



Director of the Office of Enrollment and Discipline (“Director”) regrade only the afternoon section of his examination. Petitioner paid the required regrade fee. *See* 37 CFR § 1.21(a)(6)(i). Prior to the May 4, 1998, application deadline for the ‘98 exam, the PTO sent all applicants, including Petitioner, a general requirements bulletin (GRB). The GRB informed applicants, *inter alia*, that the ‘98 exam was the last examination where the morning and afternoon sections would be graded separately and the last examination to credit applicants with previously passed sections. Petitioner applied and sat for the ‘98 exam. On September 1, 1998, the Director issued a decision on the § 10.7(c) request for regrade of the afternoon section of the ‘97 exam, refusing to award additional points.

On October 7, 1998, Petitioner petitioned the Commissioner under 37 CFR § 10.2(c) for review of the Director’s regrade decision of the afternoon section of the ‘97 exam. The PTO subsequently notified Petitioner on October 26, 1998, that he failed both sections of the ‘98 exam. Petitioner did not submit a timely request for regrade of either section of the ‘98 exam. On April 9, 1999, the Commissioner dismissed as moot Petitioner’s petition for review of the Director’s decision because even if Petitioner prevailed on this petition and received a passing grade for the afternoon section of the ‘97 exam, he still would not pass the registration examination.

On April 19, 1999, the PTO received Petitioner’s current request for a refund of the regrade and petition fees because “[the Commissioner] and the Director have chosen to avoid the issue of correct answers.”

## DISCUSSION

Title 35 U.S.C. § 42(d) permits the Commissioner to refund “any fee paid by mistake or any amount paid in excess of that required.” *See also* 37 C.F.R. § 1.26 (“a mere change of purpose after the payment of money, as when a party desires to withdraw an application [or] an appeal . . . will not entitle a party to demand such a return.”).

Petitioner argues that the fees should be refunded because “[the Commissioner] and the Director have chosen to avoid the issue of correct answers.” Petitioner has not shown how the Commissioner or the Director have chosen to avoid the issue of correct answers. Moreover, Petitioner has not shown how the fees were either paid by mistake or were in excess of that required.

Petitioner did not pay the \$225 regrade fee by mistake; nor was this amount in excess of that required. Petitioner chose to request a regrade of only the afternoon section of the ‘97 exam and paid the required regrade fee. On September 1, 1998, Petitioner received the Director’s regrade decision. Therefore, Petitioner received the regrade he sought.

Petitioner did not pay the \$130 petition fee by mistake; nor was this amount in excess of that required. Petitioner chose to petition the Commissioner for review of the Director’s regrade decision and paid the required petition fee knowing that in order to pass the registration examination he would need to pass at least the morning section of the ‘98 exam. At the time Petitioner filed his petition, he had not received the results of the ‘98 exam. Petitioner understood that he could pass the examination by achieving a passing score on the morning section of the ‘98 exam and prevailing on his petition of the afternoon section of the ‘97 exam. Therefore, at the time the petition was filed, Petitioner was not mistaken in filing the petition.

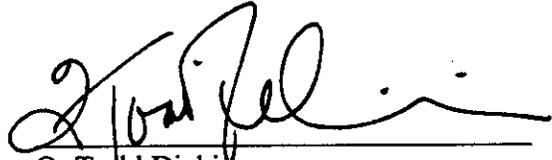
A petition for regrade seeks a determination that the Petitioner possesses one of the “necessary qualifications” needed to render patent applicants valuable assistance. 35 U.S.C. § 31; *see also* 37 C.F.R. § 10.7(b). In this case, such a determination cannot be made by completion of the petition. *See, e.g., Mills v. Green*, 159 U.S. 651, 653-54 (1895) (holding that when “intervening event is owing either to the plaintiff’s own act or to a power beyond the control of either party, the court will stay its hand”); *cf. 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). Petitioner chose not to request a regrade of the morning section of the ‘97 exam or the morning section of the ‘98 exam - either of which would have ensured a petition decision on the afternoon section of the ‘97 exam. *See* 37 CFR § 10.7(c) (“[w]ithin two months from the date an applicant is notified that he or she failed an examination, the applicant may request regrading of the examination upon payment of the fee set forth in § 1.21(a)(6)”). Petitioner’s failure to pass the ‘98 exam and failure to request review of the morning section of either the ‘97 or ‘98 exams, resulted in the Petitioner’s petition becoming moot.

Petitioner received the regrade he sought under § 10.7(c). Intervening events attributable to Petitioner rendered the § 10.2(c) petition to the Commissioner moot. Therefore, Petitioner’s regrade fee and petition fee were not fees paid by mistake or in excess of what was required. *See Miessner v. United States*, 228 F.2d 643, 644, 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 fee paid by mistake).

**CONCLUSION**

Petitioner has failed to show that he paid the relevant fees by mistake. Accordingly, it is ORDERED that the request for refund of the regrade and/or petition fees is denied.

SEP 29 1999  
Date



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