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

Case Number: D 0013/09

D E C I S I O N
of the Disciplinary Board of Appeal
of 15 June 2010

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board for the European Qualifying Examination dated 11 August 2009.**

Composition of the Board:

Chairman: C. Rennie-Smith
Members: E. Dufrasne
L. T. Johnson

Summary of Facts and Submissions

I. By letter dated 11 August 2009, the appellant was informed of the decision of the Examination Board that he had not been successful in the European qualifying examination (hereafter "EQE") held from 3 to 5 March 2009, having been awarded 22 marks for his paper C.

II. Notice of appeal against this decision, together with the statement setting out the grounds of appeal, were filed on 3 September 2009. The appeal fee was paid on the same day.

III. The appellant's submissions in his grounds of appeal, supplemented by his letters dated 20 April 2010 and 28 May 2010 can be summarised as follows.

The examination and the opinion of the examiners were fundamentally wrong, contravening well established practice under the EPC. Therefore, it was impossible to make any difference between candidates being fit to practice or not and Article 12 of the Regulation on the European qualifying examination for professional representatives (hereafter "REE") has been violated by the Examination Board.

Attacks on inventive step against claims 3 to 5 starting from document A4 were the strongest inventive step attacks against these claims; inventive step attacks against claims 1 and 2 starting from document A3 were the strongest ones and a novelty attack against claim 6 based on document A5 should have been treated as a valid attack. On the contrary, inventive step

attacks against claims 1 and 2 starting from document A2 and inventive step attacks against claim 5 starting from document A3, as presented in the Examiner's Report, should not have been admitted.

On that basis, compensation should be awarded for points unduly given to candidates for invalid attacks, in compliance with the code of fair treatment.

In having dismissed answers in line with the EPC and rewarded answers contrary to the EPC, the examiners have made serious mistakes, so obvious that they can be established without re-opening the entire marking procedure.

In the absence of any reference to the appellant's answers or any comparison with the corresponding ones of other candidates, his argumentation can not be considered as merely reflecting a difference between his opinion and that of the examiners.

IV. By letters from the Board dated 18 November 2009, 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 19 May 2010, 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. The appellant requested that the decision of the Examination Board be set aside and that the grade "PASS" be awarded to his paper C.

Reasons for the Decision

1. The appeal is admissible.

2. It is well established by the jurisprudence of the Disciplinary Board of Appeal (hereafter "the Board") 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."

This article merely gives the Disciplinary Board the power to review the legality of the process. However, the Disciplinary Board cannot reconsider the examination procedure on its merits and set its evaluation of the merits above that of the Examination Board, 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, D 6/92, OJ EPO 1993, 361, points 5-6 of the reasons, D 7/05, OJ EPO 2007, 378, point 20 of the reasons).

The appellant's arguments must be seen in the light of these principles based on the legal rule and on their application by the Board.

3. The appellant's substantiated arguments only rely on the selection of the closest prior art to be used in novelty or inventive step attacks against the subject-matter of the claims of the patent to be opposed.

However, according to its above-mentioned jurisprudence, the Board is only competent to review the legality of the examination procedure, not to re-open the marking procedure.

It is then decisive in this case to establish whether it is possible to reconsider the selection of the closest prior art without re-opening the marking procedure.

In the Board's opinion, it is not sufficient to avoid any reference to the appellant's answers to establish that the marking procedure has not been re-opened. Even if the Board could theoretically re-assess the examination performance based on the grounds of appeal without consulting the examination file of the appellant, the Board would in doing so exceed its competence i.e. it would in fact have re-opened the marking procedure.

Accordingly, the Board considers that the question of which document is correctly to be viewed as representing the closest prior art, as raised in the present case, is intrinsically linked to the technical

review of the marking, in other words to the question whether or not answers are objectively correct or appropriate. To challenge the selection of the closest prior art as presented in the Examiner's Report amounts to a claim for reconsideration of the examination procedure on its merits. Therefore, that question is not relevant in the legal assessment of this case in the context of the appeal proceedings (D 6/07 of 28 August 2008 and all other similar cases, unpublished in the OJ EPO, point 3 of the reasons).

The appellant's arguments do not demonstrate mistakes in the examination procedure which are so obvious that they can be established without re-opening the whole marking procedure such as, for example, that the examiners would have based their marking on a technically or legally false premise on which the contested decision should be based (D 16/02 of 16 July 2003, unpublished in the OJ EPO, point 3 of the reasons, D 6/04 of 30 August 2004, unpublished in the OJ EPO, point 1 of the reasons and D 7/05, above-cited, point 20 of the reasons).

That opinion is reinforced by the fact that the appellant, in the sum of his written submissions, needed more than 17 pages of analysis, including e.g. definition of technical objects and methods, to reach his conclusion. Such a long and detailed approach illustrates the very essence of the reason why the Board cannot entertain such submissions.

4. Furthermore, the appellant's request that the decision be set aside and that the grade "PASS" be awarded to his paper C, is presented in his written submissions of

28 May 2010 (page 9) as "a natural request(...), without even reviewing (his) answers", in order "to be compensated for points unduly given to candidates for invalid attacks, under the code of fair treatment". In his statement of grounds of appeal (last page), he raised that "candidates have been deprived the possibility of 64 points on claims 1,2,4 and 5; and deprived the possibility of points for valid novelty attack on claim 6, while candidates have been given up to 19 points for invalid attack on claim 5".

In this way, the appellant only claims having been deprived of possible marks, on the basis of his review of the Examiner's Report.

In the absence of reference to his answers, the Board cannot see how it could be established that the appellant should have received a "PASS" grade for his paper C, i.e. that he should have been awarded a final mark of at least 50, instead of the 22 he received.

This further demonstrates that it is not possible to allow the appellant's request without re-opening the marking procedure.

5. In conclusion, contrary to the appellant's opinion, the Board does not see in the impugned decision of the Examination Board any infringement of the REE, in particular of its Article 12, nor of any provision relating to its implementation.

6. Consequently, 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 C. Rennie-Smith