



Case Number : D 9/91

D E C I S I O N
of the Disciplinary Board of Appeal
of 23 November 1992

Appellant : N.N.

Decision under appeal : Decision of the Examination Board for the
European Qualifying Examination dated 11 October
1990.

Composition of the Board :

Chairman : C. Payraudeau
Members : L.C. Mancini
J. Stephens-Ofner
C. Bertschinger
A. Armengaud

Summary of Facts and Submissions

- I. The Appellant sat for the European Qualifying Examination for Professional Representatives held before the EPO in 1990.

- II. By registered letter dated 11 October 1990 the Chairman of the Examination Board (hereafter "the Board") for the European Qualifying Examination notified the Appellant of his performance in the four papers. In accordance with the instructions published in OJ EPO 1988, 233-235 and 1989, 136 (which, with effect from 1 April 1988, amended the previous instructions published in OJ EPO 1983, 296).

The grades obtained by the Appellant were the following:

Paper A	:	5	(inadequate)
Paper B	:	4	(pass)
Paper C	:	7	(fail)
Paper D	:	5	(inadequate).

The Appellant was, therefore, informed of his failure.

- III. On 30 November 1990 the candidate appealed against such a decision requesting that the whole decision be revoked, and that it be decided instead that he had passed the examination.

In the subsequent Statement of Grounds dated 9 January 1991, the Appellant indicated them as follows:

- 1. In marking the papers and in the decision as a whole the criterion of "fitness to practice" has not been taken into account;

2. the principle of uniformity of examination has been infringed because in Question 4 of Part I of Paper D there was a difference between the German and the English version;
3. there were no equal conditions for all candidates because Paper C related to a mechanical/electrical problem and thus there was a discrimination against chemists;
4. there was no substantiation in the marking of the papers, hence the papers could not be revised by the Examination Board neither as a whole nor individually; and
5. a third Examiner corrected Paper C.

The Appellant's requests were essentially the following:

- (I) that the contested decision be set aside in favour of a new overall marking on the basis of the referral back to the Examination Board ex A23(3) and (4) of REE;
- (II) that the points of law set out in point 3) of the Statement of Grounds of Appeal be either decided by the Board of Appeal, or be referred to the Enlarged Board of Appeal for a decision on the issue of the uniform application of the law;
- (III) that the present appeal be dealt with by the Board of Appeal ex A111(1) EPC;
- (IV) that oral hearing be accorded;
- (V) reimbursement of the appeal fee.

- IV. On 19 February 1991 the Board decided not to rectify its decision, and forwarded the case to the Disciplinary Board of Appeal.

- V. The President of the Council of the Institute of Professional Representatives before the EPO and the President of the EPO were consulted under Article 12 of the Regulation for discipline for Professional Representatives in conjunction with Article 23(4) REE and did not present any comment.

- VI. At the request of the Appellant, oral proceedings took place on 1 July 1992.

Reasons for the Decision

- 1. The appeal complies with Article 23(2) REE and is therefore admissible.

- 2. The Disciplinary Board of Appeal notes that, since the candidate had failed in three of the four papers, this appeal cannot possibly concern a borderline case, hence although the criticism of Question 4 of Part I of Paper D (different starting dates in English and German versions) could be justified, this alone cannot result in setting aside the contested decision.

- 3. The numerous contentions made by the Appellant can be reduced to the question of whether the Board's decision (a) infringes the REE (particularly Article 23(1)) and (b) violates the candidate's right to substantiation (Article 68(2) REE). The question for the Disciplinary Board of Appeal is therefore whether: (a) any decision by the Board, in a case like the present one (in which only

one mark was 4 (pass), two other marks were 5 (inadequate) and the fourth grade was 7 (fail)), infringes the REE and whether (b) it needs to be substantiated, and if so, to what extent.

4. The Disciplinary Board of Appeal has reviewed the legality of the contested decision in accordance with applicable provisions and the basic principle that, in matters connected with examinations, the Disciplinary Board of Appeal is empowered to investigate whether the appealed decision constitutes, or is based on, an infringement of the REE or of any higher-ranking law.
5. Ever since the promulgation of the instructions to the Examination Committees for marking papers, first published in 1983, and in particular instruction VII, clearly stating that "the mark 7 means that under no circumstances should the candidate pass the examination", it was a matter of public record that a grade 7 (fail) necessarily resulted in overall failure.

The legitimacy of the above instruction, which, as was said before, was public and known, was upheld in decision D 7/82 (OJ EPO 1983, 185) reaffirming the principle that, as a rule, it was not possible for a candidate who obtained different results on individual papers, including a grade 7 (fail) on one paper, to pass the examination as a whole. The said instruction was reaffirmed in the amended instructions for marking papers published in OJ EPO 1988, 233. Considering said instruction, and decision D 7/82, clearly in line with the REE, the legal validity of the appealed decision, based on such a principle, cannot be disputed.

6. As to the fourth ground of appeal, namely the alleged violation of the candidate's right to substantiation, it is

the judgment of the Disciplinary Board of Appeal that in the exercise of its discretionary power, the Board did adhere to the principles directly inferable from the REE, and to other provisions relating to their implementation, as well as to the principles of applicable and relevant case law.

The Disciplinary Board of Appeal is aware of the fact that the Board's discretionary decisions may be reviewed on the ground of the infringement of REE or higher-ranking law under Article 5(3) in conjunction with Article 12(3) REE: but this is only possible insofar as there are good reasons to doubt whether such discretion was exercised in a manner consistent with the rules and, therefore, not arbitrarily. In the present case, which was not a borderline case, the principles of REE and the instructions were duly applied and the standard reference made by the Board to them was sufficient to enable the Appellant to know and appreciate the reasons on which it was based. The reason given for the decision being well founded, namely a standard reference to the relevant rules and instructions as well as the inspection of individual files granted to the unsuccessful candidate, were in the Board of Appeal's judgment sufficient to constitute the substantiation specifically required by the law.

It does not, therefore, appear that, in the exercise of its discretionary power, the Board acted in violation of Article 12(3) REE, or of Instruction VII and of decided case law. On the contrary, the Board's decision did have the required degree of substantiation and transparency to enable the candidate to know that no infringement of REE had occurred and that there was, therefore, no legal basis whatsoever for an appeal based on issues.

The Disciplinary Board of Appeal therefore concludes that the arguments brought forward by the Appellant with his first request do not establish any failure in the Board's procedures and in its appraisal of the candidate's results as a whole. Accordingly, request (I) by the Appellant is rejected.

The legal effects of the conclusions indicated above extend also to the examination by the Disciplinary Board of Appeal in accordance with Article 111(1) EPC and the reimbursement of the appeal fee and the corresponding requests (III) and (V) are therefore equally to be rejected being that they are void of justification.

As to request II (referral of the appeal to the Enlarged Board of Appeal), it suffices to restate that such a request is inadmissible, since the Disciplinary Board of Appeal has no power to refer questions to the Enlarged Board of Appeal (D 05/82: OJ EPO, 1983).

Order

For these reasons, it is decided that:

1. The appeal against the decision of the Examination Board for the European Qualifying Examination of the EPO dated 11 October 1990 is dismissed and all its requests are refused.

The Registrar:

The Chairman:

M. Beer

C. Payraudeau