

Decision of the European Ombudsman on complaint 883/2000/MM against the European Commission

Decision

Case 883/2000/(MM)VL - Opened on 01/09/2000 - Decision on 29/11/2001

Strasbourg, 29 November 2001

Dear Mr K.,

On 8 July 2000, you made a complaint to the European Ombudsman concerning your exclusion from the oral examination of competition KOM/A/3/98 for Austrian citizens (letter from the European Commission 01.10.98/IX.A 2./03476).

On 1 September 2000, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 20 October 2000. I forwarded it to you with an invitation to make observations, which you sent on 14 and 17 December 2000.

I apologise for the length of time it has taken to deal with your complaint.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant sent his application for competition KOM/A/3/98 published by the Commission in OJ C 30 A, dated 28 January 1998, in order to recruit Austrian citizens after Austria's accession to the European Union. Although he fulfilled the admission requirements under point IV.A. of the competition notice, he was not invited to participate in the oral examination.

The complainant complained to the Commission by letter dated 31 July 1998 about the decision to exclude him and requested to be informed of the decision criteria used for selecting the candidates admitted to the oral examination. The Commission confirmed its decision by letter dated 1 st October 1998.

The complainant turned to the European Ombudsman on 8 July 2000 and alleged that the applicants admitted to the oral tests of the competition in question were selected according to



arbitrary selection criteria.

Further, he alleged that the letter received from the Commission dated 1 st October 1998 lacked sufficient reasoning as to why he was not admitted to the oral tests.

He claimed that the appointments effected according to non-transparent selection criteria should be annulled.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The open competition KOM/A/3/98 was organised in order to compose an internal reserve list for principal administrators of Austrian nationality. It was based on Council Regulation (EC) No 626/95 of 20 March 1995 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Austria, Finland and Sweden.

Competition KOM/A/3/98 consisted of an evaluation of qualifications and an oral examination according to annex III of the Staff Regulations, in particular Article 5, paragraphs 1, 4 and 5. In order to be admitted to the competition in question, the criteria mentioned under point IV.A. and III. of the notice were relevant. The admission to the oral examination was - in line with point IV. B. - decided by the Selection Board which examined the applicants' qualifications and selected exclusively the applicants with the best qualifications.

The Commission informed the complainant by letter dated 22 July 1998 that, although he fulfilled the requirements specified under point III. of the notice, he could not be admitted to the oral examination, as he was not among the candidates with the best qualifications. In the second and third paragraph of this letter, the complainant's attention was drawn to the notice of competition and the proceedings of the Selection Board were explained to him.

By letter dated 31 July 1998, the complainant requested the Commission to check its decision. In its response dated 1 October 1998, the Commission explained again the procedure and pointed out that its decision was based on a comparative assessment of the application papers of all candidates admitted to the competition. It was confirmed that only those candidates who best fulfilled the requirements mentioned under point II. of the notice were admitted to the oral examination. A re-examination established once more that the complainant did not belong to them.

Regarding the first allegation, the Commission explained that the Selection Board based the admission of applicants to the oral examinations on the criteria mentioned under points III., IV.A., IV.B. and II. in the notice of competition OJ C 30 A. These criteria were mentioned in the two letters of response addressed to the complainant. According to the established case law of the Court of Justice, Selection Boards are bound to the notices of competition and are only



authorised to assess the candidates' merits, whilst enjoying a wide discretion.

Concerning the complainant's allegation of inadequate reasoning, the Commission's letters dated 22 July and 1 October 1998 contain a clear reference to the notice of competition and a sufficient reasoning explaining how the Selection Board proceeded to admit candidates to the oral examination.

As regards the complainant's claim to annul the appointments of the successful candidates of the competition KOM/A/3/98, even if the complainant had appealed to the Court of First Instance and that instance had declared the Selection Board's decision invalid, this would not have had as a direct consequence that the complainant would have been admitted and that the appointments of the candidates admitted would have been annulled.

The complainant's observations

The complainant enclosed a copy of his letter to the Commission dated 31 July 1998 as well as his curriculum vitae.

He maintained his complaint that the Commission had not explained the criteria on which the Selection Board based the selection of the candidates for the oral examination.

He also criticised the wide discretion enjoyed by the Selection Board in the selection procedure and maintained his allegation that the reasoning for the refusal of his application was inadequate.

He stated that the Commission's explanations did not dispel his suspicion of nepotism.

THE DECISION

1 Alleged use of arbitrary selection criteria in competition KOM/A/3/98

1.1 The complainant alleges that the applicants admitted to the oral tests of KOM/A/3/98 were selected according to arbitrary selection criteria.

1.2 In its opinion, the Commission states that the competition was based on qualifications and an oral examination in accordance with annex III of the Staff Regulations, in particular Article 5, paragraphs 1, 4 and 5. In order to be admitted to the competition in question, the criteria mentioned under points IV.A. and III. of the notice of competition OJ C 30 A were relevant. The admission to the oral examination was - in line with point IV. B. - decided by the Selection Board which examined the applicants' qualifications and selected exclusively the applicants with the best qualifications. The criteria used for selecting the best candidates at this stage were based on points III., IV.A., IV.B. and II. of the notice, as mentioned in the two letters of response addressed to the complainant. According to the established case law of the Court of Justice, Selection Boards are bound to the notices of competition and are only authorised to assess the candidates' merits, whilst enjoying a wide discretion.

1.3 The Ombudsman notes that, according to the Court of Justice, competitions are normally divided into two stages.



"The first stage, particularly, where the competition is based on formal qualifications, consists in comparing the diplomas or other certificates of qualifications provided by the candidates with the qualifications required by the notice of competition (...). Since that comparison is made on the basis of objective factors which are moreover known to each candidate in his own case, observance of the secrecy surrounding the proceedings of the selection board does not preclude communication of those objective factors and in particular of the criteria for assessment upon which the selection made at the stage of the preliminary proceedings in the competition was based, a selection which enables those whose applications have been rejected even before any individual test to ascertain the possible reasons for their elimination (...)." (1)

1.4 The Ombudsman also notes that the notice of competition in this case divides the competition into three stages, i.e. (i) determination of the eligibility of the candidates (point IV.A.); (ii) selection of the best candidates on the basis of their qualifications (point IV.B.) and (iii) an oral examination. According to the notice of competition, the criteria for assessment of the best candidates at stage (ii) were to be defined and applied after having determined the eligibility of candidates and before the individual tests.

1.5 In the Ombudsman's view, stage (ii) of the competition in this case corresponds to the first stage of a competition as mentioned in the above-cited passage from the judgement of the Court of Justice. The Ombudsman takes this view for two reasons. First, this stage involved elimination of applicants before any individual test. Second, the notion of "applicants with the best qualifications" necessarily implies the existence and application of objective criteria to identify which qualifications are the best.

1.6 The Commission's letter dated 22 July 1998 informed the complainant that the Selection Board's decision as to which applicants to admit to the oral tests was based on the nature and extent of their professional experience in relation to the tasks to be fulfilled in the framework of an appointment. The Commission's letter dated 1 October 1998 explained that those candidates whose experience matched most closely the conditions mentioned under point II of the notice of competition were selected for the oral examination. In the Ombudsman's view, these letters failed to communicate to the complainant any objective criteria which the Selection Board could have used to exclude him from the oral tests. This constitutes an instance of maladministration.

2 Lack of adequate reasoning

2.1 The complainant alleges that the Commission failed to provide adequate reasoning in its letter dated 1st October 1998 as to why he was not admitted to the oral tests.

2.2 The Commission argues that its letters dated 22 July and 1 October 1998 contain a clear reference to the notice of competition and a sufficient reasoning explaining how the Selection Board proceeded to admit candidates to the oral examination.

2.3 The Ombudsman notes that according to the case law of the Court of Justice a mere reference to the condition which was not fulfilled cannot satisfy the requirement to state reasons, in view particularly of the fact that such a reference is not capable of providing the person concerned with a sufficient indication to allow him to know whether the refusal is well



founded or on the other hand if is vitiated by a defect which would make it possible to contest its legality. (2)

2.4 In the present case, the Selection Board provided the complainant only with a general and abstract description of the condition which he did not fulfil. The Selection Board therefore failed to provide reasons that could enable the complainant to assess if his exclusion from the oral tests was well founded and eventually enable him to contest the legality of the decision in question. This constitutes an instance of maladministration.

3 Claimed annulment of appointments resulting from competition KOM/A/3/98

3.1 The complainant claims that the appointments resulting from competition KOM/A/3/98 should be annulled.

3.2 The Ombudsman notes that, according to the established case law of the Community Courts, the administration has no authority to amend or annul the decisions of Selection Boards in competitions. If it considers that a Selection Board has illegally prevented certain candidates from sitting a test, its role is to take formal note of that situation by means of a reasoned decision and recommence the whole procedure by publishing a new notice of competition. (3)

3.3 In the present case, the Ombudsman notes that the competition in question is closed and that appointments from the reserve list constituted as a result of the competition have been made. The Ombudsman is not aware of any legal rule or principle which could lead to the annulment of the appointments resulting from competition KOM/A/3/98 as a result of the findings of maladministration made in paragraphs 1.6 and 2.5 above. The Ombudsman does not therefore consider that it is possible for the Commission to accept the complainant's claim.

Conclusion

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

The Commission's letter dated 22 July 1998 informed the complainant that the Selection Board's decision as to which applicants to admit to the oral tests was based on the nature and extent of their professional experience in relation to the tasks to be fulfilled in the framework of an appointment. The Commission's letter dated 1 October 1998 explained that those candidates whose experience matched most closely the conditions mentioned under point II of the notice of competition were selected for the oral examination. In the Ombudsman's view, these letters failed to communicate to the complainant any objective criteria which the Selection Board could have used to exclude him from the oral tests.

The Selection Board provided the complainant only with a general and abstract description of the condition which he did not fulfil. The Selection Board therefore failed to provide reasons that could enable the complainant to assess if his exclusion from the oral tests was well founded and eventually enable him to contest the legality of the decision in question.

For the reasons given in paragraph 3.3 above, 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) Case C-254/95 P, *European Parliament v Angelo Innamorati* , 1996 ECR I-3423.

(2) Joined cases 4,19 and 28/78, *Enrico M. Salerno, Xavier Authi and Guiseppe Massangioli v Commission* 1978 ECR 2403.

(3) See for example, Case T-44/92, *Claudia Delloye and others v Commission* 1993 ECR II-221.