

**UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS**

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	)	
In re	)	Decision on Petition
	)	for Refund of Regrade Fee
	)	
_____	)	

**MEMORANDUM AND ORDER**

(Petitioner) petitions the Commissioner for a refund of the \$230 fee

Petitioner paid for a Request for Regrade of the morning section of his August 26, 1998, registration examination. The petition is denied.

**BACKGROUND**

The August 26, 1998, registration examination (exam) required an applicant for registration to practice before the United States Patent and Trademark Office (PTO) to attain a passing grade of 70 in both the morning and afternoon sections of the exam. Petitioner passed the afternoon section, but scored a 60 on the morning section. On December 29, 1998, Petitioner filed a timely Request for Regrade of his exam pursuant to 37 C.F.R. § 10.7(c). Included in the petition was \$230 for the regrade fee. While waiting for a response to the regrade petition, on December 30, 1998, Petitioner submitted an application for the April 21, 1999, exam. On June 4, 1999, Petitioner was notified that he had passed the April 1999 exam. On July 8, 1999, the Commissioner dismissed Petitioner's Request for Regrade of the August 1998 exam as moot.

## DISCUSSION

Under 35 U.S.C. § 42(d), the Commissioner is authorized to refund any fee paid in excess of that required or paid by mistake. Petitioner did not pay an amount in excess of what was required for the Request for Regrade. On December 29, 1998, Petitioner filed a Request for Regrade of the morning section of his August 1998 registration exam. Along with the request, he enclosed \$230, the required fee. *See* 37 C.F.R. § 1.21(a)(6)(I). Hence, Petitioner paid the correct fee, and he is not entitled to a refund on the basis of an excess payment.

Petitioner is also not entitled to a refund because he did not pay the fee by mistake. Section 10.7(c) of title 37 allows an applicant for the registration exam to request a regrade of a failed exam. The request must be filed within two months of being notified of failing the exam. *Id.* Petitioner sat for the morning section of the August 1998 exam, but he did not pass. Within five weeks of being notified that he failed the August 1999 exam, Petitioner filed a Request for Regrade. The fact that he timely filed the request shows that he did not mistakenly submit the fee. *See Miessner v. United States*, 108 USPQ 6, 7 (D.C. Cir. 1955) (appeal fee paid after examiner's final rejection but prior to examiner's withdrawal of final rejection was not paid by mistake).

Furthermore, instead of waiting for a decision, the day after filing the Request for Regrade, Petitioner applied for and subsequently passed the April 1999 exam.

Petitioner argues that he should be reimbursed for the regrade fee since his request was dismissed subsequent to his passing the April 1999 exam. Before getting a response to his request for regrade, Petitioner applied to take and ultimately passed the April 1999 exam. By passing the exam, Petitioner demonstrated that he had the proper qualifications to practice before the PTO. However, passing the exam also became an intervening act which rendered the request for regrade

as moot. *See Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923) (ordering dismissal of a petition because relief sought by petitioner had already been granted, thereby rendering the issue moot). *See also Mills v. Green*, 159 U.S. 651, 654 (1895) (holding that when an intervening event occurs, created either by the plaintiff or by a power beyond the control of either party, "the court will stay its hand"). Therefore, Petitioner's Request for Regrade was properly dismissed as moot.

### **CONCLUSION**

Petitioner has failed to show that he paid the regrade fee in excess of what was required or by mistake. Accordingly, it is ORDERED that the request for refund of the \$230 regrade fee is denied.

DEC 10 1999



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

Harry I. Moatz, Acting Director  
Office of Enrollment and Discipline