

Decision of the European Ombudsman on complaint 2059/2002/IP against the Council of the European Union

Decision

Case 2059/2002/IP - Opened on 10/12/2002 - Recommendation on 08/07/2003 - Decision on 14/11/2003

Strasbourg, 14 November 2003

Dear Mr A.,

On 29 November 2002, you lodged a complaint against the Council of the European Union concerning your participation in competition Council/A/394.

On 10 December 2002, the complaint was forwarded to the Secretary General of the Council. On 7 April 2003, I received the English version of the Council's opinion, which I sent to you on 16 April 2003, with an invitation to make observations. On the same date, I wrote to the Council of the European Union and I asked the institution to provide me, by 30 April 2003, with a translation of its opinion into French. On 22 April 2003, I received the French translation of the Council's opinion, which I forwarded to you on 5 May 2003. On 27 May 2003, you sent your observations.

On 8 July 2003, I submitted a draft recommendation to the Council. On 30 October 2003, the Council sent me its detailed opinion concerning this draft recommendation. On 5 November 2003, my services contacted you by telephone. On 11 November 2003, a copy of the Council detailed opinion was forwarded to you for your information.

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

THE COMPLAINT

The complainant, a Portuguese citizen, took part in competition Council/A/394 for administrators of Portuguese language. On 1 March 2002, the Secretary General of the Council of the European Union (hereinafter "the Council") informed the complainant that he was not admitted to the oral examination because in test VI.A.d.1, which consisted of a written dissertation, he had only obtained 13 out of 40 points when the minimum required was 20 points.

On 5 March 2002, the complainant wrote to the President of the Selection Board. He took the



view that it was highly improbable that he had obtained such a low mark and asked the Selection Board to re-examine his test VI.A.d.1. By letter of 11 March 2002, the Selection Board informed the complainant that after having reconsidered the mark attributed to his test, it confirmed the original decision.

On 18 March 2002, the complainant made a complaint under Article 90 (2) of the Staff Regulations. He requested to have access to a copy of the marked written test he had failed and to be informed about the evaluation criteria followed by the Selection Board. The Council rejected the complainant's complaint by decision of 11 July 2002.

On 26 August 2002, the complainant wrote a further letter to the Council, which replied on 25 September 2002 and confirmed the decision of 11 July 2002.

In his complaint to the Ombudsman, the complainant alleged that the Council had not respected Article 255 of the EC Treaty and had failed to implement the general principle that was laid down in the special report made by the European Ombudsman following his own initiative inquiry 1004/97/PD against the Commission, which had been approved by the European Parliament.

The complainant asked to be given access to a copy of his marked examination paper and to be informed about the criteria followed by the Selection Board in the evaluation of the tests.

THE INQUIRY

The Council's opinion

In its opinion, the Council made the following comments:

After having received notice of his non-admission to the oral examination, the complainant demanded a re-examination of the test he had failed (test VI.A.d.1). The Selection Board carried out a re-examination of the test. It confirmed the result of the first evaluation and notified the complainant by letter of 11 March 2002.

On 18 March 2002, the complainant made a complaint under Article 90 (2) of the Staff Regulations against the Selection Board's decision. The complaint was rejected on 11 July 2002. In its reply to the complainant, the Council pointed out that the Selection Board of a competition acts independently and that the Appointing Authority is not in a position to annul or overrule its decision, unless there is evidence of manifest illegality by the Selection Board. The Council had found no evidence of manifest illegality in the activity of the Selection Board as regards the case concerned.

Furthermore, as consistently held by the Community courts (1), the confidential nature of the deliberations of the Selection Board, namely in the case of a comparative examination of merits of candidates, prevents it from divulging the evaluation criteria of tests, as these are part of the comparative evaluation of candidates. The complainant was informed of the marks he had obtained in the various tests which, according to the Community jurisprudence, constitutes an



adequate statement of the reasons on which the Selection Board's decision is based. Finally, the obligation to safeguard the independence and the confidentiality of the proceedings of the Selection Board prevented the Council from granting a candidate access to his or her marked examination papers.

In a further letter of 26 August 2002, the complainant alleged maladministration on the part of the Selection Board. By letter of 25 September 2002, signed by the Deputy Secretary General, the Council confirmed the arguments already stated in the letter of 11 July 2002.

The complainant's observations

In his observations on the Council's opinion, the complainant maintained his allegation and claim.

THE DRAFT RECOMMENDATION

On 8 July 2003, the Ombudsman addressed the following draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the Ombudsman:

The Council of the European Union should allow the complainant to have access to his own marked examination paper and should inform him of the evaluation criteria followed by the Selection Board.

This draft recommendation was based on the following considerations:

As regards the refusal to grant access to marked examination paper

1 The complainant, a Portuguese citizen, took part in competition Council/A/394 for administrators of Portuguese language. On 1 March 2002, the complainant was informed that he had not been admitted to the oral examination because in test VI.A.d.1, which consisted of a written dissertation, he only obtained 13 out of 40 points, when the minimum required was 20 points. He therefore asked the Selection Board to re-examine the test he had failed. After having reconsidered the mark attributed to his test, the Selection Board confirmed the original decision. The complainant then lodged a complaint under Article 90 (2) of the Staff Regulations, which was rejected. He thereupon requested to be given access to a copy of the marked written test he had failed, but the Council rejected his request.

In his complaint to the Ombudsman, the complainant alleged that the Council had not respected Article 255 of the EC Treaty and had failed to implement the general principle that was laid down in the special report made by the European Ombudsman following his own initiative inquiry 1004/97/PD against the Commission, which had been approved by the European Parliament. The complainant asked to be given access to a copy of his marked examination paper.

2 In its opinion, the Council pointed out that the Selection Board of a competition acts independently and that the Appointing Authority is not in a position to annul or overrule its decision, unless there is evidence of manifest illegality by the Selection Board. The Council had found no evidence of manifest illegality in the activity of the Selection Board as regards the case



concerned. Furthermore, the Council considered that the obligation to safeguard the independence and the confidentiality of the proceedings of the Selection Board prevented it from granting a candidate access to his or her marked examination paper.

3 The European Ombudsman has already had to deal with the issue of access to candidates' marked examination papers in cases concerning the European Commission (2) and the European Parliament (3) .

4 On the basis of his inquiries concerning the recruitment procedures of the Commission, the Ombudsman submitted, on 18 October 1999, a special report to the European Parliament (4) , which contains the following considerations:

"The Ombudsman is not aware of any provision of Community law or case-law of the Community courts which would prevent the Commission from allowing a candidate in a written examination to see his or her own marked script. Article 6 of Annex III to the Staff Regulations stipulates that the "proceedings of the Selection Board" are to be secret. The deliberations of the Selection Board must therefore remain secret, but it does not necessarily follow from this that a candidate must be prevented from seeing his or her own marked examination script.

The main argument which the Commission puts forward in order to justify its refusal concerns the nature of the recruitment procedure. In the Commission's view the Selection Board assesses each candidate by comparing his or her performance to the performance of all the other candidates in the same competition. The Commission concludes from this that the disclosure of the marked examination script would serve no purpose, since it only reflects the appraisal of a person who has not assessed all the other candidates.

However, being able to inspect his own marked examination script does entail several benefits for the candidate. First, the candidate gains the opportunity to discover his mistakes and thus to improve his future performance. Second, the candidate's confidence in the administration is strengthened. This is important, since there seems to be a widespread belief that tests are not always properly assessed by the Commission and indeed that sometimes they are not assessed at all. Third, if a candidate feels that he has been wrongly assessed, he will be able to argue much more precisely if he has seen his marked examination script. In any event, the citizen who requests information should be the judge of whether the information is useful, not the administration.

The Commission also refers to administrative and financial burdens which the disclosure of examination scripts could entail. The Ombudsman is confident that the Commission services could organise the process of disclosure in a way that would minimise the costs since it is unlikely that every candidate would wish to see his or her marked examination script.

(...)

The Commission is also correct to point out that the activity of Selection Boards is subject to judicial review by the Community courts. However, this means that queries which could easily



have been solved if the candidate had a chance to see the marked examination script may have to be dealt with by the courts. The Ombudsman believes that this is highly unsatisfactory for candidates. Granting access to the marked examination script, on the other hand, is likely to satisfy many queries with a minimum of effort and time.

(...)

As the Treaty of Amsterdam has confirmed, the obligation to take decisions as openly as possible represents one of the fundamental principles of the administrative law of the European Communities. Furthermore, it is important to ensure that citizens receive a positive impression when first encountering the Community institutions. Citizens who wish to work for the Communities receive a very bad impression if they are left in doubt as to whether they have been assessed fairly and correctly. To dispel such doubt it is essential that each candidate should have the possibility to inspect the marked copy of his or her own examination script. This possibility in no way conflicts with the requirement that the proceedings of Selection Boards shall be secret, since it does not concern the deliberations of Selection Boards in which the relative merits of candidates are assessed. For these reasons, the Commission's failure to modify its administrative procedures so as to give each candidate the possibility of access to his or her own marked examination script, appears to constitute an instance of maladministration."

5 On the basis of these considerations, the Ombudsman made a recommendation to the Commission according to which the latter should, in its future recruitment competitions, and at the latest from 1 July 2000, give candidates access to their own marked examination scripts upon request. By letter of 7 December 1999, the President of the European Commission informed the Ombudsman that the Commission had accepted this recommendation.

6 On 17 November 2000, the European Parliament adopted a resolution (5) in which it endorsed the Ombudsman's special report and congratulated the Commission on its positive response to the recommendation made by the Ombudsman. Parliament also expressed the hope "that all other European bodies and institutions will follow the example set by the Commission".

7 On 17 July 2000, the Ombudsman addressed draft recommendations to the European Parliament in which he suggested that the latter should grant the complainants concerned access to their marked examination papers. On 27 November 2000, Parliament informed the Ombudsman that it had accepted the principle that candidates should be allowed to obtain a copy of their own marked examination papers and described how it would implement the Ombudsman's draft recommendations. (6)

8 The arguments put forward by the Council in the present case do not refer to any special characteristics of competitions organised by the Council which would distinguish them from competitions organised by the European Parliament and the Commission. The Ombudsman therefore takes the view that the considerations set out in his special report concerning the recruitment procedures of the Commission also apply (*mutatis mutandis*) to the competitions organised by the Council.



9 In view of the above, the Ombudsman considers that the refusal of the Council to grant the complainant access to his marked examination papers constitutes an instance of maladministration.

As regards the communication of the evaluation criteria

1 The complainant claimed that he should be informed about the criteria followed by the Selection Board in the evaluation of the tests.

2 In its opinion, the Council pointed out that, as consistently held by the Community courts (7) , the confidential nature of the deliberation of the Selection Board, namely in the case of a comparative examination of merits of candidates like in an open competition, prevents it from divulging the evaluation criteria of tests, as these are part of the comparative assessment of candidates. The complainant was informed of the mark he had obtained in the various tests which, according to the case-law, constitutes an adequate statement of the reasons on which the Selection Board's decision is based.

3 In the past, the Ombudsman has already had to deal with the issue concerning the communication of evaluation criteria to candidates. He is aware of the fact that according to the case-law of the Court of Justice, Selection Boards are vested with wide discretionary powers. Such powers imply that the scope of judicial control is limited; the conferral of such powers does not however appear to prevent public authorities from complying with principles of good administration. The Ombudsman therefore considered that without prejudice to the discretionary powers of Selection Boards and Article 6 of Annex III to the Staff Regulations, the institutions could themselves decide to develop procedural guarantees for applicants as a matter of good administrative behaviour (8) . Furthermore, he took the view that communication of the evaluation criteria to the applicant concerned could increase the transparency in the decision making process and the confidence of citizens vis à vis the Community institutions, in view of the fact that many citizens' first contact with the Community institutions happens in the context of recruitment procedures.

4 Furthermore, the Court of First Instance has recently held that although the communication of the mark obtained by candidates in the various tests constitutes an adequate statement of the reasons on which the Selection Board's decision is based, this conclusion does not imply that a candidate who so requests cannot be informed about the Selection Board's general criteria of correction (9) .

5 In view of the above, the Ombudsman takes the view that there are no reasons which should prevent the Council from communicating to the complainant the evaluation criteria followed by the Selection Board.

The Council's detailed opinion

In its detailed opinion, the Council stressed that, further to the draft recommendation made by the Ombudsman in a previous similar case (complaint 2097/2002/GG), the General Secretariat of the Council had, on 17 September 2003, set up new rules related to the communication of marked copies to candidates. These rules would apply to all external and internal competitions to be organised by the General Secretariat of the Council.



Candidates participating in competitions published from 1 September 2003 onwards would be allowed to obtain a copy of their own examination paper and, for written tests, of the evaluation sheet of the Selection Board. In case of competitions organised before 1 September 2003, the relevant rules provided that candidates so requesting were allowed to obtain a copy of their own examination paper and also the evaluation sheet, where the Selection Board had drawn up such a sheet.

As regards the present case, the Council had decided to allow the complainant access to his own examination paper. As regards the communication of the evaluation criteria, the Council stressed that they had been indicated in point VI.A.d) of the notice of competition and that the Selection Board had not drawn up an evaluation sheet. According to the Council, a copy of the complainant's examination paper, together with a copy of the notice of competition, would be sent to the complainant the same day.

The complainant's observations

On 5 November 2003, the Ombudsman's services contacted the complainant by telephone in order to inform him about the Council's reply and to ascertain if he considered the reply to be satisfactory. The complainant congratulated the Ombudsman for the outcome of the inquiry and for the results that had been achieved.

THE DECISION

1 Refusal to grant access to marked examination paper and to communicate the evaluation criteria

1.1 The complainant asked for access to a copy of his marked examination paper in competition Council/A/394 and to be informed about the criteria followed by the Selection Board in the evaluation of the tests. The Council refused to comply with these requests. The complainant therefore complained to the Ombudsman.

1.2 On 8 July 2003, the Ombudsman addressed, in accordance with Article 3 (6) of the Statute of the Ombudsman, a draft recommendation to the Council according to which the Council should allow the complainant to have access to his own marked examination paper and should inform him of the evaluation criteria followed by the Selection Board.

1.3 In its detailed opinion, the Council informed the Ombudsman that it had decided to accept his draft recommendation.

The Council pointed out that on 17 September 2003 its General Secretariat had set up new rules related to the communication of marked copies to candidates. These rules would apply to all external and internal competitions to be organised by the General Secretariat of the Council.

Candidates participating in competitions published from 1 September 2003 onwards would be allowed to obtain a copy of their own examination paper and, for written tests, of the evaluation sheet of the Selection Board. In case of competitions organised before 1 September 2003, the relevant rules provided that candidates so requesting were also allowed to obtain both a copy of



their own examination paper and a copy of the evaluation sheet of the Selection Board where it had drawn up such a sheet.

1.4 As regards the complainant's case, the Council informed the Ombudsman that a copy of the complainant's examination paper and of the notice of competition would be sent to the complainant the same day. The Council explained that since the evaluation criteria followed by the Selection Board had been set out in point VI.A.d) of the notice of competition, the Selection Board had not drawn up an evaluation sheet.

2 Conclusion

2.1 On the basis of his inquiries, the Ombudsman concludes that the Council has accepted the Ombudsman's draft recommendation and that the measures taken by the Council to implement it are satisfactory.

2.2 The Ombudsman therefore closes the case. The Secretary General of the Council will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Case C-245/95 P, *European Parliament v Innamorati* [1996] ECR I - 3423.

(2) Own-initiative inquiry 1004/97/(PD)/GG.

(3) Complaints 457/99/IP, 610/99/IP, 1000/99/IP and 25/2000/IP.

(4) OJ 1999 no. C 371, page 12.

(5) OJ 2001 no. C 223, pages 352, 368.

(6) Cf. the Ombudsman's decisions of 11 May 2001 concerning complaints 457/99/IP, 610/99/IP, 1000/99/IP and 25/2000/I, available on the Ombudsman's website (<http://www.ombudsman.europa.eu>).

(7) Case C-245/95, *European Parliament v Innamorati* [1996] ECR I - 3423.

(8) The Ombudsman made this statement in his own initiative inquiry into the secrecy which forms part of the Commission's recruitment procedure (see note 3).

(9) Judgement of 25 June 2003, in case T-72/01, *Pyres v. Commission*.