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Boards of Appeal

Chambres de recours

Case Number: D 0019/97

D E C I S I O N
of the Disciplinary Board of Appeal
of 3 November 1999

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: W. Moser
Members: J. Stephens-Ofner
R. Teschemacher
Ch. Bertschinger
Ch. Onn

Summary of Facts and Submissions

- I. The Appellant resat Papers C and D of the European qualifying examination in 1996.
- II. By letter dated 1 October 1996, the Appellant was informed that the Examination Board for the European qualifying examination had decided that she had not been successful in the examination. The Appellant was also informed that her papers had been marked as follows: Paper C: 3 (passed), Paper D: 5 (failed).
- III. On 2 December 1996, the Appellant lodged an appeal against the above decision and paid the appeal fee at the same time. The statement setting out the grounds of appeal was filed on 13 January 1997.
- IV. The Appellant requested that:
 - (1) The decision under appeal be set aside,
 - (2) that the Appellant be declared as having passed the European qualifying examination,
 - (3) that the declaration of point 2 be made by the Disciplinary Board of Appeal as soon as possible,
 - (4) that, failing point 2 and on referral back to the Examination Board, such declaration should be made by the Examination Board as soon as possible,
 - (5) that in any event the appeal fee be reimbursed,
 - (6) that oral proceedings be held if the above-mentioned requests are not intended to be granted.

V. By communication dated 8 July 1998 the Disciplinary Board of Appeal informed the Appellant of its provisional opinion on the prospects of her appeal. By letter dated 18 November 1998, the Appellant responded to the communication and maintained her requests. On 2 November 1999, the Appellant filed further written submissions.

VI. The submissions of the Appellant can be summarized as follows:

(i) The Appellant first sat the European qualifying examination in 1995, obtaining the following grades:

Paper A: 4 (passed), Paper B: 3 (passed),
Paper C: 5 (failed), Paper D: 6 (failed). She then resat the failed papers in 1996, obtaining the following grades:

Paper C: 3 (passed), Paper D: 5 (failed). Thus, if the two sets of examination results were taken, and the best results presented then the following position would have arisen:

Paper A: 4 (passed), Paper B: 3 (passed),
Paper C: 3 (passed), Paper D: 5 (failed).

(ii) By virtue of Rule 10(1)(a) of the Implementing provisions to the Regulation on the European qualifying examination (OJ EPO 1994, 595), hereinafter IP 1994, if a candidate had achieved the same results as the appellant's best results in the first sitting, then the candidate would have been deemed to have passed. The grade 5 would thus have been offset by the grade 3 in either of Paper B or Paper C.

- (iii) In decision D 1/93 (OJ EPO 1995, 227) it had been stated that Article 12(3) of the Regulation on the European qualifying examination for professional representatives before the European Patent Office (OJ EPO 1991, 79), hereinafter REE 1991, had to be interpreted so as to leave the Disciplinary Board of Appeal the right to decide whether in borderline cases the candidate was fit to practise although he had failed one paper at the resit.
- (iv) Under the now applicable new Regulation on the European qualifying examination for professional representatives (OJ EPO 1994, 7), hereinafter REE 1994, a candidate who failed an examination could only resit those examination papers which he failed. Article 17 REE 1994 provided now that a candidate could be declared to have passed the examination if he passed each of the papers. There was nothing in Article 17 REE 1994 which went contrary to the decision D 1/93, and it was submitted that this provision had to be interpreted so as to leave the Disciplinary Board of Appeal free to determine whether a candidate was "fit to practise" in the circumstances set out in D 1/93 and in the circumstances of the present case. The Disciplinary Board of Appeal had the discretion to consider and, if appropriate, deem to have passed a candidate in circumstances where one of the papers had not been attained with grade 4 or more.
- (v) Under Rule 10(1)(a) IP 1994, it was possible to pass with results, such as:
Paper A: 4, Paper B: 4, Paper C: 3, Paper D: 5,
without any need for consideration as to discretion in whether the candidate was fit to

practise or not. Furthermore, under Rule 10(1)(b) IP 1994, it was possible to pass with results, such as:

Paper A: 4, Paper B: 3, Paper C: 3, Paper D: 6, again without any need for consideration as to discretion in whether the candidate was fit to practise or not.

- (vi) The Appellant had obtained over the two examination sittings results equivalent to those listed in three of the papers and better than those listed on one. The overall performance was therefore better than the performance of candidates who would have been deemed to have passed. Any arguments that the positions were not comparable because of the Appellant's results had been achieved over two sittings were without merit upon a full consideration of the circumstances and their practical implications. No particular advantage was derived from the combination of results or the manner in which they had been achieved.

- (vii) No benefit accrued from the Appellant's taking of the four papers at the first sitting over other candidates. In considering the second sitting of the Appellant, once again no advantage was derived. The Appellant was merely in the position of those who take the examination in a modular style.

- (viii) The Appellant should not be penalised against when compared with the modular sitters. The results of the modular sitters were combined, without taking any account that the results may be several years apart in the time between their performance, and that the results of the first

sat module may no longer be indicative of the candidate's fitness to practise in those aspects and hence overall. On a fair comparison, the Appellant should therefore be allowed at least the same discretion between the papers in determining whether or not she was fit to practice. Given the fact that the Appellant's results more than matched those required of a modular sitter to pass, it was requested that the appeal be granted and the Appellant be deemed to have passed the European qualifying examination.

- (ix) In case D 1/93, the then applicable Article 12(3) REE 1991 had indicated the circumstances in which a candidate would be deemed to have passed when partially resitting. The candidate in case D 1/93 had not met the strict requirements of Article 12(3) REE 1991. Despite that, it had been decided that there was room to interpret that provision based on the very purpose of the examination, i.e. to establish fitness to practice. A pass had been awarded as a result. This interpretation had been made despite the position that the REE 1991 had been supposed to have removed such considerations, because the Disciplinary Board of Appeal had been of the opinion that interpretation in borderline cases was important to meet the overriding purpose of the examinations.
- (x) REE 1994 and IP 1994 did not change the provision called upon in decision D 1/93, namely the requirement to obtain grade 4 or better in each re-sit. Thus, the same problem applied to the criteria stated in REE 1994 and IP 1994 as in REE 1991 and IP 1991 in the case of the

results at the first re-sit. The same problem should, therefore, be considered in the same way and with the same conclusion being reached. The equivalent results demonstrated an equivalent fitness to practise.

- (xi) It was not consistent to state that equivalent provisions, i.e. REE 1991 and IP 1991, on the one hand, and REE 1994 and IP 1994, on the other, had to be taken in a way which stated that room for interpretation and borderline assessment were possible for the first, but not the latter. Such an approach applied an inconsistent standard to "fitness to practise". Performances that had been good enough in 1991 and 1992 were not now deemed good enough, despite a clear requirement that a consistent standard be applied overtime. The statements in REE 1994 and IP 1994 were no more exhaustive than the statements in REE 1991 and IP 1991. The fact that under REE 1994 and IP 1994 the number of partial resits was no longer limited was irrelevant when assessing fitness to practise of a candidate.
- (xii) The argument that borderline assessment was no longer possible under REE 1994 and IP 1994 was not in keeping with the higher requirements of fairness and consistency, both to the candidates themselves and to the public.
- (xiii) In decision D 8/96 (OJ EPO 1998, 302) the Disciplinary Board of Appeal referred to the concept of compensation for grades being applicable in a first sitting or between two sittings where a module was sat at each. The Appellant should not be penalised for sitting all the papers in the first sitting, when the

results of the first sitting for the first module, i.e. Papers A and B, and the results of the resit for the second module, i.e. Papers C and D, would have been sufficient for a candidate to be deemed fit to practise if Papers C and D had not been sat at the first attempt. The Appellant had gained no benefit from taking four papers the first time; indeed significant extra work had been involved. It was contrary to fundamental principles of justice to distinguish between such cases.

- (xiv) The statement in decision D 8/96 that Article 17(1) REE 1994 was exhaustive was merely one interpretation. The REE 1994 did not state that such a set of conditions were exhaustive. The definition merely defined what shall be declared a pass. Contrary to decision D 8/96, room for interpretation continued and indeed was consistent with past practice. If the REE 1994 definition of what was to be deemed a pass was to be exhaustive, then the REE 1994 should affirmatively state that.
- (xv) The Appellant could not have been aware of decision D 8/96 when the papers in question had been sat or the appeal had been made. Therefore, the applicable practice which should have been followed by the EPO was that of decision D 1/93, and not the practice of decision D 8/96, when considering the present appeal.

VII. 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 27(4) REE 1994.

VIII. On 3 November 1999, oral proceedings took place in the absence of the Appellant.

The Appellant, who had duly been summoned, informed the Disciplinary Board of Appeal by letter received by the EPO on 2 November 1999 that she would not attend oral proceedings. Based on Rule 71(2) EPC, in conjunction with Article 27(4) REE 1994 and Article 13(2) of the Regulation on Discipline for Professional Representatives, the proceedings were continued without the Appellant. The President of the EPO was represented. The President of the Council of the Institute of Professional Representatives was not represented. At the end of the oral proceedings, the decision was given orally.

Reasons for the Decision

1. The appeal is admissible.
2. In case D 1/93 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: 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 if the grades obtained by a candidate who did not pass the examination at the first sitting met the requirements provided under point IX of IP 1991. Failing this, the candidate had to resit all four papers at a subsequent examination.
3. Article 12(3) REE 1991 provided that, in case of a partial resit, a candidate would be declared to have passed the examination if he passed all papers of the partial resit, which meant that each of these papers

had to be awarded a grade from 1 to 4. Thus, if a candidate failed one or more papers at the partial resit, he once again had to resit all four papers at a subsequent examination.

4. Against the background of the legal situation that only one partial resit was possible, it thus became evident that a strict application of Article 12(3) REE 1991 and IP 1991 could give rise to consequences which would be consistent neither with the very purpose of the examination, namely to establish whether a candidate is fit to practise as a professional representative before the European Patent Office, nor with the principle of proportionality which requires that the examination standards be adapted to that purpose (cf. decision D 5/92 of 26 November 1993, point 6 of the Reasons).
5. Therefore, while the overall assessment of candidates in borderline cases was meant to be abandoned by 1991 (cf. decision D 8/96, point 2 of the Reasons), the Disciplinary Board of Appeal, in decisions D 5/92 and D 1/93, 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 practise although he failed one paper at a partial resit.
6. The Appellant sat the examination for the first time in 1995 and resat two papers in 1996, one of which she failed. The following provisions were applicable to these examinations: REE 1994 and IP 1994. Under REE 1994 and IP 1994 the number of partial resits is not

limited, and the partial resits do not depend on certain preconditions (which, incidentally, the Appellant would not have met) as was the case under REE 1991 and IP 1991. Consequently, in the present case, the legal situation is fundamentally different from that underlying decisions D 5/92 and D 1/93.

7. Article 17(1) REE 1994 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, they obtain the minimum grades required under the IP 1994. Article 17(1) REE 1994 is thus in itself 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, fulfils the requirements of Rule 10 IP 1994. This interpretation is corroborated by Rule 14 IP 1994, which provides 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". Consequently, there is no room for compensating a grade in a given paper by any grades in other papers in the case of a partial resit under REE 1994 and IP 1994. Rather, in the judgement of the Disciplinary Board of Appeal, REE 1994 and IP 1994 have brought the former system of an overall assessment in borderline cases pertaining to partial resits to a final close (cf. decision D 8/96, point 4 of the Reasons).
8. The introduction of the possibility to sit the examination in modules according to Article 14 REE 1994 and indeed to resit only papers in which a candidate was not successful according to Article 18 REE 1994, with the number of partial resits not being limited, undoubtedly means a significant relief to candidates, which is counterbalanced by the cancelling of the

examination of so-called borderline cases pertaining to partial resits. In the judgement of the Disciplinary Board of Appeal, the provisions of REE 1994 and IP 1994 thus form a legal system which is well-balanced and perfectly in keeping with the purpose of the examination and the principle of proportionality (cf. point 4 supra).

9. Unlike a candidate who resits Papers C and D, a candidate who sits the second module (cf. Article 14 REE 1994, Rule 2 IP 1994) does sit these papers for the first time. The Appellant's submission that she is merely in the position of those who avail themselves of the modular sitting of the examination is therefore not correct. By the same token, the Appellant's submission that her overall performance is better than the performance of a candidate who would have been deemed passed if he or she had chosen to sit the examination in two modules is not pertinent either.
10. A candidate who sits the examination the first time may choose either to sit all four papers or to sit the examination in two modules pursuant to Article 14 REE 1994. If a candidate who sits all four papers is declared to have passed the examination, he or she definitely gains a time advantage in comparison with a candidate who chooses to sit the examination in two modules. Thus, contrary to the Appellant's submission, a candidate sitting all four papers may indeed gain a benefit from taking all these papers the first time.
11. There is no causal relation between the overall performance of the Appellant in the European qualifying examinations 1995 and 1996, on the one hand, and the fact that the Appellant could not have been aware of decision D 8/96, on the other. The Appellant's submission based on this lack of knowledge is thus irrelevant.

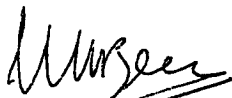
12. The Appellant did not pass Paper D in the partial resit in 1996. The Examination Board thus correctly decided that, pursuant to Article 17(1) REE 1994 and Rule 14 IP 1994, the Appellant was not deemed to have passed the examination. Hence, the Disciplinary Board of Appeal cannot allow the appeal. Since the appeal is not allowed, the reimbursement of the appeal fee is not possible pursuant to Article 27(4) REE 1994, 3rd sentence.

Order

For these reasons it is decided that:

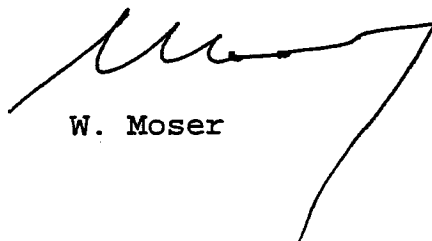
The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



W. Moser