

DECISION
of 18 July 1997

Case Number: D 0008/96

Language of the proceedings: EN

Appellant: N.N.

Headword:
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Relevant legal provisions:
Art. 7(3), 17(1) REE 1994
R. 3, 10 1P 1994

Keyword:
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Headnote:

Borderline case assessments of candidates' fitness to practice as professional representatives before the European Patent Office are not possible under the 1994 Regulation on the European Qualifying Examination, REE 1994, and its implementing provisions, IP 1994. Article 17(1) REE 1994 is exhaustive. In accordance with this a candidate must pass each examination paper in order to pass the European qualifying examination as a whole. The only exception is laid down in Rule 10 IP 1994, which by virtue of Article 17(1) REE 1994 is also exhaustive and applicable only to candidates who sit the examination the first time.



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Boards of Appeal

Chambres de recours

Case Number: D 0008/96

D E C I S I O N
of the Disciplinary Board of Appeal
of 18 July 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: C. Holtz
J.-C. De Preter
L. C. de Bruijn
J. Neukom

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: 6, paper B: 4, paper C: 5 and paper D: 5. In 1995 the appellant resat papers A, C and D, in which he obtained a grade of 3 in each of papers A and C and a grade 5 in paper D.
- II. The appellant was notified by the Examination Board with reference to the Implementing provisions (IP) to the Regulation on the European Qualifying Examination (REE, OJ EPO 1994, 595) that he had failed the examination. In the form "Record of the candidate's results in the 1995 European Qualifying Examination, Form EB/A-D/95/e, the Examination Board had crossed the box indicating that, the candidate having failed one or more papers, the Examination Board had decided that the candidate had failed under Article 17(1) first sentence REE in conjunction with Rule 14 IP.
- III. On appeal, the appellant requests that the decision under appeal be set aside and that he be declared to have passed the European Qualifying Examination, that the examination fee for 1996 be refunded, alternatively that the case be remitted for review by the Examination Board.
- IV. The appellant's grounds and arguments in support of the appeal may be summarised as follows:

There had been a violation of the applicable regulation in that the Examination Board had not made a borderline assessment of the appellant's fitness to practice as a professional representative before the EPO, which was the basic purpose of the examination, as laid down in Rule 3 Implementing provisions (IP) 1994. This purpose

conformed with item I of the 1991 IP under Article 12 REE 1991. The literal interpretation of Article 17(1) REE 1994 in conjunction with Rule 14 IP 1994 referred to by the Examination Board corresponded to a literal interpretation of Article 12(3) REE 1991 in conjunction with item XII IP 1993, in that a candidate should be declared unsuccessful in each and every case where he obtained a 5 in one of the papers he resat, irrespective of the results in other papers. However, neither Article 12(3) 1991 nor Article 17(1) REE 1994 should be interpreted literally.

According to Article 7(3) REE 1994, the Examination Board had to (a) determine the grades for each paper and (b) decide whether or not the candidate has passed the examination. While the word "determine" meant that the Examination Board had to accept the grades given by the examination committees, the word "decide" indicated that the Examination Board still had a discretion to decide in borderline cases that a candidate had passed the examination although he had not been given a pass grade (4 or better) in each paper.

The Examination Board also had failed to apply decision D 1/93 which required that a judgment be made in borderline cases on whether or not the candidate was fit to practise, in spite of the literal meaning of Article 12(3) REE 1991. The Disciplinary Board of Appeal in D 1/93 based its deviation from this literal interpretation on Article 5(3) REE 1991, which laid down that the Examination Board decided whether a candidate had passed or not. Since Article 7(3) REE 1994 was equivalent to Article 5(3) REE 1991, this margin of discretion must be available also for the assessment of candidates under the 1994 regulation. As the wording of the relevant provision, item XII of the 1993 IP, was literally the same in 1991, cf. Article 12(3) REE 1991, as in 1993, the Examination

Board had in fact correctly applied D 1/93 also to candidates who re-sat the examination in 1993 and 1994. Parallel to this, Article 17(1) REE 1994 was non-exclusive in the sense that there might be situations not mentioned there in which the Examination Board did have the power to decide, i.e. in borderline cases.

As the Examination Board in its decision only referred to the failed papers, it had misinterpreted its obligation, which required a reasoned decision. The failure to issue such a decision was a substantial procedural violation.

Considering the result of the papers, the sum obtained was 15, which would have meant passing the examination, had it been achieved in a first sitting. Furthermore, the grade 5 in paper D would have been offset by the grade 3 in either paper A or C. The appellant had failed paper D by only 3 or 4.5 points (depending on which examiner had done the marking). This was amply offset by his results in paper C, legal aspects, which corresponded to a grade 3. The appellant, who sat the examination for the first time in 1994 was not entitled to sit the examination in modules. At least for this reason, he was entitled to a borderline assessment of his combined results of the two sittings.

V. The President of the European Patent Office and the President of the Council of the Institute of professional representatives before the European Patent Office were given the opportunity, in accordance with Article 12 of the Regulation on discipline for professional representatives, to comment on the appeal.

VI. The representative of the President of the European Patent Office explained the procedure under the new 1994 regulation as follows:

The Examination Board had a discretion to discuss the grades to be awarded, which meant that the marks and grades as proposed by the Committees could be reviewed. In this context, especially with regard to a proposed grade 5, the examiners would be asked which marks were missing, in order for the Examination Board to assess whether the candidate should be awarded a pass grade. The 1994 system was based on the intention of reducing the number of exams as much as possible without reducing quality. The Examination Board was well aware of the problem of having too many re-sitters. In a hypothetical case where a re-sitting candidate had excellent grades in three of the papers but a 5 in the fourth (e.g. the grades 1+1+1+5) the Examination Board could ask the chairman of the Committee if the 5 in question could be a 4. If the examiners would insist that the candidate was too weak to be declared passed, a vote on the grade would be taken. However, once the grades had been decided, there was no more discretion for the Examination Board. Article 7(3) REE 1994 was to be interpreted in the opposite direction than proposed by the appellant: There was a certain discretion in determining the grades, but none in deciding whether the candidate had passed or not.

Reasons for the Decision

1. *Admissibility*

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 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 (see e.g. decision D 3/91 of 24 August 1992). Firstly, a candidate who would by virtue of his appeal be declared passed, may be entitled to a refund of the appeal fee and any examination fees he might in the meantime have had to pay. Secondly, and more importantly perhaps, a candidate's professional reputation and economical conditions may be affected by the time required for him to be entered on the list of professional representatives before the EPO. Thus, the Board concludes that the appellant has a genuine legitimate interest in having his case reviewed. As the appeal meets the other conditions under Article 27(2) REE 1994, it is admissible.

2. *The development of the Regulation and its Implementing Provisions*

The very first Regulation on the European Qualifying Examination for professional representatives before the European Patent Office was adopted in 1978 (REE 1978, OJ 1978, 101). In it, the basic areas of candidates' qualifications to be tested were decided (Article 10 REE 1978). Already from the start a system with four separate papers emerged. A candidate who had passed each paper was to be declared to have passed the examination, Article 12(2) REE 1978. A candidate who had passed at least half of the papers could still pass the examination, if the Examination Board in considering the papers as a whole so decided, Article 12(3) REE 1978. According to Article 5(3) REE 1978, the Examination Board was obliged to examine borderline cases and decide whether a candidate had passed or failed. A new REE was adopted in 1983, in which the above provisions were essentially maintained unamended.

With the REE adopted and put into force on 7 December 1990, REE 1991, a new system was introduced by which candidates who had failed the examination would be able in certain circumstances to resit only the failed papers. In order to pass the examination, however, such a candidate had to pass each of these papers, Article 12(3) REE 1991. For those candidates sitting all papers the possibility of passing in spite of one or two failed papers was kept, but only under the precise conditions laid down in the Implementing provisions to Article 12(2)(b), i.e. Item VII of the IP 1991 (OJ EPO 1991, 89). These conditions meant inter alia that a grade 5 in only one paper could be offset by a grade 3 or better in any other paper, regardless of the topic covered by these papers, whereas a grade 5 in two papers only could be offset if the first one had been obtained either in paper A or B and a grade 3 or better had been obtained in the other of those two, and the same was true for papers C and D. This shows that a candidate must be well qualified in both the main topics covered by the examination. Between A and B on the one side and C and D on the other side compensation was excluded (except as described above when a candidate only had failed one paper in which a grade 5 had been obtained). One could say that the two modules now existing by virtue of REE 1994 actually emerged already in 1991. The aim was obviously to ensure that the candidate's qualifications in each main topic would still be adequate.

By 1991, then, the overall assessment of candidates in borderline cases, as governed by REE 1978 and 1983 and the case law of the Disciplinary Board of Appeal, was meant to be abandoned. However, the Disciplinary Board of Appeal in decision D 1/93 recognised that problems could still remain with the new system, and decided that the then applicable Article 12(3) REE 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. It should be noted here that the candidate in this case had sat the examination for the first time in 1991 and resat two papers in 1992, one of which he failed. Decision D 1/93 must thus be seen as an exception in the early days of the new system.

With effect from 1 January 1993, a clarification was made in added item XII of the IP that in case a candidate had made a partial resit he would only pass the examination if a grade 4 or better was awarded in each paper.

From this historical overview, it can be appreciated that the introduction of partial resits was combined with abandoning the overall assessment in borderline cases. By the 1993 examination, at the latest, no candidate could have been unaware of the new system and how it was meant to work.

The appellant claims that the absence of a possibility for him to sit the examination in modules should entitle him to have this overall assessment in borderline cases. The appellant was however entitled to sit only one module in the 1994 examination. Those candidates who had enrolled for the 1994 examination were informed by the Examination Board in a letter dated 20 December 1993 that first-sitters could still avail themselves of the possibility of modular sitting by notifying the Examination Board before 21 January 1994. This was made possible by making Article 14 REE on modular sitting applicable already from 10 December 1993 (Article 2(2) REE, OJ EPO 1994, 7).

3. *REE 1994*

The new regime adopted by the Administrative Council on 9 December 1993 and entered into force on 1 May 1994, REE 1994 can be said to have brought the former system of an overall assessment in borderline cases to a final close. In the travaux préparatoires to the REE 1994, doc CA/84/93, under Article 17 it is pointed out that the new system as a general rule stipulates that candidates have to pass each paper. In the Disciplinary Board's view, this can only mean that compensation, or "borderline assessment", is not possible, except where expressly provided for. All such exceptions are laid down in Rule 10 IP 1994, which essentially contain the same precise conditions as the IP 1991. But the focus of the regime had by 1991 already shifted from the "overall assessment" criterion to one of pure compensation of grades in certain circumstances. The conclusion by the appellant that the almost identical wording of Item XII of IP 1993 and the corresponding provision in REE 1994 must extend borderline case assessments to the present regime is therefore incorrect.

4. *The interpretation of Article 17(1), Article 7(3) REE 1994, Rule 3 and Rule 10 IP 1994*

The appellant claims that Rule 10 is not exhaustive, leaving room for borderline case assessments also under the 1994 regime.

Rule 10 is a result of the power given to the Examination Board by the Administrative Council through Article 17(1) REE 1994. This article expressly 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 obtain the minimum grades required under the implementing provisions.

grades required under the implementing provisions. Article 17(1) REE is in itself thus exhaustive, leaving room for only two possibilities to pass the examination, either that a candidate passes each paper or, when sitting for the first time, fulfils the conditions of Rule 10 IP 1994. Rule 10 IP 1994, therefore, cannot be interpreted as leaving room for further interpretation beyond its wording.

Article 17 REE being of a 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. The Board may also add with regard to Rule 3 IP that it does not contain any legal provision in the strict sense of the word, but rather constitutes a general statement for the guidance of the examiners. In fact, Rules 3 to 7 contain instructions to the members of the examination committees to ensure a uniform marking of candidates' papers (see Article 16 REE 1994). At REE level, the object of the examination is laid down in Article 12 REE, giving a concentrate of all the areas in which the candidate is expected to have a thorough knowledge. As can be seen here, each paper represents a major topic to ensure the candidate's abilities in accordance with this object.

The interpretation of Article 7(3) REE as contended by the appellant contrasts with the object of the new REE 1994 as explained above and also with the aim of the marking of papers and functions of the Examination Board in accordance with the REE read as a whole. As explained by the representative of the President of the EPO, there is a certain discretion when determining the grades for each paper, but none when it comes to deciding on a pass or fail result. The Disciplinary Board of Appeal, seeing that the latter interpretation

is in conformity with the aim of the new regime and that it is not in conflict with any higher ranking provision or fundamental principle of law, therefore concludes that there is no room for borderline assessments in the case of a partial resit.

5. *The relevance of decision D 1/93*

Against the above history and interpretation of the new regulation, the system of overall assessments in borderline cases which was applied in D 1/93 to candidates sitting the examination in 1991 and 1992 cannot be recognised for partial resits in 1995. Decision D 1/93 must therefore be seen as an exception allowing for a margin in the early days of the new system. Even when considering that the Examination Board's exceptional passing of candidates who sat the examination in 1993 and 1994 may have resulted from D 1/93, as the appellant would have it, the applicability of this decision cannot extend to candidates who resat papers as late as 1995. The reasoning and outcome of D 1/93 consequently has no relevance for the present case.

6. *Procedural violation*

It follows from the above that the Examination Board by issuing an unreasoned decision did not commit any substantial procedural violation.

7. *Combined points*

It likewise follows from the above that the sum obtained by the appellant when combining the most favourable grades from the sittings in 1994 and 1995 is irrelevant to the examination result, as the appellant

did not meet the requirements under Article 17(1) REE to be declared to have passed. Nor are the obtained marks in papers C and D of relevance for the appeal as no compensation is foreseen in the applicable regulation for a partial resitting.

8. *Conclusions*

For these reasons the requests that the appellant be declared to have passed the examination or that the case be remitted for review to the Examination Board cannot be allowed. Hence, the request for refund for the examination fee for the 1996 examination must be refused.

Order

For these reasons it is decided that:

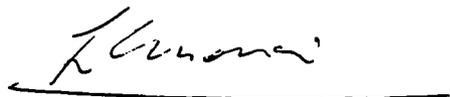
The appeal is rejected.

The Registrar:



M. Beer

The Chairman:



L. Mancini