



Case Number: D 0009/12

D E C I S I O N
of the Disciplinary Board of Appeal
of 21 March 2013

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
27 July 2012.

Composition of the Board:

Chairman: B. Günzel
Members: I. Beckedorf
T. L. Johnson

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board of 27 July 2012 that the appellant had been unsuccessful in the European Qualifying Examination (EQE) in 2012. The appellant sat the EQE and achieved pass grades in papers B to D (paper B 73, paper C 68 and paper D 50), but failed in paper A (Chemistry 26).
- II. The Examination Board decided that she having failed the paper A has failed the EQE under Article 14(1) of the Regulation on the European qualifying examination for professional representatives (REE, Supplement to OJ EPO 12/2011, p. 2 *et seq.*).
- Copies of the appellant's answer papers had been forwarded to her. The relevant marking sheets of the two members of the Examination Committee I as well as the record of the candidate's results in the 2012 EQE were enclosed with the contested decision.
- III. By letter both dated and received by facsimile on 23 August 2012, the appellant filed a notice of appeal including a statement of grounds of appeal. The appeal fee was credited on the same day.
- IV. The Examination Board did not allow the appeal, and by letter of 22 October 2012 transmitted it to the Disciplinary Board of Appeal (DBA).
- V. The appellant's case is based essentially on the assertion that the Examiners' Report Paper A 2012 (Chemistry) showed that the examiners' approach to the question of novelty was legally incorrect and so the

marking schedule for the paper A was fundamentally flawed. The submissions can be summarised as follows:

The examiners' report and, based on this report, the examiners' evaluation of her solution contained a mistake in respect of the assessment of novelty by suggesting that it were necessary to remove the whole overlap from the formula of the compound claim in order to establish novelty over *i.a.* document D2. This suggestion, however, was inconsistent with the case law of the Boards of Appeal. Consequently, the marking of the appellant's solution was based on the examiners' "lack of thorough knowledge of EPO case law relating to novelty" and, thus, contrary to the requirements of Article 13 REE and Rules 2, 22 and 23 Implementing provisions to the Regulation on the European qualifying examination (IPREE, Supplement to OJ EPO 12/2011, p. 20 *et seq.*). As a consequence of this fundamental mistake by the examiners, the claims drafted by her, although being in line with the EPO case law and sufficient to establish both novelty and inventive step over documents D1 and D2, were awarded zero marks. This marking, however, was contrary to Rule 23(3) IPREE.

For the detailed reasoning of the appellant's argumentation, reference is made to points 3.1 and 3.2 of the notice of appeal.

VI. The appellant essentially requests,

1. as main request

that the decision under appeal be set aside and that paper A (Chemistry) of the EQE 2012 be qualified as having been passed,

2. as auxiliary request
that the appellant's paper A be referred back to
the Examination Board for remarking,
3. furthermore, that the enrolment fee for the EQE
2013 Paper A (Chemistry) be reimbursed.

VII. By letters from the DBA of 30 October 2012, the President of the EPO and the President of the Institute of Professional Representatives (epi) were invited, pursuant to Article 24(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.

Reasons for the Decision

The appeal is admissible according to Article 24 REE but not allowable.

Procedural Aspects

1. The decision is taken in the written proceedings because, in the absence of a request by the appellant for oral proceedings, the DBA does not consider oral proceedings to be expedient. The notice of appeal contains a detailed and comprehensive substantiation of the appellant's case.

Main and Auxiliary Request

2. The appellant based the main and first auxiliary requests essentially on the following arguments:
- that the solution according to the examiners' report was incorrect in respect of the issue of novelty and thus applied also to the sample solution for overcoming the novelty destroying document D2,
 - that the appellant's own solution was correct because the claims drafted by her were in line with the EPO case law and sufficient to establish both novelty and inventive step over documents D1 and D2,
 - that the marking with "0" points was contrary to Rule 23(3) IPREE.

2.1 According to Article 1(1) REE, it is the object of the qualifying examination to establish whether the candidate is fit to practise as a professional representative. Possession of the required knowledge and abilities is demonstrated by the examination results alone, not by completion of the prescribed training or by paper qualifications. A candidate incapable of achieving a high enough mark, as provided for in Article 14 REE and Rule 6 IPREE, to satisfy the examination standards is not fit to practise as a professional representative. The purpose of paper A is to assess candidates' ability to draft claims and the introductory part of a European patent application as defined in Article 1(4) REE and Rule 23(1) IPREE.

2.2 The appellant's line of arguments is directed essentially against the evaluation of her answer paper

A by the Examination Committee and Examination Board and towards a higher marking (according to the main request) or a remarking (according to the first auxiliary request) of her answer paper A as a prerequisite for the desired declaration that the appellant has passed the examination.

2.2.1 However, Examination Board decisions in EQE are subject only to limited judicial review.

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 board.

Only if the appellant can show that the contested decision is based on serious and obvious mistakes the DBA may consider this. 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 (cf.

D 11/07 of 14 May 2009, point 3 of the reasons; D 9/11 of 23 April 2012, points 13 and 14 of the reasons; Case Law of the Boards of Appeal, 6th edition 2010, p. 939, with further references).

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 actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the DBA; 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).

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. 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 24(1) REE.

2.2.2 The appellant's requests and submissions have to be evaluated and judged against this background.

The appellant in essence requests a reconsideration of her answer paper A and that she is qualified as having passed that paper and the entire EQE 2012. To this effect, the appellant submits that the Examination Committee and the Examination Board were obviously wrong in their technical as well as legal approach in

respect of the novelty issue, in particular with regard to what amendments were necessary and sufficient to overcome the novelty destroying document D2.

Taking the appellant's detailed reasoning for her opinion (cf. points 3.1 and 3.2 of the appellant's letter of 23 August 2012), the alleged mistake or incorrectness is far from being obvious. The sample solution proposed in the examiners' report and applied by the examiners to the appellant's paper for overcoming the novelty destroying document D2 by removing the whole overlap from formula (I) appears to be well justifiable, at least it is not evidently unreasonable. The examiners' report contains a comprehensive reasoning for its proposal. In this respect, the DBA cannot identify any serious and obvious mistake affecting the marking itself. The decision that the Examination Committee and the Examination Board took is one to which they were entitled to come and which shows no obvious mistake that would allow the DBA to review the exercise of discretion by the Examination Board.

The appellant's entire submission is primarily based on the appellant's opinion that an objective evaluation of her answer paper should have led to her being awarded higher grades. Her arguments are confined to her view of the meaning and the degree of correctness and completeness or at least acceptability of her answer to paper A. What is being contested, therefore, are value judgments specific to the examination. 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 EQE answer paper are not subject to judicial review, the DBA cannot concern itself with the substance of her arguments. That the appellant disagrees with the contested decision and holds a different opinion from the Examination Board might be understandable but such differences of opinion are reflections of value judgments which are not, in principle, subject to judicial review (see point 2.2.1 above). There is no evidence that, in marking the appellant's paper, the examiners made a serious mistake that could be regarded as an abuse of their powers.

- 2.3 For these reasons, the DBA cannot award higher marks to the appellant's answer paper A according to Rule 6(3) IPREE in order to consider her as having passed paper A of the EQE 2012 under Article 14(1) REE.

Likewise, the DBA cannot identify any serious mistake by the Examination Committee and/or Examination Board justifying that the examination procedure be re-opened by remitting the case to the Examination Board for remarking of the appellant's answer paper A.

Ancillary Request: Reimbursement of the enrolment fee for the EQE 2013 Paper A (Chemistry)

3. The appellant's additional request for reimbursement of the fee for enrolment of the EQE 2013 is based upon the assumption that the contested decision of the Examination Board was incorrect and that she should be qualified as having passed paper A of the EQE 2012, and consequently the entire EQE. Apart from the fact that the contested decision is correct, there is no legal basis for such a claim of a candidate who decided to

enrol for resitting the failed examination without waiting for the outcome of the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:

P. Martorana

B. Günzel