

BESCHWERDEKAMMERN  
DES EUROPÄISCHEN  
PATENTAMTS

BOARDS OF APPEAL OF  
THE EUROPEAN PATENT  
OFFICE

CHAMBRES DE RECOURS  
DE L'OFFICE EUROPEEN  
DES BREVETS

Case Number: D 0007/96

D E C I S I O N  
of the Disciplinary Board of Appeal  
of 17 December 1997

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  
M. Lewenton  
J. Neukom  
Ch. Kalonarou

**Summary of Facts and Submissions**

- I. The Appellant re-set the European Qualifying Examination for Professional Representatives during the period 29 to 31 March 1995.
- II. By official communication dated 25 September 1995 the candidate was informed by the Examination Board (hereinafter referred to as the "Board") that he had not been successful in the examination, having regard to the implementing provisions to the regulation on the European Qualifying Examination as published in OJ EPO 1994, pp. 595-598. ("REE").

That communication informed the candidate that his papers had been marked in accordance with the scale published in the above mentioned implementing provisions as follows:

A:-

B:3 pass

C:3 pass

D:5 fail

- III. By letter dated 12 December 1995 the candidate appealed against the above decision, requesting that the decision be set aside in accordance with Article 27(3) of the REE and that he be declared to have passed the examination.
- IV. On 25 January 1996 the candidate (Appellant) filed his grounds of appeal. Those grounds, in essence relied upon the REE as in force at the time when the Appellant first took his examination i.e. as it stood amended on 1 January 1993, and in particular as it had been applied in case D1/93. Furthermore, he pointed to the inequitable consequences of the changes brought about by the REE as promulgated in May 1994, arguing that the purpose of the examination as a whole was to establish whether a candidate was fit to practice as a professional representative before the EPO, so that the mere fact of the tightening of the regulations should not deprive him of the benefit afforded to the candidates who had sat the examination under the previous and more lax set of regulations. By way of auxiliary request, his Statement of Grounds of appeal also expressly asked for oral proceedings in case the Disciplinary Board were minded to dismiss his appeal.
- V. The President of the Council of the Institute of the Professional Representatives for the EPO and the President of the EPO were consulted under Article 12 of the Regulation on Discipline Boards for professional representatives and have made no comments within the prescribed period.
- VI. By communication dated 6 August 1996 the candidate was apprised of the Board's preliminary view of the matter and in

particular of the legal consequences of the changes brought about by the REE of June 1994. The precise nature of these is set out in the reasons for this decision. The communication also invited the appellant to reconsider his auxiliary request for oral proceedings.

- VII. By letter dated 16 October 1996 the Appellant strongly disagreed with the legal analysis set out in the above communication, arguing that the tightening of the REE must be a violation of the underlying purpose of the examination to decide whether a candidate was fit to practice before the EPO so that, to quote, there must have been "a slip when redesigning the rules". Thereafter oral proceedings were duly set for the 23 June 1997, but the appellant, on the 17 March 1997 informed the Board that he could not attend as he was going to be away on business. He also stated that a written **reasoned answer** to the questions put in his grounds of appeal as well as to his answer to the above communication would enable him to withdraw his request for oral proceedings.
- VIII. In the Board's view this request for written reasoned answers was tantamount to a conditional withdrawal of the earlier auxiliary request for oral proceedings, the condition precedent being the rendering of a reasoned answer by the Board to the Appellant's case which, by the very nature of the Board's decision making powers it was bound to provide, since all decisions of the Courts (Boards) exercising jurisdiction under the EPC, including the Disciplinary Board, must be reasoned and thus contain a reasoned answer to the Appellants' case. Accordingly the Board is in the position to fulfil the condition precedent set by the Appellant since his request for oral proceedings must be deemed to have been withdrawn on the 17 March 1997.

#### **Reasons for the Decision**

1. The appeal is admissible.
2. As indicated before, the Appellant's case is based on the allegedly unacceptable and/or mistaken effects of the changes in the REE promulgated in May 1994.
3. It is clear to the Board that between December 1990 and May 1994 the principle of compensating partial failure by invoking earlier successful marks achieved in the first full and subsequent partial resits of the examination has been gradually eroded, and then finally extinguished by enacting new provisions.
4. Thus, the relevant provisions of the REE as promulgated on December 1990 enabled the Examination Board to deal with "borderline cases" under paragraph VII, and in the case of initial failure, under paragraph IX both of which recognised the principle of compensation for failed papers by papers in which success at a particular grade had been attained.

5. Moreover, the relevant provisions of the REE as amended on 1 January 1993 preserved the right of initially unsuccessful candidates to attempt a number of partial resits, so that they did not need to resit the entire examination, but only those papers in which they had failed. In particular, paragraph X allowed candidates who failed one or two papers in a partial resit, a **further partial resit**, subject to certain numerical aggregate conditions.

Case D1/93 applied and extended the principle recognised by both these versions of the REE by specifically stating (§4) of the Reasons that "partial resit" candidates should be judged upon the same basis as candidates resitting the full examination thus, in effect specifically preserving the compensating provisions of VII of the REE of 7 December 1990. The Board in that case considered that a candidate in a partial resit, who failed one or two papers, ought to be considered as a borderline case, so that fitness to practice had to be taken in its entirety i.e. with due regard to the **cumulative effects** of earlier successful papers.

However the latest amendments to the REE (19 June 1994), and in particular Rule 14 REE, are clear and peremptory in their provisions. Their effect is that after the first sitting of the examination a candidate resitting the examination **shall only** be deemed to have passed the examination when he or she has passed **each paper**. Coupled with the provisions contained in Rule 12, which provides that after failure in the first sitting **only** partial resits on failed papers will be permitted, the possibility of achieving an eventual pass in the qualifying examination through a "paper by paper" or progressive cumulative process, has been removed, and replaced by the principle and practice of absolute success/failure at the partial resit stage, the result of which now can no longer be affected by specified degrees of successful performance in earlier partial resits or first attempt at the examination. Thus success can only be achieved the first time around in accordance with the provisions of Rule 10 REE, or the second time around in accordance with the provisions of Rules 12 and in particular Rule 14.

6. It will be obvious from the above that case D1/93 (relied upon by the Appellant) can no longer be relevant to deciding the allowability of this appeal. The Board wishes to observe and to emphasize that such a state of affairs is not uncommon where various legal criteria and rules are altered without express transitional provisions designed to cushion the adverse effects of these changes.

Consequently, this appeal must fail.

**Order**

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

The appeal is dismissed.

The Registrar: The Chairman:

M. Beer

L. C. Mancini