

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

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 his April 21, 1999, registration examination. The petition is denied.

BACKGROUND

An applicant for registration to practice before the United States Patent and Trademark Office (PTO) who took the April 21, 1999, registration examination (exam) was required to attain a passing grade of 70 percent on the entire exam. Petitioner attained a score of 68. On July 21, 1999, 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. On the same day he submitted his regrade petition, Petitioner submitted an application for the November 3, 1999, exam. On December 15, 1999, Petitioner was notified that he had passed the November 1999 exam. On December 23, 1999, the Commissioner dismissed Petitioner's Request for Regrade of the April 1999 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 July 21, 1999, Petitioner filed a Request for Regrade of the morning section 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)(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. 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 six weeks 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 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

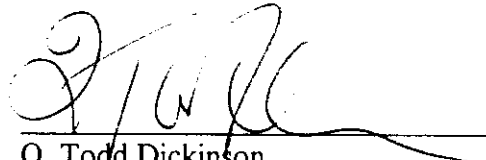
Commissioner to issue a decision on the petition, rendered the petition moot since the relief sought by the petition was granted by passing the exam. *See Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923) (ordering dismissal of a petition because relief sought by petitioner had already been granted, thereby rendering the issue moot). *See also Mills v. Green*, 159 U.S. 651, 654 (1895) (holding that when an intervening event 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.

Petitioner also argues that, in the alternative, his Request for Regrade should be reinstated and acted upon. This argument is also without merit. Petitioner's request is moot because Petitioner has already received what he sought in the request—admission to practice before the PTO in patent matters.

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.

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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