



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
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Case Number: D 0045/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 30 August 2022

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated
21 June 2021 concerning the European Qualifying
Examination 2021.**

Composition of the Board:

Chairman: W. Sekretaruk
Members: G. Decker
D. Korper Žemva

Summary of Facts and Submissions

I. The appeal is against the decision of the Examination Board posted on 21 June 2021 to award the appellant's answer papers the grade FAIL in the European qualifying examination 2021 ("EQE 2021") in accordance with Rule 6(3) of the Implementing provisions to the Regulation on the European qualifying examination ("IPREE", OJ EPO 2019, Supplementary publication 2, 18) because his answer Papers A, B, C and D had been awarded the marks 69, 32, 20 and 46, respectively.

II. By fax dated 20 July 2021, received on the same day by the Examination Secretariat, and subsequently by letter dated 20 July 2021, received on 22 July 2021 by the Examination Secretariat, the appellant filed notice of appeal including a statement setting out the grounds for appeal. The appeal fee was paid on 21 July 2021.

The appellant contests the marking of Papers B, C and D of the EQE 2021.

III. The Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal ("Board"), with notification that the Examination Board had decided not to rectify its decision.

IV. The President of the Council of the epi and the President of the European Patent Office ("EPO") were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives ("RDR", OJ EPO 2022, Supplementary publication 1, 142) in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives ("REE",

OJ EPO 2019, Supplementary publication 2, 2). No written observations were received.

V. The appellant requested that the *"Decision regarding the Communication of grades awarded to [him] in the Main Examination of the EQE 2021 be set aside and that the marks awarded for Papers B, C, and D be adjusted in view of the attached grounds of appeal"*.

VI. The appellant submitted in the grounds of appeal that there had been severe technical problems with the examination software during the examination of Papers B, C and D of the EQE 2021. The problems had reduced the time available for answering the papers and caused the appellant extreme stress and considerable psychological disadvantages. This had led to serious disadvantages compared to other candidates who had not experienced these problems.

He further submitted that he:

- *"filed a complaint on the same day of the examination of Paper D, stating all the problems [he] experienced and the actions [he] took to report and receive help from the invigilators to solve the problems"*
- *"submitted an official complaint immediately after the examination of Paper C, stating all the problems [he] experienced and the actions [he] took to report and receive help from the invigilators to solve the problems"*

However, he had not received any answer to these two complaints. The appellant did not state in the grounds

of appeal that he had submitted a complaint regarding Paper B.

- VII. In a communication under Article 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal ("RPDBA", OJ EPO 2022, Supplementary publication 1, 67), the appellant was invited to produce evidence regarding the filing of complaints as regards Papers B, C and D of the EQE 2021.
- VIII. In response to this communication, the appellant produced copies of his complaints against Papers D and C of the EQE 2021, which he had sent by email to the Examination Secretariat's email address helpdesk@eqe.org on 2 March 2021 at 20:17 hrs EET (i.e. 19:17 hrs CET) and 5 March 2021 at 19:22 hrs EET (i.e. 18:22 hrs CET), respectively. He further submitted that he had also sent a written complaint for Paper B under Rule 19(3) IPREE by email to the Examination Secretariat on 4 March 2021. However, he was unable to produce a copy of the filed complaint because of problems with the mail server of his email provider.
- IX. Upon request of the Board, the Examination Secretariat confirmed receipt of the appellant's complaints against Papers C and D of the EQE 2021 and informed the Board that no complaint had been received concerning Paper B of the EQE 2021 on 4 March 2021 or any other date.
- X. In a further communication, the Board informed the appellant about the Examination Secretariat's answer and set out its preliminary opinion regarding Paper B of the EQE 2021 that the appellant bore the burden of proof that a filing complying with the time limit had been received by the EPO.

XI. Oral proceedings dealing exclusively with the issue that the Board had addressed in its last communication (see point X above) took place on 30 August 2022. At the end of the oral proceedings, the Chair announced the Board's decision.

XII. The appellant's arguments may be summarised as follows.

(a) In view of the severe technical problems with the examination software during the examination of Papers B, C and D of the EQE 2021 and the resulting serious disadvantages for the appellant, the marks allocated for his answers to these papers should be adjusted to a "Pass" or at least a "Compensable Fail" mark.

(b) Concerning the email which contained the complaint regarding Paper B of the EQE 2021, there had been no logical reason not to send it. The appeal fee was the same regardless of whether the complaint had been sent. It was highly probable that the appellant had sent the complaint by email. The appellant referred to the case law of the boards on the standard of proof and the "balance of probabilities" standard (see Case Law of the Boards of Appeal of the European Patent Office, 9th edn. 2019, chapter III.G.4.3.1, page 753). The problem at issue had only occurred three times over a long period of using his email provider. He had not double-checked whether the Examination Secretariat had received the complaint email. Nor had he contacted his email provider after the incident to identify possible technical problems at that time or to establish the correctness of the sending and receiving process.

Reasons for the Decision

1. The appellant filed written notice of appeal including the statement setting out the grounds of appeal by fax within the one-month time limit under Article 24(2) REE and subsequently in original within the two-month time limit under Article 6(2) RPDBA. The appeal fee was also paid within the time limit under Article 24(2) REE. The appeal is therefore admissible.
2. The Board interprets the appellant's request (see point V above) to be that the decision under appeal be set aside and that the case be remitted to the Examination Board for a new decision to be taken on Papers B, C and D of the EQE 2021.
3. In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal, as per decision D 1/92 (OJ EPO 1993, 357), decisions of the Examination Board may, as a rule, 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 the case at issue, it is to be assessed whether Rule 19(3) and (4) IPREE as a provision relating to the application of the REE has been infringed.
4. *Papers C and D of the EQE 2021: infringement of Rule 19(3) and (4) IPREE*
 - 4.1 Under Rule 19(3) IPREE, complaints concerning the conduct of the examination are not to be entertained by the Examination Board unless a written statement of the facts is submitted to the chief invigilator at the latest 30 minutes after the closing signal has been

given on the final day of the examination. Under Rule 19(4) IPREE, any decision taken by the Examination Board pursuant to Rule 19 IPREE must be based upon all the available evidence, reasoned and issued in writing.

- 4.2 Additionally, under No. 39 of the "Instructions to candidates concerning the conduct of the European qualifying examination 2021" (OJ EPO 2021, A13; "Instructions"), any disruptions during the examination for which candidates are not responsible or which are beyond their control must be reported to the Examination Secretariat within 24 hours of the end of the relevant examination (via email to helpdesk@eqe.org).
- 4.3 The appellant invoked severe technical problems with the examination software during the examination of Papers D and C of the EQE 2021 which took place on 2 March 2021 and 5 March 2021, respectively. He claimed that these problems had reduced the time available for answering the papers and caused him extreme stress and considerable psychological disadvantages. This complaint is clearly a complaint concerning the conduct of the examination under Rule 19(3) IPREE.
- 4.4 As far as Paper D is concerned, the appellant complied with the time limit set out in Rule 19(3) IPREE for filing the complaint. This time limit expired *"30 minutes after the closing signal ha[d] been given on the final day of the examination"*, i.e. on 5 March 2021 at 16:45 hrs CET. The appellant emailed his complaint regarding Paper D on the same day of the examination, i.e. on 2 March 2021, and therefore in good time. Whether communication by email met the written form requirement under Rule 19(3) IPREE can be left open since No. 39 of the Instructions expressly

provides for this form of communication. The complainant could therefore trust that a complaint by email would be sufficient. By the same token, the Examination Board could not invoke a lack of written form.

- 4.5 Regarding Paper C, which was held on the final day of the EQE 2021, the appellant emailed his complaint on that day at 19:22 hrs EET (i.e. 18:22 hrs CET), thus after expiry of the time limit set out in point 4.4 above. However, No. 39 of the Instructions comes into play again, according to which any disruptions during the examination must be reported to the Examination Secretariat via email within 24 hours of the end of the relevant examination. As with the issue of the written form (see point 4.4 above), the appellant could trust that compliance with the time limit under No. 39 of the Instructions would suffice.
- 4.6 The Examination Board was therefore obliged under Rule 19(4) IPREE to take a written and reasoned decision on the appellant's complaint regarding the alleged disturbances during the examination of Papers D and C, considering all the available evidence. However, no such reasoned decision was taken at any time, neither in a separate letter from the Examination Board, nor in the letter of 21 June 2021 informing the appellant of the marks awarded by the Examination Board, nor together with the letter of 10 August 2021 informing the appellant that the Examination Board had not rectified its original marking decision.
- 4.7 With regard to Papers C and D of the EQE 2021, the appeal is therefore allowable, and the decision under appeal must be set aside in this respect. As to the content of the new decision to be taken under

Rule 19(4) IPREE, the following principles set out in decision D 26/21, Reasons 4.5, apply.

4.7.1 Should the Examination Board conclude that the complaint is unfounded and that the marking of the appellant's Papers C and D of the EQE 2021 is not to be changed, it must give reasons. The appellant is entitled to appeal this decision under Article 24(1) REE.

4.7.2 If the Examination Board concludes that the complaint is well founded, it must find an appropriate compensation for the disturbances. As a possible compensatory measure, it may revise the marking for Papers C and D of the EQE 2021 under Article 6(5), second sentence, REE. The appellant may then have the orders made by the Examination Board reviewed in a new appeal.

5. *Paper B of the EQE 2021*

5.1 As per D 3/10, Reasons 14, raising complaints about alleged disturbances during the examination only by way of an appeal before the Disciplinary Board of Appeal, i.e. without any prior decision of the Examination Board under Rule 19(4) IPREE, is not acceptable. By not submitting a complaint immediately after the examination, as required by Rule 19(3) IPREE, appellants deprive the Examination Board of the opportunity to determine the exact circumstances involved and to react accordingly, if necessary with a decision pursuant to Rule 19(4) IPREE, or to deal with the allegations in its decision on the result of the examination under Article 6(5) REE. It is contradictory to exclude the assessment of late-filed facts by the Examination Board under Rule 19(3) IPREE but allow the

submission and the legal evaluation of these facts in appeal proceedings.

- 5.2 In the case in hand, the Examination Secretariat stated that it had never received the appellant's written complaint under Rule 19(3) IPREE dated 4 March 2021 concerning Paper B of the EQE 2021.
- 5.3 The appellant bears the burden of proof that a filing complying with the time limit was received by the EPO, just as the EPO must prove that its letters were received by the addressee (see T 1200/01, Reasons 4; T 2454/11, Reasons 2.1; T 1587/17, Reasons 2).
- 5.4 This case law also applies to the receipt of emails. To ensure that an email was received by the addressee, the sender can request an electronic delivery receipt and/or an electronic read receipt via the email software used. Furthermore, it might be at least an indication that an email was received by a recipient if the sender can provide an electronic copy of the sent email containing data about the sending.
- 5.5 The appellant has been unable to provide such electronic delivery or read receipts. In this context, it would also not be sufficient to prove that the email was sent, as argued by the appellant. The Board accepts that there is no sensible reason to believe that the appellant did not try to send the email containing the complaint. However, the decisive issue is whether this email was successfully sent by the appellant and subsequently received by the Examination Secretariat. The appellant conceded that there was no evidence for the latter fact, and he could not produce evidence for the former fact either. Indeed, the appellant has been unable to access an electronic copy of the complaint

email on the mail server of his email provider. He also did not collect any information about the successful sending of the email in question via his email provider. The fact put forward by the appellant that problems with sending emails via his email provider had hardly ever occurred in the past does not mean that such problems did not occur with the email at issue. Given this, there appears to be a good chance that the complaint was never successfully sent to the Examination Secretariat for unknown technical reasons on the part of the appellant or his email provider. Applying the principle of free evaluation of evidence, reasonable doubts remain for the Board (i.e. there is an insufficient probability) that the email in question was successfully sent to and received by the Examination Secretariat.

5.6 In the absence of any evidence or indication of receipt, the Board must assume that the appellant's written complaint under Rule 19(3) IPREE dated 4 March 2021 concerning Paper B never reached the Examination Secretariat. Consequently, applying the case law set out in point 5.1 above, the appeal must fail for Paper B.

6. *Partial reimbursement of the appeal fee*

6.1 Under Article 24(4), third sentence, REE, if the Board allows the appeal, it should order reimbursement in full or in part of the fee for appeal if this is equitable in the circumstances of the case.

6.2 Since the appeal is allowable for Papers C and D but not Paper B, the Board deems it equitable to reimburse 2/3 of the appeal fee.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board for a new decision to be taken regarding Papers C and D of the European qualifying examination 2021.
3. The appeal fee is reimbursed at 2/3.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated