

Decision of the European Ombudsman on complaint 1836/2001/PB against the Council of Ministers

Decision

Case 1836/2001/PB - Opened on 16/01/2002 - Decision on 30/08/2002

Strasbourg, 30 August 2002

Dear Mr J.,

On 18 December 2001, you made a complaint to the European Ombudsman concerning a recruitment procedure organised by the Council.

On 16 January 2002, I forwarded the complaint to the Secretary General of the Council of the European Union. The Council sent its opinion on 19 April 2002. I forwarded it to you with an invitation to make observations, which you sent on 28 May 2002.

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

THE COMPLAINT

The complaint was submitted in December 2001. It concerned an application made by the complainant in response to a vacancy notice published by the Council of the European Union (1).

Background

On 15 and 19 January 2001, the Council of the European Union published vacancy notices for posts in the CESDP-structure (Common European Security and Defence Policy). The notice published on 15 January invited officials of the Council or other Community institutions to apply for the post under Article 29 of the Staff Regulations. The notice of 19 January invited applications for a post under contract as another servant.

On 25 January 2001, the complainant submitted his application for the post "principal administrator in the field of forces planning and elaboration of capability goals". The complainant was working as an A6 official at the European Parliament, and had previously worked as a military expert at for instance NATO's SHAPE (Supreme Headquarters Allied Powers Europe).

On 20 March 2001, the Council's Director of Personnel informed the complainant that the Council's selection committee had decided not to shortlist him for a job interview. On 27 March



2001, the complainant requested a review of this decision.

On 6 April 2001, the Director of Personnel confirmed the decision because the complainant did not fulfil certain requirements in the vacancy notice. The requirements in full were the following:

"Job description

- coordinating the work of a group of staff carrying out development, analysis and control duties in the field of forces planning,
- evaluating developments in Member States' defence plans, in liaison with the Military Staff,
- evaluating the contributions of Member States to the European Union's capability goals and the additional contributions from third States, in liaison with the military staff,
- consulting with NATO and with third countries in the capability goals field, and liaising with the Committee of Contributors,
- participating in the work of Council bodies in this field.

Specific qualifications required

Applicants must:

- have six years' professional experience, including at least three years in the above field,
- have an aptitude for organisation and coordination,
- have the capacity to analyse all aspects of defence plans (military, technical and financial),
- have experience of military planning within a national or multinational defence planning department,
- have a good knowledge of armed forces and the various aspects of planning (finance, human resources, procurement),
- have across-the-board expertise in budget planning, in general matters relating to the development of military technologies and in interfacing with the use of non-military instruments."

The requirements which the Council considered that the complainant did not fulfil were:

- at least three years professional experience in the fields of forces planning and elaboration of capability goals;
- a good knowledge of armed forces and the various aspects of planning (finance, human



resources, procurement).

On 25 April 2001, the complainant requested the decision of the Selection Committee to be reversed. On 22 May 2001, the Director of Personnel confirmed the decision again.

On 23 May 2001, the complainant submitted a formal complaint to the Council under Article 90(2) of the Staff Regulations. The complainant put forward two allegations:

1) The Council had breached Article 29 (1) of the Staff Regulations by not looking for in-house or inter-institutional applicants before considering external applicants (2) . The complainant considered himself an inter-institutional applicant within Article 29(1), due to his status as an official at the European Parliament. He appears to have thought that the Council's examination of applications for a post under contract as another servant could have had a negative impact on his application.

2) The Council's Selection Committee was wrong when it decided that his qualifications were insufficient.

The Council replied on 19 September 2001. The Council specified that the complainant's application had not been dealt with as an interinstitutional application. Instead, it had been dealt with as an application for a post under contract as another servant, i.e. as an application in response to the vacancy notice dated 19 January 2001. Thus, Article 29 of the Staff Regulations had no relevance to his case.

The Council nevertheless explained its examination of the applications received in response to both vacancy notices. It stated that all applications had been examined "in a single operation", but with due regard for the obligation to first examine the applications submitted by officials under Article 29 of the Staff Regulations. The vacancy notice published on 19 January 2001 stated that "if these posts are not filled by recruitment on the basis of Article 29(1)(a) or (c) of the Staff Regulations for Officials, they will be filled, ... , by the recruitment of temporary staff".

As regards the merits of the Selection Committee's decision, the Council confirmed the Committee's interpretation of the complainant's qualifications. As for the lack of "at least three years professional experience in the fields of forces planning and elaboration of capability goals", the determining point was the Council's interpretation of the complainant's work at SHAPE. The Council took the view that the complainant's one year at SHAPE dealing with ACE Rapid Reinforcement Plan cannot be regarded as relevant experience as this relates to the planning for specific operations and contingencies as opposed to the elaboration of military capability goals, which relate to generic military capabilities for EU crisis management.

As regards "a good knowledge of armed forces and the various aspects of planning (finance, human resources, procurement)", the Council stated that the planning competencies concerned were those that relate to the preparation and assessment of defence plans and budgets at least at national level, including procurement and human resource policies, as opposed to planning experience at lower levels within the armed forces.



The Council considered that the complainant's application did not demonstrate compliance with the above requirements.

The present complaint

In his complaint to the Ombudsman, the complainant maintained that the Council had breached Article 29 of the Staff Regulations.

As concerns the merit of the Council's decision, the complainant submitted detailed arguments to support his view that the Council had misinterpreted his application and applied requirements which were not in the vacancy notice. The complainant noted that the requirements in the vacancy notice were stated in unusually broad terms, but he maintained that there had been "a manifest error of assessment".

Thus, the complainant alleged that

1) The Council had acted in breach of Article 29 (1) of the Staff Regulations, by deliberately organising the recruitment procedure for post POL/MIL/006 so as to be able to examine both internal and external applications at the same time.

2) In connection with the recruitment procedure for vacancy notice POL/MIL/006/D, the Council's selection committee had committed manifest errors of assessment by applying an illogical and incoherent evaluation with regard to the complainant's qualifications, and by disregarding or misinterpreting information about his professional and educational background.

The complainant claimed that the Council should apologise for the maladministration committed, and promise that it will deal positively with any future application.

THE INQUIRY

The Council's opinion

The complaint was forwarded to the Council for opinion. The Council addressed the complainant's allegations as follows:

Article 29 of the Staff Regulations

First, Article 29(1) of the Staff Regulations does not prevent an institution from jointly examining internal and external applications (court cases *Kotzonis* (3) and *Richard* (4)).

Second, the Council did not invite external applications on the basis of Article 29 of the Staff Regulations, but on the basis of Articles 2 b) and 12 of the Conditions of Employment of Other Servants. The complainant was treated as an external candidate. As a matter of fact, the complainant could not apply as an interinstitutional applicant because his grade is inferior to the grade that was required for interinstitutional applicants (A4-A5). Article 29 of the Staff Regulations was therefore not applicable to the complainant's situation.

Manifest error of assessment of qualifications

The Council referred to its detailed answer to the complainant of 19 September 2001, maintaining that the criteria applied by its Selection Committee were in line with the published



vacancy notice.

Thus, the Council did not find reason to apologise. Furthermore, the Council stated that it was impossible to promise that future applications by the applicant would be dealt with positively. The outcome of any future application would naturally depend on whether the requirements of the vacancy notice are fulfilled.

The complainant's observations

The Council's opinion was forwarded to the complainant for observations.

In his observations, the complainant maintained his complaint in regard to the merit of the Council's decision.

As for the applicability of Article 29 of the Staff Regulations, the complainant maintained that even if he was not entitled to apply as an interinstitutional applicant, he still had an interest in the proper conducting of the recruitment competitions. The complainant therefore maintained his allegation that the Council had acted in breach of Article 29 (1) of the Staff Regulations, by deliberately organising the recruitment procedure so as to be able to examine both internal and external applications at the same time. The complainant furthermore challenged the Council's legal view, stating that the Council had misinterpreted the relevant case law. The complainant referred to the *Carbajo Ferrero* case (5) .

Finally, the complainant stated that in the case the Ombudsman would reject essential parts of his complaint, he would like to be given a formal oral hearing before the Ombudsman closes the decision. The complainant referred to Article 41 of the European Union's Charter on Fundamental Rights (6) .

THE DECISION

1 Preliminary remark on the claim to be heard

1.1 The complainant stated that in the case the Ombudsman would reject essential parts of his complaint, he would like to be given a formal oral hearing before the Ombudsman closes the decision.

1.2 The Ombudsman points out that the procedure normally applied in the European Ombudsman's inquiries is a written procedure. In this procedure, both parties can submit their arguments, and the complainant is always, as in this case, given the opportunity to submit the final set of arguments in response to the opinion by the relevant Community institution or body. Although it does not appear to be excluded that the Ombudsman organises an oral hearing, it is considered that inquiry on the basis of written correspondence normally satisfies the requirements of fair procedure. Having examined the complainant's claim to be heard, the Ombudsman did not consider that it was necessary to conduct an oral hearing in this case.

2 Possible breach of Staff Regulations

2.1 The complainant alleges that the Council has acted in breach of Article 29 (1) of the Staff Regulations, by deliberately organising recruitment procedure 2001/C 17 A/01 so as to be able to examine both internal and external applications at the same time.



2.2 The Council considers that the relevant case law allowed it to organise the recruitment procedure as it did in this case.

2.3 Article 29 of the Staff Regulations sets out the successive stages which must be observed when a vacant post in an institution is to be filled (7) . However, the institution may publish the vacancy notice on the same date (8) and, as confirmed by the case law referred to by the Council (9) , collect applications simultaneously for examination. The obligation to observe the successive states set out in Article 29(1) of the Staff Regulations applies when the applications are examined.

2.4 Thus, the Council's organising of the competition here concerned does not appear to have been contrary to Article 29 of the Staff Regulations, and there has therefore been no maladministration with regard to this aspect of the case.

3 The merits of the Council's decision

3.1 The complainant alleges that the Council has committed manifest errors of assessment by applying an illogical and incoherent evaluation with regard to the complainant's qualifications, and by disregarding or misinterpreting information about his professional and educational background.

3.2 The Council has confirmed its evaluation of the complainant's qualifications.

3.3 When an institution seeks to fill a vacant post, it has a wide discretion for the purpose of finding the candidates with the highest standard of ability, efficiency and integrity. When applying its discretion, it must remain within the limits of its legal authority.

3.4 The requirements of the vacancy notice were, as noted by the complainant, stated in very broad terms. The Council therefore had a broad margin to interpret the notice.

3.5 The Ombudsman has thoroughly examined the submissions by the complainant and the Council, and the Council does not appear to have acted beyond the limits of its legal authority. The Ombudsman therefore considers that there has been no maladministration by the Council with regard to this aspect of the case.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Council of the European Union. The Ombudsman therefore closes the case.

The Secretary General of the Council of the European Union, Mr Javier Solana, will also be informed of this decision.

Yours sincerely,



Jacob SÖDERMAN

(1) Official Journal 2001/C 17 A/01, post 'POL/MIL/00/6/D', at p 4.

(2) Article 29 of the Staff Regulations provides as follows:

1. Before filling a vacant post in an institution, the appointing authority shall first consider: (a) whether the post can be filled by promotion or transfer within the institution; (b) whether to hold competitions internal to the institution; (c) what applications for transfer have been made by officials of other institutions of the three European Communities; and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure. The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.

(3) Case T-586/93, Petros Kotzonis v Economic and Social Committee, ECR 1995 II - 665, paragraph 44.

(4) Case C-174/99 P, European Parliament v Pierre Richard, ECR 2000 I-6189, paragraphs 38 to 43.

(5) Case C-304/97 P, Fernando Carbajo Ferrero v European Parliament, ECR 1999 I-1749, paragraphs 29 and 30.

(6) Article 41 confirms the "right of every person to be heard, before any individual measure which would affect him or her adversely is taken".

(7) Case C-304/97 P, Fernando Carbajo Ferrero v European Parliament, ECR 1999 I-1749, paragraphs 29.

(8) Case T-52/90, Cornelis Volger v European Parliament, ECR 1992 II-121.

(9) I.e. Case T-586/93, Petros Kotzonis v Economic and Social Committee, ECR 1995 II - 665, paragraph 44, and Case C-174/99 P, European Parliament v Pierre Richard, ECR 2000 I-6189, paragraphs 38 to 43.