

Decision of the European Ombudsman on complaint 258/2007/(MHZ)RT against the European Commission

Decision

Case 258/2007/(MHZ)RT - Opened on 23/03/2007 - Decision on 10/12/2007

Strasbourg, 10 December 2007

Dear Mr B.,

On 23 January 2007, you submitted a complaint to the European Ombudsman against the European Commission concerning the 2005 attestation procedure.

On 2 February 2007, you sent me additional information related to your complaint.

On 23 March 2007, I forwarded the complaint to the President of the Commission.

On 4 April 2007, you informed me that you wished to clarify your allegation on the basis of which I had decided to open an inquiry. You also submitted comments concerning my handling of your case (1) .

On 16 May 2007, I forwarded your revised allegation to the President of the Commission. On the same day, I sent you a letter in which I answered your above comments (2) .

The Commission sent its opinion on 14 June 2007.

On 25 June 2007, you sent me additional comments regarding my handling of your case (3) and asked for a copy of my letter of 16 May 2007 to the Commission. On the same day, the Commission sent me the translation of its opinion into French.

On 7 July 2007, I sent you (i) a copy of my letter of 16 May 2007 to the Commission following your request and (ii) the Commission's opinion in French. I also invited you to submit your observations on that opinion, which you sent on 26 July 2007.

On 29 October 2007, you sent additional comments (4) to which I replied on 15 November 2007 (5) .

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



THE COMPLAINT

The relevant facts can be summarised as follows:

The complainant is a category "C" member of the Commission Staff in the Directorate-General ("DG") for Education and Culture. Prior to working for the Commission, he performed similar duties in the French civil service.

On 28 January 2005, DG Education and Culture organised a PowerPoint presentation during which the proposal of DG Personnel and Administration ("DG ADMIN") on the draft decision concerning the criteria for the 2005 attestation procedure ("the Proposal") was discussed. The complainant took the view that the Proposal was not in conformity with Article 6(1) of the Commission's Decision of 7 April 2004 laying down the rules for implementing the attestation procedure (6) ("the Commission Decision of 7 April 2004"). According to the complainant, the Proposal foresaw, *inter alia*, that only professional experience evaluated on the basis of available career development reviews could be taken into account in order to be admitted to the attestation procedure, and not the entire professional experience. Such a limitation constituted, in the complainant's view, an overly restrictive interpretation of the Commission's Decision of 7 April 2004.

Therefore, on 4 February 2005, the complainant sent an e-mail to DG ADMIN explaining his views with respect to the alleged non-conformity of the Proposal with the Commission's Decision of 7 April 2004 and urged DG ADMIN to modify the Proposal.

DG ADMIN did not reply to his e-mail and did not send a holding reply either.

On 29 March 2005, the complainant submitted a request for a decision under Article 90(1) of the Staff Regulations. He repeated the content of his e-mail of 4 February 2005, and pointed out that, given the restrictive interpretation of the Proposal, the complainant's seven-year experience in the French civil service might not be taken into account in relation to his attempt to change his category from C to B. The complainant also underlined the fact that DG ADMIN failed to answer his e-mail of 4 February 2005.

On 20 May 2005, DG ADMIN published decision number 33-2005, entitled "*Appointing Authority decision on the criteria for the 2005 attestation procedure*" ("Decision 33-2005"). Decision 33-2005 included in substance the same rules as those contained in the Proposal.

On 1 August 2005, DG ADMIN answered the complainant's request made under Article 90(1) of the Staff Regulations. DG ADMIN found, in summary, that the Proposal and Decision 33-2005 were made in accordance with Article 6(1) of the Commission's Decision of 7 April 2004. It did not refer to its failure to reply to the complainant's e-mail of 4 February 2005.

On 28 October 2005, the complainant submitted a complaint against the above reply, under Article 90(2) of the Staff Regulations.



On 20 February 2006, DG ADMIN replied to the complainant.

First, it found the complainant's complaint inadmissible, given that the challenged reply did not constitute an act adversely affecting him.

Second, DG ADMIN explained the legal basis of Decision 33-2005. It did not agree, in summary, with the complainant's view that Decision 33-2005 was not in conformity with the Commission's decision of 7 April 2004. DG ADMIN stated that Article 6(2) of the Commission's Decision of 7 April 2004 stipulated that the appointing authority shall decide on the value of the criteria and the weighting applied to them. On the basis of this Article, DG ADMIN decided that, in order to be admitted to the 2005 attestation procedure, officials must have been recognised, in their annual career development report relating to 2004, as having the potential to take on category B duties.

Furthermore, DG ADMIN stated that the appointing authority needed to compare the professional experience of officials who were candidates for attestation. Therefore, the column entitled "potential", which was recently included in the career development reports as of 2005, needed to be compared in order to evaluate the professional experience of the officials for the purposes of their attestation.

The complainant was not satisfied with the reply that he received and on 23 January 2007 turned to the European Ombudsman.

The Ombudsman opened an inquiry into the complainant's following allegation, as the latter it was clarified in the complainant's further letter of 4 April 2007, and claim:

The complainant alleges that DG ADMIN (i) deliberately failed to reply to the complainant's e-mail of 4 February 2005; (ii) failed to take a stance on the complainant's remarks in due time, and (iii) refused to apologise for the above failures, contrary to the principles of good administration.

He claims that the Commission should apologise for its failure to reply.

THE INQUIRY

The Commission's opinion

The opinion adopted by the Commission can be summarised as follows:

As to the facts:

On 28 January 2005, DG ADMIN organised a conference entitled "Attestation procedure: Career streams C and D". During the conference, a PowerPoint presentation was shown which was designed to give a general overview of the principles governing the attestation procedure and to explain how officials employed in categories C and D before 1 May 2004 may become members of the assistants function group without restriction. The presentation indicated that experience and merit would be evaluated on the basis of career development reports.



After having attended the presentation, the complainant sent an e-mail to DG ADMIN on February 2005, in which he stated that evaluating a candidate's professional experience on the basis of the last three annual career development reports would infringe Article 6(1) of the Commission's Decision of 7 April 2004 which stipulated that the appointing authority must draw up a list of eligible officials in order of priority based on the following criteria: the level of education and training; seniority in career stream C or D; and *experience and merit evaluated on the basis of available career development reports*. DG ADMIN did not reply to this e-mail.

On 29 March 2005, the complainant introduced a formal request pursuant to Article 90(1) of the Staff Regulations. A formal reply was given to that request by decision of 1 August 2005.

On 28 October 2005, the complainant lodged a complaint pursuant to Article 90(2) of the Staff Regulations against the decision of 1 August 2005 refusing to comply with his request. On 20 February 2006, his complaint under Article 90(2) was declared inadmissible.

As to the merits

In its opinion, the Commission " *acknowledged that no reply was given to the complainant's e-mail of 4 February 2004* ". However, the Commission pointed out that (i) at the time when the complainant's e-mail was sent, the attestation procedure had not yet been launched and (ii) the criteria for the 2005 attestation procedure were only later established and were published on 20 May 2005. Therefore, DG ADMIN considered that the complainant's e-mail expressed "a general criticism" and did not require a formal reply.

The Commission also added that the complainant had never been a candidate for the attestation procedure carried out in 2005. Thus, the Commission's failure did not have a negative impact on the complainant's statutory rights.

Further, the Commission took the view that a formal reply to the complainant's queries was given following his request submitted pursuant to Article 90(1) of the Staff Regulations. Moreover, DG ADMIN offered a detailed explanation concerning the matter in question in its reply to the complainant's appeal under Article 90(2) of the Staff Regulations.

Finally, the Commission expressed its apologies for its failure to reply. It also pointed out that the lack of reply was not deliberate and did not cause any harm to the complainant's administrative situation.

The complainant's observations on the Commission's opinion

In his observations on the Commission's opinion, the complainant made, in summary, the following comments:

The complainant took the view that the Commission failed to take a stance on all his allegations and to apologise for its failures.

As regards the first allegation that DG ADMIN deliberately failed to reply to his e-mail of 4 February 2005, the complainant stated that he was only partially satisfied with the Commission's explanation. He went on to argue that the statement that " *his e-mail did not require a formal*



reply " proved that the Commission failed to act in good faith. The complainant also pointed out that the Commission had an obligation to reply to his correspondence independently of whether its reply could influence his statutory rights or not.

As regards his second allegation that the Commission failed to take a stance on his remarks in due time, the complainant stressed that this allegation referred to the delayed reply received from the Commission. The complainant observes that DG ADMIN did not make any effort to reduce the delay in replying to his complaint made under Article 90(2) of the Staff Regulations. Moreover, the complainant pointed out that DG ADMIN failed to apologise for this fact in particular.

Further, the complainant stressed that the Commission did not make any reference to his e-mail of 4 February 2005 and did not apologise for its failure to reply to the above e-mail either in its answer to his request under Article 90(1), nor in its reply to his complaint made under Article 90(2). Therefore, the complainant took the view that the Commission's attitude infringed his right to good administration and to an equal and impartial treatment.

Finally, the complainant contested the inadmissibility of his complaint under Article 90(2) on the twin grounds that, DG ADMIN's decision was contrary to the Community case-law and, that it handled his Article 90 complaint unfairly.

THE DECISION

1 Preliminary remarks *Scope of the Ombudsman's inquiry*

1.1 The Ombudsman points out that, as he explained in his letter to the complainant dated 16 May 2007, that he does not deal in the present inquiry with the differences of interpretation of the internal rules governing relation between the institution and the complainant, which concerns the issue of whether or not it is legitimate for the Commission to take into account the a staff member's potential to carry out a function in category "B" as inferred in that person's career development reports in order to admit him/her to the attestation procedure and to authorise a change from category "C" to "B". Although the complainant submitted an allegation concerning this issue in his original complaint, the Ombudsman did not find sufficient grounds to deal with it, given that the Commission's position in this respect, as put forward in its reply to the complainant's Article 90(2) complaint, appeared to be reasonable.

1.2 Moreover the Ombudsman notes that some of the complainant's comments, submitted in his observations, were focused on the fact that the Ombudsman decided not to deal with all the aspects of his complaint. The Ombudsman points out that he replied to these comments on 15 November 2007, in a separate communication. As it appears that these comments do not directly relate to the original complaint, the Ombudsman decided not to include them in his present decision.

2 Alleged failure to reply in due course and to apologise

2.1 The complainant alleges that the Commission's Directorate-General for Personnel and Administration ("DG ADMIN") (i) deliberately failed to reply to his e-mail of 4 February 2005; (ii) failed to take a stance on his remarks in due time; and (iii) refused to apologise for the above



failures contrary to the principles of good administration. He claims that the Commission should apologise for its failure to reply.

2.2 In its opinion, the Commission acknowledged that no reply was given to the complainant's e-mail of 4 February 2005. The Commission took the view that the complainant's e-mail expressed "a general criticism" and did not require a formal reply. The Commission justified its view by stating that (i) at the time when the complainant's e-mail was sent, the attestation procedure had not yet been launched and (ii) the criteria for the 2005 attestation procedure were only later established and were published on 20 May 2005. The Commission also pointed out, that in fact, a formal reply to the complainant's queries was given following his request submitted pursuant to Article 90(1) of the Staff Regulations. Moreover, DG ADMIN offered a detailed explanation in its reply to the complainant's appeal under Article 90(2) of the Staff Regulations.

In its opinion, the Commission apologised for its failure to reply. It also pointed out that the lack of reply was not deliberate and did not cause any harm to the complainant's administrative situation. The Commission noted that the complainant did not take part in the 2005 attestation procedure.

2.3 The Ombudsman notes that, on 4 February 2005, the complainant sent an e-mail to DG ADMIN concerning the Commission's proposal on the criteria for the 2005 attestation procedure. The Ombudsman also notes that, following the Commission's lack of reply to his e-mail, the complainant submitted on 29 March 2005 a request for a decision under Article 90(1) of the Staff Regulations. Further, the Ombudsman notes that the Commission replied to the complainant's request under Article 90(1) and to his Article 90(2) complaint within the four-month time-limit laid down in the Staff Regulations.

2.4 The Ombudsman has consistently taken the view that principles of good administration require that the Commission reply to correspondence from citizens within a reasonable time. In accordance with the Commission's Code of Good Administrative Behaviour (7) , a reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter from the responsible Commission department. Moreover, the Ombudsman points out that, according to the Commission's Code of Good Administrative Behaviour, if a reply in substance cannot be sent within the time-limit, a holding letter should be first sent.

2.5 In the present case, the Commission had argued that it did not reply to the complainant's e-mail because it considered that its contents expressed "a general criticism" and did not require a formal reply . Having examined the complainant's e-mail of 4 February 2005, the Ombudsman considers that this view does not appear to be entirely reasonable (8) . Moreover, the Ombudsman notes that no holding reply was sent to the complainant.

2.6 However, the Ombudsman notes that, at a later stage, the Commission did indeed, in its replies to the Article 90(1) request and to the Article 90(2) complaint, reply to the points raised by the complainant in the e-mail at issue. Moreover, the Ombudsman recalls that, in its opinion, the Commission offered its apologies for the fact that it did not (i) reply to the complainant's



e-mail of 4 February 2005 and (ii) in due time take a stance on the complainant's remarks. Given these circumstances, the Ombudsman does not consider it necessary to inquire further into the issues in question. He therefore closes the case.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, no further inquiries are justified. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) In his additional letter of 4 April 2007 , the complainant considered in summary that the Ombudsman should, as a matter of principle, have opened an inquiry into all allegations and claims which were submitted in his original complaint. The complainant also referred to the allegation on which the inquiry was opened and suggested that the Ombudsman should add the allegation that the Commission had failed to apologise for its failure to reply to the complainant's e-mail.

(2) In his reply of 16 May 2007 , the Ombudsman (i) explained to the complainant his margin of discretion as regards the admissibility of complaints and (ii) accepted the proposed addition to the allegation on the Commission's failure to reply to the complainant's e-mail. On the same day, the President of the Commission was informed about the revised allegation.

(3) In summary, the complainant reiterated his earlier 4 April 2007 comments.

(4) In summary, the complainant reiterated his earlier comments.

(5) The Ombudsman repeated to the complainant the explanation provided in his letter dated 16 May 2007.

(6) C(2004)1318 (see administrative notice N 70 - 2004/22.06.2004).

(7) OJ 2000 L 308, p. 26.

(8) In his e-mail, the complainant stated that he was expecting a reply from the DG ADMIN. In French: "*Dans l'attente de votre réponse (...)*".