



Europäisches Patentamt	European Patent Office	Office européen des brevets
Beschwerdekammern	Boards of Appeal	Chambres de recours

Case Number: D 0004/96

D E C I S I O N  
of the Disciplinary Board of Appeal  
of 24 March 1998

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the  
European Qualifying Examination dated  
25 September 1995.

Composition of the Board:

Chairman: L. C. Mancini  
Members: J. Stephens-Ofner  
W. Moser  
J. Neukom  
L. C. de Bruijn

## Summary of Facts and Submissions

- I. The appellant sat the European Qualifying Examination for the first time in 1994, obtaining the following grades: paper A: 4 (pass), paper B: 5 (inadequate), paper C: 5 (inadequate) and paper D: 5 (inadequate).
- II. In 1995 the appellant resat papers B, C and D, in which he obtained the following grades: paper B: 3 (good), paper C: 2 (very good) and paper D: 5 (inadequate).
- III. By letter dated 25 September 1995, the appellant was notified by the Examination Board that, in accordance with the Implementing provisions (published in OJ EPO 1994, 595), hereinafter IP 1994, to the Regulation on the European Qualifying Examination (published in OJ EPO 1994, 7), hereinafter REE 1994, he had failed the examination held from 29 to 31 March 1995.
- IV. By letter dated 12 October 1995, the appellant appealed against that notified decision and filed grounds of appeal. At the same time he paid the appeal fee. By letter dated 24 October 1995 the appellant supplemented his grounds of appeal.
- V. By communications dated 18 July 1996 and 22 September 1997, respectively, the Disciplinary Board of Appeal advised the appellant that, firstly, Rule 14 IP 1994 governed the legal framework within which his appeal had to be decided and that it was peremptorily worded; and, secondly, that having regard to his having finally passed the European Qualifying Examination he had the option to withdraw his appeal and so to obtain a refund of his appeal fee (Art. 27(4) REE 1994).

- VI. By letter dated 30 September 1997, the appellant informed the Disciplinary Board of Appeal that, although he had in the meantime passed the European Qualifying Examination 1996, he wished to continue the appeal.
- VII. By communication dated 12 February 1998, the Disciplinary Board of Appeal advised the appellant that his "borderline case" argument based on the REE in force before 1994 and supported by decision D 1/93 (published in OJ EPO 1995, 227) was no longer tenable bearing in mind changes in the REE and that if he wished to rely upon the fact that an earlier pass might well have accelerated his career progression within his company, he should be ready to produce evidence in support of such an assertion.
- VIII. Oral proceedings were held on 24 March 1998.
- IX. The appellant's submissions in writing and during oral proceedings can be summarized as follows:

The question to be decided was whether the grade 5 obtained in paper D was compensated by the other grades obtained in the other papers.

The combined results in joint examination for 1994 and 1995 were: paper A: 4, paper B: 3, paper C: 2, paper D: 5. Thus, the arithmetical sum of his grades was 14, which was a better result than that of a candidate having obtained grade 4 in all four papers.

Rule 3 IP 1994 stipulated that the purpose of the examination was to establish whether a candidate was fit to practise as a professional representative before the EPO. He should therefore have been declared to have passed the examination in that grade 5 obtained for paper D was offset by grade 2 obtained for paper C.

The legal deficiencies in paper D were compensated with paper C, and the compensation was made within the same examination session because both papers C and D had been taken at the 1995 examination.

In view of decision D 1/93 (above), the Board had to analyse the results obtained by the appellant in all four papers, taking into account the grades obtained, but also the arithmetical sum of the grades obtained, the nature of the examination papers and the results obtained in each part of the papers.

It was not correct to consider the candidate who resits part of the examination differently from the candidate who obtains the same or worse grades at the first sitting.

In paper D, he had obtained a total of 53,5/54 marks. Such a mark, while it was insufficient, was merely insufficient, and was not the reflection of a fundamental flaw in his legal education. In addition, in paper C, he had obtained 22/23 marks on "legal aspects" out of a maximum possible of 25. These 22/23 marks out of 25 would have translated into a grade 1, if that part of the paper had been graded on its own. He could not have obtained such a "grade 1" if indeed his legal education had been deficient to the point where he had needed to resit the examination.

The legal marks awarded in paper C should have borne particularly significant value in borderline cases, when it came to assessing a candidate's fitness to practice or not. As opposed to paper D, paper C was closer to "real life" situations in which assessing the legal aspects were not an end as such, but a means to an end. In paper C, the legal aspects first had to be extracted from the overall facts before their effect on the overall situation could be assessed. And if that

assessment was not made properly, then the whole opposition exercise might be compromised. Thus, the legal marks awarded in paper C had to be given considerable weight in such a borderline situation, with the consequence that the grade 5 in paper D was compensated for by the legal marking of paper C.

The appellant further submitted that his delay in passing the European Qualifying Examination had substantially hindered his career both inside and outside his employer's organisation. In support of this submission, he submitted an internal management document entitled "Work and Development Plan" which, under the heading "Building Organisation Capacity", specifically referred to the European Qualifying Examination. The appellant's failure in his first two attempts to pass had, so he submitted, given rise to his not having been promoted during the seven years he had spent with his employer, and to the eventual result that he sought professional employment with another company.

X. Pursuant to Article 12 of the Regulation on discipline for professional representatives, in conjunction with Article 27(4) REE 1994, the President of the Institute of Professional Representatives and the President of the EPO were given an opportunity to comment; however, they did not do so.

XI. The appellant requested that the decision under appeal be set aside and that he be declared as having passed the European Qualifying Examination in 1995. As an auxiliary request, the appellant requested that the case be remitted to the Examination Board for further examination.

## Reasons for the Decision

1. The Disciplinary Board of Appeal has noted that the appellant passed the European Qualifying Examination in 1996. The question therefore arises whether or not the appellant can still be said to be adversely affected by the decision under appeal.

The Disciplinary Board of Appeal recognises that candidates who pass the examination before an appeal can be decided, still may have a legitimate interest in a review on appeal (cf. eg. decision D 3/91 of 24 August 1992). As a matter of fact, a candidate's career as a patent attorney, his professional reputation and his economic conditions may be affected by the time required for him to be entered on the list of professional representatives before the EPO.

In the present case, having regard to all the relevant facts and matters as submitted by the appellant in writing and during the oral proceedings, the Disciplinary Board of Appeal concludes that the appellant has a genuine legitimate interest in having his case reviewed. The appeal also meets the requirements under Article 27(2) REE 1994. It is admissible.

2. In case D 1/93 (above) the candidate sat the examination for the first time in 1991 and resat two papers in 1992, one of which he failed.

The following provisions were applicable to these examinations:

Regulation on the European Qualifying Examination for professional representatives before the EPO (OJ EPO 1991, 79), hereinafter REE 1991, and

Implementing provisions under Article 12 REE 1991 (OJ EPO 1991, 88), hereinafter IP 1991. Under IP 1991 only one partial resit was possible under certain circumstances. Thus, if a candidate failed one or more papers at the partial resit he had to resit all papers at a subsequent examination. A strict application of Article 12 (3) REE 1991 and IP 1991 could therefore have given rise to consequences which would not have been consistent with, on the one hand, the very purpose of the examination, namely to establish whether a candidate is fit to practise as a professional representative before the EPO, and the principle of proportionality which requires that the examination standards be adapted to that purpose, on the other (cf. decision D 5/92 of 26 November 1993, point 6 of the Reasons).

Thus, while the overall assessment of candidates in borderline cases was meant to be abandoned by 1991 (cf. decision D 8/96 [OJ EPO 1998, 302], point 2 of the Reasons), the Disciplinary Board of Appeal in decisions D 5/92 and D 1/93 (above) nonetheless recognised that problems could still remain with the system, and decided that the then applicable Article 12 (3) REE 1991 should be interpreted so as to leave the Examination Board the possibility to appreciate whether in a borderline case the candidate was fit to practice although he failed one paper at a partial resit.

However, in the present case REE 1994 and IP 1994 apply. Under REE 1994 and IP 1994 the number of resits is not limited, and the resits do not depend on certain preconditions. Consequently, in the present case, the legal situation is considerably different from the one underlying decisions D 5/92 and D 1/93 (above).

As a matter of fact, REE 1994 and IP 1994 have brought the former system of an overall assessment in borderline cases to a final close for the following reasons (cf. decision D 8/96 [above], point 4 of the Reasons): Article 17(1) REE 1994 explicitly provides that candidates shall be declared to have passed the examination if they pass each of the papers or if, the first time they sit the examination, they obtain the minimum grades required under the IP 1994.

Article 17(1) REE 1994 and Rule 14 IP 1994 are thus in themselves exhaustive, leaving room for only two possibilities to pass the examination, either that the candidate passes each paper or, when sitting for the first time, fulfills the conditions of Rule 10 IP 1994. Moreover, Article 17 REE 1994 being of higher rank than Rule 3 IP 1994 takes precedence over this rule. This means that Rule 3 IP 1994 must be read as an indication only for the examiners on how to go about marking the papers, and that this rule may not be interpreted in a sense not in conformity with the REE 1994. Consequently, there is no room for borderline assessments in the case of a partial resit.

3. As to the merits of the marks awarded, it has to be borne in mind that the Disciplinary Board of Appeal must adhere to the basic and generally accepted principle that in matters pertaining to qualifying examinations the Disciplinary Board of Appeal is empowered only to investigate whether the decision under appeal constitutes, or is based on, an infringement of the REE or any provision relating to its application, or of higher ranking law. Consequently, the Disciplinary Board of Appeal is in principle not competent to review marks or grades, unless serious errors occurred which were so obvious that they can be established without re-opening the entire marking procedure. It is accordingly not empowered to reconsider the entire examination



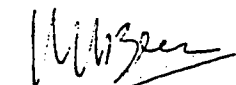
procedure and the marking therein on its merits. It may thus only take into account serious and obvious mistakes that are relevant to the decision under appeal in the sense that the decision would have been different if the mistakes had not been made and, furthermore, that these mistakes must be fundamental in the sense that they can be readily verified by the application of the legal principles incorporated in the REE and the provisions relating to its application. In other words, allegations that the Examiners' evaluation of the answers, or the Examination Board's determination of grades, should have been more favourable for the candidate are *ultra vires* the jurisdiction of the Disciplinary Board of Appeal, for value judgements are not subject to judicial review (cf. eg. decisions D 1/92, D 6/92 and D 13/93). It follows that the requirements for a review of the marks or grades are not met in the present case.

**Order**

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

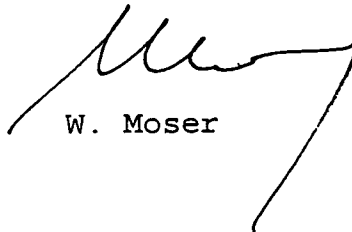
The appeal is dismissed.

The Registrar:



M. Beer

On behalf of the Chairman:



W. Moser