

Decision of the European Ombudsman on complaint 1899/2003/OV against the European Personnel Selection Office

Decision

Case 1899/2003/OV - Opened on 04/11/2003 - Decision on 01/12/2004

Strasbourg, 1 December 2004

Dear Mr de M.,

On 2 October 2003, you made a complaint to the European Ombudsman concerning your participation in open competition COM/B/1/02 organised by the European Personnel Selection Office (EPSO).

On 4 November 2003, I forwarded the complaint to the Director of EPSO. On 2 December 2003 you sent an e-mail asking various questions concerning the inquiry. My office contacted you by phone on 5 December 2003 replying to your questions. The Commission sent the Commission's and EPSO's joined opinion on 27 January 2004. I forwarded it to you with an invitation to make observations, which you sent on 30 March 2004.

On 7 June 2004, 9 August, and 29 October 2004 you sent e-mails concerning your case. My office replied to you by e-mail on 10 June, 3 September and 5 November 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

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

The complainant participated in open competition COM/B/1/02 organised by the European Personnel Selection Office (EPSO) for the recruitment of assistants in the fields of financial management and contracts/projects management. By letter of 5 August 2003, EPSO informed the complainant that he had not succeeded in the written test e), as he obtained only 16,5/40. He could not therefore be admitted to the oral tests.

As the complainant had already worked three years in the Commission on cases similar to the



one that was the subject of the written test, he wrote to EPSO on 11 August 2003 asking a) for a copy of his test, b) the maximum possible marks per question, c) the correct answers to the 11 questions and d) his marks and the examiners' comments on his answers for each question. On 19 August 2003, EPSO sent a holding reply, including a copy of the complainant's written test, as well as an evaluation sheet. In a second letter of 18 September 2003, EPSO indicated that the principle of confidentiality of the Selection Boards does not allow it to enter into more details concerning the correction of the exams of candidates. The complainant therefore wonders what the possibility of a request for clarification, which was mentioned in the competition notice, entails.

The complainant also observes that, in its letter of 19 August 2003, EPSO referred to the vacation period as a reason for not being able to reply immediately. This appears to reduce the chances for a further participation in the competition.

On 2 October 2003, the complainant lodged the present complaint with the Ombudsman. The complainant alleged that:

1. EPSO refused to provide information to him with regard to written test e), namely 1) the maximum possible marks per question, 2) his marks per question, and 3) the examiners' comments on his answers.

2. there was undue delay by EPSO in sending a substantive reply to his letter of 11 August 2003.

THE INQUIRY

EPSO's and the Commission's joint opinion

Since the complaint was against EPSO, the Ombudsman forwarded the complaint to the Director of EPSO for an opinion. The opinion received, however, stated that it was the joint opinion of EPSO and the Commission.

In summary, the opinion was as follows:

The complainant participated in the field 02 "management of contracts/projects" of competition COM/B/1/01. The complainant was invited to participate in written test e). This test covered two subjects in the field chosen by the candidate and was designed to test candidates' knowledge of the specific field and their ability to develop ideas and to draft a clear, structured and logical argumentation (point VI.A of the competition notice). The minimum pass mark for this test was 20/40.

All copies of this test have been corrected anonymously by two examiners on the basis of the criteria established by the Selection Board. The Selection Board then checked the correct application of these criteria and examined the remarks made by the examiners. After this examination, the Selection Board determined - again anonymously - the results which were then communicated to the candidates.



By letter of 5 August 2003, the complainant was informed that he had obtained a mark of 16,50/40 and could not be admitted to the oral test. After a holding reply of 19 August 2003 - which enclosed a copy of the complainant's written test and the evaluation sheet established by the Selection Board - EPSO replied on 18 September 2003 to the complainant's letter of 11 August 2003. EPSO recalled the secrecy of the Selection Board's proceedings and explained the way in which the test had been corrected.

As regards the complainant's first allegation, the Commission and EPSO observed that point VI.A of the competition notice foresaw a maximum of 40 marks for written test e), but did not foresee an allocation of these marks by subject and/or question. In the present case, the Selection Board had decided on a written test consisting of two subjects and containing a series of questions on each subject. However, the decision as to how to subdivide the number of marks for the test depends exclusively on the Selection Board, which has a large discretionary power. It is in this framework that marking criteria are established, before the tests, in order to guide the examiners in their task.

In accordance with the case-law (1) , these criteria are an integral part of the Selection Board's comparative evaluation of the respective merits of the candidates. These criteria are covered by the secrecy of the proceedings in the same way as the evaluation of the Selection Board. The comparative evaluation of the Selection Board is reflected in the marks given to the candidates. The Selection Board has no obligation to inform a candidate how many marks have been awarded for each answer.

The communication of the complainant's mark out of 40 therefore constitutes a sufficient reasoning of the Selection Board's decision, in accordance with the case-law.

As regards the examiners' comments on the complainant's answers, the Commission and EPSO observed that the examiners communicate their comments to the Selection Board on an evaluation sheet (they do not make corrections on the copies themselves) which the Selection Board examines before determining the marks. Those evaluation sheets constitute preparatory documents that serve for the Selection Board's deliberations. They are therefore covered by secrecy (2) and cannot be divulged.

However, the Selection Board indicates its comments on a separate sheet. This document was communicated to the complainant by letter of 19 August 2003. This evaluation sheet clearly indicates the elements of the written test that were evaluated, namely the knowledge of the field, the drafting capacities, the development of ideas, the analysis and the argumentation. This sheet contains a global evaluation of the written test and the final mark by the Selection Board. The comments of the Selection Board for each element should enable candidates to understand the reason for their mark.

The complainant was therefore already provided with all documents to which he could have access.



As regards the complainant's second allegation, EPSO observed that the complainant's letter, which was received on 14 August 2003, was answered on 19 August 2003. This letter indicated that his request was submitted to the Selection Board which, given the vacation period, would not be able to examine the file before the beginning of September 2003. The definitive reply was finally sent to the complainant on 18 September 2003. The Commission and EPSO therefore argue that the allegation is unfounded.

The complainant's observations

The complainant maintained his complaint. He firstly observed that there has been an additional delay as it took the Commission, which has a well paid and large personnel, three months to send an opinion on his complaint.

The complainant observed that the opinion does not give an explanation as to why he obtained a lower mark in comparison with the other candidates. He points out that, if the competition notice had mentioned that, on the basis of the case-law, the communication of the final mark to the candidates is a sufficient reasoning, he would not have made a request for further information, nor have made a complaint to the Ombudsman.

The complainant has not received a reply to his question as to what the correct answers were. There must be some kind of model correct answer. Nor has the Commission communicated the complainant's mark per question.

The complainant is very disappointed by the way the competition was run. The whole selection procedure took about two years. Annex II of the competition notice provides for different ways to obtain further information and to complain, but the complainant has not obtained any additional information further to his requests. The complainant hopes that in the future candidates will obtain a better reasoning when they fail a competition.

THE DECISION

1 Preliminary remarks

1.1 In his observations, the complainant observed that there has been an additional delay as it took the Commission three months to send an opinion on his complaint.

1.2 The Ombudsman would like to point out that Article 4.3 of the European Ombudsman's Implementing Provisions (3) provides that, when the Ombudsman opens an inquiry, he invites the institution concerned *"to submit an opinion within a specified time that is normally no more than three months"*. In the present case, the complaint was sent to EPSO on 4 November 2003. The Commission sent its opinion on 27 January 2004 and a translation into Dutch on 2 February 2004, i.e. within three months as specified in the Implementing Provisions.

1.3 In his observations, the complainant also expressed the view that the notice of competition could have been more precise about the further information that candidates could obtain and the hope that, in the future, candidates will obtain better reasoning when they fail a competition. The Ombudsman does not understand these points as new allegations of maladministration, but as constructive comments by which the complainant intends to help EPSO to communicate



better with European citizens who are candidates in future competitions. The Ombudsman will forward the complainant's observations to EPSO.

2 The alleged refusal of information

2.1 The complainant alleged that EPSO refused to provide information to him with regard to written test e), namely 1) the maximum possible marks per question, 2) his marks per question, and 3) the examiners' comments on his answers.

2.2 With regard to points 1) and 2) of the information request, the Commission and EPSO observed that point VI.A of the competition notice foresaw a maximum of 40 marks for written test e), but did not foresee an allocation of these marks by subject and/or question. In the present case, the Selection Board had decided on a written test consisting of two subjects and containing a series of questions on each subject. The decision as to how to subdivide the number of marks for the test depends exclusively on the Selection Board, which has a large discretionary power to establish marking criteria before the tests. In accordance with the case-law, the marking criteria are an integral part of the comparative evaluation of the Selection Board on the respective merits of the candidates. These criteria are covered by the secrecy of the proceedings in the same way as the evaluation of the Selection Board. The comparative evaluation of the Selection Board are reflected in the marks given to the candidates. The Selection Board has no obligation to inform a candidate how many marks have been awarded for each answer.

With regard to point 3) of the information request, the Commission and EPSO observed that the examiners communicate their comments to the Selection Board on an evaluation sheet which the Selection Board examines before determining the marks. Those evaluation sheets constitute preparatory documents that serve for the Selection Board's deliberations. They are therefore covered by secrecy and cannot be divulged. The final evaluation sheet clearly indicates the elements of the written test that were evaluated, namely the knowledge of the field, the drafting capacities, the development of ideas, the analysis and the argumentation. The comments of the Selection Board for each element should enable candidates to understand the reason for their mark.

2.3 The Ombudsman notes that, following the complainant's request, EPSO forwarded him on 19 August 2003 a copy of his written test e), as well as a copy of the final evaluation sheet established by the Selection Board. In his decision on case 774/2003/ELB, the Ombudsman considered that, in principle, giving access to an evaluation sheet can be an adequate indication of the reasons for the mark of a candidate (4) .

2.4 In the present case, it appears that written test e) consisted of two subjects, with the first subject containing three questions to deal with and the second subject containing two questions to deal with. The maximum mark for the entire test was 40 and the minimum pass mark was 20.

2.5 With regard to points 1) and 2) of the complainant's request, the Ombudsman is mindful of the case law of the Court of Justice, according to which 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 (5) . The Ombudsman therefore does not consider that it



was unreasonable for EPSO to regard the comments made on the final evaluation sheet as an adequate indication of the reasons for the complainant's mark on test e) and to decline to inform the complainant how many marks he was awarded for each answer within the written test.

2.6 With regard to point 3) of the complainant's request, namely to be informed of the examiners' comments on his answers, the Ombudsman recalls that, according to the case law of the Community courts, the observance of the secrecy surrounding the proceedings of Selection Boards precludes both disclosure of the attitudes adopted by individual members of Selection Boards and disclosure of any factors relating to individual or comparative assessments of candidates (6) . In view of this case law and of the fact that the complainant has received the final evaluation sheet established by the Selection Board, the Ombudsman considers that it is reasonable for the Commission and EPSO to consider that comments by individual examiners are preparatory documents that should not be communicated to the complainant.

2.7 On the basis of the above, no instance of maladministration was found with regard to EPSO's refusal to communicate the requested information to the complainant.

3 The alleged avoidable delay

3.1 The complainant alleged that there was undue delay by EPSO in sending a substantive reply to his letter of 11 August 2003.

3.2 The Commission and EPSO observed that the complainant's letter of 11 August 2003, which was received on 14 August 2003, was answered on 19 August 2003. This letter indicated that his request was submitted to the Selection Board which, given the vacation period, would not be able to examine the file before the beginning of September 2003. The definitive reply was finally sent to the complainant on 18 September 2003. The Commission and EPSO therefore argue that the allegation is unfounded.

3.3 The Ombudsman notes that, according to the Commission's Code of Good Administrative Behaviour *"a reply to a letter addressed to the Commission shall be sent within fifteen working days from the date of receipt of the letter by the responsible Commission department (...) If a reply cannot be sent within fifteen working days, and in all cases where the reply requires other work on it (...), the member of staff responsible should send a holding reply, indicating a date by which the addressee may expect to be sent a reply (...)"* (7) .

3.4 In the present case, it appears that EPSO sent a holding reply to the complainant on 19 August 2003, i.e. five days after it had received the complainant's letter of 11 August 2003. The holding reply indicated that a full reply would be sent in the course of the month of September. EPSO sent the definitive reply to the complainant on 18 September 2003. The Ombudsman therefore considers that the Commission has acted in accordance with its own rules as regards deadlines for replies to correspondence. No instance of maladministration was therefore found.

4 Conclusion

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



The Director of EPSO and the President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

- (1) Case T-289/94, *Parliament v. Innamorati* , paragraph 48.
- (2) Case T-53/00, paragraph 68, and Case T- 33/00, paragraph 44.
- (3) Decision of the European Ombudsman adopting implementing provisions, adopted on 8 July 2002 [and amended by decision of the Ombudsman of 5 April 2004]. See <http://www.ombudsman.europa.eu/lbasis/en/provis.htm> [Link]
- (4) Decision of the European Ombudsman on complaint 774/2003/ELB against EPSO (<http://www.ombudsman.europa.eu/decision/en/030774.htm> [Link]).
- (5) See case C-254/95, *European Parliament v. Angelo Innamorati* , [1996] ECR I - 3423, par. 31.
- (6) See case C-254/95, *European Parliament v. Angelo Innamorati* , [1996] ECR I - 3423, par. 24, case T-33/00, *Martínez Parama v. Commision* , [2003] ECR SC IA-00105, par. 44, case T - 53/00, *Angioli v. Commission* , [2003] ECR SC IA-00013, par. 68.
- (7) Commission decision (2000/633/CE CECA, EURATOM) of 17 October 2000 amending its Rules of Procedure, OJ 2000 L 267/63.