



Decision of the European Ombudsman on complaint 2369/2003/IP against the European Parliament

Decision

Case 2369/2003/IP - Opened on 22/12/2003 - Decision on 10/12/2004

Strasbourg, 10 December 2004

Dear Mr P.,

On 5 December 2003, you made a complaint to the European Ombudsman concerning your participation in open competition PE/91/A.

On 22 December 2003, I forwarded the complaint to the President of the European Parliament. The Parliament sent its opinion on 16 April 2004. I forwarded it to you with an invitation to make observations, which you sent on 1 June 2004.

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

THE COMPLAINT

The complainant took part in open competition PE/91/A, organised by the European Parliament to establish a list of Italian-language assistant administrators.

By letter of 27 November 2002, signed by the Head of the "Service Concours" of the Parliament, the complainant was informed that he had succeeded in all the tests. Nevertheless, he could not be included in the list of suitable candidates because he was not among the six best candidates. In accordance with point VIII of the notice of competition (1), only the six best candidates would be included in the list of suitable candidates.

On 6 February 2003, the complainant asked for access to the following documents: *(i)* his marked examination scripts; *(ii)* the minutes of the oral examination and the marks awarded to him by the members of the Selection Board; *(iii)* the evaluation criteria established by the Selection Board for both the written and the oral examination and *(iv)* his ranking on the list of successful candidates.

On 17 February 2003, the complainant made a complaint under Article 90 (2) of the Staff Regulations. The complainant alleged that the Selection Board had failed to act in accordance with Article 5 of Annex III to the Staff Regulations, that principles of good administration had not been respected during the carrying out of the open competition, namely due to its duration of almost three years, and that the institution's letter of 27 November 2002 did not contain sufficient reasons to allow him to understand the development of the open competition and his own results.



On 28 May 2003, the Parliament rejected the complainant's complaint made under Article 90 (2) of the Staff Regulations.

The complainant therefore made a complaint to the Ombudsman, in which he alleged that the Parliament: (i) had not replied to his request for access to documents within the deadline foreseen by Regulation 1049/2001 of 30 May 2001, but only 120 days after he had made the request and (ii) had not informed him about his ranking on the list of successful candidates. The complainant claimed that, in accordance with Article 5 of Annex III to the Staff Regulations, the Parliament should have drawn up a list of suitable candidates containing at least twice as many names as the number of posts to be filled, i.e. a list of twelve candidates.

THE INQUIRY The European Parliament's opinion

In its opinion, the European Parliament stated that, as regards the request for access to documents made the complainant, he had made a first request on 6 February 2003, followed by a further one on 17 February 2003, together with the complaint made by him on the basis of Article 90 (2) of the Staff Regulations. In view of the fact that it appeared that the complainant had chosen to make his request as a part of his complaint under Article 90(2), the Parliament considered that the complainant wished to have a reply on this issue in the context of the reply to his complaint. According to the Parliament, this interpretation was supported by the fact that the complainant repeated his request for access to documents only in a letter of 20 May 2003, five days before the appointing authority replied to his complaint within four months as foreseen by the Staff Regulations.

Enclosed to this reply, the Parliament forwarded to the complainant a copy of his multiple choice tests, the list of the correct answers for the multiple choice tests, a copy of his other written tests and a copy of the correction grid where the marks obtained by the complainant were indicated for each test. As concerns the other documents requested by the complainant, the Parliament did not forward them to him because they were, in the Parliament's view, covered by the confidentiality of the work of the Selection Board.

As regards the alleged refusal by the Parliament to inform the complainant of his ranking in the list of successful candidates, the Parliament explained that it could not agree to the complainant's request since it normally does not rank those candidates who are unsuccessful in a competition. Nevertheless, in the interest of transparency, the Parliament informed him about the points obtained by the first six candidates who were on the list in order to allow the complainant to know the difference between himself and the last successful candidate.

As regards the complainant's point that the Parliament should have drawn up a list of suitable candidates containing at least twice as many names as the number of posts to be filled, the Parliament pointed out that Section VIII (Inclusion on the list of suitable candidates) of the notice of competition unambiguously stipulated that the number of candidates that would be included in the list of suitable candidates was six (2) . This maximum number of candidates to be included in this list was determined by the appointing authority, after consulting the Joint Committee, with due regard to the provisions of Article 5 of Annex III to the Staff Regulations. In no circumstances could the Selection Board deviate from the text of the notice. The number of successful candidates envisaged for the list of suitable candidates



was not only a key factor to enable potential candidates to decide whether or not to apply for the competition concerned, but it was also a crucial element in the Selection Board's decisions as regards the content and the assessment of the tests. The Parliament also stated that it was not its practice to extend the list of suitable candidates after the tests had taken place, since doing so could be regarded by unsuccessful candidates as a manipulation of the results of the competition.

The decision to include six candidates in the list of suitable candidates did not mean that there were six posts to fill. Furthermore, the purpose of drawing up such a list was to have suitable candidates to fill posts which would become vacant in the future and not to fill posts that were already vacant.

The Parliament also stated that the number of successful candidates to be included in a list of suitable candidates was calculated in accordance with Article 5 of Annex III to the Staff Regulations and that in this case it actually represented twice the number of posts, for the grade and language concerned, which the Parliament expected to have to fill over a period of at least three years. On the basis of the case-law of the Community courts, *"the fifth paragraph of Article 5 of Annex III is only a recommendation to the Selection Board, intended to facilitate the decision of the appointing authority, and whether or not it is followed depends on the nature and circumstances of the competition, the number of candidates and their qualifications (...)"* (3) .

Furthermore, the Parliament stressed that the time-table which is indicated in a notice of competition is only for guidance and is not binding for the institution. The number of candidates who applied for the competition might increase the length of time taken by a competition, as had, in fact, happened in the case of the competition in which the complainant had taken part. The duration of a competition could not affect the notice of competition, which had to remain unchanged throughout the whole procedure.

The complainant's observations

In his observations on the Parliament's opinion, the complainant stated that, as regards his request for access to documents, contrary to what had been affirmed by the Parliament, he had not made two different requests for access to documents. His sole request had been made on 6 February 2003. When he had made his complaint under Article 90 (2) of the Staff Regulation, on 17 February 2003, he had simply referred to his request of 6 February 2003, of which he had sent a copy as an enclosure. In view of this, the Parliament's interpretation that, by lodging his complaint under Article 90(2), he had made a second request for access to documents and that he wished to have a reply on this issue in the context of the reply to his complaint was not correct.

The complainant also pointed out that he was wondering how it was possible that the practice of extending a reserve list was generally followed by the European Commission in the most recent open competitions, if, according to the Parliament, such a practice seemed to be illegal. He furthermore referred to the fact that with the entry into force of the new Staff Regulations on 1 May 2004, the category of contractual agents had been introduced. The complainant was wondering whether having already passed an open competition would be taken into account as an advantage in a future selection procedure for contractual agents.



THE DECISION **1 The Parliament's handling of the complainant's request for access to documents**

1.1 On 6 February 2003, the complainant, who participated in open competition PE/91/A, asked the Parliament to have access to certain documents related to his participation in the above-mentioned competition. In his complaint, he alleged that the Parliament had not replied to his request within the deadline foreseen by Regulation 1049/2001 of 30 May 2001, but only 120 days after he had made the request.

1.2 In its opinion, the Parliament stated that, on 17 February 2003, the complainant had made a second request for access to documents, together with the complaint that he made under Article 90(2) of the Staff Regulations. The Parliament pointed out that it had considered that the complainant wished to have a reply on the issue concerning access to documents in the context of the reply to his complaint. It had also considered that this interpretation was supported by the fact that the complainant repeated his request for access to documents only in a letter of 20 May 2003, five days before the appointing authority replied to his complaint.

1.3 In his observations, the complainant put forward that he had made only one request for access to documents on 6 February 2003 and that in his complaint under Article 90(2) made on 17 February 2003 he had simply referred to his request of 6 February 2003, of which he had sent a copy as an enclosure.

1.4 In accordance with Article 7(1) of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents (4), an application for access to a document shall be handled promptly. Within 15 working days from registration of the application, the institution shall either grant access to the document requested or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application. In exceptional cases, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

1.5 The Ombudsman had the possibility to check the content of the complaint made by the complainant on 17 February 2003 under Article 90(2) of the Staff Regulations, a copy of which had been forwarded to him by the complainant. It emerged that in this complaint the complainant referred to the letter sent on 6 February 2003 concerning his request for access to documents and stated that he had still not received a reply to this request.

1.6 On the basis of the above, the Ombudsman takes the view that the Parliament has not given a convincing explanation as to why it considered that the complainant wished to receive a reply on the issue concerning access to documents in the context of the reply to his complaint under Article 90(2). The Ombudsman further notes that, on the basis of the information in his possession, it appears that the Parliament did not inform the complainant of its intention to deal with the request for access to documents in the framework of the handling of the Article 90(2) complaint, which would have given the complainant the



opportunity to clarify any possible misunderstanding.

1.7 The Ombudsman also notes that according to Article 7(4) of (EC) Regulation 1049/2001 the failure by the institution to reply to a request for access to documents within the prescribed time-limit (fifteen working days) shall entitle the applicant to make a confirmatory application.

1.8 In the present case, the complainant did not make such a confirmatory application.

1.9 The Ombudsman has consistently taken the position that the requirement set out in Article 2(4) of the Ombudsman's Statute that a complainant needs to make the "appropriate" prior approaches before being able to complain to the Ombudsman means that the complainant must have made both an initial and a confirmatory application under Regulation (EC) 1049/2001.

In view of the above, and of the fact that the Parliament did deal with the complainant's request for access to documents in its reply to the complainant's complaint made under Article 90(2) of the Staff Regulations and has given reasons for its decision, the Ombudsman takes the view that no further inquiries appear to be necessary into this aspect of the case.

2 The complainant's ranking in the list of successful candidates

2.1 The complainant alleged that the Parliament failed to inform him about his ranking in the list of successful candidates.

2.2 The Parliament explained that it could not agree to the complainant's request, since it normally did not rank unsuccessful candidates. Nevertheless, in the interest of transparency, the Parliament informed him about the points obtained by the first six candidates which were on the list in order to allow the complainant to know the difference between himself and the last successful candidate.

2.3 The Ombudsman is not aware of any rule which would oblige the Parliament to rank unsuccessful candidates in an open competition. He furthermore notes that the institution has provided the complainant with information concerning the points obtained by the six best candidates who were included in the reserve list.

2.4 In these circumstances, the Ombudsman considers that there are no grounds for further inquiries into this aspect of the case.

3 The list of suitable candidates drawn up by the European Parliament

3.1 The complainant claimed that, in accordance with Article 5 of Annex III to the Staff Regulations, the Parliament should have drawn up a list of suitable candidates containing at least twice as many names as the number of posts to be filled, i.e. a list of twelve candidates.

3.2 The Parliament pointed out that Section VIII of the notice of competition unambiguously stipulated that the number of candidates that would be included in the list of suitable candidates was six, and that in no circumstances could the Selection Board deviate from the text of the notice.



3.3 The Ombudsman notes that the notice of competition PE/91/A clearly stipulated that the number of candidates that would be included in the list of suitable candidates was six. Furthermore, as indicated by the Parliament in its opinion, on the basis of the case-law of the Community courts (5), the fifth paragraph of Article 5 of Annex III is only a recommendation to the Selection Board, intended to facilitate the decision of the appointing authority, and whether or not it is followed depends on the nature and circumstances of the competition, the number of candidates and their qualifications.

3.4 On the basis of the evidence in his possession, the Ombudsman considers that when drawing up the list of suitable candidates, the Selection Board acted in accordance with the notice of competition by which it was bound.

3.5 In his observations, the complainant raised the question about how it was possible that the practice of extending a reserve list was generally followed by the European Commission in the most recent open competitions, if, according to the Parliament, such a practice seemed to be illegal.

As indicated in point 3.4 of the present decision, the Ombudsman considers that the position adopted by the Parliament was correct. He further takes the view that the fact that other Community institutions may proceed differently has no relevance in the present context.

3.6 Also in his observations, the complainant referred to the fact that with the entry into force of the new Staff Regulations on 1 May 2004 the category of contractual agents had been introduced. The complainant was wondering whether having already passed an open competition would be taken into account as an advantage in a future selection procedure for contractual agents.

The Ombudsman notes that this point has been raised by the complainant for the first time in his observations and that the Parliament has not yet had the possibility to reply to. However, this point does in any event not appear to be related to the present complaint. The complainant is however free to raise this point directly with Parliament.

3.7 In view of the conclusion reached in point 3.4 above, the Ombudsman considers that the complainant's claim cannot be sustained.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, no further inquiries appear to be necessary as regards the complainant's allegations. As far as the complainant's claim is concerned, the Ombudsman concludes that it cannot be sustained. The Ombudsman therefore closes the case.

The President of the European Parliament will also be informed of this decision.

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) OJ C147 A of 26 May 2000, p. 10.

(2) "The list of suitable candidates (...) for competition PE/91/A will contain the name of the six best candidates, grouped by merit (...)".

(3) Case 122/77 of 26 October 1978 *Agneessens v. Commission* [ECR 1978] 2085, paragraph 22.

(4) OJ L145 of 31 May 2001, pp. 43-48.

(5) Case 122/77 of 26 October 1978 *Agneessens v. Commission* (see note 3 above).