

## **Decision of the European Ombudsman on complaint 1564/99/(XD)ADB against the European Commission**

Decision

**Case 1564/99/ADB - Opened on 28/01/2000 - Decision on 12/11/2001**

Strasbourg, 12 November 2001

Dear Mr X

On 22 December 1999, you lodged a complaint with the European Ombudsman in the framework of the promotion process for the year 1998.

On 28 January 2000, I forwarded the complaint to the President of the European Commission.

The European Commission sent its opinion on 25 April 2000, and I forwarded it to you with an invitation to make observations, if you so wished. I received your observations on 5 July 2000. You submitted further observations on 13 and 14 July, 14 September, 23 October, 6 and 29 December 2000, as well as on 4 February and 15 May 2001. Further inquiries were necessary. The Commission sent me further information on 6 July 2001 and I received your additional observations on 2 October 2001.

I am now writing to let you know the results of the inquiries that have been made.

### **THE COMPLAINT**

In the early 1990s, the complainant was an official of a Directorate General (DG) of the European Commission. He considered himself to be the victim of harassment and therefore requested to be transferred to a General Service of the European Commission. When he left the DG the complainant alleges that his hierarchy tried to impose on him a noticeably worse Staff Report than the previous ones. He decided to appeal against it. Allegedly his hierarchy informally advised him to accept the report in order not to jeopardise his career. The complainant nevertheless maintained his appeal and his Staff Report was amended.

At the time of the complaint, there were considerable delays in the drawing up of the complainant's 1995-1997 Staff Report and difficulties in his promotion. He believes that these might be the aftermath of the problems faced when he left the DG.



On 9 March 1998, the complainant formally complained to the Joint Committee on Staff Reports (hereafter JCSR) about the delay in the drawing up of his Staff Report. On 10 July 1998, given that the Joint Committee had not answered, he lodged a complaint in accordance with article 90 paragraph 2 of the Staff Regulations of officials of the European Communities (hereafter the Staff Regulations).

The complainant considered that the 1998 list of officials eligible for promotion could not have been properly established in the absence of the aforementioned Staff Report. On 5 June 1998, he therefore lodged an appeal with the Joint Promotion Committee against its decision to include him only at the eighth rank of the proposition list. The Chairman of the Committee informed the complainant that his appeal was inadmissible without stating reasons. Following the publication, in August 1998, of the list of the officials found to be most worthy of promotion and the absence of the name of the complainant on this list, he lodged a complaint on 10 November 1998, in accordance with article 90 paragraph 2 of the Staff Regulations, in order to be promoted. The Appointing Authority rejected his complaint on 2 March 1999.

In the meantime, on 29 January 1999, the complainant again lodged a complaint against the lack of the Staff Report for 1995-1997 and the list of promoted officials, pursuant to article 90 of the Staff Regulations.

On May 1999, the European Commission - DG IX - admitted the delay in the process and decided to grant a 250 ƒ compensation for the complainant's non-material damage. He was also informed that priority would be given to the handling of his file.

On 22 December 1999, given the continuing difficulties concerning the drawing up of the Staff report and the promotion process, the complainant lodged a complaint with the European Ombudsman and made the following allegations:

1. The Staff Report covering the complainant's service for 1995-1997 has not been finalised, in breach of article 43 of the Staff Regulations and article 7 of General Provisions for Implementing article 43.
2. The promotion process for the year 1998 was carried out in breach of article 45 of the Staff Regulation given that the complainant could not be part of the promotion process.
3. The institution made use of delaying tactics in the appeal procedure launched by the complainant.
4. The complainant is a victim of harassment.

The complainant expects the Commission to recognise the facts, to grant him a compensation and to reconsider his promotion for the year 1998.

## THE INQUIRY



### **The European Commission's opinion**

The opinion of the European Commission on the complaint was in summary the following:

1. In practice, the deadlines provided for in article 7 of the General Provisions for implementing article 43 of the Staff Regulations can only apply once the rapporteur has been appointed. In the case of the Staff Report 1995-1997 the deadlines could not be met because of two particular problems. On the one hand, an extraordinary volume of reports submitted to the Joint Committee on Staff Reports. On the other hand, a deadlock situation of its work between the end of 1997 and the beginning of 1998 because of the Staff Representatives' refusal to attend the meetings.

Moreover, the deadlines are never met in practice, because the JCSR is not in permanent session and reports are pending until the day of the session. Many other Commission officials were in the same situation as the complainant. The delay in the examination of the complainant's report was by no way intentional. Besides, this delay has been admitted and a 250  $\pi$  compensation allocated to the complainant.

2. The promotion process for the year 1998 complied with article 45 of the Staff Regulations. In fact, although the Staff Report is an essential evaluating element in case of promotion, the lack of it does not stop the promotion process. The Appointing Authority can take into consideration other information concerning the merits of officials. In this context it is worth noting that due to the difficulties following the changes in the Staff Report system, it had been agreed with the trade unions and professional organisations that the points attributed in the 1995-1997 Staff Report would be neutral in the promotion process.

The Directorate General, which proposed to promote the complainant, took into consideration his qualities, his skills and his work on the basis of the complainant's previous staff reports, his career development, the draft staff report for 1995-1997 and his comments on it. The Joint Promotion Committee took into account a note of 15 June 1998 written by the appeal assessor of the complainant. However, despite the complainant's merits, the Joint Promotion Committee decided not to include the complainant on the list of officials found to be most worthy of promotion for the year 1998, on the basis of a consideration of the comparative merits of officials.

The fact that the complainant alleges a "complete break" in the grading between the former Staff Reports and the draft for 1995-1997 period is normal. The new Staff Report system introduced in 1997 precisely aimed at putting an end to the practice of a too high grading.

Besides, the complainant was promoted in 1999, still without his Staff Report for 1995-1997, which proves that the lack of it does not stop the promotion process.

3. As already mentioned, the delay in the appeal procedure launched by the complainant is not intentional. The complainant argued that the JCSR refused the revision of his Staff Report in order not to undermine the whole promotion process because of the too long delay. This personal explanation is not confirmed by the facts, given that the complainant had been



promoted although the JCSR had not given its opinion on the Staff Report. Moreover, the revision of the Staff Report falls into the sole competence of the Appeal assessor, even after the JCSR opinion, which is not compulsory.

4. The complainant's allegation that he is a victim of harassment refers mainly to the period of time prior to his appointment to the present department.

**The complainant's observations**

The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. In his reply, the complainant stated the following:

1. Article 7 of General Provisions for Implementing article 43 of the Staff Regulations and the Guide to Staff Reports leave no doubt about the timetable for the drawing up of the Staff Report. The whole procedure had to be finished by 31 December 1997. The complainant's Staff Report was finally established on 7 April 2000, with a 27-month delay. The European Commission is entirely responsible for the delay. In fact, it decided itself the creation of a new Staff Report system, which is the cause of the alleged "unusual" situation.

The responsibility of the European Commission also follows the fact that it has not invoked exceptional circumstances that would have prevented it from giving a priority to the handling of the complainant's file.

Moreover, the complainant never received the 250  $\pi$  compensation promised by the European Commission. In a letter of 23 October 2000 the complainant underlined that in a similar case dealt with by the Court of First Instance (1) (T-202/99), another official was granted about twice that compensation.

2. The European Commission confirmed that the Staff Report is an essential evaluating element in case of promotion. Therefore, the Institution should have complied with rules established by it and made compulsory for its officials.

The proposition made by the Directorate-General to put the complainant only at the eighth rank of the promotion list, is based on the argument of a lack of management responsibilities, whereas the draft Staff Report of the 1995-1997 period stipulates the opposite.

3. The complainant considers that the sequence of events surrounding the finalisation of his Staff Report shows that the administration delayed the work. The complainant made the administration aware of the consequences of the late adoption of the Staff Report on his promotion. Although the administration acknowledged the delay and decided to pay the complainant a compensation, the complainant's file had obviously not been considered a priority.

4. Regarding the complainant's allegation that he is a victim of harassment, it is true that it refers to both his present department and the former DG. However both services are part of the European Commission.



In accordance with the final report on a Staff Opinion Survey, concerning harassment, it appears that there exists a real matter of discrimination and "mobbing" in the service.

**Further observations sent by the complainant**

On 29 December 2000, the complainant made an additional allegation that the Joint Committee on Staff Reports infringed Article 26 of the Staff Regulations. The Ombudsman decided to deal with the new allegation in the framework of the existing inquiry, since it is closely linked to the previous allegations.

The complainant alleged that the note of 15 June 1998 mentioned in the Commission's opinion, was never communicated to him. He therefore considered that the decision of the Joint Promotion Committee not to promote him had been taken in breach of article 26 of the Staff Regulations. This article provides that the documents may not be used or cited by the institution against an official unless they were communicated to him before they were filed.

## **FURTHER INQUIRIES**

On 11 May 2001, the Ombudsman's services contacted the complainant to check whether the compensation promised for the delay in drawing up his Staff Report had been paid. On 15 May 2001, the complainant confirmed that he could find no trace of such payment.

On 23 May 2001, the Ombudsman asked the Commission to inform him about the note of 15 June 1998, which the complainant was allegedly never communicated as well as about the delay in the payment of the promised compensation.

On 6 July 2001, the Commission regretted the delay in paying the compensation and attributed it to an internal misunderstanding. The amount would be paid swiftly. Regarding the note of 15 June 1998, the Commission stressed that it aimed at explaining the choices made in the framework of the promotion process. The note, which compared the merits of officials eligible for promotion, did not question the content of the complainant's staff report. The note of 15 June 1998 was sent as a copy to the Ombudsman for inspection. On the Commission's express request it was not to be transferred to the complainant or to any third party.

In his observations of 1 October 2001, the complainant acknowledged that the 250<sup>th</sup> compensation had been paid on 19 July 2001. He however regretted the excessive delay and on the basis of the case law stressed that in similar situations other officials had been paid much higher amounts. Furthermore, the complainant considers that the responsibility of the Commission in drawing up his staff report goes far beyond a 250<sup>th</sup> compensation. Regarding the Commission's assertion that the case law he had cited did not apply to his case, the complainant underlined that at the time of the promotion process he did not have a definitive staff report. Finally regarding the confidential note of 15 June 1998 the complainant urged the Ombudsman to inspect the document and to check whether it did not infringe the Staff Regulations. The complainant also provided the Ombudsman with information which does not form part of the present inquiry but relating to other complaints or possible new complaints lodged by the complainant. The present decision will therefore not deal with these issues.



## THE DECISION

### **1 Delay in drawing up the Staff Report for 1995-1997**

1.1 The complainant alleged that the Staff Report covering his service for 1995-1997 has not been finalised, in breach of article 43 of the Staff Regulations and of article 7 of the General Provisions for implementing article 43.

1.2 The Commission argued that the administration had to face a serious backlog mainly originating in the implementation of a new procedure. Many other officials were in the same situation which had no intentional character. Following a complaint under article 90 of the Staff Regulations, the Commission admitted that there had been a considerable delay in the procedure. The Director General of DG IX (Personnel and Administration) of the Commission therefore granted a 250 ₤ compensation to the complainant and informed him that he would ask the chairman of the JCSR to give priority to the complainant's file.

1.3 The Ombudsman notes that, according to established case law of the Community Courts, failure to establish a Staff Report on time is a service-related fault. In some circumstances it can give rise to the payment of a compensation (2) .

1.4 In the complainant's case, the Staff Report was finally established during the Ombudsman's inquiry on 7 April 2000. In the light of article 7 of General Provisions for Implementing article 43 of the Staff Regulations, the delay therefore amounted to 27 months.

1.5 The Commission's failure to finalise the complainant's staff report in accordance with the timetable set by the General Provisions for Implementing article 43 of the Staff Regulations was an instance of maladministration. The Commission has apologised and paid compensation for the delay.

### **2 Alleged irregularity in the promotion process for the year 1998.**

2.1 The complainant alleged that the promotion process for 1998 was carried out in breach of article 45 of the Staff Regulations since he could not be part of the promotion process, given that his Staff Report had not been finalised. Article 45 provides for promotion to be decided *"after consideration of the comparative merits of the officials eligible for promotion and of the reports on them"* .

2.2 The Commission argued that the lack of the Staff Report does not necessarily stop the promotions process, since other elements can be taken into account in exceptional circumstances. In the present case, The Commission argued that exceptional circumstances existed because of an extraordinary volume of reports submitted to the Joint Committee on Staff Reports and a deadlock in its work. According to the Commission, the following elements concerning the complainant were taken into account in the promotion procedure for 1998: the complainant's previous staff reports, his career development, the draft staff report for 1995-1997, his comments on it, as well as a note dated 15 June 1998 drafted by the complainant's appeal assessor.



2.3 According to the case law of the Community courts, a promotion procedure is tainted by an irregularity when the Appointing Authority could not compare the merits of candidates because of significant administrative delays in the drawing up of one or more staff reports (3) . However, in exceptional circumstances the absence of periodic reports may be compensated for by the existence of other information on an official's merits (4) .

2.4 In the present case, the complainant's staff report for 1995-1997 was not finalised in time to be taken into consideration for the 1998 promotion procedure. The Commission attributed the delay to exceptional circumstances and thereby justified that other elements had to be taken into account for the promotion. This explanation appears reasonable.

2.5 In his observations, the complainant queried whether the taking into account by the Commission of a note of 15 June 1998, drafted by the appeal assessor, was in accordance with the Staff Regulations.

2.6 Articles 26 (5) and 43 of the Staff Regulations aim at guaranteeing that decisions by the Appointing Authority are not based on documents which have not been communicated to the official. However, opinions by superiors comparing the merits of officials do not fall under the provisions of Article 26 of the Staff Regulations. They are in principle not to be communicated to the official, provided they do not contain assessments of the official's competence, efficiency or behaviour which were not already part of the personal file (6) . In the present case, the note of 15 June 1998 was inspected by the Ombudsman's services. It is of comparative nature and contains no assessment of the complainant's competence, efficiency or behaviour. Thus, the note of 15 June 1998 could legitimately be considered in the promotion process without prior communication to the complainant.

2.7 In the light of the above, the Ombudsman's inquiry into the complainant's allegation has revealed no maladministration in relation to this aspect of the complaint.

### **3 The allegation of delaying tactics**

3.1 The complainant alleges that the institution made use of delaying tactics in the appeal procedure launched by the complainant.

3.2 The Commission argued that delays in the appeal procedure were not intentional and that the personal explanation about the delay given by the complainant was not confirmed by the facts.

3.3 The Ombudsman notes that the delay in the Staff Reports affected many others officials and therefore appears to be a general problem during this period of time.

3.4 There is no indication in the file that the Commission had intentionally used delaying manoeuvres to harm the complainant. The explanations given in relation to the difficulties in applying a new procedure appear to be reasonable. The Ombudsman has therefore found no instance of maladministration in relation to this aspect of the case.

### **4 The allegation of harassment**

4.1 The complainant alleges that he is a victim of harassment.





4.2 The European Commission explained that the complainant's allegation related to the period of time prior to his appointment to the present department. It argued that the complainant himself turned out to be the author of harassment, following an e-mail correspondence to 80 colleagues.

4.3 The Ombudsman notes that harassment can be defined as any malicious action which through its repetition, or seriousness affects an official's dignity, or physical or mental condition (7) .

4.4 In the present case, no evidence of malicious intent by the complainant's colleagues or superiors have been duly presented. The Ombudsman therefore concludes that there is no maladministration as regards this aspect of the case.

## **5 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

The Commission's failure to finalise the complainant's staff report in accordance with the timetable set by the General Provisions for Implementing article 43 of the Staff Regulations was an instance of maladministration.

Given that this aspect of the case concerns procedures relating to specific events in the past and that the Commission has apologised and paid compensation for the delay, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Judgement of the Court of First Instance (Third Chamber) of 5 October 2000. Léon Rappe v Commission European Communities. Case T-202/99

(2) Judgement of the Court of First Instance of 10 July 1992. Giovanni Barbi v Commission of the European Communities. Case T-68/91. European Court Reports 1992 page II-2127

(3) Judgement of the Court of Justice of the European Communities of 17 December 1992. Moriz v. Commission. C-68/91. European Court Reports 1992 page I-6849

(4) Judgement of the Court of 18 December 1980. Pierre Gratreau v Commission of the European Communities. Joined cases 156/79 and 51/80. European Court Reports 1980 page





3943. Point 22

(5) Article 26 of the Staff Regulations : *"The personal file of an official shall contain:*

*a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;*

*(a) the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed. (a)"*

(6) Judgement of the Court of First Instance of 30 November 1993. Jean-Panayotis Tsirimokos v European Parliament. Case T-76/92. European Court Reports 1993 page II-1281. Points 33-35.

Judgement of the Court of First Instance of 8 June 1995. Alain-Pierre Allo v Commission of the European Communities. Case T-496/93. European Court Reports - SC 1995 page IA-0127; II-0405. Points 75-76.

(7) See a lecture of 20 September 1999 to European Parliament Staff, by Mrs. Marie-France Hirigoyen (psychotherapist): *"Comprendre le phénomène du harcèlement moral sur le lieu de travail"*