

Decision in case 1234/2017/PB on how the European Chemicals Agency promoted staff members in 2016

Decision

Case 1234/2017/PB - Opened on 04/10/2017 - Decision on 20/12/2018 - Institution concerned European Chemicals Agency (No maladministration found) |

In this inquiry, the Ombudsman examined aspects of how the European Chemicals Agency promoted staff in 2016.

A member of staff complained that ECHA's promotion practice on a number of points was not in line with the applicable rules. The Ombudsman found no maladministration and closed the inquiry.

Background to the complaint

1. In 2016, the European Chemicals Agency launched a promotion exercise [1] for members of its staff who are 'temporary agents'. The complainant was not promoted. He made an internal administrative complaint [2]. He argued, among other things, that other staff members had been promoted despite the fact that they had not yet shown that they mastered a third language. This is a statutory requirement for a staff member's first promotion [3].

2. ECHA's management rejected the administrative complaint. The complainant turned to the Ombudsman with the following concerns and arguments:

- a) ECHA failed to explain why it did not promote him;
- b) ECHA wrongly promoted staff members who did not fulfil the requirement of being able to work in a third language;
- c) ECHA failed to respect the 'average duration per grade' (that is, the average time between promotions), an average that was set out in ECHA's internal documentation;
- d) ECHA was wrong to use certain subsidiary considerations in cases of equal merit;
- e) ECHA wrongly used quotas per directorate to grant promotions; and



f) ECHA did not perform a conflict of interest check on the people handling the administrative complaint.

The inquiry

3. The Ombudsman opened an inquiry, asking ECHA for clarifications.
4. ECHA submitted a detailed reply. In his comments on that reply, the complainant maintained his grievances.

Failure to explain why the complainant was not promoted

Arguments presented to the Ombudsman

5. ECHA stated that it is not obliged to provide staff members, who are not promoted, with justifications in the promotion decision itself [4]. If an administrative complaint is made, a statement of reasons is set out in the decision on that complaint. An institution is moreover not obliged to disclose to a staff member, who has not been promoted, its comparative assessment with staff members who have been promoted.

The Ombudsman's assessment

6. While it is good practice, from a human resources perspective, to give appropriate feedback to staff members, ECHA's response as regards the promotion decision itself is accurate. There is therefore no instance of maladministration on this aspect of the complaint.

The third language requirement

Arguments presented to the Ombudsman

7. ECHA stated that it had not promoted staff who had not shown an ability to work in a third language. It explained that its practice reflects standard practice in the EU civil service, namely that the third language requirement must be fulfilled by the date the staff member is actually promoted. The requirement does not need to be fulfilled when the staff member is considered for promotion. Accordingly, staff members are considered for promotion irrespective of whether or not they have fulfilled the third language requirement when the promotion exercise is launched.



8. In response to the complainant's concern that a staff member selected for promotion who does not master a third language would unfairly "occupy" a promotion opportunity of other staff members, ECHA stated that there was no such risk. ECHA's budgetary resources allow for a certain flexibility and the promotion exercise is carried out with a multiannual perspective when it comes to determining the number of promotion possibilities for any given grade. This ensures that promotions which cannot take place due to a staff member not mastering a third language do not prejudice the promotion of other staff members.
9. In his comments on ECHA's reply, the complainant expressed concern about the lack of clarity and transparency in ECHA's rules and practices.

The Ombudsman's assessment

10. ECHA's explanations on this point are reasonable. There is nothing to suggest that ECHA promoted staff members who did not master a third language, which is indeed a statutory requirement for a staff member's first promotion. Thus, no maladministration has been revealed on this point.

Average time between promotions

Arguments presented to the Ombudsman

11. The complainant queried whether ECHA promoted senior staff members more rapidly than other staff members.
12. ECHA pointed out that a faster promotion speed for some grades in some exercises was not as such evidence of maladministration. It responded to the complainant's allegation of bias by noting that the average figures were influenced by the fact that there were very few staff members in some of the higher grades. ECHA added that it had, in the meantime, decided to apply the system of "Multiplication rates for guiding average career equivalence" set out in the Staff Regulations for EU civil servants [5].

The Ombudsman's assessment

13. The information made available to the Ombudsman is not sufficient to determine whether or not there was any maladministration on this point. In any case, the method applied at the time has been replaced as a result of ECHA's decision to apply the system of "Multiplication rates for guiding average career equivalence" set out in the Staff Regulations.



Subsidiary considerations in case of equal merit

Arguments presented to the Ombudsman

14. Where two or more staff members have obtained equal scores in the assessment of merits for promotion purposes, ECHA uses ‘subsidiary considerations’, for instance seniority, so that it can decide whom to promote. The complainant was concerned that some of these considerations related to organisational aspects and could thus not be influenced by the staff members concerned.

15. In its decision on the complainant’s administrative complaint, ECHA noted that these subsidiary considerations were taken into account only in order to decide between candidates with equal merits. They did not replace the three main elements laid down in the relevant provision of the Staff Regulations.

The Ombudsman’s assessment

16. According to the case law, an EU body may in situations of equal merit “*take into account other elements, such as age and the seniority in grade or in the service*” [6]. The Ombudsman therefore finds that there is no maladministration on this aspect.

Promotion quotas per department

Arguments presented to the Ombudsman

17. This issue concerned the complainant’s understanding that ECHA had assigned promotion quotas to its different directorates, which he considered to be unfair.

18. ECHA stated that the promotion exercise was not carried out on the basis of quotas per directorate or unit. Its human resources department simply provided the management with an indicative number of staff members that could be promoted, broken down per directorate. It stated that “*this breakdown per directorate was of a purely indicative nature and was designed in order to keep some balance among directorates. It had no binding effect towards the Directors and the Executive Director who compared the merits of all staff members from all directorates in the same grade*”.

The Ombudsman’s assessment

19. The complainant has not provided any evidence to suggest that ECHA’s explanations on this point were not true. The Ombudsman therefore considers that there is no maladministration



on this issue.

Conflict of interest check

Arguments presented to the Ombudsman

20. The complainant had asked for a conflict of interest check to be performed before his administrative complaint was assigned to specific staff members in ECHA's Human Resources division and its Legal Affairs division. According to the complainant, this request was not respected and his complaint was handled by staff members who had been involved in setting up the promotion system and by legal advisors whom he worked with on a daily basis.

21. ECHA replied that it had not responded to the complainant's request because it concerned the manner in which it handled his administrative complaint, and not the substance of his grievances. It then explained why there had been no conflict of interest, referring to the applicable rules.

The Ombudsman's assessment

22. A conflict of interest can be said to exist when a staff member participates in a decision-making process despite the fact that s/he has an interest in the outcome of that process. A conflict of interest undermines a staff member's independence and impartiality and thus their capacity to act only in the public interest.

23. The fact that the administrative complaint was handled by staff members who had been involved in setting up the promotion system and by legal advisors whom the complainant worked with is not sufficient to conclude that there was a conflict of interest. One would assume that staff members who had been involved in setting up the promotion system would have an interest in identifying problems with it so as to improve the system for the future. As regards the legal advisors, the Ombudsman notes that the fact of working together is not sufficient to establish that those persons were conflicted.

24. The Ombudsman therefore finds no maladministration on this aspect of the case.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following finding :

There was no maladministration by the European Chemicals Agency.

The complainant and the European Chemicals Agency will be informed of this decision.



Emily O'Reilly

European Ombudsman

Strasbourg, 20/12/2018

[1] The technical term for this is 'reclassification' in the case of temporary agents. However, the term 'promotion' will be used throughout this text as a reader-friendly alternative.

[2] Under Article 90(2) of the Staff Regulations for EU civil servants (as applicable by analogy in accordance with Article 46, Chapter 8, of the Conditions of Employment of other Servants).

[3] Conditions of Employment of other Servants of the European Union, Article 54, referring to Article 45(2) of the Staff Regulations of EU Officials (
[http://data.europa.eu/eli/reg/1962/31\(1\)/2014-05-01](http://data.europa.eu/eli/reg/1962/31(1)/2014-05-01) [Link]).

[4] Judgment of 28 September 2011, *AC v Council*, F-9/10, EU: F: 2011: 160, paragraph 29.

[5] Annex I, section B, of the Staff Regulations.

[6] See for instance F-104/09, *Diego Canga Fano v Council of the European Union*

para. 32, or T-281/11 P, *Diego Canga Fano v Council of the European Union*, para 44 and case-law cited.