

Decision of the European Ombudsman on complaint 1486/2005/ELB against the European Commission

Decision

Case 1486/2005/ELB - Opened on 27/04/2005 - Decision on 13/12/2006

Strasbourg, 13 December 2006

Dear Mr X,

On 23 March 2005, you made a complaint to the European Ombudsman against the European Commission concerning the rejection of your applications for senior posts within the Commission.

On 27 April 2005, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 22 June 2005. I forwarded it to you with an invitation to make observations, which you sent on 15 and 16 August 2005.

On 27 January 2006, I requested further information from the Commission. The Commission sent its complementary comments on 11 May 2006. I forwarded them to you with an invitation to make observations, which you sent on 28 June 2006.

I sent you information in relation to your complaint and its handling on 21 December 2005, 21 and 31 March 2006, 5 April 2006 and 29 November 2006.

You sent additional information on 26 April 2006.

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

THE COMPLAINT

According to the complainant, the facts can be summarised as follows.

The complainant applied for eight senior posts within the European Commission: two posts of Director-General of the Joint Research Centre ("JRC"); Deputy Director-General of Eurostat; Director at the Directorate-General for Information Society ("DG INFSO"); Deputy Director-General and Principal Adviser at the Directorate-General for External Relations ("DG RELEX"); Director-General at the Directorate-General for Informatics ("DIGIT"); Director at the



Secretariat-General. His applications were rejected, despite his professional experience. According to him, the Commission had considered that he was too old as he was 60 years of age. He argued that the Commission violated Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (1) . He stated that several Commissioners were over 65 years old. He considered that he was being discriminated against on the basis of his age. He claimed that his applications should be considered.

On 22 November 2004, he complained to the President of the Commission about the rejection of his applications. On 21 December 2004, the Commission replied to him, indicating that it was entirely committed to ensuring that recruitment procedures take place free of any discrimination, that the applicable procedures had been followed in the present case, and that no criteria that did not appear in the vacancy notices were used to evaluate candidates. As regards the position in the JRC, the Commission underlined the need for candidates' proven responsibility for the overall management of a large science-based organisation in a senior management position given the size of the JRC, in terms of budget and staff managed, as well as the number of locations.

On 23 March 2005, the complainant submitted a complaint to the European Ombudsman, who opened an inquiry into (a) the complainant's allegation that, when he applied for senior posts at the Commission, he was discriminated against because of his age and (b) the complainant's claim that his applications should be considered on the basis of his qualifications and professional experience.

The complainant requested that his complaint be treated confidentially.

THE INQUIRY

The Commission's opinion

The Commission's opinion of 22 June 2005 can be summarised as follows:

Since the last enlargement on 1 May 2004, the Commission has published the following senior management vacancies for citizens from the new Member States: eight vacancies for posts of Directors-General and Deputy Directors-General as well as 22 vacancies for posts of Directors and Principal Advisers. More vacancies for senior management functions were to be published in the course of 2005.

Senior official recruitment procedures for the ten new Member States follow standard Commission recruitment procedures:

- applications from candidates are received by the Directorate-General for Personnel and Administration ("DG ADMIN");
- a pre-selection phase is carried out by the recruiting departments (eligibility check, check against selection criteria, pre-selection interviews);
- interviews are held with the Commission's Consultative Committee on Appointments ("CCA") after the candidate has undergone tests at an assessment centre; and



- the College appoints after interviews with the Commissioner(s) responsible.

To ensure objectivity, an independent Rapporteur (2) , who holds at least the same grade and occupies a function of at least the same level of that of the vacancy notice, is personally responsible for following an appointment from its initial publication to the final decision by the Commission. The Rapporteur participates and acts as a full member of the CCA for the examination of the specific appointment she/he is following.

The complainant had, up to the date of the Commission's opinion, applied for the following vacancies for senior management functions:

- COM/069/04: Director-General JRC (published 14 May 2004, 60 applications);
- COM/075/04: Deputy Director-General DG RELEX (published 14 May 2004, 105 applications);
- COM/083/04: Director DG INFSO (published 14 May 2004, 203 applications);
- COM/085/04: Director Eurostat (published 14 May 2004, 80 applications);
- COM/R/7022/04 Director-General JRC (published 21 September 2004, 61 applications);
- COM/175/04: Principal Adviser DG RELEX (published 22 October 2004, 130 applications);
- COM/176/04: Director DIGIT (published 22 October 2004, 65 applications); and
- COM/182/04: Director Secretariat-General (published 22 October 2004, 80 applications).

The two procedures in the JRC had been closed without an appointment decision. Procedure COM/075/04 in DG RELEX had been completed with an appointment decision. The procedures concerning DG INFSO, Eurostat, RELEX (Principal Adviser), DIGIT and Secretariat-General were still ongoing. For all above-mentioned procedures, pre-selection reports had been produced with the exception of the procedure in DIGIT, for which the pre-selection phase was still ongoing.

The complainant has not been invited for pre-selection interviews by any of those recruiting departments which have completed the pre-selection phase.

Regarding all procedures for which the pre-selection phase has been completed - that is all the above-listed procedures except for DIGIT - the Commission confirmed that the complainant had in no case been excluded by reason of age. Neither the Rapporteur for the Procedure, DG ADMIN nor the CCA have, in any of these cases, come across evaluations during the pre-selection phase citing or invoking the criterion of "age". The complainant's applications were eligible in all cases. However, when assessed against the stated selection criteria, other candidates showed a better "skills mix".

Among the main reasons why the complainant was not considered to be among the most suitable candidates for the jobs in question were his lack of adequate "skills mix" or the fact that other candidates had stronger "skills mix" on the following scores:

- the requirement for, or desirability of, an excellent command of French in some procedures;
- the need for an adequate high-level management experience in view of the seniority of the published senior management functions and the size of the departments in questions (in terms of budget and staff managed as well as number of locations); and
- the sufficiently in-depth knowledge of/experience in specific sectors (for example, external



relations).

Given the large number of applications for all procedures in which the complainant participated, it was to be expected that there would be a high degree of competition.

The Commission assured the complainant that "age" had not been a criterion in the assessment of his applications and that merit, assessed against stated selection criteria, is the basis for recruitment to senior management positions in the Commission.

The complainant's observations

The complainant's observations can be summarised as follows:

First, the complainant pointed out that, in connection with his eight applications, there has not been any negative or questionable comment regarding his qualifications and competencies. He highlighted the following facts:

- As regards posts in DG JRC, he had more than 34 years of experience in research at national and international levels. He has been involved in more than ten projects funded by the European Union in the Information Society Technologies area. According to him, his experience was much more relevant to these posts than experience in life sciences, environment and chemistry because the priority of the EU until 2010 is for it to become the most advanced knowledge based economy in the world.
- As regards posts in DG RELEX, he had worked for an international organisation in the highest professional category and was appointed as an international civil servant which is possible only after long-term services. He also worked as a founding director of a department of the Office of a Prime Minister in his country and as a special adviser to the deputy Prime Minister. He doubted that there were many such experts in DG RELEX.
- As regards posts in DG INFSO, he is one of the leading experts from the new Member States who has been working in numerous IST projects and as an evaluator of projects in the framework of the Sixth Framework Programme.
- As regards the post in Eurostat, he has spent more than 20 years in direct research, project development, agendas, and so forth with various statistical offices in his country, and at European and international levels.
- As regards the post in the Secretariat-General, he has held similar posts in offices of prime ministers, deputy prime ministers and ministers.

According to him, few candidates from the new Member States have the same qualifications and international experiences as he has.

The complainant stated that, according to press articles, there was a general mistrust of the candidates from the complainant's country in the EU and that all nationals from his country occupying senior posts in the EU had been exclusively nominated by the current government and/or were former employees of the current government. Consequently, the complainant wished to extend his complaint of discrimination based on age to discrimination based on political opinion and nationality. He considered that the criteria mentioned in the notice of vacancies were discriminatory because they were against senior qualified candidates and allowed junior candidates to apply. He added that the qualifications requested were too low.



In reply to the explanations given by the Commission for the rejection of his applications, the complainant argued that the requirement for an excellent command of French was discriminatory as it had no basis in the current EU legislation and was in breach of the notices of vacancies where it was stated that " *a thorough knowledge of one of the official languages of the EU or one of the ten new Member States and an adequate knowledge of another of the official languages* " was required. He protested against this discrimination based on knowledge of French. He specified that, to his knowledge, some Commissioners started learning French just after their appointment. He added that he started learning French in 1989, but, as he has never used it, he does not consider that it is one of his foreign languages. Moreover, he has high-level management experience. He also coordinated funding received under the Phare programme. According to him, he has one year of management experience at the highest national and international levels. Finally, he added that, as a Professor, he has published several papers for conferences and books. He has worked in more than 80 countries.

In conclusion, the complainant rejected all the Commission's arguments and requested the Ombudsman to arrange for a reassessment of his applications and to give him the opportunity to apply for a suitable post at the Commission. He stated that he might take the matter to the European Court of Justice. He added that the Commission's comments should have been signed by a responsible representative of the Commission.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore requested the Commission to specify, with respect to each post for which the complainant applied, the reason(s) for rejecting his applications for the following vacancies: COM/069/04, COM/075/04, COM/083/04, COM/085/04, COM/R/7022/04, COM/175/04, COM/176/04, and COM/182/04.

The Commission's further reply

In its further reply, the Commission made the following remarks:

The Commission explained that the complainant's applications were rejected following a comparative evaluation of the applicants using the selection criteria published in the vacancy notice for each post.

- COM/069/04 (Director-General JRC) :

The complainant does not have the requisite experience in managing a large scientific organisation (responsibility for scientific, budgetary and personnel aspects).

- COM/R/7022/04 (Deputy Director-General JRC) :

The reasons are the same as indicated above.

- COM/075/04 (Deputy Director-General RELEX) :

The vacancy notice stated that an excellent knowledge of English and French was essential for



the diplomatic post in question. The complainant's CV did not indicate that he possessed such knowledge.

- COM/175/04 (Chief Advisor RELEX) :

The complainant failed to demonstrate in his CV that he had sufficient knowledge of Community policies, particularly in the external relations and regional fields.

- COM/083/04 (Director INFISO) :

The complainant was not selected for interview as he had not demonstrated a sufficient knowledge of European research policies or a grasp of leadership, negotiating tactics and management (personnel and financial management, policy development and implementation).

- COM/085/04 (Director EUROSTAT) :

The complainant's application was rejected because he had insufficient experience in top-level management.

- COM/176/04 (Director DIGIT) :

The pre-selection panel considered that the complainant did not have sufficient experience in the job environment and in management (human and financial resources).

- COM/182/04 (Director Secretariat-General) :

The complainant's experience in an international organisation was not in the fields of activity specific to the Secretariat-General, and his knowledge of the Secretariat-General's activities was insufficient.

The Commission pointed out that the posts in question involved a very high level of responsibility, and that a significant number of applications were received. As such, there was intense competition between applicants.

The Commission confirmed that the complainant's applications for the posts in question were evaluated using the selection criteria published in the vacancy notice, and that they were rejected after a comparative evaluation had been made of the applicants' merits alone. In view of the number of applications and the high level of the posts in question, competition was extremely intense.

The criteria of age, nationality, languages spoken and political opinion were not taken into account (with the exception of vacancy notice COM/075/04 for which an excellent knowledge of French was required in view of the diplomatic nature of the post).

The complainant's final observations

The complainant's final observations can be summarised as follows:



First, the complainant noted that the Commission submitted its comments after many extended deadlines, which, in his view, is not acceptable. He further noted that the reply was not on official stationery. Therefore, he did not consider that it was the Commission's official reply. He also considered the document to be an unofficial and unauthorised translation from French. Therefore, he asked the Ombudsman to dismiss these comments as inadmissible and void.

Given the complainant's above-mentioned comments, he did not consider it appropriate to comment in detail on the individual Commission's observations. He did, however, make the following points:

- COM/069/04 : the complainant took the view that a definition of a large scientific organisation should be given.
- COM/R/7022/04 : he made the same remark and added that a deputy Director-General should be more a professional than an administrator.
- COM/075/04 : the complainant pointed out that there were very few places where diplomats or experts speaking only French could serve and that English was the most commonly used language, followed by Spanish and Portuguese.
- COM/175/04 : the complainant considered that the Commission's comments were baseless and constituted offensive accusations and added that he reserved the right to protect his human and professional dignity by any means.
- COM/083/04 : he referred to his previous remarks and suggested that the Commission visit a website that shows that he has been involved in many successful European Union and international projects. He stated that he knew European Union research policy far better than most of those responsible for it, which explains the state of the Lisbon Strategy.
- COM/085/04 : he referred to his comments on large organisations and added that he has handled projects with large budgets, which he assumed was not the case with other applicants.
- COM/176/04 : he referred to the comments he made for COM/083/04.
- COM/182/04 : the complainant indicated that his qualification as an international civil servant was generally accepted in any kind of international relations and doubted that other applicants had similar qualifications.

THE DECISION

1 Preliminary remarks

1.1 The European Ombudsman notes that, in his observations of 15 August 2005 and in his e-mails of 21 December 2005 and 26 April 2006, the complainant wished to extend his complaint of discrimination based on age to discrimination by reason of political opinion and nationality. On 27 January 2006, the Ombudsman informed the complainant that no prior administrative approaches had been made to the Commission in relation to these allegations. On 29 May 2006, the Ombudsman noted that the complainant had addressed his allegations to the Commission and advised him of the possibility of lodging a new complaint if he did not receive a satisfactory reply within a reasonable time.

1.2 In his observations on the opinions sent by the Commission on his complaint, the complainant pointed out that the opinions were not signed and that one of them was not on



official stationery. He therefore considered that these replies were not official replies. The Ombudsman informs the complainant that, until November 2005, the Commission's opinions on complaints were sent to the Ombudsman accompanied by a formal letter of transmission signed by the Secretary-General of the Commission. This is what happened with the Commission's opinion dated 22 June 2005. This was also the case with the translation of the Commission's opinion dated 14 March 2006. The original version of the latter opinion was sent by letter signed by Commissioner Kallas, following the application by the Commission of new rules on the adoption and transmission of its communications to the European Ombudsman. The Ombudsman would like to assure the complainant that the Commission's opinions that he received are the Commission's official opinions on his complaint.

1.3 Finally, the Ombudsman notes that, as specified in his letters of 27 April 2005 to the Commission and to the complainant, his inquiry into the present complaint concerns (i) the complainant's allegation that he was the victim of age discrimination in the context of the rejection of his applications for senior posts at the Commission and (ii) the complainant's related claim that his applications should be considered on the basis of his qualifications and professional experience. In the context of the present inquiry, the complainant has made certain observations which might be regarded as challenging (i) the propriety of the Commission's evaluation of the complainant's qualifications; (ii) the adequacy of the reasons provided by the Commission in relation to its decisions not to accept the complainant's applications; and (iii) the propriety of a language requirement laid down in one of the relevant notices of competition. These issues do not fall within the scope of the present inquiry and will not be examined in this context. Nevertheless, the complainant may consider submitting a new complaint to the Ombudsman about these matters (3) . Such a complaint must have been preceded by appropriate administrative approaches to the Commission, as required by Article 2(4) of the Statute of the European Ombudsman (4) .

2 Alleged age discrimination and related claim

2.1 The complainant applied for different senior posts (COM/069/04, COM/075/04, COM/083/04, COM/085/04, COM/R/7022/04, COM/175/04, COM/176/04, COM/182/04) within the Commission. His applications were rejected. The complainant alleged that, in this context, he was discriminated against because of his age. Relatedly, he claimed that the Commission should eliminate this instance of maladministration by considering his applications on the basis of his qualifications and professional experience, instead of his age.

2.2 In its opinions, the Commission rejected the above allegation and claim. It noted, in particular, that, in all procedures for which the pre-selection phase had been completed (that is, all procedures except for the DIGIT procedure) the complainant had in no case been excluded by reason of age. The complainant's applications were eligible in all cases. The complainant's application, in each one of the competitions concerned, was not accepted for the reason(s) indicated below:

- COM/069/04 (Director-General JRC) :

The complainant did not have the requisite experience in managing a large scientific organisation (responsibility for scientific, budgetary and personnel aspects).



- COM/R/7022/04 (Deputy Director-General JRC) :

The reasons are the same as indicated above.

- COM/075/04 (Deputy Director-General RELEX) :

The vacancy notice stated that an excellent knowledge of English and French was essential for the diplomatic post in question. As the complainant's CV indicated, he did not possess these attributes.

- COM/175/04 (Chief Advisor RELEX) :

The complainant failed to demonstrate in his CV that he had sufficient knowledge of Community policies, particularly in the external relations and regional fields.

- COM/083/04 (Director INFSO) :

The complainant was not selected for interview as he had not demonstrated a sufficient knowledge of European research policies or a grasp of leadership, negotiating tactics and management (personnel and financial management, policy development and implementation).

- COM/085/04 (Director EUROSTAT) :

The complainant was considered to have insufficient experience in top-level management.

- COM/176/04 (Director DIGIT) :

The pre-selection panel considered that the complainant did not have sufficient experience in the job environment and in management (human and financial resources).

- COM/182/04 (Director Secretariat-General) :

The complainant's experience in an international organisation was not in the fields of activity specific to the Secretariat-General, and his knowledge of the Secretariat-General's activities was insufficient.

2.3 In his observations the complainant made a number of arguments which may be regarded as challenging (i) the propriety of the Commission's evaluation of the complainant's qualifications; (ii) the adequacy of the reasons provided by the Commission in relation to its decisions not to accept his applications; and (iii) the propriety of a language requirement laid down in one of the relevant notices of competition. As noted in point 1.3 above, these issues fall outside the scope of the present inquiry. Moreover, no evidence, not even *prima facie* evidence, has been produced to show that the above reasons invoked by the Commission in support of its decisions not to retain the complainant's applications were a mere sham and



pretense, covering up the Commission's choice to assess the complainant's candidacies in light of his age. Relatedly, it is recalled that the Commission has categorically denied that age was one of the criteria it examined when it assessed the complainant's applications. Under these circumstances, the Ombudsman concludes that the complainant's allegation has not been substantiated. Hence, he finds no corresponding instance of maladministration in the Commission's activities. Further, he does not accept the complainant's related claim.

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) OJ 2000 L 303, p. 16.

(2) Rapporteurs serve Directors-General and Directors and are appointed by the Commission for a renewable term of a minimum of two years. For each appointment to a senior management function, the Chair of the CCA designates a Rapporteur from the pool of Rapporteurs, whose role is to follow the procedure throughout its various stages (see SEC(2004) 1352/2, OJ 2004).

(3) In this regard, the Ombudsman would like to clarify that his review regarding issue (i) concerning the propriety of the Commission's evaluation of the complainant's qualifications, and issue (iii) concerning the propriety of a language requirement laid down in one of the relevant notices of competition would be limited, taking into account that the Commission has a wide margin of discretion in these contexts.

(4) Article 2(4) of the Statute of the Ombudsman states the following:

" The complaint (...) must be preceded by the appropriate administrative approaches to the institutions and bodies concerned. "

The purpose of this requirement is to give the institution or body concerned the possibility to correct its behaviour, or at least to explain itself, before a complaint is made to the Ombudsman, and subsequently, in case a complaint is lodged with the Ombudsman, to enable the Ombudsman to take into consideration the institution's reply when he makes a decision on the existence of sufficient grounds for opening an inquiry.