



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
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Case Number: D 0009/18

D E C I S I O N
of the Disciplinary Board of Appeal
of 7 May 2020

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated
16 July 2018 concerning the European Qualifying
Examination 2018.**

Composition of the Board:

Chairman: I. Beckedorf

Members: L. Bühler

S. Arkan

Summary of Facts and Submissions

- I. The appeal, which complies with the relevant formal requirements, lies from the Examination Board's decision of 16 July 2018 awarding the appellant the grade "fail" in the European qualifying examination 2018 part C, his answer paper having been given a score of 41.
- II. The Examination Board remitted the appeal to the Disciplinary Board of Appeal (hereinafter Appeal Board) without rectifying its decision and informed the appellant accordingly.
- III. The Appeal Board invited the Presidents of the EPO and of the Institute of Professional Representatives before the EPO (epi) to comment on the case under Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, supplementary publication 2) and Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2019, supplementary publication 1). Neither of them commented on the appeal.
- IV. On 21 February 2019, the Appeal Board sent a communication informing the appellant of the Appeal Board's preliminary opinion.
- V. By letter dated 10 April 2019, the appellant replied to the Appeal Board's preliminary opinion.
- VI. The Appeal Board scheduled oral proceedings to be held on 13 September 2019.

VII. By facsimiles dated 1 August 2019 and 6 August 2019, the appellant asked for a decision in writing. The oral proceedings were cancelled.

VIII. The appellant requested that the marking of his answer regarding claim 3 in paper C of the European qualifying examination 2018 be reviewed.

Previous requests concerning claim 5 and the general part were withdrawn.

IX. The appellant argued that his attack of lack of inventive step starting from Annex 4 as the closest prior art in combination with Annex 2 was reasonable, despite deviating from the examiners' report. The Examination Board had erred in considering it less plausible to start from Annex 4. There were two features distinguishing the subject-matter of claim 3 from the device according to Annex 4. However, the skilled person would arrive at the claimed subject-matter by combining Annex 4 with Annex 2. The skilled person would modify the one-litre reservoir in Annex 4 by increasing its capacity to two litres as shown in Annex 2. As had been argued for claim 2, the at least one rotating brush would also be incorporated in the device in Annex 4 when combining Annex 4 and Annex 2. Awarding 1 mark out of 15 ran counter to the principle of fair marking.

Reasons for the Decision

1. The appeal is admissible.
2. It is established case law that the examiners are obliged to allow for fair marking of answers which deviate from what was expected according to the examiners' report but are reasonable and competently substantiated (see *inter alia* D 7/05, OJ EPO 2007, 378, Headnote II and Reasons 13; D 12/82, OJ EPO 1983, 233, Reasons 3). This obligation follows from the object of the qualifying examination, which is to establish whether a candidate is fit to practise as a professional representative (Article 1(1) REE). This principle does not rule out the possibility of an individual answer to one part of paper C being awarded no marks if, for instance, an objection of lack of inventive step is based on a document which cannot reasonably be regarded as the closest prior art or a suitable starting point for the problem-solution approach, or if the reasoning is structured according to the problem-solution approach but cannot be regarded as a logical and justified ground, in a notice of opposition, that would be prejudicial to the maintenance of a European patent.
3. The examiners' report underlines that candidates had to develop convincing arguments in order to be awarded marks. The Appeal Board cannot find fault with this criterion applied by the examiners in their assessment of the candidates' answers since it is in line with the purpose of paper C.
4. The appellant's answer for claim 3 is sketchy with little argumentation. The appellant's explanations given on appeal are far more detailed. Whether or not

these explanations reflect the appellant's true intentions when he wrote his answers is irrelevant. The examiners cannot be expected to read between the lines or fill in gaps in the arguments - they can only mark what is substantiated in an examination paper. Likewise, on the basis of what is set out in a candidate's examination paper, the examiners can assess whether an answer that deviates from what is expected is nevertheless reasonable and merits some marks.

5. In view of the criterion applied in the marking, the deviation from the expected solution and the minimal argumentation, awarding only 1 mark out of a possible 15 is not in itself evidence of misuse by the examiners of their discretionary power. This holds true even though the problem-solution approach was correctly applied. Without re-examining the appellant's answer, the possibility that the examiners took account of other aspects when marking it cannot be excluded. The Appeal Board notes that claim 3 is not dependent on claim 2. The appellant's reference in his answer to his reasoning for claim 2 is therefore at least problematic.
6. The appellant has thus not shown that the contested decision is based on serious and obvious mistakes. In particular, the marking of the appellant's paper does not reveal any misuse by the examiners of their discretionary power. The appeal is therefore to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated