



Europäisches  
Patentamt

European  
Patent Office

Office européen  
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: D 0003/94

**D E C I S I O N**  
of the Disciplinary Board of Appeal  
of 30 March 1995

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the  
European Qualifying Examination dated  
7 October 1993.

**Composition of the Board:**

**Chairman:** P. Gori  
**Members:** J.-C. Saisset  
J. Stephens-Ofner  
Ch. Onn  
A. Armengaud

## Summary of Facts and Submissions

I. The Appellant was notified in a letter dated 7 October 1993 that he had not been successful in the European qualifying examination held from 31 March to 2 April 1993. He received the following grades in accordance with the grading scheme published in OJ EPO 1991, pages 88-89 and OJ EPO 1993, pages 73-75:

Paper A: 3	Paper C: 5
Paper B: 6	Paper D: 4

II. A notice of appeal was filed on 2 December 1993, and the appeal fee was simultaneously paid. Grounds of appeal were filed on 17 January 1994, in which the Appellant alleged that:

- (a) In the correction of paper B, no effort was made by the Examiners to appreciate the validity of the line chosen by the candidate for overcoming the novelty objection raised in the official letter.

Therefore, bearing in mind the "ideal solution" of paper B, the Examiners gave too few marks to "Claims and Arguments" instead of answering the question "Is the candidate fit to practise before EPO as regards the preparation of response to official actions?". Their answer should have been "Yes", since the candidate had fully understood that the cited prior art was novelty destroying for product claims, and had correctly restricted the patent coverage changing the claim category from product into process.

The Appellant considers that his answer was based on the selection of a particular reaction temperature, and such essential feature has been

correctly defined in the claims as mandatory. Although he admitted that the arguments were partially unclear, he considered that they were substantially and correctly in line with the proposed claims, and consequently that no effort had been made by the Examiners to compensate the style deficiencies in the sense of point II of Implementing provisions under Article 12 REE. He cites decision T 426/87, in which a selective purposive temperature range was deemed sufficient to give inventiveness to the claimed process.

- (b) In the correction of paper C the Appellant underlined that the part "Legal Aspects" was awarded almost the maximum of marks by an Examiner, i.e. 28/30. In his view, this evaluation clearly showed that he had a good knowledge and preparation with respect to problems concerning the legal matters involved in the Opposition Procedure in this case too, the answer to the question "Is the candidate fit to practise before EPO in this field?" should have been "Yes". The Appellant pointed out that he is a chemist who had worked for more than twelve years only in the Patent Department of a pharmaceutical firm, preparing and successfully prosecuting many European patent applications relating to complex chemical substances with biologic activity and to the processes for their preparation.

In order to find the correct solution of paper C (i.e. the key information that Annex 3 was novelty destroying for Claim 1) it was necessary to have a practice of studying drawings and to possess a knowledge of the structure of a rivet. Both these elements were completely absent from the patent experience of a normal chemist who does not work

in a private patent office, since he never had to deal with patent matters in the mechanical field. Paper C itself should therefore be corrected, bearing in mind that the candidate may be a chemist employed in an industry, therefore, *mutatis mutandis*, the same warning of point II of Implementing provision under Article 12 REE for the language should be applicable as well to the technical field of the candidate.

Were it, paper C in alternate years should be based on a patent directed at a simple chemical formula of a new compound. Of course, the situation for candidates having not as official language one of the three official languages of the EPO was even worse, owing to the amount of time which has to be spent on translating all the annexes.

For example, he has not realized that a rivet consists of two cooperating parts, like the fastener of Claim 1 of the Annex 1 of paper C.

- (c) In the correction of the legal paper (paper D), the Examiners did not take all possible care to compensate the style deficiencies of the answers, and moreover they did not consider the greater amount of time requested to candidates whose mother tongue is not one of the above three official languages for translating and understanding the questions.

As to questions 2, 3 and 6, even if the answers were not:

- (i) perfectly clear, they are fully correct and should therefore be given the maximum possible marks;
- (ii) as regards question 9, at least 3/4 of the available marks should have been given to the answer of the Appellant, since three of the four legal points therein present were correctly explained (time for filing observation, party to the proceeding, duty of EPO to examine the facts of its own motion);
- (iii) it was true that the candidate had not correctly answered to point C of part II, also owing to the longer time spent on language interpretation, but some observation of this part must be taken into account in the evaluation of the other two points A and B, in particular those relating to the payment of the fees.

The Appellant concluded that in the evaluation of papers B and C, point I of Implementing provision under Article 12 REE was infringed and that in marking papers B, C and D, point II of Implementing provisions under Article 12 REE was not correctly followed by the members of the Examination Committee.

He requests that:

- (a) Papers B and C are both awarded a sufficiency grade (4), or
- (b) at least paper C is awarded a sufficiency grade (4) and paper B is awarded an inadequate grade (5), or

- (c) at least paper B is awarded a sufficiency grade (4), or
- (d) paper D is awarded a good grade (3) and paper C is awarded a sufficiency grade (4), or
- (e) paper D is awarded a good grade (3) and paper B is awarded an inadequate grade (5)

and that the appealed decision is reversed, the candidate being judged to have been successful under Article 12(2) REE or under point VII(a), (b) or (c) of Implementing provisions under Article 12 REE.

As "auxiliary request", the Appellant requests that at least one of paper B or C is awarded a sufficiency grade (4) and that the Appellant is entitled under the new provisions to resit a subsequent examination only for the paper B or C.

- III. On the 25 March 1994 the Examination Board decided not to rectify its decision, and forwarded the case to the Disciplinary Board of Appeal for its decision.
- IV. The President of the Council of the Institute of Professional Representatives and the President of the EPO were consulted under Article 12 of the Regulation on Discipline for Professional Representatives, in conjunction with Article 23(4) REE, and have not made any comment.
- V. In a communication dated 28 November 1994 the Appellant was informed of the non-binding preliminary opinion of the Disciplinary Board of Appeal that it was envisaged to dismiss the appeal. Although invited to make further submissions at least before the end of January 1995, the Appellant did not answer.

## Reasons for the Decision

1. The appeal complies with Article 23(2) REE and is therefore admissible.
2. In accordance with the case law (see D 1/92, OJ EPO 1993, 357; D 6/92 OJ EPO 1993, 361; D 8/93 unpublished etc...) the Disciplinary Board of Appeal is only empowered to examine whether the examination procedure conformed to the relevant regulations and instructions, but not to reconsider the entire examination procedure on its merits. Only alleged serious and obvious mistakes by the Examination Board can be considered under this heading. These mistakes must be relevant to the appealed decision, in the sense that the decision would have been different if the mistakes had not been made, and fundamental in the sense that they can be verified by application of legal principles. Apart from these conditions, value judgments are not subject to judicial review.
3. The present Board has carefully considered the Appellant's submissions.
  - 3.1 It follows from the above that the numerous allegations made by the appellant relating to the appreciation given by the Examiners to his answers cannot be followed as far as they concern questions of value judgment.
  - 3.2 Moreover, although it is clear that the Appellant was awarded good marks in paper A and in the part "legal aspects" of paper C, the purpose of the examination is to establish whether the candidate is fit to practise as a professional representative before the EPO and

this could only be decided throughout on the basis of the result of the evaluation of the candidate's answers in all the papers of the examination.

- 3.3 The assertion of the appellant that he had suffered a disadvantage vis à vis the candidates whose mother tongue is one of the three official languages of the EPO because the Examiners did not take into account the time he needed to read and to understand documentary material cannot be accepted either.

The Appellant did not seriously substantiate this submission. Moreover, when enrolling for the examination he did not request as allowed under Article 11(3) REE to submit his answers in his mother tongue which is an official language of a contracting state.

The present Board shares the views stated in decision D 13/93 of 19 May 1993 in which it was decided that whilst the problem of candidates having an other mother tongue than one of the three official languages of the EPO may conduce to elements of unfairness in the system of examination, such elements cannot suffice to render invalid the examination system as a whole.

## **Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



M. Beer

P. Gori