

## **Decision of the European Ombudsman on complaint 1459/2005/GG against the European Personnel Selection Office**

Decision

**Case 1459/2005/GG - Opened on 28/04/2005 - Decision on 17/01/2006**

Strasbourg, 17 January 2006

Dear Mr X.,

On 12 March 2005, you made a complaint to the European Ombudsman against the European Personnel Selection Office ("EPSO"). This complaint, which I received on 6 April 2005, concerned EPSO's handling of requests made by you in relation to your participation in Open competition EPSO/A/2/03.

On 28 April 2005, I forwarded the complaint to the Director of EPSO.

On 9 June 2005, you telephoned my Office to inform me that you wished your complaint to be treated confidentially. I informed EPSO accordingly by a letter sent on 10 June 2005.

EPSO sent its opinion on 18 July 2005. I forwarded it to you on 19 July 2005 with an invitation to make observations, which you sent on 28 August 2005.

On 13 September 2005, I asked EPSO to provide further information in relation to your case. EPSO sent its reply on 19 October 2005. I forwarded it to you on 24 October 2005 with an invitation to make observations, if you so wished, by 30 November 2005. No observations were received from you by that date.

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 are, in summary, as follows.

The complainant took part in Open competition EPSO/A/2/03 organised by the European Personnel Selection Office ("EPSO") with a view to establishing a reserve list of Czech-language assistant administrators. On 5 May 2004, the complainant was informed about



the results of the written tests. According to this information, the complainant had obtained only 6 out of 10 points in test (e) whereas a minimum of 8 points had been necessary to pass this test. Test (e) consisted in the preparation of a note in the complainant's mother tongue (in the present case, Czech).

In his view, the complainant mastered his own mother tongue perfectly. It was not logical that he should have failed a test in his mother tongue whilst he had achieved a good result in a comparable test in German.

On 11 May 2004, the complainant therefore asked EPSO, by registered letter and by e-mail, to review the result of test (e). The complainant also asked for a copy of his examination paper and of the assessments made by the examiners.

In the absence of a reply, the complainant renewed his requests by e-mail on 24 May 2004. After several telephone conversations with EPSO staff, the complainant reiterated his requests by e-mail on 16 June 2004.

According to the complainant, EPSO had disregarded the repeated requests he had made in writing and by telephone and had failed to reply to any of his letters or e-mails. The complainant submitted that, on the occasion of a telephone conversation in September 2004, he had been told that his requests would be considered later since EPSO was currently busy with oral examinations. In the complainant's view, this meant that he had deliberately been given wrong information so as to deprive him of the possibility of having his test reviewed.

In his complaint to the Ombudsman, the complainant alleged that there had been (a) an abuse of power; (b) a failure to consider his letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004; (c) a refusal to provide information and internal administrative inadequacies within EPSO; and (d) an unnecessary delay as regards his complaint.

The complainant claimed (1) that he should be given full access to the documents relating to his tests, in particular as regards test (e), and (2) that test (e) should be reviewed.

## **THE INQUIRY**

### **The Ombudsman's approach**

The Ombudsman considered that the complainant's allegations and his second claim were admissible. As regards the first claim, however, the appropriate prior approaches that are necessary under Article 2 (4) of the Statute of the European Ombudsman only appeared to have been made to the extent that the complainant's examination paper for test (e) and the documents relating to the assessment of this test were concerned. The first claim was therefore inadmissible in so far as access to other documents was concerned. EPSO and the complainant were informed accordingly.

### **EPSO's opinion**

In its opinion, EPSO made the following comments:



The written tests of Open competition EPSO/A/2/03 had all been held on the same day. Test (d) consisted of a test on a subject chosen by the candidate that was set in the second or third language of the candidate. This test aimed at examining the knowledge of candidates, their comprehension skills and ability to analyse and summarise and their ability to draft. The maximum number of points in this test was 40, the minimum necessary being 20. Test (e) consisted of the preparation of a short note in the candidates' main language setting out the arguments and conclusions of test (d). This test aimed at checking the candidates' command of their main language as regards both the quality of writing style and presentation. This test was marked out of 10 points, with a minimum of 8 points to be achieved.

Given that the complainant had only been awarded 6 points in test (e), he had been informed that he could not be admitted to the oral test.

In an e-mail sent on 11 May 2004, the complainant had asked for a review of this decision.

By letter of 25 June 2004, EPSO had informed the complainant that, after having reconsidered his written test (e), the Selection Board had confirmed its decision to award him only 6 out of 10 points. Together with this letter, EPSO had sent the complainant a copy of his examination paper and the corresponding evaluation by the Board. According to this evaluation, the mark was due to the fact that sentences had not been formed correctly and that the candidate had not mastered the relevant language.

As indicated in the evaluation sheet, the Selection Board had considered that the complainant's examination paper was of insufficient quality, that sentences had been formed incorrectly (for example, that they had been incomplete, that they had contained systematic errors of syntax and of punctuation and that they had been fraught with orthographical errors) and that the relevant language had not been mastered.

The Selection Board was alone competent to assess the performance of a candidate.

The complainant's messages of 11 May, 24 May and 16 June 2004 had been registered by EPSO and forwarded to the persons in charge at EPSO. A reply had been sent on 25 June 2004. EPSO regretted that no holding letter or acknowledgment of receipt had been sent to the complainant in good time, once the first e-mail had been received. This omission, however regrettable it was, could perhaps be explained by EPSO's exceptional workload at that time.

As regards the complainant's submission that wrong information had been given to him on the occasion of a telephone conversation with a member of EPSO's staff, EPSO always provided accurate information in the sense that this information was in conformity with the information which the relevant service possessed.

Given that the complainant might not have received the letter of 25 June 2004, EPSO enclosed a copy of the letter with its opinion.

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

In his observations, the complainant pointed out that EPSO's claim that it had sent a reply to his



letters on 25 June 2004 was decisive for all his grievances. The complainant stressed that he had never received this letter. In his view, it was very unlikely that the letter should have been lost in the post. The complainant submitted that EPSO should prove that the letter had been addressed to him more than a year earlier.

The complainant further considered that the reasons given for the decision on his examination paper were not sufficient, since the Selection Board had simply ticked certain boxes on the evaluation sheet whereas the examination paper as such did not show any corrections or correction marks.

The complainant asked the Ombudsman to invite EPSO to submit a further opinion concerning this matter, including evidence to show that the letter dated 25 June 2004 had indeed been sent at that time. He also asked for a further review of his examination paper for test (e) by an authorised and qualified body.

### **Further inquiries**

After careful consideration of EPSO's opinion and the complainant's observations, it appeared that further inquiries were necessary.

#### *Request for further information*

On 13 September 2005, the Ombudsman therefore asked EPSO to submit evidence to confirm that the (unsigned) letter annexed to its opinion was sent to the complainant on 25 June 2004.

#### *EPSO's reply*

In its reply, EPSO informed the Ombudsman that it was unfortunately unable to provide any evidence to show that the letter dated 25 June 2004, which had been registered in the database for registering correspondence used by EPSO ("Adonis"), had been sent out that day. According to EPSO, there was neither an acknowledgement of receipt nor a copy of a registered letter on the file. EPSO added that it did not have a copy of the signed letter or of a version of the letter with the visa from the sender either. It pointed out that it regretted not being able to provide a more positive reply and asked the Ombudsman to accept its apologies. EPSO submitted that this instance of negligence, which it regretted sincerely, was due to a lack of attention in the context of an exceptional workload that had occurred at the relevant time.

#### *The complainant's observations*

EPSO's reply was forwarded to the complainant with an invitation to make observations, if he so wished, by 30 November 2005 at the latest. No observations were received from the complainant by that date.

## **THE DECISION**

### **1 Introductory remarks**

1.1 The complainant, a Czech national, took part in Open competition EPSO/A/2/03 organised by the European Personnel Selection Office ("EPSO") with a view to establishing a reserve list of Czech-language assistant administrators. On 5 May 2004, the complainant was informed about the results of the written tests, that is to say test (d) and test (e). Test (d) consisted of a test on a subject chosen by the candidate that was set in the second or third language of the candidate. This test aimed at examining the knowledge of candidates, their comprehension skills and ability to analyse and summarise and their ability to draft. The maximum number of



points in this test was 40, the minimum necessary being 20. Test (e) consisted of the preparation of a short note in the candidates' main language setting out the arguments and conclusions of test (d). According to the information provided by EPSO on 5 May 2004, the complainant had obtained only 6 out of 10 points in test (e) whereas a minimum of 8 points had been necessary to pass this test.

On 11 May 2004, the complainant asked EPSO, by registered letter and by e-mail, to review the result of test (e). The complainant also asked for a copy of his examination paper and of the assessments made by the examiners.

In the absence of a reply, the complainant renewed his requests by e-mail on 24 May 2004. After several telephone conversations with EPSO staff, the complainant reiterated his requests by e-mail on 16 June 2004.

1.2 In his complaint to the Ombudsman lodged in March 2005, the complainant took the view that EPSO had disregarded the repeated requests he had made in writing and by telephone and that it had failed to reply to any of his letters and e-mails. The complainant further submitted that on the occasion of a telephone conversation in September 2004 he had been told that his requests would be considered later since EPSO was at that time busy with the oral examinations. In the complainant's view, this meant that he had deliberately been given wrong information so as to deprive him of the possibility of having his test reviewed.

In his complaint to the Ombudsman, the complainant alleged that there had been (a) a misuse of power; (b) a failure to consider his letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004; (c) a refusal to provide information and internal administrative inadequacies within EPSO; and (d) an unnecessary delay as regards his complaint.

The complainant claimed (1) that he should be given full access to the documents relating to his tests, in particular as regards test (e), and (2) that test (e) should be reviewed.

1.3 The Ombudsman considered that the complainant's allegations and his second claim were admissible. As regards the first claim, however, the appropriate prior approaches that were necessary under Article 2 (4) of the Statute of the European Ombudsman (1) only appeared to have been made to the extent that the complainant's examination paper for test (e) and the documents relating to the assessment of this test were concerned. The first claim was therefore inadmissible in so far as access to other documents was concerned. EPSO and the complainant were informed accordingly by the Ombudsman.

## **2 Alleged misuse of power**

2.1 The complainant alleged that EPSO had committed a misuse of power.

2.2 In its opinion, EPSO did not expressly address this allegation. However, it emerges from the opinion that EPSO considered that there had been no maladministration.

2.3 The Ombudsman notes that the complainant has not clarified which act of EPSO he considers to constitute a misuse of powers. In the absence of further information, the



Ombudsman therefore assumes that the complainant refers to the information that he alleges he was given on the occasion of a telephone conversation in September 2004 and according to which his requests would be considered later since EPSO was at that time busy with the oral examinations. In the complainant's view, this meant that he had deliberately been given wrong information so as to deprive him of the possibility of having his test reviewed.

2.4 According to the established case-law of the Community courts, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty (see for example Joined Cases T-332/00 and T-350/00 *Rica Foods and Free Trade Foods v Commission* [2002] ECR II-4755, paragraph 200).

2.5 The Ombudsman considers that the complainant has not submitted such objective, relevant and consistent evidence in the present case. In particular, as regards the information that the complainant was given over the telephone, there is nothing to suggest that this information was provided with the purpose of depriving him of the possibility of having his test reviewed.

2.6 In view of the above, the Ombudsman considers that the complainant has not established his first allegation. It should be noted, however, that the Ombudsman's finding in this part relates solely to the allegation of misuse of powers and that the information provided in the telephone call will be examined again, in part 4 below, in relation to the complainant's allegation of internal administrative inadequacies in EPSO.

### **3 Alleged failure to consider the complainant's letters and e-mails**

3.1 The complainant alleged that EPSO had failed to consider his letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004.

3.2 In its opinion, EPSO submitted that it had answered the complainant by letter of 25 June 2004. In this letter, EPSO informed the complainant that, after having reconsidered his written test (e), the Selection Board had confirmed its decision to award only 6 out of 10 points. Together with this letter, EPSO had sent the complainant a copy of his examination paper and the corresponding evaluation sheet drawn up by the Board. According to this evaluation sheet, the Board had considered that the complainant's examination paper was of insufficient quality, that sentences had been formed incorrectly (for example, that they had been incomplete, that they had contained systematic errors of syntax and of punctuation and that they had been fraught with orthographical errors) and that the relevant language had not been mastered. EPSO stressed that the Board was alone competent to assess the performance of a candidate.

3.3 In his observations, the complainant pointed out that he had never received EPSO's letter dated 25 June 2004. The Ombudsman notes, however, that the copy of the letter dated 25 June 2004 that was submitted to him by EPSO shows that EPSO (or the Selection Board) did consider the requests made by the complainant in his letters and e-mails. The fact that the letter of 25 June 2004 may not have reached the complainant or may never have been sent does not affect this conclusion. This aspect of the case will be dealt with separately (see point 4 below).



3.4 In his observations, the complainant further submitted that the reasons given for the decision on his examination paper were not sufficient, since the Selection Board had simply ticked certain boxes on the evaluation sheet whereas the examination paper as such did not show any corrections or correction marks. The complainant asked the Ombudsman for a further review of his examination paper for test e) by an authorised and qualified body.

3.5 According to the settled case-law of the Community courts, the Selection Board enjoys a broad discretion in evaluating competition test results. Whether or not its value judgments were well-founded can be reviewed by the Community judicature only in clear cases of infringement of the rules governing its proceedings (Case 195/80 *Michel v Parliament* [1981] ECR 2861, paragraphs 24 and 25; Case T-115/89 *González Higuera v Parliament* [1990] ECR II-831, and Case T-55/91 *Fascilla v Parliament* [1992] ECR II-1757), manifest error or misuse of powers, or if it has manifestly exceeded the bounds of its discretion (Case 30/86 *Kolivas v Commission* [1987] ECR 2643, paragraph 11).

3.6 The Ombudsman notes that the complainant, in his complaint, submitted that it could be assumed that he mastered his own mother tongue perfectly and that it was not logical that he should have failed a test in his mother tongue whilst he had achieved a good result in a comparable test in German. However, these arguments are not sufficient to prove that the Selection Board made a manifest error when assessing the complainant's test in the present case.

3.7 The Ombudsman further notes that after having received EPSO's opinion, which included a copy of his test and of the Selection Board's evaluation sheet, the complainant did not submit any specific comments to show that the Board had made a manifest error when considering that sentences had been formed incorrectly (for example, that they had been incomplete, that they had contained systematic errors of syntax and of punctuation and that they had been fraught with orthographical errors) and that the relevant language had not been mastered. It is true that the Board limited itself to ticking boxes instead of drawing up an individual, detailed assessment of the complainant's test. However, regard should be had to the fact that the present allegation does not concern the issue as to whether EPSO provided sufficient reasons for its decision but the question as to whether it had failed to deal with the request for a review of the initial decision on the complainant's test and the request for access to documents, which the complainant had submitted in his letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004. In the Ombudsman's view, and as mentioned above (see point 3.3), the letter of 25 June 2004 clearly shows that EPSO did deal with these requests.

3.8 In his observations, the complainant asked for a further review of his examination paper for test (e) by an authorised and qualified body. It should be noted in this context that the Ombudsman's role is to examine possible instances of maladministration. Given that the complainant has not submitted specific arguments to suggest that the Selection Board committed a manifest error when assessing his test (e), the Ombudsman considers that the need for a further review of the relevant test has not been established.

3.9 In view of the above, the Ombudsman considers that the complainant has not established





maladministration as regards the second allegation and the second claim submitted by him.

#### **4 Alleged refusal to provide information, internal administrative inadequacies and unnecessary delays**

4.1 The complainant alleged that there was a refusal to provide information, that there were internal administrative inadequacies within EPSO and that an unnecessary delay had occurred. Given the link between these issues, the Ombudsman considers it appropriate to deal with these allegations together.

4.2 In its opinion, EPSO stressed that it had replied to the complainant's requests by its letter of 25 June 2004. EPSO regretted that no holding letter or acknowledgment of receipt had been sent to the complainant in good time, once the first e-mail had been received. It added that this omission, however regrettable it was, could perhaps be explained by EPSO's exceptional workload at that time. As regards the complainant's submission that wrong information had been given to him on the occasion of a telephone conversation with a member of EPSO's staff, EPSO stressed that it always provided accurate information in the sense that this information was in conformity with the information which the relevant service possessed.

4.3 It is good administrative practice to deal with letters and queries from candidates in competitions properly and speedily. In the present case, the Ombudsman notes that EPSO intended to reply to the complainant's letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004 by its letter of 25 June 2004. Given that this letter addressed the issues raised by the complainant and contained useful documentary evidence on the assessment of the relevant test, the Ombudsman considers that there is no evidence to show that EPSO refused to provide information. As regards the time needed for this reply, good administrative practice requires a reply to be sent within a reasonable period of time. In the Ombudsman's view, it is doubtful, even taking into account the considerable workload that EPSO appears to have had to shoulder at the relevant time, whether more than six weeks can be regarded as reasonable in the context of a competition. However, given that EPSO has expressed its regret concerning this delay the Ombudsman considers that no further inquiries into this aspect of the case are needed.

4.4 The above considerations are based on the assumption that EPSO's letter of 25 June 2004 was indeed sent out that day. The Ombudsman takes the view that the copy of the letter that was submitted to him by EPSO would indeed appear to show that EPSO intended to reply to the complainant's letters and e-mails on 25 June 2004. It should be noted that the document is dated (in manuscript) "25/06/2004" and bears a reference that would appear to confirm that the letter was registered on that day in the database for registering correspondence used by EPSO ("Adonis"), as EPSO explained in its reply to the Ombudsman's request for further information.

4.5 However, the Ombudsman also notes that EPSO has been unable to provide any evidence to show that this letter was indeed sent out or that it was at least signed or initialled by the person who was mentioned as being its author. In these circumstances, it cannot be excluded that the letter was mistakenly not dispatched to the complainant. Although it is not possible to establish that this letter was *not* sent out on 25 June 2004, the Ombudsman notes that the only reason why the question could not be resolved was the lack of any tangible evidence on EPSO's file to show that the letter *was* sent out. In the Ombudsman's view, however, it is good





administrative practice to keep a proper record of outgoing correspondence. This means that at least a copy of the letter signed or initialled by its sender should be added to the file.

4.6 The Ombudsman considers, therefore, that EPSO's handling of the complainant's letters and e-mails clearly shows that there were internal administrative inadequacies.

4.7 As regards the information that the complainant alleges to have been given on the occasion of a telephone conversation in September 2004, the Ombudsman notes that in its opinion, EPSO did not dispute the facts put forward by the complainant. Instead, EPSO argued that it always provided accurate information in the sense that this information was in conformity with the information which the relevant service possessed. The Ombudsman does not consider this response to be satisfactory. If the person to whom the complainant spoke was familiar with the file, he or she should have informed the complainant that a reply had been sent (or had been intended to be sent) on 25 June 2004. If the relevant person did not have the information the complainant was looking for, he or she should have directed the complainant to the person who possessed the relevant information instead of providing information that, as EPSO implicitly accepted, was incorrect.

4.8 The Ombudsman therefore considers that the reply given to the complainant over the telephone in September 2004 also shows that there were internal administrative inadequacies within EPSO.

4.9 In these circumstances, the Ombudsman concludes that EPSO's handling of the complainant's case was hampered by internal administrative inadequacies. This constitutes maladministration. The Ombudsman notes that EPSO has expressed its regret as regards the absence of evidence regarding the dispatch of its letter of 25 June 2004. However, no apology was offered to the complainant. The Ombudsman furthermore notes that EPSO has not expressed any regret or presented an apology as regards the information that was provided to the complainant over the telephone in September 2004. A critical remark will therefore be made below.

## **5 Claim for access to documents**

5.1 In his complaint, the complainant asked for full access to the documents relating to his tests. The Ombudsman considered this claim admissible to the extent that it concerned the assessment of test (e).

5.2 Together with its opinion, EPSO provided the complainant with a copy of his examination paper and of the corresponding evaluation sheet drawn up by the Selection Board.

5.3 EPSO would thus appear to have given the complainant access to the documents that he needed to assess his own performance. Given that the complainant did not return to the issue of access to documents in his observations, the Ombudsman considers that there is no need for further inquiries into this aspect of the complaint.

## **6 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:



It is good administrative practice to deal with letters and queries from candidates in competitions properly and speedily.

In the present case, the Ombudsman notes that EPSO intended to reply to the complainant's letters and e-mails of 11 May 2004, 24 May 2004 and 16 June 2004 by its letter of 25 June 2004. However, the Ombudsman also notes that EPSO has been unable to provide any evidence to show that this letter was indeed sent out or that it was at least signed or initialled by the person who was mentioned as being its author. In these circumstances, it cannot be excluded that the letter was mistakenly not dispatched to the complainant. Although it is not possible to establish that this letter was *not* sent out on 25 June 2004, the Ombudsman notes that the only reason why the question could not be resolved was the lack of any tangible evidence on EPSO's file to show that the letter *was* sent out. In the Ombudsman's view, however, it is good administrative practice to keep a proper record of outgoing correspondence. This means that at least a copy of the letter signed or initialled by its sender should be added to the file.

As regards the information that the complainant alleges to have been given on the occasion of a telephone conversation in September 2004, the Ombudsman notes that EPSO, in its opinion, did not dispute the facts put forward by the complainant. Instead, EPSO argued that it always provided accurate information in the sense that this information was in conformity with the information which the relevant service possessed. The Ombudsman does not consider this response to be satisfactory. If the person to whom the complainant spoke was familiar with the file, he or she should have informed the complainant that a reply had been sent (or had been intended to be sent) on 25 June 2004. If the relevant person did not have the information the complainant was looking for, he or she should have directed the complainant to the person who possessed the relevant information instead of providing information that, as EPSO implicitly accepted, was incorrect.

The Ombudsman therefore considers that EPSO's handling of the complainant's letters and e-mails and the reply given to the complainant over the telephone in September 2004 show that there were internal administrative inadequacies within EPSO. This constitutes maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The director of EPSO will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS



(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.