



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
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Case Number: D 0008/24

D E C I S I O N
of the Disciplinary Board of Appeal
of 8 January 2025

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated
1 July 2024 concerning the European
Qualifying Examination 2024.

Composition of the Board:

Chairman: I. Beckedorf

Members: P. Guntz

P. Walser

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Examination Board dated 1 July 2024 that the requirements of Article 14(1) of the Regulation on the European qualifying examination for professional representatives (REE, applicable version published in OJ EPO 2019, Supplementary publication 2, 2 ff) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2024.

II. The appellant sat the main examination of the European qualifying examination (hereinafter "EQE") 2024 for all papers A to D.

III. By letter dated 1 July 2024 from the Examination Secretariat, the Chairman of the Examination Board informed the appellant that, while the appellant's answer paper to paper B, C, and D were awarded 58, 47, and 56 marks, respectively, his answer paper to paper A was awarded only 42 marks and that, on the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled such that the appellant did not pass the EQE 2024.

For paper A, the letter contained the following marking details:

Examination Committee I: Paper A - Marking Details - Candidate No 82705

Category		Max. possible	Marks M98649	M29555
Independent Claims	Device	40	10	10
Independent Claims	Method	15	5	5
Dependent Claims	Set of Dependent Claims	30	17	17
Description	Introductory of a Description	15	10	10
Total			42	42

Examination Committee I agrees on 42 points and recommends the grade FAIL

IV. By his letter dated 8 July 2024, received by the Examination Secretariat on 23 July 2024, the appellant filed notice of appeal, including his statement of grounds of appeal, to challenge the decision of the Examination Board. He had paid the prescribed appeal fee already on 7 July 2024.

The appellant submitted that his answer to paper A had been incorrectly marked as a result of mistakes which were serious and so obvious that they could be established without re-opening the entire marking procedure. He claimed a failure of Examination Committee I to apply the marking scheme as published in the Examiners' report and a failure of the Examination Board to provide (with regard to the dependent claims) both a model answer and an appropriate marking scheme

broken down to each of the expected dependent claims in order to enable a consistent marking of the candidates' answers. These mistakes made him lose 7 marks and led to him failing paper A and, as a result, the EQE in its entirety. This was therefore an infringement of the provisions of the REE and the Implementing provisions to the Regulation on the European qualifying examination (IPREE, applicable version published in OJ EPO 2019, Supplementary publication 2, 18 ff). He believed that an objective evaluation of his answers to paper A should have led to his answer paper being awarded the higher grade of at least a COMPENSABLE FAIL.

V. By letter dated 5 September 2024 the Examination Secretariat informed the appellant that the Examination Board "[a]fter due consideration to all the arguments brought forward" had not allowed his appeal. The Examination Board added the following comment:

"The Examination Board has reviewed the marking of the paper in the light of the arguments presented in the appeal and comes to the conclusion that no further marks should have been awarded."

VI. Consequently, the Examination Board forwarded the appeal to the Disciplinary Board of Appeal of the EPO (DBA) without rectifying their decision.

VII. In accordance with Article 24(4), first sentence, REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (RDR, Supplementary publication 1, OJ EPO 2022, 142 ff), the DBA consulted both the President of the EPO and the President of the Council of the Institute of Professional Representatives before the EPO (epi), neither of whom presented any comment in writing on the merits of the appeal. The President of epi was represented at the oral proceedings.

VIII. The appellant's arguments relate to the marking of the dependent claims, relating to his process claim and to his method claim, and can be summarised as follows.

The decision under appeal infringed both on Article 6(6) REE and Rule 4(1) IPREE) and there was a strong suspicion that the appellant was double penalised in breach of Article 8(1)(d) REE in conjunction with Article 6(2)(c) REE.

Art. 6(6) REE which requires the preparation and publication of a model solution that extends to a model set of dependent claims was clearly infringed. This matter firmly sat within the competence of the Disciplinary Board. The Examination Board thus failed to give Examination Committee I clear instructions for marking the candidates' answers regarding Paper A consistently as required by Article 6(2)(c) REE.

The failure to provide marking sheets containing details regarding the respective dependent claims and the marks

awarded to each of them disregarded Article 6(2)(b) and Rule 4(1) IPREE.

There was furthermore a strong suspicion that the guidance given in the Examiners' report according to Article 6(2)(c) REE was not properly applied by the Examination Committee I when marking the appellant's answer and submitting their proposal according to Article 8(1)(d) REE and Rule 4(1) IPREE because applying the guidance on pages 8 to 10 would have led to awarding 24 marks to the appellant's set of dependent claims. This gave rise to the suspicion that the Examination Committee applied the 1-point deduction for claims depending of the less appropriate independent claim to the appellant's claims 6 to 11 and 13 without taking into account the reservation that - in order to avoid double penalisation - this deduction is not to be applied where the dependent claim refined the scope for a feature already present in such independent claim (see Examiners' report, page 9 first paragraph after the table, last sentence).

Thus, according to the appellant, the respective parts of paper A should have been awarded at least 7 more marks.

Together with the 42 marks already obtained it could be stated that he would have reached more than 45 marks without re-opening of the whole marking process.

IX. The Board issued two communications informing the appellant of its preliminary assessment of the appeal. Oral proceedings were held by video-conference on 8 January 2025.

X. The appellant finally requested that

- the decision under appeal be set aside.
- the case be remitted to the Examination Board for a new decision in relation to Paper A of the EQE 2024.
- the appeal fee be reimbursed.

Reasons for the Decision

Admissibility of the appeal

1. The notice of appeal and the statement of grounds of appeal were duly filed within the one-month time limit under Article 24(2) REE. The appeal fee was also paid on time. The appeal is therefore admissible.

Extent of the judicial review by the DBA

2. In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal, which followed

decision D 1/92 (OJ EPO 1993, 357), decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application, or higher-ranking law.

2.1. It is not the function of the Board to reconsider the entire examination procedure on the merits. This is because the Examination Committees and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the Board. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. This is for instance the case if an examiner is found to have based his evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgments are not, in principle, subject to judicial review (see e.g. D 1/92, *supra*, points 3 to 5 of the Reasons).

2.2 However, the freedom of evaluation must be exercised appropriately and without arbitrariness. In order to make the decision of the Examination Board in individual cases comprehensible for the applicant, Rule 4 (1) IPREE provides as an essential element of the examination procedure (see D 13/17, point 3.3 of the Reasons) that the participants are sent marking sheets which must contain details of the marks awarded. The basis for awarding the individual marks broken down by category can in turn be found in the published Examiners' report, which contains information on both the solutions expected from the candidates and any errors that may have had a negative impact on the assessment. This mechanism aims at standardising the assessment of candidates' answers in accordance with Article 6(2)(b) and (c) of the REE.

2.3 Thus, where a candidate's answer contains all the features considered necessary in the examiner's report, does not raise any objections to clarity and does not contain any superfluous, in particular unnecessarily restrictive, features, it may be expected that all marks foreseen in the Examiners' report be granted (see D 30/22, Reasons 1.8 and 1.9). It has also been held that justifiable and competently reasoned alternative solutions must be appropriately assessed and rewarded (see D 7/05 of 17.07.2006, Reasons 13, D 14/23, Reasons 2.2).

2.4 With regard to the possibility that marks might be lost twice for a single mistake because, owing to Paper A's structure, a wrong answer to one part could have implications for the answer to another part, it has been held that such a "double penalisation" was not in keeping with the standards for fair marking (see D 13/17, Reasons 3.7.1).

3. On the basis of the appeal it cannot be ruled out that the Examination Board violated these principles and committed a serious and obvious mistake by not correctly applying their own marking scheme and thereby penalising the appellant twice.

Dependent claims - model solution

3.1. The appellant is correct to state that, whereas model solutions for the independent claims have been provided, the Examiners' report 2024 - unlike in the years before - does not contain a detailed model solution regarding the dependent claims.

3.1.1 A breach of Article 6(6) REE does not necessarily result in a violation of an actual EQE candidate's rights, since the main purpose of Article 6(6), according to its last sentence, is to give future generations of candidates a means of preparation for their upcoming examinations.

3.1.2 However, Article 6(2)(c) REE protects the actual candidates' right for equal treatment and fair and consistent marking of their answers. The model solution is thus also a key element in enabling the members of the respective Examination Committee to consistently mark the candidates' answers and in allowing the candidates to comprehend the marking process and the individual grade achieved. Thus, candidates adversely affected by an EQE decision without the examiners having agreed on any model solution for the respective paper which is then sent to the Examination Board and published might base their appeal according to Article 24(1) REE on an infringement of Article 6(2)(c) REE.

3.1.3 In the case at hand, however, there is no absolute lack of a model solution. The Examiners' report lists a set of features that may be taken as the basis for formulating dependent claims. In most cases this will have been the basis for consistent marking of the candidates' papers. And the answer of one candidate has been published as an outstanding example. Thus, when taking into account the overall picture, the lack of the model solution alone does not seem to infringe Article 6(2)(c) REE.

3.1.4 It must be noted, even though, that a detailed model answer would have helped a lot to comprehend the marking process and to judge on whether the examiners have followed their own marking scheme, especially in a situation where 30% of all marks achievable in paper A have been awarded to the dependent claims.

The bullet-point list of possible contents of dependent claims in the Examiner's report cannot completely fill this gap, since the exact wording is important both for assessing possible clarity objections and for the question whether the broadest possible scope of protection could be achieved in the interest of the client, see the appellant's example regarding the use of „comprising“ or „consisting of“ with regard to a

dependent claim on the glue composition.

The exemplary candidate's answer is rather published to help future candidates in preparing their examinations and not so much to give guidance to the examiners when marking and transparency to the candidates when trying to understand where they lost marks, since it can neither be assumed that the answer has been awarded 100 points nor that it has been used at the outset of the marking process as a model for all the examiners to streamline a common consistent marking.

Thus, when assessing whether the Examining Committee apparently respected its own marking scheme (see below, point 3.3), the fact that the marking process was apparently not based on a fully formulated model solution will have to be taken into account.

Independent claims - detailed break down of marks awarded

3.2. It is also true that the marking sheet provided by the Examination Board for every candidate according to Rule 4(1) IPREE is not broken down to each and every single dependent claim.

3.2.1 This seems to be a problem against the background that 30% of all the marks achievable in Paper A are awarded for the dependent claims and that the marking scheme provided for in the Examiners' report establishes a combination of adding points for selecting suitable subject matter to draft a potentially valuable dependent claim and deducing points for minor deficiencies, such as a lack of clarity or choosing the wrong dependency. Thus, the only figure shown in the marking sheet is - unlike the figures regarding other major parts of paper A like the independent claims - not only the difference between an achievable amount minus deductions for all the detected deficiencies but the sum of a multitude of such operations and, thus a rather complex calculation which is detrimental to transparency for the candidates trying to comprehend where they have lost achievable marks.

3.2.2 A more detailed marking sheet would in fact be helpful in this situation. However, it is not for the Disciplinary Board, but for the Examination Committee to draft and the Examination Board to decide on the marking sheets used for the respective papers, see Article 6(2)(b) and 6(3)(b) REE, thereby enjoying discretion how to fulfil this task. Thus, whereas the respective bodies might consider avoiding the above-mentioned problems by providing more detailed marking sheets in the future, the Board does not yet consider the limits of discretion to have been overstretched in violation of Rule 4(1) IPREE and Article 6(3)(b) in the case at hand.

3.2.3 However, the lack of transparency will need to be considered when assessing whether the Examination Committee respected its own marking scheme.

3.3 Candidates may expect that the marking scheme proposed by the Examination Committee and accepted by the Examination Board be applied in the interest of a consistent and fair marking (see above, point 2.3), especially that the measures to avoid double penalisation as set out in the Examiners' report be really implemented (see 2.4).

3.3.1 Of the 15 items listed in the Examiners' report as potentially suitable subject matter for drafting independent claims the appellant covered 13, allowing for a maximal achievable amount of 27 marks in his dependent device claims 2 to 11 and method claims 13 to 15. Taking into account the Examiners' report's guidance on deductions for multiple features (see page 9, second paragraph after the table, second sentence) in claim 3 and for lack of clarity (see sentence bridging page 9 and 10) in claim 7, the appellant might have reached 24 marks. However he was only awarded 17 marks, the reasons being not at once apparent. Thus, there is a strong suspicion that the members of the Examining Committee deduced 7 points for wrong dependencies according to the guidance given on page 9, first paragraph below the table, first sentence, without taking into account the fact that the dependent claims referred to features that had already been misallocated in the independent claims with the consequence that they had already lost marks there and should not suffer from a second loss of marks within the assessment of the dependent claims (see the guidance given in said paragraph, second sentence).

While the Disciplinary Board could assume that some of the marks were deduced correctly or lost for other reasons, it is unable to see how a loss of all 7 marks might be justified. Thus, the suspicion that a double penalisation contrary to the guidance in the Examiners' report has taken place cannot be ruled out in the given situation where the lack of a fully formulated model solution and of a more detailed breakdown of marks in the marking sheet impairs the comprehension of the marking process (see above points 3.1 and 3.2).

3.3.2 In this rather special situation the Disciplinary Board sees no other possibility than to set aside the impugned decision and to order a re-assessment of the appellant's answer regarding paper A taking into account the prohibition of double-penalisation.

Request for reimbursement of the appeal fee

4. With respect to the appellant's request for reimbursement of the appeal fee, reference is made to Article 24 (4), third sentence, REE.

The appeal is successful, no requests have been maintained that need to be refused, and the board considers it equitable to order the reimbursement of the appeal fee in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board for a new decision related to Paper A of the EQE 2024.
3. The appeal fee is reimbursed in full.

The Registrar:



The Chairman:

N. Michaleczek

I. Beckedorf

Decision electronically authenticated