

## Decision of the European Ombudsman on complaint 1900/2003/OV against the European Commission

Decision

**Case 1900/2003/OV - Opened on 04/11/2003 - Decision on 07/04/2004**

Strasbourg, 7 April 2004

Dear Mr W.,

On 30 September 2003, you made a complaint to the European Ombudsman concerning the refusal of the Commission to reclassify you in grade B 4/2.

On 4 November 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 7 January 2004. I forwarded it to you with an invitation to make observations, which you sent on 20 February 2004.

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

### THE COMPLAINT

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

The complainant was recruited by the Commission on 1 January 1985, at the grade B 5, step 2. He was employed by DG Employment and Social Affairs to manage a major IT project. On 20 December 2002, DG Personnel informed the complainant that, following the judgement of the Court of Justice in case C-389/98 P ( *Gevaert/Commission* ) (1) , the Appointing Authority had carried out an additional examination of his initial grading file. The Appointing Authority however confirmed the classification of the complainant in grade B 5, with effect from 1 January 1985, considering that the totality of the complainant's file did not contain sufficient elements allowing his profile to be considered as exceptional on the following criteria: relevance and level of educational diplomas; level and quality of professional experience; relevance of this experience to the post to be filled; length of professional experience; and scarcity on the labour market of the profile sought.

On 18 March 2003, the complainant made an appeal against this decision to the Appointing Authority, asking to be reclassified in grade B 4, step 2 and step 3 from 1 September 1986 onwards. The complainant provided documentary evidence concerning the above criteria. By



decision R/118/03 of 23 July 2003, the Appointing Authority rejected the appeal, allegedly without commenting on the complainant's arguments about the exceptional character of his profile. The Appointing Authority simply stated that a) the complainant's qualifications are not exceptional when compared to the average background of successful candidates, b) the length of his experience is quite normal and, indeed, falls short of that of other successful candidates in the same competition and in competitions of the same level, c) the occupational requirements of the post were not of an exceptional nature, and that d) with regard to his background in terms of the labour market, it would have no difficulty in recruiting an official with a similar background to the complainant.

On 30 September 2003, the complainant lodged the present complaint with the Ombudsman. The complainant alleged that, in its refusal to reclassify him in grade B 4/2, the Appointing Authority did not take into consideration his arguments, but merely gave a standard reply without any specific argumentation.

## THE INQUIRY

### **The Commission's opinion**

When checking whether a decision classifying an official entering the service is sound, the Appointing Authority examines whether or not the person concerned meets the conditions for being regarded as "exceptional", in terms of the criteria applied when the classification was decided, namely:

a) *exceptional qualifications* , such as academic background (i.e. the number and quality of diplomas and the number and level of any works published), length and quality of professional experience;

b) *the specific needs of the department wishing to recruit a specially qualified person* , namely relevance of professional experience to the post held, situation on the labour market of persons with the particular professional background.

With regard to a) the complainant's exceptional qualifications, the Appointing Authority provided a precise and personal reply when it reviewed his academic background and the length and quality of his professional experience. This can be seen from points I (a) and I (b) of the Appointing Authority's decision R/118/03 of 23 July 2003 annexed to the complaint.

The reply was precise in that it judged the complainant's academic qualifications as being "of a high level compared to the average successful category B candidate. That said, [the complainant's] qualifications are not exceptional when compared to the average background of successful candidates for these competitions". The Appointing Authority also "noted the continuity of [the complainant's] work in a specific area and the excellent assessments by his superiors and the fact that he was carrying out a job at the time when he entered the service. However, this does not mean that [the complainant] had exceptional qualifications entitling him to be classified in the upper grade of the career bracket". The Appointing Authority concluded that "the length of his experience is only average, and, indeed, falls short of that of other



successful candidates in the same competition and in competitions at the same level (see Barnett judgement, point 50)".

With regard to b) the specific needs of the department wishing to recruit a specially qualified person, the Appointing Authority concluded that the occupational requirements of the post were not of an exceptional nature. As in all cases where it has to be decided whether an exception should be made pursuant to Article 31(2) of the Staff Regulations, this conclusion was based on the vacancy notice, which reflects the needs of the recruiting department at the time.

Similarly, as regards the complainant's specific professional background in view of the situation on the labour market when he was recruited, the Commission pointed out that it had not had any great difficulty recruiting officials with a comparable background to that of the complainant.

As regards the criticism that the Appointing Authority merely gave a standard reply without any relevant argumentation, the Commission points out that the fact that it uses standard expressions in its decisions gives absolutely no cause to infer that it deals with each of the claims it receives in an impersonal and identical manner. In the present case, decision R/118/03 mentions a sufficient number of individual and distinctive factors relating to the complainant's personal situation to thoroughly dismiss all accusations that the Commission deals with specific situations in a uniform or undifferentiated manner. Moreover, the Commission repeatedly uses certain expressions solely out of a concern to ensure that these claims are dealt with as fairly as possible. The fact that the Commission does so certainly does not mean that it is indifferent to the specific information provided in the case in question.

#### **The complainant's observations**

The complainant maintained that the Commission did not take into account any of his arguments in its rejection decision of 23 July 2003. The complainant invested an enormous amount of time in explaining why he thought he belonged, at the time of his recruitment, to the absolute top of the experienced, high educated and scarce IT staff in Europe. The complainant presented the following hard evidence in his complaint to the Commission:

- for scarcity on the labour market: different studies by recognised bodies, articles in respected human resources magazines, statistics from the Dutch Bureau for Statistics, extra salary steps by his former employer, several posts offered at the Commission, etc;
- very high level of salary from his former employer;
- extremely high level of education in IT and scarcity of people with this diploma on the labour market;
- strategic post at the Commission and exceptional high ranking in first and all subsequent staff reports, etc.

Although all of these arguments were well documented in the annexes to his appeal, the Commission did not react to any of these arguments, either in the Appointing Authority's decision on his appeal, or in the opinion on the complaint to the Ombudsman.



The complainant maintains that there is a flagrant case of maladministration and asks the Ombudsman to insist that the Commission, based on the convincing evidence, should change the complainant's initial grading from B 5/4 to B 4/2 from 1 October 1985 onwards and to B 4/3 from 1 September 1986 onwards.

## THE DECISION

### 1 The facts constituting the background of the complaint

1.1 The Ombudsman finds it useful to recall the following facts at the basis of the present complaint, since they do not appear from the complaint itself:

1.2 Following a judgement of the Court of First Instance of 5 October 1995 (2) , the Commission adopted the decision of 7 February 1996 (3) , amending its decision of 1 September 1983 on the criteria applicable to appointment in grade and classification in step on recruitment. The first paragraph of Article 2 of the latter decision, as amended, was as follows:

*"The [appointing authority] shall appoint a probationary official in the starting grade of the career bracket to which he is recruited. By way of exception to this principle, the appointing authority may decide to appoint a probationary official to the higher grade of the career bracket where the specific needs of the service require the recruitment of a person with particular qualifications or where the person recruited has exceptional qualifications".*

The decision of 7 February 1996 states that it is to take effect on 5 October 1995, the date of the above judgement. Following this decision, a large number of officials applied to be reclassified in the higher grade of the career bracket.

1.3 In a subsequent judgement, the Court of Justice considered that the above-mentioned decision of 7 February 1996 constituted a new fact liable to have an adverse effect on officials recruited before 5 October 1995 (4) . It is in this context that the Appointing Authority in the present case re-examined the complainant's initial grading.

### 2 The alleged lack of reasoning in the decision of the Appointing Authority

2.1 The complainant alleged that, in its refusal to reclassify him in grade B 4/2, the Appointing Authority did not take into consideration his arguments, but merely gave a standard reply without any specific argumentation. The complainant claims that he should be reclassified in grade B 4.

2.2 The Commission recalled the wording used by the Appointing Authority in its decision R/118/03 of 23 July 2003, both with regard to a) exceptional qualifications and b) the specific needs of the department wishing to recruit a specially qualified person. The Commission pointed out that the decision of the Appointing Authority mentions a sufficient number of individual and distinctive factors relating to the complainant's personal situation to thoroughly dismiss all accusations that the Commission deals with specific situations in a uniform or undifferentiated manner.



2.3 The Ombudsman has carefully examined the decision R/118/03 of the Appointing Authority of 23 July 2003, and notes the following elements:

(a) The Appointing Authority first recalled Article 31, paragraph 1 of the Staff Regulations, according to which officials are appointed to the starting grade of their category, and Article 31, paragraph 2, according to which the Appointing Authority may make exceptions to the above rule within certain limits. The Appointing Authority referred to the case law according to which it has a wide discretion within the framework of Article 31, and it is only in exceptional circumstances that it may appoint to the higher grade of the category. It referred to Article 2 of the Commission decision of 1 September 1983, as amended, according to which the Appointing Authority may appoint to the higher grade of the career bracket "*where the specific needs of the service require the recruitment of a person with particular qualifications or where the person recruited has exceptional qualifications*". The Appointing Authority then proceeded to a re-examination of the complainant's file on the basis of the above specifications.

(b) As regards the *exceptional qualifications*, the Appointing Authority examined in detail the following elements: the academic background, the length of the professional experience and the quality of the professional experience of the complainant, and came to the following conclusions:

(c) As regards the academic background, the Appointing Authority looked at the diplomas obtained by the complainant (two are mentioned) and concluded that the qualifications of the complainant are of a good level compared to the average successful category B candidate, but are not exceptional when compared to the average profile of successful candidates for these competitions.

(d) As regards the quality of the complainant's professional experience, the Appointing Authority looked into the various posts the complainant held since 1974 (7 in total). It considered that the complainant had exercised functions of a good level and effectively relevant, and noted the continuity of his work in a specific area and the excellent assessments by his superiors, as well as the fact that he was operational at the moment of entering into service. The Appointing Authority however concluded that it was not possible to affirm that he had exceptional qualifications entitling him to be classified in the upper grade of the career bracket. As regards the length of the complainant's professional experience, the Appointing Authority concluded that it was completely normal, and even falls short of that of other successful candidates of the same competition and of competitions of the same level.

(e) As regards *the specific needs of the service requiring the recruitment of a person with particular qualifications*, the Appointing Authority referred to the description of the functions in vacancy notice COM/1177/86 and stated that it did not contain exceptional professional requirements. With regard to the particularity of the complainant's professional profile on the labour market, the Appointing Authority stated that it has no difficulty in recruiting officials with a comparable profile.

(f) On the basis of the above arguments, the Appointing Authority concluded that there were no



elements in the complainant's file justifying a classification of the complainant in the higher grade of the category.

2.4 On the basis of these elements, the Ombudsman considers that there is evidence to show that, although it did not respond in detail to every point mentioned in the complainant's appeal of 18 March 2003, the decision of the Appointing Authority not to reclassify the complainant in the higher grade took into account the specific characteristics of the complainant's case and that it enabled the complainant to understand the reasons why the Appointing Authority rejected his appeal. In its opinion on the complaint to the Ombudsman, the Commission has set out again those reasons. The Ombudsman therefore finds no maladministration. In view of this finding, the Ombudsman considers it unnecessary to examine separately the complainant's claim to be classified in grade B 4.

### **3 Conclusion**

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Case C-389/98 P, *Gevaert v. Commission* [2001] ECR I-00065.

(2) Case T-17/95, *Alexopoulou v. Commission* [1995] ECR Staff Cases I-A-227 and II-683.

(3) Published in "Administrative Notices" of 27 March 1996.

(4) Case C-389/98 P, *Gevaert v. Commission* [2001] ECR I-0006, paragraph 49.