

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 July 19, 1999, Petitioner filed a Request for Regrade of his April 1999 registration exam. Along with the request, he enclosed \$230, the required fee. *See* 37 C.F.R. § 1.21(a)(6). 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. An applicant for the registration exam may request a regrade of a failed exam. 37 CFR § 10.7(c). The request must be filed within two months of being notified of failing the exam. *Id.* Petitioner sat for the April 1999 exam, but he did not pass. Within two months of being notified that he failed the April 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).

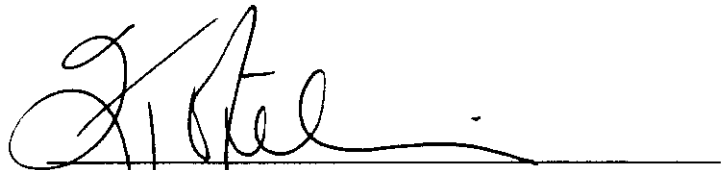
Petitioner argues that he should be reimbursed for the regrade fee since his request was dismissed as moot subsequent to his passing the November 1999 exam. Before getting a response to his request for regrade, Petitioner applied to take and ultimately passed the November 1999 exam. Petitioner argues that, because he received no decision on his request for regrade, the regrade fee was “in excess of that required,” and this entitles him to a refund under 37 CFR § 1.26(a). This argument is without merit. A petition for regrade seeks a determination that the Petitioner possesses one of the “necessary qualifications” needed to render patent applicants

valuable assistance. 35 U.S.C. § 31; *see also* 37 CFR § 10.7(b). In this case, such a determination was made when Petitioner successfully sat for the November 1999 examination. Petitioner's intervening act of taking and passing this subsequent exam, instead of waiting for the Commissioner to issue a decision on the request for regrade, rendered the request moot since the relief sought was granted by passing the exam. *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, caused either by the plaintiff or by a power beyond the control of either party, renders the case moot, "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.

This is a final agency action.



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

~~APR 15 2000~~ *mlv*

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