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Boards of Appeal

Chambres de recours

Case Number: D 0002/97

D E C I S I O N
of the Disciplinary Board of Appeal
of 16 March 1998

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
25 September 1996.

Composition of the Board:

Chairman: L. C. Mancini
Members: C. Holtz
J. Stephens-Ofner
Ch. Bertschinger
L. C. de Bruijn

Summary of Facts and Submissions

- I. The appellant resat papers A, C and D of the European Qualifying Examination in 1996, obtaining the following grades: Paper A: 4, passed, paper C: 5, failed, and paper D: 4 passed.

In the decision under appeal, the appellant was informed that he had not been successful in the examination. Reference was made to the Regulation on the European Qualifying Examination (REE) published in OJ EPO 1994, 595 ff.

- II. The appellant filed an appeal against the decision, requesting that the decision under appeal be set aside, and that he be declared to have passed the examination.

- III. The appellant's reasons and arguments filed with several letters, the first dated 7 January 1997 and the last of 10 February 1998, may be summarised as follows:

- The Examination Board was obliged under decision D 1/93 to examine whether or not the appellant was fit to practise before the EPO, in accordance with Rule 3 REE (implicitly contained in Article 12 REE). The appellant's case was a borderline case, such as the one discussed in that decision. To this end the Examination Board was obliged to take into account also the arithmetical sum of the grades obtained. The Board of Appeal in D 1/93 specifically determined that any legal deficiencies in paper C could be compensated by the candidate's performance in paper D. Had the Examination Board done as required, the appellant would have been declared to have passed the examination, due to his performance in these papers.

- Although after the introduction of the REE 1994 the onus placed on the Examination Board by decision D 1/93 to examine borderline cases seems to have been removed, this would not be prevented in case of irregularities or procedural violations.

- During the sitting of paper A, the appellant could only see one of the clocks in the examination hall. This clock happened to be slow, which meant that the appellant was surprised when told that the time was nearly up and he consequently had no time to finish his paper. Being convinced that this meant that he had failed that paper, the appellant thought that he would necessarily fail the examination as a whole, which significantly influenced his performance in paper C. Where candidates were severely disadvantaged by actions directly attributable to the Examination Board this board was under a clear obligation to compensate or otherwise make allowances for their actions. An example in point was question 11 of paper D in the examination of 1996, which, having been considered ambiguous, resulted in full marks for all candidates regardless of their answers to that question. The appellant should have been compensated in the same way for his results in paper C. The appellant's paper C should therefore be remarked, whereby consideration should be had to his mental state when sitting this paper.

- The appellant asked the invigilator if he should file a complaint after paper C, but the invigilator told him that this was not necessary.

The appellant followed this advice. If he had not done so, his complaint had been examined, possibly leading to his being awarded a pass grade. This constituted a grave procedural violation.

- As the marking of paper C did not seem to have been correctly done, when comparing the candidate's answers to the 1996 paper C compendium, his results should have warranted a grade pass at the very least.
- The appellant was never informed about any result of the complaint made with regard to the conduct of the examination as to paper A. This also constituted a procedural violation.

IV. The Examination Board made the following observations with regard to the submissions made by the appellant regarding the conduct of the examination and the ensuing complaints:

- The Examination Board looked very thoroughly into complaints made about the conduct of the examination. The board could choose from a number of alternative measures, such as taking note and ensuring that similar incidents are not repeated in the future or giving instructions to the examiners when marking papers to consider inconveniences that could have influenced the candidates. In cases where only one or a few candidates had been affected and where therefore the right to anonymity prevented the board from revealing their names to the examiners, the Examination Board would discuss the matter and could possibly arrive at awarding a better grade.

In the present case, the last alternative had been applied. However, the candidate having obtained 46/47 out of 50 required for a pass grade, was not considered a borderline case. As a resitter the candidate had to pass each paper.

- As the problem of the clock occurred during paper A, there were no grounds for re-examining paper C. No complaint was filed with regard to paper C. The invigilator had not prevented the candidate from lodging a complaint with respect to paper C, he only expressed his opinion that this would not be necessary and assured the candidate that he would report orally to the Examination Board, which he also did. The results of the candidates who had been disturbed by the clocks and who turned out to be borderline cases were examined individually.
- According to the Examination Board's practice, candidates were not informed about conclusions regarding complaints. In the present case it was thought inappropriate, as the candidate's appeal was pending before the Disciplinary Board of Appeal. The Examination Board had already taken a position on the appellant's arguments before remitting the case to the Disciplinary Board of Appeal.

V. The president of the EPO and the president of the EPI were offered the opportunity in accordance with Article 27(4) REE 1994 in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives, RDR 1977, OJ EPO 1978, 91, to file observations on the appeal but abstained from doing so.

Reasons for the Decision

1. The appeal is admissible.

2. As pointed out by the Examination Board, a resitter under the REE 1994 has to pass each paper in order to pass the European Qualifying Examination as a whole. The arguments related to decision D 1/93 thus are not relevant, as this decision refers to the application of a set of provisions which had been replaced by the REE 1994.

According to the applicable REE 1994 (and its Implementing Provisions of 1994, IP 1994) compensation of grades only applies to first-sitters under the specific conditions laid down in Rule 10 IP 1994. The Disciplinary Board of Appeal has noted the significance of the new regulation for the European Qualifying Examination in a number of decisions, of which D 8/96 of 18 July 1997 is to be published in the OJ EPO. In sum, the introduction of the possibility to sit the exam in modules and indeed to resit only papers in which a candidate was not successful meant a significant relief to candidates, which was counterbalanced by the cancelling of the examination of so-called borderline cases. Decision D 8/96 notes that Article 17(1) REE 1994 is exhaustive and that according to this provision, a candidate has to pass each examination paper in order to pass the examination as a whole, the only exception being Rule 10 IP 1994. According to Rule 10 IP 1994, a candidate *who sits the examination for the first time* (emphasis added by the Disciplinary Board of Appeal) shall be deemed to have

passed the examination if he or she fulfils the conditions set out in the ensuing paragraphs. The appellant's request for a re-assessment based on the "borderline principle" must therefore fail.

3. However, the appellant also argues that the special circumstances surrounding his sitting of paper A and the ensuing paper C justifies a re-examination of his performance in paper C. In this respect, the Disciplinary Board of Appeal would point out that the Examination Board did a re-assessment of paper A, but considered a re-assessment of paper C not called for. The Disciplinary Board of Appeal concurs in this conclusion. Although the situation to the candidate may have seemed caused by the conduct of the paper A examination, not all individual reactions of candidates are relevant to the examination situation so as to warrant a re-marking of papers. To take individual reactions into account would mean going beyond normal grading conditions, which must be made objectively, taking only the answers into account. Any compensation due to incidents during the examination must instead be decided by the Examination Board when discussing the grade to be awarded. This was also made in the present case with regard to paper A.

4. Further, the appellant claims that a procedural violation was committed in that he was prevented from filing a complaint after paper C. However, his allegations are not borne out by the invigilator in question. Even if the invigilator might have created the impression that the complaint was going to be taken care of and that it therefore did not need to be submitted formally, as in all matters before the EPO,

parties always must take a position themselves on whether or not to submit formal requests in writing. The Disciplinary Board of Appeal can see no procedural violation in what occurred after the examination as to paper C was concluded.

5. The applicable regulations, point 7 of the Instructions to Candidates concerning the conduct of the examination; OJ EPO 1995, 145 and the corresponding point 7 of the Instructions to Invigilators, OJ EPO 1995, 153, both provide for complaints being lodged by candidates. Such complaints must be dealt with by the responsible organ if meeting the requirements set down there. This means that certain procedures must be followed, although not expressly contained in these provisions. In lieu of express provisions, the EPC should be applied *mutatis mutandis*, in particular Article 113 EPC on the principles of the right to be heard and Article 125 on generally recognised principles of procedural law. This requires, as a minimum, that the candidate be informed of the outcome of the complaint. The Disciplinary Board of Appeal would in this context also refer to the European Convention on Human Rights, Article 6(1) on the right to a fair trial.

It may be noted that the proper function and place in the hierarchy of procedural possibilities of such complaints is not defined in the regulation. One could for example speculate on whether there is offered a parallel possibility of appeals with regard to such complaints. At any event, the Disciplinary Board of Appeal can understand why under the circumstances the Examination Board abstained from informing the appellant. One reason could simply be that the case was

no longer in the hands of that board after the appeal. As the failure to inform the appellant could not have influenced his examination results, the Disciplinary Board of Appeal sees no reason to pursue this issue further.

6. The appellant finally claims that his answers in paper C were not correctly marked in comparison to the paper C compendium of 1996 and requests that they be re-marked. However, 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 (see decision D 1/92, OJ EPO 1993, 357). These requirements are not met in the present case.
7. The Disciplinary Board consequently can find no reason to allow the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Beer

L. C. Mancini