appellant does not like the decision and takes a different view from the Examination Board may be understandable, but such differences of opinion are

reflections of value judgments which are not, in principle, subject to judicial review (cf. D 1/92, OJ EPO 1993, 357, 360). On the other hand, the DBA, in the exercise of its jurisdiction, finds that the issue in question 2 is neither inconsistently nor incomprehensibly formulated. The candidate is asked to propose legal solutions to a given situation and to demonstrate his ability to practise as a professional representative.

3.6 For these reasons, the DBA cannot award marks to the appellant's answer to question 2 of part D-II.

3.7 Since the appellant, having resat paper D of the 2008 EQE, failed to achieve an overall mark of at least 50, as required under Rule 4(2) IPREE, he cannot be declared to have passed the examination under Article 17(1) REE.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J. - P. Seitz