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Boards of Appeal

Chambres de recours

Case Number: D 0006/99

D E C I S I O N
of the Disciplinary Board of Appeal
of 6 July 2001

Appellant: n.n.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
23 September 1998.

Composition of the Board:

Chairman: C. Holtz
Members: B. Schachenmann
J.-P. Seitz
E. Klausner
A. Armengaud Aîné

Summary of Facts and Submissions

I. The appellant sat the European Qualifying Examination (EQE) in two modules, papers A and B in 1996 and papers C and D in 1998. In the decision under appeal dated 23 September 1998 and posted on 29 September 1998, the appellant was informed that the papers had been marked as follows:

| | |
|---------|----------|
| Paper A | 4 (1996) |
| Paper B | 4 (1996) |
| Paper C | 5 - fail |
| Paper D | 4 - pass |

and that he had not been successful in the EQE 1998.

II. By letter of 16 October 1998 the appellant appealed against the decision, stating the grounds on which the appeal was based. Further arguments were brought forward in a letter of 27 October 1998. The appeal fee was paid on 20 October 1998. Still further arguments were submitted by the appellant in a letter dated 2 March 1999.

III. The appellant's submissions can be summarized as follows:

(i) The "instructions" referred to in Article 16 of the Regulation on the European qualifying examination (REE) had not been correctly applied in the marking of paper A. In his understanding these instructions, although not published, required that where a candidate missed the next higher grade by one mark the better mark for each sub-category of the paper be counted. Had the better mark of one examiner ("8" for the description) been added to the remaining marks of

the other examiner, this would have resulted in a total of 30 marks and a grade 3 for paper A. Thus, grade 5 obtained for paper C could have been compensated according to Rule 10(1)(a) of the Implementing provisions (1996) to the REE (IP(1996)), so that he would have passed the examination overall.

- (ii) If such "instructions" did not exist as the Examination Secretariat had informed him, Article 16 REE was violated because no uniform marking was possible. The fact that the marks of the two examiners for his paper A consistently differed by one mark in each sub-category supported the contention that the instructions on uniform marking were insufficiently detailed to resolve a pass from a fail with a reasonable degree of certainty where the candidate failed by one mark. He had difficulties to accept that a subjective one mark difference awarded for the sub-category "description" of his paper A was the difference between an overall pass and a fail and was therefore of major importance.

If, on the other hand, such instructions did exist but were not available to appealing candidates, it would be impossible for them to formulate a strong argument in support of their appeal. He should therefore be allowed to obtain a copy of these instructions.

- (iii) Rule 3, paragraph 2, IP(1996) had been applied in such a way that it contradicted paragraph 1 of this Rule which required that candidates in borderline pass/fail cases be given the benefit of doubt. Failing to obtain a grade 3 for paper A

by one mark where the two examiners disagreed by one mark in the sub-category "description" was not an indication that the candidate was "unfit to practise".

IV. In response to an enquiry made by the Disciplinary Board of Appeal the Secretary of the Examination Board confirmed by letter of 19 November 1999 that for the 1996 EQE the "instructions" referred to in Article 16 REE were contained in Rules 3 to 8 IP(1996), that the Examination Board had not issued any other non-published marking instructions, and that no other rules than those mentioned above were followed by the Examination Board or the examination committees.

V. By communication of 10 February 2000 the Disciplinary Board of Appeal transmitted a copy of the letter referred to above to the appellant pointing out that it had no reason to question the statements made therein. The appellant's arguments referring to Article 16 REE did not therefore appear to be well founded. The same seemed to be true for the alleged infringement of Rule 3 IP(1996) which explicitly provided that the examiners shall mark each paper separately as though it were the only one in the examination. Thus, according to the jurisprudence of the Disciplinary Board of Appeal, the principle of "benefit of doubt" in borderline cases was not applicable beyond the limits of Rule 10 IP(1996).

The Disciplinary Board of Appeal also drew the appellant's attention to Article 27(1) REE limiting the review of appealed decisions to alleged infringements of the law. According to D 12/97, review by the Disciplinary Board of Appeal was confined to clear abuses of discretion.

VI. In a reply of 25 February 2000 the appellant referred to the decisions D 8/96 and D 9/96 of the Disciplinary Board of Appeal and submitted that, in view of these decisions, an abuse of the discretion of the Examination Board may have taken place for the following reasons:

- (i) the appellant had failed to achieve a pass by only one mark and was seeking to compensate for only one paper;
- (ii) in applying its discretionary power it would have been easy for the Examination Board to "find" the missing mark. Moreover, his papers A and B were both comfortable passes;
- (iii) if the uniform marking instructions referred to in Article 16 REE were nothing more than Rules 3 to 8 IP(1996) to the REE, the assignment of the marks was almost entirely left to the discretion of the members of the examination committees. Given that therefore a margin of error existed in the marks awarded, the Examination Board had not made proper use of its discretionary power in declaring the appellant to have failed the examination because of a shortfall of one mark in his paper A.

VII. The appellant requested (main request) that the decision of the Examination Board be set aside, that a pass be awarded and that the appeal fee and any enrolment fee that the appellant subsequently might have paid be refunded. As a subsidiary request he requested that the Disciplinary Board of Appeal investigate whether or not the Examination Board took account of his paper A marks when reaching its decision and that, if this question was answered in the negative, the papers be remitted to the Examination

Board for reconsideration. Should the Disciplinary Board of Appeal envisage rejecting both requests, oral proceedings were requested.

- VIII. Oral proceedings were scheduled for 31 January 2001. However, the appellant informed the Board on 25 January 2001 that he was unable to attend and withdrew the corresponding request.

Reasons for the Decision

1. The appeal is admissible.
2. The present appeal is, in essence, based on the appellant's assumption that he had failed to achieve a pass by only one mark in paper A due to non-uniform marking by the two examiners resulting in a margin of error that the Examination Board should have taken into account.
3. As far as the marks awarded for paper A are concerned, the marking sheet shows the following: the two examiners who marked the answers awarded paper A a mark of 29 and 28, respectively, whereas a mark of 30 was necessary for grade 3. Their marks do not differ in more than 1 for each sub-category as well as for the paper as a whole. As set out by the Disciplinary Board of Appeal in its decision D 4/99 such differences do not, as such, violate the REE and its implementing regulations. They are an unavoidable consequence of Article 8(b) REE providing that each answer being marked separately by the two examiners. Nor is the Disciplinary Board of Appeal aware of any provision supporting the appellant's submission that in such cases only the better mark awarded in each category of his paper A should be counted.

4. In any case, the two examiners were in agreement that a mark of less than 30 had to be awarded to appellants' paper A and that, therefore, a grade 3 ("good performance") could not be awarded to it. Also for this reason it cannot be said that the appellants' answers were marked in a non-uniform manner.

5. On inquiry from the Disciplinary Board of Appeal the Examination Secretariat confirmed that, for the 1996 EQE, the instructions for uniform marking referred to in Article 16 REE were contained in Rules 3 to 8 IP(1996) and that no other rules were followed by the Examination Board or the examination committee. According to the jurisprudence of the Disciplinary Board of Appeal (D 8/96, point 4 of the reasons) Rules 3 to 8 IP(1996) indeed were considered as sufficient instructions to the members of the examination committees to ensure a uniform marking of candidates' papers.

6. In this connection, the appellant submitted that, if the marking instructions referred to in Article 16 REE were nothing else than Rules 3 to 8 IP (1996), the assignment of the marks was almost entirely left to the discretion of the members of the examination committees. Given that therefore a margin of error existed in the marks awarded, the Examination Board had not made proper use of its discretionary power in declaring the appellant to have failed the examination because of a shortfall of one mark in his paper A.

According to Article 7(3) REE, it is the Examination Board which, on the basis of the grades proposed to it by the examination committees, determines the grade for each paper. Hence, the Examination Board decides on the grades for each paper in knowledge of the (possibly different) marks awarded by the two examiners. In the course of the discussion the examiners may be asked by

the Examination Board which marks were missing in order for the Board to assess whether a candidate should be awarded a pass grade. The Board could also ask the Chairman of the committee if a fail grade could be a 4, if all other papers were excellent (D 8/96, point VI). These conditions are however not met here.

There is of course a certain discretion which is a major element in any examination procedure. However, in this respect review by the Disciplinary Board of Appeal is confined to clear abuses of discretion or mistakes in the marking procedure which do not require that the examination be reopened (D 12/97, point 3 of the reasons; D 1/92, OJ 1993, 357, head note). Mistakes are limited to errors such as calculation or typing errors which would be corrigible under Rule 89 EPC (see decision D 23/97, point 5 of the reasons).

In the circumstances of the present case, the two examiners both proposed a mark of less than 30. Thus, they agreed that, in accordance with the schedule of marks, appellant's paper A should not be awarded a grade 3 but a grade 4. Against this background, the decision of the Examination Board to follow the unanimous proposal of the examiners and the examination committee to award the paper a grade 4 cannot be considered as a mistake or an abuse of discretion.

7. For the reasons set out above, the appellant's main request cannot be granted. According to his subsidiary request the Disciplinary Board of Appeal should investigate whether or not the Examination Board took account of his paper A marks when reaching the decision under appeal. In support of this request the appellant submitted that his papers A and B sat in 1996 were not borderline cases in 1996. Only in 1998 his papers as a

whole became a borderline case, a fact of which no indication could have been given to the Examination Board when taking its decision.

However, whereas the Examination Board has a certain discretion when determining the grades for each paper (Article 7(3) REE), there is none when it comes to deciding on a pass or fail result. As was set out by the Disciplinary Board of Appeal in its decision D 8/96, Article 17(1) REE of 1994 is exhaustive leaving no room for interpretation beyond its wording. No compensation of the grades is possible beyond the provisions of Rule 10 IP(1996). Consequently, the system introduced in 1994 does not, in this respect, allow for any discretion in borderline cases. Thus, it would not have been appropriate for the Examination Board to revise the grade 4 originally awarded to paper A in view of a possible later compensation under Rule 10 IP(1996). Any such revision would have contradicted Rule 9(3) IP(1996) according to which candidates shall be informed of the grades awarded in the first module before sitting the second module, a necessary consequence of the provisions for sitting the examination in modules. Thus, the result of the requested investigation would be irrelevant as, for the application of the provisions of Rule 10 IP(1996), the Examination Board still had to rely on the marks awarded for papers A and B in 1996. The subsidiary request must therefore be rejected.

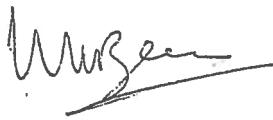
8. Since the appeal is not successful, the requests for refund of the enrolment fee and the appeal fee must also be refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



C. Holtz

R. Sch.