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<b>Date of decision</b>	<b>04 Februar 2000</b>	<b>Case number</b>	<b>D 0012/99 - DBA</b>
<b>Application number</b>			
<b>IPC</b>		<b>Procedure Language</b>	<b>EN</b>
<b>Title of the application</b>			
<b>Applicant name</b>	<b>N.N.</b>	<b>Opponent name</b>	
<b>Headnote</b>		<b>Articles and Rules</b>	
<b>Keywords</b>		<b>Cited Decisions</b>	
<b>Catchwords:</b>			

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### Summary of Facts and Submissions ▲

I. The Appellant sat the European Qualifying Examination in modules. After the first module in 1997 he was informed that his papers had been marked as follows: Paper A: 4, paper B: 4. In the decision under appeal, dated 29 September 1998, he was informed that in the second module paper C had been marked: 4 and paper D: 5 and that the Examination Board had decided that the appellant had not been successful in the examination 1998.

II. By letter received on 18 November 1998, the Appellant appealed against that decision and filed grounds of appeal. At the same date, he paid the appeal fee.

III. The Appellant submitted that he should have been awarded a grade 3 instead of grade 4 for his paper A. He explained certain aspects of the drafting of the set of claims in his paper which justified, he claimed, the addition of one mark in order to obtain grade 3 according to the marking scheme. In addition, he pointed to the fact that the two examiners had disagreed with one-another by one mark and suggested he should be given the benefit of the doubt and be given the one extra mark. Furthermore, he submitted to have a right to be provided with a detailed reasoning explaining why and on which legal and technical points marks had been lost and awarded.

IV. In a communication of the Board, the Appellant was informed that the Board was empowered only to investigate whether the decision under appeal constituted, or was based on, an infringement of the Regulation on the European qualifying examination for professional representatives (REE) or any provision relating to its application (Article 27(1) REE), or of higher ranking law.

Consequently, the Board was in principle not competent to review marks or grades unless serious errors had occurred which were so obvious that they could be established without re-opening the entire marking procedure. The only mistakes which could be taken into account were those that were relevant to the decision under appeal and that could be readily verified by the legal principles incorporated in the REE and the provisions relating to its application. Such errors had not been shown in the statement of grounds of appeal. Referring to D 1/92, OJ 1993, 357 and D 6/92, 1993, 361, it was emphasized that, according to the Disciplinary Board case law, requests to the Board based on the allegation that the Examiners' evaluation of the answers, or the Examination Board's determination of grades, should have been more favourable for the candidate, could not be allowed since the functions of the Disciplinary Board did not include reconsidering the examination procedure on its merits and thus the value judgments were not subject to judicial review. Indeed such requests fell outside the Board's jurisdiction.

In particular, the fact that the second examiner had given one point more for the independent claims and one point less for the dependent claims than the first examiner could not be considered a violation of the principle that the candidates' answers should be marked in a uniform manner. Rather, such slight differences in marking resulted from the fact that marking involved value judgments which were not mere mathematical operations necessarily and always resulting in the same figures.

As regards the Appellant's request to be provided with a detailed reasoning explaining why and on which points marks were lost and awarded, the communication made reference to decision D 12/97 (OJ EPO 1999, 566) dealing with a similar request. According to this decision, the REE did not require that the decision of the Examination Board on a candidate's failure to pass the examination be reasoned. Pursuant to Article 25(2) REE in connection with Rule 9(2) of the Implementing provisions to the REE, only the answers and the marking sheets were to be sent to the unsuccessful candidates. This had been done in the present case.

V. In his reply, the Appellant referred to point (7) of his grounds of appeal alleging that there was an apparent contradiction in the paper. Preferred embodiments of emulsifiers according to the invention were identified as "homologous mixtures with an average value of  $n$  ranging from 2-4",  $n$  being the degree of oxyalkylation. He considered this indication to be misleading since the product could be either a mixture or homologous. In the practice of a professional representative such contradiction could be clarified by an enquiry with the client. The lack of such information, normally available to a professional representative, was an infringement of Article 13(3)(a) REE. Any specialist knowledge necessary to come to an unambiguous interpretation could not be expected from the candidates.

VI. The Appellant requested that the decision under appeal be set aside and that he be declared as having passed the European Qualifying Examination 1998. Auxiliarily, he requested that a detailed breakdown of the marking scheme as applied to his paper A be provided to him and he be permitted to submit further grounds for appeal on the basis of such information. In addition, he requested that the appeal fee and the examination fee in respect of the resitting of paper D in 1999 be reimbursed.

#### **Reasons for the Decision ▲**

1. The appeal is admissible.
2. In the communication of the Board, the Appellant was informed of the reasons why the Board is not in a position to reopen the marking procedure and why there is no right to be provided with a detailed breakdown of the marking scheme

explaining why marks were lost and awarded. The Board's objections in this respect have not been commented upon. Therefore, the Board maintains its position in this respect for the reasons set out in the communication.

3. As concerns the alleged contradiction in paper A, a violation of Article 13(3)(a) REE cannot be accepted. Pursuant to said provision the examination papers shall at least cover "the drafting of claims and the introductory part of a European patent application on the basis of such information as is normally available to a professional representative for the purposes of carrying out this task". The client's letter in paper A is such type of information. The inconsistency between the term "homologous" on the one hand and the term "mixture" on the other hand alleged by the Appellant does not exist. Since homologous does not mean identical, the mixture consisting of different homologues, as indicated in the client's letter, consisted of components with different values of  $n$ . Therefore, the indication of an average value from 2-4 was technically meaningful and correct.

4. The Disciplinary Board consequently can find no reason to allow the appeal. Hence, pursuant to Article 27(3) REE, reimbursement of the appeal fee is not possible. Furthermore, there is no legal basis for reimbursement of the enrolment fee for the 1999 examination.

5. In addition to his requests (above, pt. VI), the Appellant asked for clarification what would happen if his appeal were still pending at the time of the next examination. Within the scope of this appeal, this Board can only decide on the Appellant's success in the examination 1998. Any queries concerning later examinations are outside the scope of this appeal and have to be addressed to the bodies responsible for conducting the examination under the REE.

#### **ORDER ▲**

For these reasons it is decided that:

The appeal is dismissed.

#### **Remarks:**

#### **O.J. EPO issue:**