

Decision of the European Ombudsman on complaint 411/2003/GG against the European Personnel Selection Office

Decision

Case 411/2003/GG - Opened on 11/03/2003 - Decision on 19/11/2003

Strasbourg, 19 November 2003

Dear Mr X,

On 27 February 2003, you made a complaint to the European Ombudsman against the European Personnel Selection Office (EPSO) concerning EPSO's handling of your reply to the call for interest published by EPSO with a view to the selection of auxiliary staff for pre-enlargement.

On 11 March 2003, the Ombudsman forwarded the complaint to the Director of EPSO. EPSO sent its opinion on 25 April 2003, and I received it on 6 May 2003. I forwarded it to you on 20 May 2003 with an invitation to make observations by 30 June 2003. No observations were received from you by that date.

On 15 July 2003, I submitted a proposal for a friendly solution to EPSO. You were informed accordingly in a letter sent the same day. EPSO sent its opinion on 28 July 2003. I forwarded it to you on 9 September 2003 with an invitation to make observations, which you sent on 5 November 2003.

I am writing now to let you know the results of the inquiries that have been made. Since you indicated that I could use either German, English or French, this decision will be sent to you in English, the working language of the Ombudsman's office.

THE COMPLAINT

In November 2002, the European Personnel Selection Office (EPSO) organised, on behalf of the EU institutions, a call for expressions of interest for a number of non-permanent posts in the light of the forthcoming enlargement of the EU. Candidates had to possess a *"thorough"* knowledge of at least one of the languages of the ten accession countries and a *"sound knowledge"* of English, French or German. Applications had to be handed in by 10 January 2003. The application form required candidates to indicate whether the relevant language was



their mother tongue or whether their knowledge was “good”, “very good” or “excellent”. The eligible applications were to be entered into a data base by EPSO. It appears that only candidates whose names figure in this data base can be recruited.

The complainant, a German citizen, submitted an application. He alleged that when he subsequently telephoned EPSO, he was informed that the linguistic requirements had been modified after the expiry of the application period. As a result, it was now required that candidates had to have one of the languages of the ten accession countries as a mother tongue or possess an “*excellent*” knowledge of this language; furthermore they needed to have a “*good knowledge*” of English, French or German.

The examination of the applications was finalised on 13 February 2003. According to the complainant, 21 020 out of the 22 005 applicants from the accession countries were entered into the data base but only 1 126 out of 3 374 applicants from the present Member States. The complainant’s application was not among the successful ones.

When the complainant telephoned EPSO, he was told that the rejection of his application was due to the fact that he had not ticked “excellent” in relation to his knowledge of one of the languages of the ten accession countries. According to the complainant, the official from EPSO to whom he spoke also submitted that in the case of a call for expressions of interest like the present one EPSO was not bound by the principles of legitimate expectations and of legal certainty. The complainant thereupon sent two faxes to the acting director of EPSO on 24 and 26 February 2003 in which he asked for his name to be added to the relevant data base.

In the absence of any reaction from EPSO, he lodged the present complaint.

The complainant submitted that he fulfils the original criteria, given that he has a “good” knowledge of German, English and French and a “thorough” knowledge of Polish. He therefore took the view that his name should be entered into the data base. The complainant submitted that the requirement to have a “*thorough*” knowledge of a given language could not be interpreted as meaning that an “*excellent*” knowledge was required or that this language had to be the mother tongue of the applicant. An “excellent” knowledge was substantially more than a “thorough” knowledge. According to the complainant, the institutions have to comply with fundamental rights and general principles of administrative law whenever they act. The complainant alleged that by subsequently changing the criteria, EPSO infringed the principles of legitimate expectations and of legal certainty. The complainant also argued that applicants from the present Member States were being discriminated against since applicants from the accession countries only needed to have a “good” knowledge of English, French or German.

According to the complainant, the data base was available to the institutions and bodies of the EU since 14 February 2003. The complainant therefore considered the matter to be urgent.

THE INQUIRY



The complaint was forwarded to EPSO for its opinion. In his letter, the Ombudsman drew EPSO's attention to the fact that the complainant considered the matter to be urgent.

In its opinion, EPSO made the following comments:

Candidates had to possess a thorough knowledge ("connaissance approfondie") of at least one of the languages of the ten accession countries and a sound knowledge ("bonne connaissance") of English, French or German. This reflected the spirit of Article 28 (f) of the Staff Regulations according to which nobody can be appointed as an official unless he "produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties".

In a first centralised phase, a preselection of candidates was carried out. A validation committee, composed of representatives of all the Community institutions taking part in the procedure, defined the filtering criteria in order to determine the candidates admitted to the data base of candidates having fulfilled the eligibility criteria. EPSO's services had helped in checking the more than 25 000 applications.

This operation was terminated on 13 February 2003, and the data base was made available to the institutions so that the latter could examine the applications in the light of their own needs. A little more than 3 000 applications had not been included in the data base. These were mostly cases where the criteria for admission were not fulfilled, but there were also cases of double and thus incorrect applications.

Candidates had to possess a thorough knowledge of at least one of the languages of the ten accession countries. The Selection Board had defined the expression "thorough knowledge" as equivalent to that of main or mother tongue or "excellent" knowledge.

The complainant had indicated in his application that his mother tongue was German and that his knowledge of Polish was "very good". He had also enclosed his curriculum vitae. According to the information provided by the complainant regarding his linguistic skills, his knowledge of Polish was "good".

Since the complainant himself had evaluated his knowledge of one of the languages of the accession countries (in this case, Polish) as being "good" or "very good", the Selection Board had limited itself to applying the filtering criteria that had already been established in order to check the admissibility of applications and had thus been unable to include the complainant's application in the relevant data base.

The eligibility criteria for this procedure that had been published on EPSO's website reflected the real needs that the European institutions had identified in relation to the tasks linked to the preparation of the forthcoming enlargement. For example, the Commission would need to work in close liaison with the future Member States in order to prepare the implementation of EU policies. At the European Parliament, the work linked to enlargement concerned several



services and in particular the translation and interpretation services. In both cases, the thorough knowledge of one of the new languages was thus extremely important.

The fact that a candidate was a national of one of the existing Member States was not a ground for exclusion. All the candidates had been taken into consideration. It was however not surprising that a large number of candidates from the countries about to join the EU were included in the final data base, since a larger proportion of these candidates fulfilled the conditions, including those concerning linguistic skills.

The complainant's observations

The Ombudsman forwarded EPSO's opinion to the complainant and invited the latter to submit observations, if he so wished, by 30 June 2003. No observations were received from the complainant by that date.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and of the issues that had been raised, the Ombudsman was not satisfied that EPSO had responded adequately to all the complainant's allegations.

The proposal for a friendly solution

Article 3 (5) of the Statute of the Ombudsman (1) directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint. The Ombudsman's provisional conclusion was that EPSO's decision not to include the complainant's application in the data base of admissible applications could be an instance of maladministration.

The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

The Ombudsman could reconsider the complainant's application in reply to the call for expressions of interest published by EPSO.

This proposal was based on the following considerations:

1 The requirement to possess a "thorough" knowledge of a language may be interpreted taking into account the needs of the EU institutions for whom EPSO organised the relevant call for expressions of interest. In the light of the explanations provided by EPSO, the Ombudsman takes the view that the Selection Board was entitled to require candidates to have a very good knowledge of the language concerned. The Ombudsman notes, however, that in his application form, the complainant appears to have indicated that he possesses a very good knowledge of Polish.

2 The rejection of the complainant's application was thus only lawful if the Selection Board's view that what was required was an excellent knowledge of the language concerned, or that the



language had to be the main language or the mother tongue of the applicant, was correct. The Ombudsman notes that Selection Boards dispose of a large margin of discretion in recruitment procedures. However, this discretion has to be exercised within the framework of the notice of vacancy or, as in the present case, the call for expressions of interest. This call required candidates to possess a “thorough” knowledge of the relevant language. As the complainant has pointed out, an “excellent” knowledge of something is generally understood as going beyond a “thorough” knowledge. In these circumstances, the Ombudsman considers that EPSO has not provided a satisfactory explanation as to why the Selection Board should nevertheless have been entitled or even obliged to require candidates to have an “excellent” knowledge of the language concerned, or that the language had to be the main language or the mother tongue of the applicant.

3 The Ombudsman’s preliminary view, therefore, is that EPSO’s decision not to include the complainant’s application in the data base of admissible applications could be an instance of maladministration.

EPSO’s opinion

In its opinion, EPSO made the following comments:

The explanations that had been given with regard to the linguistic requirements had not provided the clarity that EPSO had hoped to establish. EPSO’s position should therefore be explained more clearly.

This had been an operation on a scale not previously encountered, designed to enable the institutions to prepare for the integration of ten new Member States before the accession negotiations had even been finalised. It had established a single, open and transparent procedure, which was applicable to all candidates. Thus all potential candidates had received exactly the same information in exactly the same way. With the same aim of establishing commonality of standards and transparency, the linguistic requirements conformed to those laid down for competitions in the Staff Regulations. Clearly the question of linguistic competence had been particularly important for this exercise. However, EPSO had never assumed that, because it was dealing with a call for expressions of interest, the general legal principles did not apply.

The decision to apply the same linguistic requirements as those specified in Article 28 (f) of the Staff Regulations had meant that a “thorough” knowledge of the language concerned was interpreted as being at mother tongue/main language level, indicating an ability to work in that language. This was how this requirement within the Staff Regulations was applied for competitions.

It was true that it would probably have been clearer if EPSO had been able to use the term “mother tongue”, but because of multilingualism and for other reasons, candidates might choose a main language which was not necessarily their mother tongue. For this reason, in the context of competitions the requirement of a “thorough” knowledge laid down in Article 28 (f) of the Staff Regulations was interpreted as equating to mother tongue or an excellent knowledge of another language, chosen by the candidate, at an equivalent level to mother tongue.



This was the interpretation which had been adopted in the context of the call for expressions of interest. Since it arose out of the Staff Regulations, it had been logical to apply this condition in the same way as it was applied within the framework of competitions. It had therefore not been a question of adding a more demanding, and therefore more restrictive condition but simply of defining “thorough” knowledge more clearly. This interpretation had never been questioned within the context of competitions. However, if the Ombudsman should consider that an explanation should be included in any future call for expressions of interest that EPSO might be called upon to organise, EPSO would consider taking the necessary steps.

The complainant’s observations

In his observations, the complainant stressed that before submitting his application, he had telephoned the number that had been provided by EPSO. On this occasion, he had not been told that an excellent knowledge of the language concerned was necessary. The complainant further noted that the call for expressions of interest did not contain any reference to Article 28 (f) of the Staff Regulations. Such a reference would have clarified the linguistic requirements.

Conclusion

In these circumstances, the Ombudsman concluded that no friendly solution was possible in the present case.

THE DECISION

1 Failure to handle application properly

1.1 In 2002, the European Personnel Selection Office (EPSO) organised, on behalf of the EU institutions, a call for expressions of interest for a number of non-permanent posts in the light of the forthcoming enlargement of the EU. Candidates had to possess a “*thorough*” knowledge of at least one of the languages of the ten accession countries and a “*sound knowledge*” of English, French or German. The application form required candidates to indicate whether the relevant language was their mother tongue or whether their knowledge was “good”, “very good” or “excellent”. The eligible applications were to be entered into a data base by EPSO. The complainant, a German national, submitted an application, indicating that German was his mother tongue and that his knowledge of Polish was good or very good. His application was rejected by EPSO on the grounds that he did not have an “excellent” knowledge of one of the languages of the accession countries or that he did not have such a language as his main or mother tongue. In his complaint to the Ombudsman, the complainant alleged that EPSO had acted incorrectly by applying this criterion.

1.2 In its opinion, EPSO pointed out that candidates had to possess a thorough knowledge (“*connaissance approfondie*”) of at least one of the languages of the ten accession countries. The Selection Board had defined the expression “thorough knowledge” as equivalent to that of main or mother tongue or “excellent” knowledge. Given that the complainant himself had evaluated his knowledge of one of the languages of the accession countries (in this case, Polish) as being “good” or “very good”, the Selection Board had been unable to include his application in the relevant data base. In its reply to a proposal for a friendly solution submitted by the Ombudsman, EPSO explained that it had intended to apply the same linguistic requirements as those specified in Article 28 (f) of the Staff Regulations. It added that in the



context of competitions, the requirement of a “thorough” knowledge laid down in Article 28 (f) of the Staff Regulations was interpreted as equating to mother tongue or an excellent knowledge of another language, chosen by the candidate, at an equivalent level to mother tongue. It had therefore not been a question of adding a more demanding, and therefore more restrictive condition but simply of defining “thorough” knowledge more clearly. This interpretation had never been questioned within the context of competitions. However, if the Ombudsman should consider that an explanation should be included in any future call for expressions of interest that EPSO might be called upon to organise, EPSO would consider taking the necessary steps.

1.3 The Ombudsman considers that the explanations provided by EPSO as regards the need for candidates replying to the call for expressions of interest to have a knowledge of the language concerned equating to mother tongue or an excellent knowledge of another language, chosen by the candidate, at an equivalent level to mother tongue appear to be reasonable.

1.4 The fact remains, however, that the call for expressions of interest only required candidates to possess a “thorough” knowledge of the relevant language. As the complainant pointed out, an “excellent” knowledge of something is generally understood as going beyond a “thorough” knowledge. It is true that Article 28 (f) of the Staff Regulations requires a “thorough” knowledge of one of the languages of the European Communities and that this criterion appears to have been interpreted, within the context of competitions, as requiring an excellent knowledge or mother-tongue level knowledge of the language concerned. However, nothing in the call for expressions of interest seems to have indicated that the relevant criterion had to be interpreted in the same way as the said requirement in Article 28 (f) of the Staff Regulations. It should further be noted that whilst Article 28 (f) of the Staff Regulations requires a “thorough” knowledge of one language and a “satisfactory” knowledge of another, the call for expressions of interest requires a “thorough” knowledge of one language and a “sound” knowledge of another. In view of this difference in wording candidates could hardly be expected to know that EPSO would interpret the term “thorough” the way it did. The Ombudsman therefore considers that EPSO failed sufficiently to clarify the linguistic requirements it expected candidates to meet. This is an instance of maladministration. A critical remark will be made in this context.

1.5 Given the Ombudsman’s finding in point 1.3, it would not be appropriate to make a draft recommendation asking EPSO to include the complainant’s name on the list of suitable candidates.

2 Discrimination against nationals of present Member States

2.1 The complainant took the view that applicants from the present member states were being discriminated against since applicants from the accession countries only needed to have a “good” knowledge of English, French or German.

2.2 EPSO replied that the fact that a candidate was a national of one of the existing Member States was not a ground for exclusion. All the candidates had been taken into consideration. In EPSO’s view, it was however not surprising that a large number of candidates from the countries about to join the EU were included in the final data base, since a larger proportion of these candidates fulfilled the conditions, including those concerning linguistic skills.



2.3 The Ombudsman notes that EPSO appears to have applied the same conditions to all applicants. In his view, the complainant has not established that EPSO discriminated against nationals of present Member States.

3 Conclusion

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

The call for expressions of interest only required candidates to possess a "thorough" knowledge of the relevant language. In the light of the explanations provided by EPSO, it appears reasonable to require that candidates should have an excellent or mother-tongue level knowledge of this language. However, the Ombudsman considers that EPSO failed sufficiently to clarify the linguistic requirements it expected candidates to meet. This is an instance of maladministration.

3.2 In its reply to the Ombudsman's proposal for a friendly solution, EPSO pointed out that if the Ombudsman should consider that an explanation should be included in future calls for expressions of interest, EPSO would consider taking the necessary steps. The Ombudsman therefore considers that no further steps are necessary in the present case.

3.3 The Ombudsman therefore closes the case. The Director of EPSO will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.