

## Decision on how an EU civilian mission dealt with the appeal of a seconded staff member's performance evaluation (case 95/2022/NH)

Decision

**Case 95/2022/NH - Opened on 04/02/2022 - Decision on 10/10/2022 - Institution concerned** European External Action Service ( No maladministration found ) |

The case concerned a negative performance evaluation that an EU civilian mission gave to a seconded staff member. The staff member complained that the evaluation had been unfair because her line managers had not warned her that her performance at work had been poor. She also said that the evaluation report failed to take into account the fact that she had been absent for a long period of time. She claimed that the mission did not handle her appeal against the evaluation fairly.

Based on the inquiry the Ombudsman found nothing to suggest that the evaluation was unfair. She also found that the mission handled the complainant's appeal in line with the applicable procedures. She therefore closed the inquiry with the conclusion that there was no maladministration.

## Background to the complaint

1. The complainant is a former seconded national expert who worked for an EU civilian mission between 2019 and 2021. [1] As a seconded national expert, she was not employed by the EU mission directly but assigned to the mission by her seconding authorities - in this case the authorities of an EU Member State.

2. All staff members in EU civilian missions are subject to regular performance evaluations, during which a 'performance evaluation report' is issued. In this case, the complainant received a first performance evaluation report in 2020, in which the mission concluded that her performance had been "*partly satisfactory*". She then received a second performance evaluation report for the year 2021 that also concluded that her performance had been "*partly satisfactory*".

3. The complainant's line manager recommended in the 2021 performance evaluation report that the complainant undergo a 'personnel improvement plan' for a duration of three months.



The objective of the personnel improvement plan was to identify tasks and expectations to guide and enhance the complainant's performance and help her to fulfil the mission's expectations in the future.

4. As the complainant's secondment was coming to an end, the head of mission informed the European External Action Service (EEAS) [2] that the mission was interested in extending the complainant's 'tour of duty'. The complainant's seconding authorities, however, decided not to extend her secondment.

5. The complainant subsequently appealed against the performance evaluation report for 2021. The main issues she raised were that:

(i) her line managers had failed to warn her, during the evaluation period, that her work was unsatisfactory;

(ii) they had not given her clear instructions on how to do her work; and

(iii) the COVID-19 pandemic had made it very difficult for her to complete her tasks, in particular because the mission requested that she leave her place of work for several months.

6. In line with the applicable rules [3], the mission set up an 'advisory board' in order to examine the appeal and submit recommendations to the head of mission. The complainant expressed her worry that the members of the advisory board were all reporting directly or indirectly to the head of mission, who had signed her performance evaluation report, and would therefore not provide an impartial and objective recommendation. She contacted both the mission and the EEAS about this concern, requesting that an advisory board be established that was not comprised of staff members at the mission, but her request was rejected.

7. The complainant met with the head of mission and another senior mission member the day before she was due to leave the mission.

8. A few weeks later, the head of mission issued her decision on the complainant's appeal, which effectively rejected her claims. [4] The decision found that the mission had followed the procedure for the performance evaluation report and the personnel improvement plan, in full compliance with the applicable rules. The decision concluded that the complainant's arguments were without merit, and that her evaluation had fully taken into account her leave and the circumstances of the COVID-19 pandemic, as it had done with the complainant's co-workers.

9. Dissatisfied with how the mission had handled her performance evaluation and her appeal, the complainant turned to the Ombudsman.

## **The inquiry**

10. The Ombudsman opened an inquiry into:



- a) how the mission evaluated the complainant's performance for the period 2020-2021;
- b) how the mission handled her appeal against the performance evaluation.

**11.** In the context of the inquiry, the Ombudsman received the reply of the European External Action Service (EEAS), on behalf of the Mission, on the complaint and on the Ombudsman's questions. The complainant was offered the possibility to send comments in response to the EEAS's reply.

## **The performance evaluation report**

### **Arguments presented to the Ombudsman**

**12.** The complainant argued that her line manager never warned her about her performance for the evaluation period 2020-2021.

**13.** The complainant said that, because of the COVID-19 pandemic, she had to leave the mission and telework for several months, which made her work very difficult. She also took extended periods of sick leave. According to the complainant, the performance evaluation report failed to take into account these specific absences.

**14.** The complainant also claimed that the "*partly satisfactory*" evaluation in the report, along with the proposed performance improvement plan, led to her seconding authorities' decision not to extend her tour of duty and, subsequently, to her unemployment.

**15.** In reply, the EEAS gave examples of feedback and instructions received by the complainant and her line managers throughout 2020 and 2021, during which the complainant was made aware that her work was assessed as not fully satisfactory. The EEAS also stated that the complainant had raised concerns herself with her line manager about her suitability for her role.

**16.** As the complainant received a partly satisfactory evaluation already in 2020, the EEAS argued that she was aware of the need to improve her performance.

**17.** The EEAS insisted that all circumstances, including the complainant's sick leave and her absence due to COVID-19, were taken into account during her performance evaluation. The mission decided to give the complainant another chance through the performance improvement plan, and to extend her tour of duty to that effect. The EEAS explained that other staff members equally affected by COVID-19 absences performed their tasks in a satisfactory manner, while the complainant failed to do so.

**18.** According to the EEAS, the mission could have requested her seconding authorities to repatriate her for medical grounds when she exceeded the maximum amount of 20 consecutive



sick leave days. The mission did not use that possibility but extended, on her request, the sick leave absence twice, up to a total of 44 days, to allow her to recover, resume her duties and eventually participate in her performance improvement plan.

## The Ombudsman's assessment

**19.** The Ombudsman's inquiry focused on how the mission handled the complainant's performance evaluation and subsequent appeal. The decision by the complainant's seconding authorities not to extend her secondment falls outside the Ombudsman's mandate because the authorities of an EU Member State are not EU institutions.

**20.** EU case-law has consistently found that the EU administration enjoys a wide margin of discretion when evaluating its staff members. [5] The Ombudsman's role in inquiries such as this is to assess whether the EU institution in question correctly followed the applicable procedures and made no manifest error in how it evaluated the staff member's performance and dealt with the appeal.

**21.** While the complainant argued that her line manager failed to warn her that her performance was not satisfactory, she had already received a 'partly satisfactory' evaluation in 2020. The EEAS also clarified how she was given feedback throughout 2020 and 2021. According to EU case-law, it is not necessary for line managers to warn staff members about potential weaknesses in their performance as long as these are included in their evaluation report. [6]

**22.** The EEAS has explained that, contrary to the complainant's arguments, the mission took her absences due to the COVID-19 pandemic into account in her performance evaluation report. The Ombudsman finds the EEAS's explanations to be reasonable: the mission operated under difficult circumstances during the COVID-19 pandemic and had to put all staff members on a rotation scheme. In this context, the mission evaluated the performance of the complainant and other staff members on a comparable basis, as the rotation scheme affected all staff members of the mission equally. Yet, taking these circumstances into account, the mission took the view that the complainant's performance was only partly satisfactory. There is no evidence in this case that the mission manifestly ignored the COVID-19 circumstances.

**23.** The complainant also argues that the mission did not take into account her extended periods of sick leave in the performance evaluation report. According to EU case-law, the EU administration's failure to take into account justified sick leave of staff members in their performance evaluation constitutes a manifest error of assessment. [7] The EEAS has insisted that the mission took into account the complainant's medical absences during the reference period. In addition, the mission could have requested the seconding authorities to repatriate the complainant on medical grounds. Instead, the mission extended her sick leave and requested the EEAS to grant a short-term extension of her tour of duty so that she could carry out the performance improvement plan set out in her performance evaluation report. This indicates that the mission recognised that the sick leave might have affected the complainant's situation and there is thus nothing to suggest that the mission failed to take into account the sick leave in her



performance evaluation.

**24.** In light of the above, the Ombudsman finds no maladministration in how the mission evaluated the complainant's performance for the period 2020-2021.

## **How the mission handled the complainant's appeal**

### **Arguments presented to the Ombudsman**

**25.** The complainant stated that the decision on her appeal failed to address the substance of her arguments, in particular her claim that her line manager had failed to warn her about her poor performance before the evaluation took place.

**26.** She also argued that she was not given the opportunity for a hearing. She stated that, while she was given the opportunity to present her views on the appeal during a meeting with her head of mission on her penultimate day, she believed this was an "end of mission" talk with her head of mission. She had been surprised that another senior staff member joined the meeting and questioned her about the appeal.

**27.** The complainant is also concerned that the members of the advisory board who assessed her appeal were all reporting directly (or indirectly) to the head of mission, which impacted their impartiality. She requested the EEAS to establish an external advisory board (composed of members not working at the mission), but says she did not receive a reply to this request.

**28.** In reply, the EEAS explained that the meeting between the complainant, her head of mission and another senior staff member on the day before leaving the mission was only one of the many opportunities offered to the complainant to present her views on the appeal procedure. The EEAS noted that the performance evaluation report itself gave the complainant the possibility to make comments on her line manager's feedback. The appeal lodged by the complainant was another such possibility. The EEAS stated that the appeal procedure is not adversarial in nature; rather, it is an administrative procedure during which the advisory board gives advice to the head of mission on the appeal.

**29.** The EEAS also rejected the complainant's claim that the members of the advisory board may not have been impartial. It argued that the fact the board members reported to and worked with the head of mission does not, in itself, mean that the members of the advisory board were partial in their recommendation. The EEAS stated that the members of the advisory board were senior experts with a strong mix of both legal and human resources experience. The EEAS explained that the current rules in place do not set out the possibility for EU civilian missions to establish external advisory boards. Even if, in theory, the EEAS could change the rules horizontally for all missions, establishing external advisory boards would be disproportionate in practice in small-sized missions.



## The Ombudsman's assessment

**30.** The Ombudsman does not find any evidence that the mission failed to address the substance of the complainant's arguments in the decision on her appeal. The decision replied adequately to the main issues raised by the complainant, in particular by highlighting that her line manager supervised her work throughout the period in various meetings, in person, by e-mail and phone.

**31.** The Ombudsman finds the explanations provided by the EEAS as regards the meeting that took place the day before the complainant left the mission to be satisfactory. Even were the complainant not expecting the meeting to also address her appeal, she had other possibilities to present her views. The 'right to be heard', which is enshrined in the Charter of Fundamental Rights of the EU, allows someone to be heard before any individual measure that would affect them adversely is taken. [8] In this case, the measure adversely affecting the complainant was the performance evaluation report. The mission's decision on the appeal cannot be considered as a *new* act adversely affecting the complainant because it confirms the initial decision without substantively changing the complainant's situation. [9]

**32.** However, there is no doubt that the purpose of the meeting came as a surprise to the complainant. The mission could have better communicated to her that the meeting would also address her appeal. This would have allowed her to be better prepared and, potentially, to ask a person she trusted to be present at the meeting. The Ombudsman trusts that the mission will provide clear information to staff members in similar situations in future.

**33.** The EEAS is correct when it says that the procedure in place for appeals does not set out the possibility for EU civilian missions to establish external advisory boards. There is no evidence in this case that the members of the advisory board were not impartial when they examined the complainant's appeal. As the EEAS stated, the fact the board members reported to and worked with the head of mission does not, in itself, mean that the members of the advisory board were not objective.

**34.** In light of the above, the Ombudsman concludes that there was no maladministration in how the mission handled the complainant's appeal against her performance evaluation report.

## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [10] :

**There was no maladministration in this case.**

The complainant and the European External Action Service will be informed of this decision .



Tina Nilsson Head of the Case-handling Unit

Strasbourg, 10/10/2022

[1] The European Union undertakes overseas operations in the form of “EU missions”, using civilian and military instruments in several countries in three continents (Europe, Africa and Asia), as part of its Common Security and Defence Policy.

[2] The Civilian Planning and Conduct Capability, a structure part of the European External Action Service (EEAS), is responsible for EU civilian missions.

[3] The procedure is set out in articles 5.4 and 5.5 of the CSDP Human Resources Handbook, which is not available to the public.

[4] With the exception of one sentence amended because it was factually incorrect.

[5] See Order of the Civil Service Tribunal of 12 December 2012, *Giorgio Lebedef v [Link] European Commission* , case F-70/11, paragraph 58.

[6] See Judgment of the Civil Service Tribunal of 11 December 2012, *Ioannis Ntouvas v [Link] European Centre for Disease Prevention and Control (ECDC)* , case F-107/11, paragraph 68: “*even if it were to be established that the reporting officer did not bring to the applicant’s notice the weaknesses in his conduct in the service during the reference period, the [administration] cannot be accused of having acted unlawfully on account of the fact that the reporting officer’s observations on the applicant’s conduct in the service are included in the appraisal report*”.

[7] See the Judgment of the Civil Service Tribunal of 2 October 2012, *Q v [Link] European Commission* , case F-52/05 RENV, paragraphs 23-25; as well as the Judgment of the General Court of 6 October 2009, *Asa Sundholm v [Link] European Commission* , case T-102/08 P, paragraphs 29-30.

[8] See Article 41 of the Charter of Fundamental Rights of the EU, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [Link]

[9] See judgment of the Civil Service Tribunal, F-114/05, *Combescot v [Link] Commission* , 19 October 2006, paragraph 38 (by analogy).

[10] This complaint has been dealt with under delegated case handling, in accordance with [the Decision of the European Ombudsman adopting Implementing Provisions](#) [Link]