





## Opinion

The Commissioner has authority to establish regulations governing “the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent and Trademark Office [“PTO”].” See 35 U.S.C. § 31; Premysler v. Lehman, 71 F.2d 387, 389, 37 USPQ2d 1057, 1059 (Fed. Cir. 1995). PTO regulations provide that an applicant will not be registered to practice before the Office unless he or she is “possessed of the legal, scientific, and technical qualifications necessary to enable him or her to render applicants for patents valuable service.” 37 C.F.R. § 10.7(a)(2)(ii). The rules further provide that to establish such qualifications, “each applicant for registration must take and pass an examination which is held from time to time.” 37 C.F.R. § 10.7(b). The General Requirements bulletin provides the PTO’s interpretive rules regarding the registration examination. Premysler, 71 F.2d at 390, 37 USPQ2d at 1059.

In this case, Petitioner asks for a waiver of the regulation requiring applicants to take and pass the registration examination because he was allegedly denied special accommodations when he took the August 1998 exam. However, in order to be accorded the waiver, Petitioner must establish “an extraordinary situation, when justice requires” such a waiver. 37 C.F.R. § 10.170. This requires a showing that circumstances exist where no other appropriate course of action for relief exists. See Margolis v. Banner, 599 F.2d 435, 443, 202 USPQ 365, 373 (CCPA 1979) (extraordinary circumstances existed sufficient to grant writ of mandamus where no other avenue of review was available).

Petitioner has not demonstrated that his situation is “extraordinary” such that justice would require waiver of the rules. In this case, Petitioner has alternative remedies available to

him. Namely, he may apply to take the next examination with a request for special accommodations and possibly obtain a passing score. See In re Klein, 16 USPQ2d 1965, 1966 (Comm'r Dec. 1990) (denying waiver under 37 C.F.R. § 10.170(a) of rules setting forth preconditions to reinstatement despite hardship to petitioner of satisfying those preconditions). Accordingly, Petitioner has not alleged any circumstances rising to the level of such an "extraordinary situation" which would require waiver of the rules. "[T]he purpose of the ADA is to ensure that disabled persons are placed on equal footing with the non-disabled, but it is not meant to give such persons an unfair advantage." Florida Board of Bar Examiners re: S.G., 707 So. 2d 323, 325 (Fla. 1998) (holding that modifications of an examination that would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test" are not required under the ADA). To entirely waive the exam requirement in this case would amount to preferential treatment of this applicant, providing an "unfair advantage."

The issues of Petitioner's qualification as an individual with a disability under the ADA and his entitlement to special accommodations are not ripe for review here because no initial determination on these matters has ever been made by OED. In fact, there is no evidence in Petitioner's file that OED ever received a request for special accommodations prior to the August 1998 examination. OED has conducted a search of their records and has found no documents evidencing either a request by Petitioner for special accommodations for the August 1998 examination or any action on such a request. OED maintains a list of all applicants who requested special accommodations for the August 1998 examination. Petitioner's name was not on that list. Additionally, OED found no record of any complaints made regarding denial of special accommodations at the test site in \_\_\_\_\_, for the August 1998 examination.

Furthermore, OED requested the Office of Personnel Management (OPM), which administers the examination, to search its records regarding any request by Petitioner for special accommodations or any complaints regarding denial of special accommodations for the August 1998 examination. OPM responded that it had no records. Accordingly, based on the records of the Office, there is no evidence that OED either received or denied Petitioner's request.

Petitioner further argues that precedent exists for allowing a bar applicant to be registered without passing a bar exam when reasonable accommodations were not provided, citing In re Petition of Kara B. Rubenstein, 637 A.2d 1131 (Del. 1994). However, the facts of that case are distinguishable from the present situation. In Rubenstein, a determination was made, based on applicants's documented learning disabilities, to grant reasonable accommodations of additional time and a separate room for the state portion of the Bar exam, but the requested accommodations were denied for the Multistate Bar Exam (MBE) portion of the exam. Id. at 1134. Applicant passed the state portion of the bar exam, but missed passing the MBE by two points. Id. Applicant had previously passed the MBE in a prior sitting. Id. at 1139. The court held that the inconsistent accommodations were not supported by the record, and, therefore, not reasonable. Id. at 1138. Based on the facts of record establishing that applicant had already demonstrated her ability to pass the MBE portion of the bar exam and that she had demonstrated her competence to practice law as attested to in affidavits by members of the Delaware judiciary that she practiced before, the court waived the requirement of passing the examination. Id. at 1139-40.

In Petitioner's case, none of these factors are present. There has been no adverse ruling denying special accommodations or providing inconsistent accommodations to petitioner.

Moreover, there has been no independent showing on this record of Petitioner's "legal, scientific, and technical qualifications" necessary to enable him to "render applicants for patents valuable service," as required by 37 C.F.R. § 10.7(a)(2)(ii). Nor has Petitioner established that he was able to separately pass the afternoon section of the examination prior to August 1998. Accordingly, there is no compelling reason to waive the requirement that Petitioner take and pass the entire examination in this case.

Petitioner has included a letter requesting special accommodations for the November 1999 PTO Registration Examination in the event that this petition is not granted. This letter references two enclosures: (1) "\_\_\_\_\_ -letter for my need for special accommodations," and (2) "\_\_\_\_\_ letter confirmation of my testing accommodations." Neither enclosure was enclosed.

This request letter to the Commissioner is premature, because such a request for special accommodations must be made in conjunction with an application to take the November 1999 examination. The Director makes all initial decisions regarding special accommodations. The letter is therefore being forwarded to OED for placement in Petitioner's file for consideration if and when Petitioner reapplies to take the next examination. Petitioner is advised that the General Requirements bulletin for the November 1999 examination (copy enclosed) sets forth the following requirements for requesting special accommodations:

If you have a disability for which special accommodations must be made for the upcoming examination, you must submit a separate letter with your application requesting disabled status. Your request must set forth your disability and the special accommodations that you need. Additional documentation, less than one year old, certifying the current severity of your disability and certifying that the accommodations requested are necessary for this disability should be sent by a licensed physician who has evaluated you regarding this condition. This documentation must be submitted for each examination for which special

accommodation is requested. In order to insure that arrangements can be made in sufficient time before the examination date, the request for disabled status and all required documentation must be submitted no later than August 16, 1999.

General Requirements Bulletin November 1999, page 5. Any request for special accommodations must be considered and acted on by the Director in the first instance. The filing deadline for applying for the examination is July 23, 1999.

### **CONCLUSION**

Petitioner's request to waive rule 37 C.F.R. § 10.7(b) requiring all applicants to take and pass the examination is denied. This is a final agency action.

### **ORDER**

Upon consideration of the petition to the Commissioner, it is ORDERED that the petition is denied.



Q. Todd Dickinson  
Acting Assistant Secretary of Commerce and  
Acting Commissioner of Patents and Trademarks

cc:

Karen L. Bovard  
Director, OED