

Decision of the European Ombudsman on complaint 1008/2003/(BB)(OV)BB against the Council of the European Union

Decision

Case 1008/2003/BB/(OV)BB - **Opened on** 01/07/2003 - **Decision on** 09/12/2004

Strasbourg, 9 December 2004

Dear Mrs A.,

On 25 May 2003, you made a complaint to the European Ombudsman concerning alleged unfairness, lack of reasoning and non-respect of the principles of good administration regarding Open Competition COUNCIL/C/413 (Finnish-speaking secretaries) and the handling of your request for reconsideration.

On 1 July 2003, I forwarded the complaint to the Secretary General of the Council of the European Union. The Council sent the English version of its opinion on 25 September 2003 and the Finnish translation of the text on 18 November 2003. I forwarded the opinion to you with an invitation to make observations, which you sent on 12 December 2003. On 12 October 2004, I wrote to you concerning a new issue that you had raised in your observations.

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

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

THE COMPLAINT

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

The complainant participated in Open Competition COUNCIL/C/413 for Finnish speaking secretaries. The complainant passed the first stage of the competition. On 29 July 2002, she was invited to a computer test to be held on 21 September 2002. The computer test consisted of three parts. Part C c) required editing a text in a foreign language within a fixed time span. At the beginning of this part of the test, the complainant encountered a technical problem relating to an automatic line change. The problem repeated itself and the complainant had to delete the beginning of the edited text and start again. This technical problem affected her concentration and the length of the edited text. The complainant obtained 11/20 points instead of the required



12/20 points. On 4 November 2002, she sent a request for reconsideration of her results taking into account the technical problem encountered during part C c) of the test. On 15 November 2002, the Selection Board informed the complainant that her marks remained unchanged without giving any reasons.

The complainant alleges unfairness, lack of reasoning and non-respect of principles of good administration regarding Open Competition COUNCIL/C/413 and the handling of her request for reconsideration of her results.

The complainant claims that her test in Open Competition COUNCIL/C/413 should be reconsidered by different persons than those responsible for the first evaluation of the tests and that she should be awarded one extra point which would allow her to participate in the oral test of Open Competition COUNCIL/C/413. The complainant also requests a reliable account of how the Selection Board investigated the possibility of a technical problem. According to the complainant, in case it is not possible to obtain a reliable account, the matter should be decided in her favour.

THE INQUIRY

The Council's opinion

The opinion of the Council contained, in summary, the following points:

I. Concerning the possibility of technical error

There were five invigilators present in the examination room on 21 September 2002 - two members of the Selection Board, two members of the General Secretariat of the Council and additionally one member of the Informatics Service, in order to provide immediate help in case of technical problems. Before the beginning of the tests one of the two members of the Selection Board gave the candidates some information about the tests to be performed and also reminded them of a number of important points. All these instructions given to the candidates are contained in a speaking note drafted by the Selection Board in English and in Finnish. One of the instructions was the following:

"If you have a problem during a test, please raise your hand and someone will come to help you."

Moreover, the candidates were given five minutes to familiarise themselves with the personal computer and keyboard.

The complainant confirms that she neither called the invigilator nor informed the members of the Selection Board about the alleged technical problem. The high number of invigilators and the low number of candidates (27) present in the examination room would have allowed the complainant to draw their attention easily and quickly to the alleged error. However, the first time the complainant claimed that she possibly had difficulties with the return between lines of the text, was on 4 November 2002 in her letter requesting reconsideration of the part C c) of her



written test.

The Council considers that only an investigation of the complainant's personal computer on the spot, i.e. in the examination room and on the examination day, could have revealed the existence and the gravity of the alleged error and allowed the Selection Board to take corrective measures. Consequently, the complainant's own behaviour deprived the Selection Board of any possibility of detecting the alleged error and taking measures to correct it. According to the Council, the Selection Board could not have simply assumed the existence of the alleged error or taken corrective measures without violating the principles applicable in the Selection Board's proceedings and in particular the fundamental principle of equal treatment. According to the well established case law of the Court of First Instance, *"the Selection Board, in assessing the candidates' professional knowledge and also their abilities and motivation [is] bound to base its decisions exclusively and autonomously on the candidates' performances alone, in accordance with the requirements of the competition."* (1) .

II. Concerning the reconsideration of the complainant's test

The complainant has never questioned the independence and impartiality of the Selection Board, but instead is requesting an assurance that the assessment will be carried out by persons other than those who made the initial judgement. According to the Council, the practice of the Selection Board to carry out the reconsideration of the tests itself is in line with Article 3 of Annex III to the Staff Regulations as well as the case law of the Court of First Instance. The Court of First Instance stated in case T-33/00 that the intervention of a third party in the organisation of the competition tests is authorised by Article 3 of Annex III to the Staff Regulations on condition that it is in an advisory capacity and the Selection Board retains the ultimate control over the procedures and its discretionary powers. Consequently, since an examiner always acts in an advisory capacity, a practice according to which the Selection Board reconsiders a test itself, as was done in the present case, is always in line with the Staff Regulations (2) .

III. Concerning the claim for award of one additional point and subsequent participation in the oral test

According to point VI of the notice of competition, a candidate obtaining less than 60% for each of the mandatory written tests, i.e. A and C, is excluded. As the complainant was excluded on the grounds of her results in test C c), her test in C a) has not been corrected. It follows from the same point of the notice of competition that the award of one additional point in test C c) could not lead directly to her participation in the oral test but only to the correction of her test C a). To be allowed to participate in the oral test, the complainant would also have to pass test C a).

On the basis of this reasoning, the Council believes that both the administration of the Open Competition as well as the complainant's requests related to the reconsideration of her test were handled in the correct manner and in full compliance with all principles of good administration.

The complainant's observations



The complainant maintains her complaint. According to her, the Council has not taken any concrete measures to seek to clarify whether the evaluation of her test infringed her legal security or to exclude the possibility of a technical error. The Council is shifting the burden of proof onto the complainant. The complainant claims that she did not notice anything unusual during the five minutes given to the candidates to familiarise themselves with their personal computers and keyboards. However, she underlines that a completely new document was opened after this initial familiarisation period. According to her, it is highly likely that the error occurred as the new pathway was opened. As part C c) of the test was a so-called speed test, the complainant did not call for one of the invigilators in order to avoid having to either quit the test or to lose more time. The complainant states that it is not possible for her to prove that an error occurred during the test. The complainant also raises a new issue by requesting access to her marked exam papers and to the evaluation criteria applied by the Selection Board in Open Competition COUNCIL/C/413.

The complainant maintains that her request for reconsideration should have been carried out by members of the Selection Board who had not corrected her disputed test. The complainant claims that her test in part C c) should be re-evaluated so as to allow her test in part C a) to be examined. If she were to pass these two tests she should be allowed to participate in the oral test.

THE DECISION

1 Preliminary remarks

1.1 In her observations on the Council's opinion, the complainant raised a new issue by requesting access to her marked exam papers and to the evaluation criteria applied by the Selection Board in Open Competition COUNCIL/C/413. The Ombudsman informed the complainant that her request should be presented directly to the Council in order to comply with the requirement to make prior administrative approaches. The complainant was told that she has the possibility to present a new complaint to the Ombudsman, if she is not satisfied with the Council's reply.

1.2 In her complaint, the complainant alleges unfairness, lack of reasoning and non-respect of principles of good administration regarding Open Competition COUNCIL/C/413 and the handling of her request for reconsideration of her results. The complainant claims that her test should be reconsidered by persons different than those responsible for the first evaluation of the tests and that she should be awarded one extra point which would allow her to participate in the oral test of Open Competition COUNCIL/C/413. The complainant also requests a reliable account of how the Selection Board investigated the possibility of a technical problem.

1.3 The European Ombudsman finds it useful to organise the decision under the following headings:

- The Selection Board's response to the complainant's argument that her performance was adversely affected by a technical problem;
- Reconsideration of the complainant's test results;
- and - The claim for award of one additional point and to participate in the oral test.



2 The Selection Board's response to the complainant's argument that her performance was adversely affected by a technical problem

2.1 The complainant participated in Open Competition COUNCIL/C/413 for Finnish speaking secretaries and passed the first stage of the competition. On 29 July 2002 she was invited to a computer test consisting of three parts. Part C c) required editing a text in a foreign language within a fixed time span. According to the complainant, at the beginning of this part she encountered a technical problem relating to an automatic line change. The problem repeated itself and the complainant had to delete the beginning of the edited text and start again. This technical problem affected her concentration and the length of the edited text. The complainant obtained 11/20 points instead of the required 12/20 points.

2.2 The Council argues that there were five invigilators present in the examination room on the 21 September 2002. Before the beginning of the tests one of the two members of the Selection Board gave the candidates some information about the tests to be performed and also reminded them of a number of important points, including the instruction to inform the Selection Board about problems occurring during the test by raising one's hand. The Council points out that the complainant confirms that she neither called the invigilator nor informed the members of the Selection Board about the alleged technical problem before 4 November 2002, when she sent her letter requesting reconsideration of the part C c) of her written test. The Council argues that the complainant's own behaviour therefore deprived the Selection Board of any possibility to detect the alleged error and of taking the measures to correct it.

2.3 The Ombudsman considers that the Council took the necessary steps to provide the candidates with assistance in case any problems should occur during the test. The candidates were also properly instructed to inform the invigilators about any problems that might rise in the course of test. The Ombudsman accepts that as the Selection Board had no knowledge of a possible technical error either during or at the end of the test C c), it was not technically possible for it to investigate the matter at a later stage.

2.4 The complainant also claims that she should be given the benefit of the doubt if a technical investigation is not possible. According to the Council, the Selection Board could not have simply assumed the existence of the alleged error or taken corrective measures without violating the principles applicable to the Selection Board's proceedings and in particular the fundamental principle of equal treatment. According to the well established case law of the Court of First Instance, *"the Selection Board, in assessing the candidates' professional knowledge and also their abilities and motivation [is] bound to base its decisions exclusively and autonomously on the candidates' performances alone, in accordance with the requirements of the competition."* (3) .

2.5 The Ombudsman considers that the Council's reasoning as regards the need to treat candidates in a competition equally is persuasive. In the absence of any concrete evidence to justify treating the complainant differently from other candidates, the Ombudsman therefore finds no basis on which the Council could accept the complainant's claim.

2.6 In the light of the above, the Ombudsman finds no maladministration in relation to this



aspect of the complaint.

3 Reconsideration of the complainant's test results

3.1 The complainant alleges unfairness, lack of reasoning and non-respect of principles of good administration in the handling of her request for reconsideration of her results. She claims that her test in Open Competition COUNCIL/C/413 should be reconsidered by different persons than those responsible for the first evaluation of the tests.

3.2 In its opinion, the Council argues that the complainant's request for reconsideration was handled correctly according to the Staff Regulations and the principles of good administration. The Council also argues that the practice of the Selection Board to carry out the reconsideration of the tests itself is in line with the Article 3 of the Annex III to the Staff Regulations as well as the case law of the Court of First Instance.

3.3 The Ombudsman notes that the Council appears to have understood the complainant's claim as meaning that persons other than members of the Selection Board should carry out the reconsideration of her test. In her observations, the complainant clarifies that her claim is that members of the Selection Board other than the original correctors should have carried out the reconsideration.

The Ombudsman considers that the Council's understanding of the complainant's original claim as well as its response thereto were reasonable and that the response is not inconsistent with the complainant's claim as clarified in her observations. The Ombudsman recalls that the complainant also raised in her observations a new issue by requesting access to her marked exam papers and to the evaluation criteria applied by the Selection Board and that the Ombudsman informed her that her request should be presented directly to the Council, in order to comply with the requirement to make prior administrative approaches. The Ombudsman points out that, insofar as the complainant may wish to seek further information about the way the Selection Board organised the reconsideration of her test, she has the opportunity to do so in this context. Therefore, the Ombudsman does not find it justified to further pursue his inquiries regarding this aspect of the case.

3.4 As regards the complainant's allegation of lack of reasoning, the Ombudsman notes that the Selection Board informed the complainant that her marks remained unchanged. According to the established case law of the Community Courts, the communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the Selection Board's decisions are based (4) . Moreover, the Council has replied in detail to the complainant's arguments concerning the technical problem that she experienced. The Ombudsman therefore considers that the Council has adequately stated the reasons why the complainant's request for reconsideration did not lead to a change in the result of her test.

3.5 In the light of the above, no instance of maladministration has therefore been found with regard to this aspect of the case.

4 The claim for award of an additional point and to participate in the oral test

4.1 The complainant claims that she should be awarded one extra point, which would allow her to participate in the oral test of Open Competition COUNCIL/C/413.



4.2 The Council replies that a reconsideration of the complainant's test C c) did take place and it confirmed the mark initially obtained by the complainant. No additional point was awarded to her. Therefore, the decision to exclude her is final. In addition, according to point VI of the notice of competition, a candidate obtaining less than 60% for each one of the mandatory written tests, i.e. A and C, is excluded. As the complainant was excluded on the grounds of her results in test C c), her test in C a) has not been corrected. It follows from the same point of the notice of competition that the award of one additional point in test C c) could not lead directly to her participation in the oral test but only to the correction of her test C a). To be allowed to participate in the oral test, the complainant should also pass test C a). Otherwise, there would be a violation of the notice of competition.

4.3 The Ombudsman considers that, in the light of his findings in parts 2 and 3 of the present decision, the Council's position seems reasonable and that the complainant's claim cannot, therefore, be sustained.

5 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.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Judgement of the Court of First Instance of 14 July 2000, Teixeira Neves/Cour de justice, case T-146/99, Rec FP 2000, II-731, I-A-167, points 41-42: *"dans son évaluation des connaissances professionnelles des candidats ainsi que leurs aptitudes et motivations, [le jury] doit se fonder, de façon exclusive et autonome, sur les seules prestations des candidats, conformément aux prescriptions de l'avis de concours"*.

(2) Judgement of the Court of First Instance of 27 March 2003, *Martínez Páramo e.a/ Commission*, case T-33/00, (not available in English), not yet published, point 66, 77-78.

(3) Judgement of the Court of First Instance of 14 July 2000, Teixeira Neves/Cour de justice, case T-146/99, Rec FP 2000, II-731, I-A-167, points 41-42: *"dans son évaluation des connaissances professionnelles des candidats ainsi que leurs aptitudes et motivations, [le jury] doit se fonder, de façon exclusive et autonome, sur les seules prestations des candidats, conformément aux prescriptions de l'avis de concours"*.

(4) Judgement of the Court of Justice, *European Parliament/Alberto Innamorati*, Case C-254/95 P, ECR 1996 Page I-03423, point 31.