



copy of his examination. It is unclear from the record exactly when Petitioner received the copy. However, by certificate of service dated April 10, 1997, Petitioner filed a request for regrade of the morning section of the examination. The first page of the request bears the notation "Filed: April 4, 1997." A letter accompanying the request is dated April 9, 1997. On July 17, 1997, Petitioner faxed a request for waiver of the fee and time requirements for regrade of the afternoon section of the examination. The request was accompanied by a two page "Request For Reconsideration of Examination Results For Afternoon Session" dated April 4, 1997, and a letter referencing the April 4, 1997, request dated April 9, 1997.

On August 14, 1997, the Director denied Petitioner's request for waiver of the fee and time requirements for requesting regrade of the afternoon section. On August 20, 1997, the Director issued her decision on Petitioner's request for regrade of the morning section, increasing Petitioner's score by 2 points, to 66.

Petitioner requests review of the Director's August 14, 1997, decision on his request for waiver. He also requests a passing score on the afternoon section of the examination.

## DISCUSSION

The Commissioner has the authority to waive any of the PTO regulations pursuant to 37 C.F.R. § 10.170, which provides in pertinent part:

- (a) In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended or waived by the Commissioner . . . .

An "extraordinary situation" for purposes of the waiver regulation is one which could not have been prevented by the exercise of ordinary care or diligence. See Nitto Chemical Indus. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (finding that "oversight that could have been

prevented by the exercise of ordinary care or diligence” is not an extraordinary situation).

Petitioner has the burden to show that his circumstances rise to the level of an extraordinary situation which, in the interest of justice, requires a waiver.

In support of his request for waiver of the fee requirement, Petitioner argues that an “increase in fee was inherently unfair to all candidates who took the August 28, 1996 examination because they all relied on the regrade fee set earlier.” Petition, p. 2. As the Director noted, the fee for regrade for the afternoon section of the examination was increased from \$130 to \$530, effective October 1, 1996. See 61 Fed. Reg. 39585, 39588, 39591 (July 30, 1996) (notice of final rulemaking). The fee was adjusted to recover costs. Id. at 39586. A notice of proposed rulemaking had been published two months earlier, see 61 Fed. Reg. 19224 (May 1, 1996), and a public hearing was held on June 5, 1996. Id. Thus, Petitioner was on notice about the proposed fee increase several months prior to sitting for the examination. He even had an opportunity to comment to the PTO on his perceived unfairness. By the time he sat for the examination, he had been on notice for several weeks that, in the event he needed to request a regrade for the afternoon section, the request would need to be accompanied by a \$530 fee. Accordingly, Petitioner’s argument that he took the August 28, 1996, examination in reliance on the earlier fee is without merit.

Petitioner provides no additional arguments in support of his request for a fee waiver. As a result, Petitioner has not met his burden of showing that his personal circumstances rise to the level of extraordinary circumstances which, in the interest of justice, require waiver of the fee requirement to request a regrade of the afternoon section of the August 28, 1996, examination.

Petitioner's remaining arguments address his request for waiver of the time requirement for requesting regrade of the afternoon section and the merits of his July 17, 1997, request for regrade on that section. Because Petitioner's request for regrade was filed without the requisite \$530 fee, and in light of the determination that Petitioner is not entitled to waiver of the fee requirement for the regrade request, his request for waiver of the time requirement for requesting regrade and for review of the merits of his July 17, 1997, request for regrade are moot.

#### CONCLUSION

Petitioner has not met his burden of showing that his personal circumstances rise to the level of an extraordinary situation which, in the interest of justice, requires a waiver. Accordingly, Petitioner's request for waiver of the fee requirement for requesting regrade of the afternoon section of the August 28, 1996, examination is DENIED. His request for waiver of the time requirement for requesting regrade and for review of the merits of his July 17, 1997, request for regrade is DISMISSED.



Q. TODD DICKINSON  
Deputy Assistant Secretary of Commerce and  
Deputy Commissioner of Patents and Trademarks