

Decision of the European Ombudsman on complaint 1876/2003/ADB against the European Personnel Selection Office

Decision

Case 1876/2003/ADB - Opened on 17/11/2003 - Decision on 12/10/2004

Strasbourg, 12 October 2004

Dear Mr K.,

On 2 October 2003, you made a complaint to the European Ombudsman concerning your participation in open competition COM/A/11/01 organised by the European Personnel Selection Office (EPSO).

On 17 November 2003, I forwarded the complaint to the Director of EPSO. EPSO sent its opinion on 1 March 2004. I forwarded it to you with an invitation to make observations, which you sent on 29 March 2004.

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

Background

The complainant participated in open competition COM/A/11/01 organised by the European Commission to constitute a reserve of principal administrators in the field of civil and criminal law. The organisation was taken over by the European Personnel Selection Office (EPSO) after its creation. The complainant failed in the oral test (final test) of the recruitment procedure, because his mark was only 19 while the minimum required was 20. The complainant therefore lodged a complaint based on Article 90(2) (1) of the Staff Regulations for officials of the European Communities (hereafter article 90 complaint) with the Commission. He alleged various irregularities which in his eyes would justify that he should be given a higher mark for the test and put on the reserve list or alternatively that he should be given the opportunity to take the oral test again. He also claimed to be given access to the minutes of his oral examination.

In his article 90 complaint, the complainant underlined in particular that :



- the test had been shorter than announced;
- unlike other candidates, he had essentially not been asked questions to which there was an objective answer but rather questions which had implied the expression of an opinion;
- he had been discriminated against because of his disability;
- given that the number of candidates admitted to take the oral test (25) had been smaller than the number of places on the reserve list (30), there had been no necessity to eliminate candidates and the oral test should only have served the purpose of checking that candidates met the minimum requirements to be put on the reserve list;
- the testing of the complainant's knowledge of a second language (English) had been unexpectedly intensive and had not accorded with the information given to him during the training provided by German authorities in view of his participation in the test.

On 3 September 2003, EPSO rejected the complainant's article 90 complaint and confirmed the mark he had been given. As regards the various points raised by the complainant, EPSO in summary replied that :

- Minor variations in the duration of the oral test were unavoidable. The complainant had not made any objection at the end of the test and the duration had had no influence on the appraisal of the complainant's performance.
- Selection boards enjoy a wide margin of discretion as to the content of the questions put to candidates. They may vary from one candidate to another. In the complainant's case the selection board had in particular put questions to the complainant about his lack of international experience and lack of practical experience in the administrative field. The questions had not gone beyond the content of the notice of competition. The questions put to the candidate had aimed not at testing aspects for which he had proven his knowledge in earlier tests but at testing his capacity to argue and structure his replies.
- The complainant had not been discriminated against because of his disability. The candidate who had achieved the best result in the oral test had a more significant disability in comparison to the complainant.
- As far as the testing of the complainant's knowledge of a second language was concerned, the selection board could not have been bound by information provided to the complainant by the German authorities. Furthermore, the qualification "satisfactory knowledge" contained in the notice of competition must be interpreted in the light of the relatively high level of recruitment (grade A4/A5).

Complaint

Being partly dissatisfied with EPSO's reply to his article 90 complaint, the complainant considered that EPSO had not responded to all the aspects of his complaint and therefore lodged a complaint with the European Ombudsman in which he made the following allegations:

1. The explanations provided by EPSO as regards the rejection of his article 90 complaint only focused on formal issues and failed to provide information on the substance which would allow him to understand the mark he was given.
2. There was a disparity between the questions put to the complainant in the oral test and the notice of competition. Neither a lack of international experience nor the alleged lack of practical experience in the administrative field could justify his mark or the rejection of his article 90



complaint. These requirements had not been contained in the notice of competition. Furthermore, he had 22 months of experience in the administrative field.

The complainant claimed that the mark of his oral test should be raised to 20 or that he should be invited to take the oral test again. In any case, in view of his second allegation, the complainant called for more precision in future notices of competitions.

THE INQUIRY

EPSO's opinion

In its opinion on the complaint, EPSO in summary stated the following:

The complainant's article 90 complaint had been thoroughly taken into consideration and the Appointing Authority had tried to reply to all the points raised by the complainant in order to provide him with a sufficiently reasoned response.

As regards the complainant's request to be informed of the reasons of his failure in the oral test, it was established case-law that selection boards in open competitions enjoyed a wide margin of discretion concerning the assessment of the tests. The selection board had no obligation to explain why the replies of the candidate had been considered inadequate.

The assessment of merits in the oral test had been of comparative nature and equal treatment of all the candidates had to be ensured. For each candidate taking part in the oral test, the selection board had therefore established an evaluation sheet based on criteria previously agreed upon. The same criteria were used for all the candidates.

While the complainant's knowledge of the field of competence he had chosen had been assessed during the written test, the oral test aimed at assessing the complainant's capacity to argue and to structure his replies, with a particular attention to his specific linguistic knowledge and capacity to adapt to a multicultural environment, as foreseen in the notice of competition. The selection board had not questioned the complainant's eligibility on the grounds of professional experience. The latter had been examined and taken into consideration during the admission procedure. The selection board based its appraisal exclusively on the complainant's performance during the oral test.

The fact that the number of candidates admitted to take the oral test (25) was smaller than the number of places on the reserve list (30) created neither an obligation for the selection board to over-grade candidates who did not have the required skills nor a reinforced obligation to explain the marks assigned to these candidates.

The complainant's claim according to which he should be assigned a higher mark or authorised to take the test again had to be rejected. The complainant's belief that he had adequately responded to the questions put to him was not likely to imply an automatic revision of the selection board's decision.

The complainant's observations



The European Ombudsman forwarded EPSO's opinion to the complainant with an invitation to make observations. In his reply, the complainant in summary stated the following :

EPSO again provided an explanation without any consideration based on the content of the test. Although the selection board enjoyed a wide margin of discretion concerning the assessment of the tests, this should not have prevented the selection board from giving reasons for the assessment. It was not sufficient to merely disclose the mark, without explaining how and on what basis this mark had been calculated. It would have been reasonable to provide information as to the content of the evaluation sheet or the criteria used for the evaluation as well as about the actual details of the evaluation of the complainant's performance.

Given the situation in this recruitment procedure, i.e. that the number of candidates admitted to take the oral test (25) was smaller than the number of places on the reserve list (30), it would have been even more important, for the sake of transparency, that the mark obtained was properly explained, in particular in cases where the mark was closely below the pass mark.

EPSO's refusal to revise his mark or to authorise him to take the test again would have been understandable if the reserve list had been full and if the complainant's admission on the reserve list would have been detrimental to another candidate. But in the present case no harm would have been done if EPSO had given him the opportunity to serve the European Union.

Another selection board in a recruitment procedure organised by the European Parliament and the Court of Justice had found that his skills qualified him to work for the European Union and admitted him on a reserve list.

THE DECISION

1 Alleged failure to provide a proper explanation for a mark given in test

1.1 According to the complainant, the explanations provided by EPSO as regards the rejection of his article 90 complaint only focused on formal issues and failed to provide information on the substance which would allow him to understand the mark he was given.

1.2 EPSO argued that selection boards in open competitions enjoy a wide margin of discretion concerning the assessment of the tests. The selection board had no obligation to explain why the replies of a candidate had been considered inadequate. In this respect, the fact that the number of candidates admitted to take the oral test (25) was smaller than the number of places on the reserve list (30) did not create additional obligations for the selection board.

1.3 The Ombudsman notes that the complainant made a number of allegations and claims in his article 90 complaint, relating in particular to the disclosure of the minutes of the examination, the duration of the test, the testing of his knowledge of English and the participation of disabled candidates, which were not repeated in the framework of the complaint lodged with the European Ombudsman. These aspects of the complainant's article 90 complaint will therefore not be examined in the present decision which shall be limited to examine whether EPSO has provided the complainant with a proper explanation for the mark obtained in the oral test.



1.4 The Ombudsman also notes that in his observations the complainant underlined that EPSO could have provided him with the evaluation criteria or the evaluation sheet of the oral test. No request for access to these documents appears to have been made so far. The present decision will therefore not cover this aspect. However, the complainant is free to apply for the disclosure of the documents in question and to submit a new complaint to the Ombudsman if the answer to such request should be unsatisfactory.

1.5 According to the established case-law of the Community courts, the communication to the candidates of the mark obtained in a test, which reflects the assessment made of them by the selection board, constitutes an adequate statement of the reasons on which the selection board's decision is based (2) . Furthermore, the Court of First Instance has held that *"a selection board cannot be required, when giving reasons for a candidate's failure of a test, to identify the answers which were considered unsatisfactory or to explain why they were considered unsatisfactory. (...) A candidate is entitled to explanations, if he expressly requests them, on points other than the selection board's value judgement regarding his performance, such as, for example, the conduct of the procedure"* (3) .

1.6 In the present case the complainant was informed of the mark obtained in the oral test.

1.7 Notwithstanding the case-law cited above, the Ombudsman considers that it is a matter of good administrative practice to answer to precise questions put by candidates, irrespective of the fact as to whether they relate to their performance in a test or not. However, it appears that in the present case, with the exception of the aspect dealt with in point 1.8 below, no such question appears to remain unanswered further to the complainant's article 90 complaint.

1.8 The complainant took the view that the selection board was bound by a reinforced obligation to give reasons for its decision to give him an eliminatory mark because of specific factual circumstances of the oral test and of the mark the complainant was given (i.e. the number of candidates was smaller than the number of places on the reserve list and the mark he was given was only one point below the pass mark).

1.9 The Ombudsman is not aware of any provisions or case-law that would impose reinforced obligations on selection boards in this respect. EPSO's position therefore appears to be reasonable.

1.10 In view of the above, the Ombudsman concludes that there is no maladministration as regards this aspect of the case.

2 Alleged disparity between the questions put to the complainant in the oral test and the notice of competition

2.1 According to the complainant there was a disparity between the questions put to him in the oral test and the notice of competition. He alleged that neither a lack of international experience nor the alleged lack of practical experience in the administrative field could justify the mark he had obtained in the oral test or the rejection of his article 90 complaint. These requirements had not been contained in the notice of competition. Furthermore, he had had 22 months of



experience in the administrative field.

2.2 EPSO argued that while the candidate's knowledge of the field of competence of the recruitment procedure had been assessed during the written test, the oral test aimed at assessing the candidate's capacity to argue and to structure his replies, with a particular attention to his specific linguistic knowledge and capacity to adapt to a multicultural environment, as foreseen in the notice of competition. The selection board had not questioned the complainant's eligibility on the grounds of professional experience. The latter had been examined and taken into consideration during the admission procedure. The selection board had based its appraisal exclusively on the complainant's performance during the oral test.

2.3 The Ombudsman notes that according to the established case-law the selection board enjoys wide powers of appraisal regarding the procedures for and content of the tests in a competition. The courts may not investigate the detailed content of a test unless such content goes beyond the limits laid down in the notice of competition or is not consonant with the purposes of the test or competition (4) .

2.4 The Ombudsman also notes that in addition to the explanation provided by EPSO in the framework of the present complaint, EPSO also explained in its decision of 2 September 2003 regarding the complainant's article 90 complaint that both the complainant's lack of international experience and alleged lack of practical experience in the administrative field were brought into the discussion during the oral test in order to evaluate the complainant's ability to "*adjust to a multicultural working environment*" as foreseen in title VI of the notice of competition or to fulfil the duties set out in title II of the notice of competition.

2.5 The Ombudsman considers that EPSO has thus provided a reasonable explanation for the selection board's action. It could therefore not be established that the latter went beyond the limits laid down in the notice of competition. No instance of maladministration has therefore been found as regards this aspect of the case.

3 Conclusion

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

The Director of the European Personnel Selection Office will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Article 90(2) of the Staff Regulations of officials of the European Communities : (...) 2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a



decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. (...)

(2) Case C-254/95 *Parliament / Innamorati* [1996] ECR Page I-3423.

(3) Case T-291/94 *Pimley-Smith / Commission* [1995] ECR-SC Pages IA-209, II-637.

(4) Case 228/86 *Goossens / Commission* [1988] ECR Page 1819.