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Boards of Appeal

Chambres de recours

Case Number: D 0013/99

D E C I S I O N
of the Disciplinary Board of Appeal
of 27 September 2000

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: P. Messerli
Members: B. Schachenmann
R. Menapace
E. Klausner
Ch. Onn

Summary of Facts and Submissions

I. The appellant sat the European qualifying examination for professional representatives held from 1 to 3 April 1998.

II. By letter dated 29 September 1998 he was notified of the decision of the Examination Board that he had not been successful in the examination as his performance in the various papers had been marked as follows:

A:4 - pass

B:4 - pass

C:4 - pass

D:5 - fail

III. Notice of appeal against this decision was filed on 7 November 1998 together with a statement setting out the grounds for appeal. The appeal fee was paid on the same date.

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

The aim of the qualifying examination is to determine whether the candidate is "fit to practise". According to Article 17 REE a candidate sitting the examination for the first time is considered fit to practise if he obtains the minimum grades required under the implementing provisions (IP). Under the implementing provisions applied to his examination (i.e. the IP 1994) he did not obtain the required minimum grades. However, had the new implementing provisions adopted on 28 April 1998 (IP 1998) been applied, he would have been awarded a "pass" grade for all papers. Since the new provisions were the result of progressing insight

with regard to the requirements to be fit to practice, it was in conflict with the aim of the examination to apply the replaced IP 1994 which were no longer regarded as adequate.

According to Rule 9(1) of the IP 1998 a candidate who already sat the first module of the examination but not the second module when the new IP entered into force benefits from either the old or the new IP whichever are more favourable. Thereby a difference between two groups of candidates was introduced, i.e. between those who only sat the first module in 1998 and those who sat the whole examination in 1998. It is an unjustified legal inequality that only candidates of the first group had the advantage of the most favourable law, all so more so as, at the time of enrolment for the examination, the candidates were unaware that the IP would change.

- V. In reply to a communication of the Disciplinary Board of Appeal the appellant added that the principle of equal treatment would have required not to change the IP without previously informing the candidates of the 1998 examination so that they could have made the choice between enrolment for the first module only or the whole examination, in full awareness of the IP that would apply to their case.
- VI. For these reasons the appellant requested that the decision under appeal be set aside and he be declared to have passed the European qualifying examination in 1998. Further he requested the reimbursement of the appeal fee and of the examination fee for the enrolment for the examination in 1999.

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, and have not made any comment.

Reasons for the Decision

1. While the present appeal was pending, the appellant passed the European qualifying examination held in 1999. Nevertheless, he is considered to be adversely affected by the impugned decision for the reasons set out in point 1 of decision D 8/96, OJ EPO 1998, 302. The appeal is therefore admissible.

2. The first issue to be determined concerns the law applicable to the appellant's case. The appellant states that the Examination Board should have based its decision on the new Implementing provisions to the REE adopted in April 1998.
 - 2.1 According to Article 17(1) REE a candidate shall be declared to have passed the examination if, the first time he sits the examination, he obtains the minimum grades required under the implementing provisions. Article 7(6) REE confers the power to draw up such implementing provisions upon the Examination Board, including the power to change them.

 - 2.2 It is clear that under Article 17(1) REE the Examination Board has to apply the implementing provisions (including possible transition provisions) in force at the time of the examination, since the candidates have the right of being treated in accordance with the legal provisions in force when they

enrol for and sit the examination. On the other hand, they cannot expect that these provisions remain unchanged in the future (see Article 7(6) REE). Neither is there any legal provision requiring advance information of the candidates in that case.

- 2.3 The appellant sat all papers for the first time at the European qualifying examination held from 1 to 3 April 1998. The relevant legal provisions then in force were those of the REE 1994, published in the OJ EPO 1994, 7, and the Implementing provisions published in the OJ EPO 1994, 595, with amendments published in the OJ EPO 1995, 652 (IP 1994). It was only after the 1998 examination that new Implementing provisions were adopted. They did not enter into force until 1 July 1998. Rule 10(2) of the new provisions states that they only apply "to the European qualifying examination to be held in 1999 and all subsequent years", i.e. clearly not to the 1998 examination sat by the appellant.

Thus, since the appellant completed the examination in 1998, the Examination Board was correct to apply the REE 1994 and the IP 1994. The fact that the marking scheme of the IP 1994 was replaced later by another marking scheme neither means that the former provisions were retroactively repealed nor that they were inadequate for the examinations held under the former regime.

3. The appellant further refers to the principle of legal equality which he considers infringed by Rule 9 of the IP 1998. This Rule provides that candidates who, on 1 July 1998, had already sat the first but not the second module could benefit from either the IP 1994 or

the new IP whichever were more favourable. In the appellant's submission this provision introduced an unjustified legal inequality between two groups of candidates (see point IV, supra).

- 3.1 The principle of equal treatment as recognized in the proceedings before the EPO requires that similar situations shall not be treated differently unless differentiation is objectively justified (G 1/86, OJ EPO 1987, 447, point 13 of the reasons).

For the candidates referred to in Rule 9 IP 1998, the change of the law resulted in a situation in which different implementing provisions were in force when they sat the first and the second module, respectively. However, since the old and the new Implementing provisions (i.e. the IP 1994 and the IP 1998) are not compatible, only either of them can be applied. The transitional provisions of Rule 9 cope with this situation such as to avoid possible disadvantages for the group of candidates concerned by the change of the law.

For candidates who had completed their examination under the IP 1994 no such problems could arise. Hence, there was no objective need to provide any transitional provision for them.

The Disciplinary Board of Appeal is therefore satisfied that the differentiation made by Rule 9 of the new IP was objectively justified and did not exceed the extent required by the particular situation. This is all the more so as the new IP were introduced for the purpose of simplifying the marking scheme without the intention to change the overall pass rate. Also for this reason, the candidates concerned by Rule 9 of the new IP cannot be said to have been generally privileged over the others.

- 3.2 Neither does the Disciplinary Board of Appeal share the appellant's view that he was at a disadvantage compared with the candidates who had enrolled for the modular sitting. Whereas these candidates had to sit the papers C and D of the 1999 (or a later) examination, the appellant's calculations are based on his results for the papers C and D of the 1998 examination. The conclusions drawn by the appellant from these calculations are therefore merely hypothetical.
- 3.3 The appellant contends that the principle of equal treatment had required not to change the IP without informing the candidates enrolling for the 1998 examination in advance. However, as already mentioned (see point 2.2, supra), candidates cannot legitimately expect to be informed of future changes of the law. Any legitimate expectation can only be based on the legal situation as it exists at the time when a legally relevant act is performed so that retroactive application of new law is normally excluded. This, however, is exactly what was intended by the transitional provisions in question by virtue of which the new IP were not applicable to the particular situation of then unfinished examinations unless the candidates concerned agreed.
4. Since the appeal is not successful for the reasons set out above, the request for reimbursement of the appeal fee has to be rejected in accordance with Article 27(4) REE. The appellant's request for reimbursement of the examination fee for the examination in 1999 lacks any legal basis and has therefore to be rejected, too.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



P. Messerli