

Draft recommendation to the European Commission in the own initiative inquiry 1004/97/PD

Recommendation

**Case 1004/97/(PD)GG - Opened on 07/11/1997 - Recommendation on 08/03/1999 -
Special report on 07/11/1997 - Decision on 07/12/1999**

(Made in accordance with Article 3 (6) of the Statute of the Ombudsman. (1)) By letter of 7 November 1997, the European Ombudsman opened an own initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures. In his letter, the Ombudsman asked the Commission to inform him whether it would envisage taking measures in order to render the Community's commitment to transparency more tangible in this field. He wanted in particular to know whether the Commission would envisage allowing applicants to take the exam questions with them from the exam room, communicating the evaluation criteria to applicants who request them, making known to the applicants the names of the Members of the Selection Board and allowing the disclosure of the corrected copies of the exams to applicants concerned. The reasons for opening the inquiry were in substance stated as follows: An essential part of the Ombudsman's duties is to work towards enhancing relations between the Community institutions and European citizens. It appears that many citizens' first contact with the Community institutions happens in the context of recruitment. It would be valuable for the institutions if the first impressions which citizens have in this first encounter with the Community administration were positive. Furthermore, it seems contrary to the Community's commitment to transparency that these first contacts for possible future civil servants should be marked by a lack of transparency. The European Ombudsman had received a number of complaints within the field of recruitment, in particular concerning the lack of transparency in the procedures. In complaint 46/27.7.95/FVK/B-DE, the applicant was not able to obtain any communication of the reasons why her application had been rejected. In complaint 252/22.11.95/Tfr/ES, the complainant could not be given the names of the Members of the Selection Board. In complaints 659/24.6.96/AEKA/FIN/IJH and 850/3.9.96/JIA/FIN/KT, neither the names nor the qualifications of the Members of the Selection Board were disclosed. In complaint 216/08.11.95/MH/A, the complainant was not allowed to know the names of the correctors who assisted the Selection Board. In complaint 142/97/PD, the complainant was not allowed to take with him from the exam room a copy of the questions asked, and in reply to his request for review of the marks of his exam, he was told that the marks communicated to him corresponded to those the Selection Board had given him. In complaint 773/29.7.96/SS/FIN/PD, four applicants addressed the Commission in order to request a copy of their marked exams and to ask for a review of the given marks; their request was turned down and with reference to the request for a review, the competent Selection Board simply stated that it had established that



"the marking of your exam had been made in a correct and just way", without providing any further details. In complaints 105/97/PD, 675/1.7.96/AL/FIN/KT and 940/11.10.96/AS/SW/BB, a request for communication of the marked copy of an exam was equally turned down. Furthermore, in complaints 675/2.7.96/AL/FIN/KT and 659/24.6.96/AEKA/FIN/IJH, the complainants requested communication of the evaluation criteria. In complaint 940/11.10.96/AS/SW/BB, the complainant requested the communication of the evaluation criteria relating to the assessment of work experience. There were two recurrent elements in the Community Institutions' comments on these kinds of complaints. The one is a reference to Article 6 of annex III to the Staff Regulations. This provision states that "the proceedings of the Selection Board shall be secret". The other element is the wide discretionary powers of Selection Boards. Article 6 was established with a view to guaranteeing the independence of Selection Boards, by protecting them from interference and pressures. This legitimate consideration does not appear to impede development of procedural guarantees for applicants, consistent with the requirements of Article 6. It is certainly right that according to the case-law of the Court of Justice, Selection Boards are vested with wide discretionary powers. Such powers imply that the scope of judicial control is limited; the conferral of such powers does not appear to prevent public authorities from complying with principles of good administration. Without prejudice to the discretionary powers of Selection Boards and Article 6, it appears that the Commission could itself decide to develop procedural guarantees for applicants as a matter of good administrative behaviour. For the present, it seems that the provision has been given an extent which its underlying aim may not justify and which citizens find incomprehensible in a democratic and accountable administration, committed to transparency. Given the wide discretionary powers that Selection Boards enjoy, it seems all the more important that these powers be exercised in conformity with principles of good administrative behaviour. Communication of the marked exam and of the evaluation criteria to the applicant concerned who requests them could also alleviate the work of Selection Boards in dealing with queries and complaints from applicants. Thus, this was the background against which the Ombudsman addressed the Commission. **The Commission's opinion** The Commission's opinion was divided into three parts. The Commission stated in substance the following: Firstly, the Commission considered that recruitment procedures are the first and for many applicants the only direct contact with the Community administration and therefore, it is important that this contact is positive. The Commission considered that the number of complaints concerning lack of transparency was very low in comparison with the total number of applicants for the various competitions organised by the Commission. Secondly, the Commission recalled the legal framework for recruitment operations: Competitions organised by the Community administration are regulated by the Staff Regulations and by the general principles of Community law as laid down in the case law of the Community Courts. Competitions are recruitment procedures governed by law, and solely the Community Courts have jurisdiction to control the correct application of the law. The Commission emphasised that a competition is normally an exam procedure, but the exams are not exams in the traditional sense of the term. While exams and competitions are similar to the extent that both aim at selecting candidates, there is however a fundamental difference between exams and competitions as far as the assessment of the participants' merits is concerned. Success in an exam depends only on the obtention of a pass mark; participants are judged against "objective" criteria. On the other hand, applicants in a competition are judged against each other, i.e. the assessment is comparative. According to



the Commission, this is the reason underlying Article 6 of Annex III to the Staff Regulations concerning the secrecy of the proceedings of Selection Boards and ensuing rules, in particular the one concerning the independence of the Selection Board which aims at protecting the Board against any intervention or pressure, wherever it comes from. As concerns the judicial control of the proceedings of a Selection Board, the Commission stated that one has to distinguish between two kinds of decisions: - On the one hand, decisions concerning admission to the competition for which the judicial control is extremely strict. - On the other hand, decisions concerning the comparative assessment of applicants. These decisions imply a large margin of discretion in accordance with the case law of the Community Courts, to which the Ombudsman also refers in his decisions. This margin of discretion is understandable because only the Board may assess the individual applicant as only the Board has knowledge of all the applicants and can thus compare them. That is the reason why only the "clean" copy of exam papers - i.e. the copy without the annotation of the marker - is communicated to the applicant concerned in countries which allow for such communication in competitions. In fact, the communication of the marked copy or of the detailed evaluation of an oral exam would not serve any purpose, as the assessment of it by a third person, who has not assessed the other applicants, would be deprived of meaning. This margin of discretion which may be seen as discretionary, but certainly not arbitrary, is subject to judicial review to the extent that the Community Courts ensure that Selection Boards have not violated any rule or principle binding upon them. Thirdly, the Commission stated that recently, applicants had been allowed to take the exam questions with them, when leaving the exam room, unless copyright hindered this. As concerns communication of evaluation criteria, the Commission stated that the criteria are communicated upon demand. As concerns the possibility of making the names of the Members of Selection Boards known to the applicants, the Commission found it appropriate not to make the names public in order to preserve the Members' independence and the correct running of the competitions. As concerns the possibility of disclosing a copy of the marked exam papers to the applicant concerned, the Commission stated that this would be meaningless given the nature of competition proceedings, explained above. Furthermore, the Commission stated that given the thousands of applicants for competitions, often from all Member States, disclosure of the copy of the marked exam papers could entail administrative and financial costs.

THE DECISION

1 Exam questions 1.1 As concerns the exam questions, the Commission has undertaken to permit applicants to take those questions with them, when they leave the exam room, unless copyright hinders this. The Ombudsman therefore finds no reasons for inquiring further into this question. **2 Evaluation criteria** 2.1 As concerns communication of the evaluation criteria, the Commission has stated that these are communicated to applicants who make the request. The Ombudsman therefore finds no reasons for inquiring further into this question. **3 Names of Members of the Selection Board** 3.1 As concerns the question of whether the applicants should be allowed to know the names of the Members of the Selection Board, the Ombudsman shall observe the following: The Commission has until now considered it appropriate not to make the names of the Members known in order to preserve their independence and in order to hinder any pressure on the Members. The Ombudsman finds this consideration relevant. However, the Ombudsman must also recall that it is a fundamental principle of good administration that any member of the public, who deals with a civil servant, is entitled to know



the name of that civil servant. An administration without a face and a name is alienating. The Ombudsman therefore finds it unacceptable that applicants who participate in oral exams are not entitled to know the names of persons who examine them. **4 Copy of marked exam papers**

4.1 As concerns the question of whether applicants shall have access to their own exam papers, once marked, the Ombudsman notes that the Commission bases its denial to give access to the applicant concerned on the consideration that such a disclosure would be deprived of meaning given the nature of competitions, i.e. the comparative assessment of applicants. In addition, the Commission has argued that disclosure of the exam papers could entail administrative and financial costs. 4.2 Firstly, the Ombudsman shall observe that the Commission is certainly right that Selection Boards dispose of a large margin of discretion in assessing applicants. The Selection Board's assessment is definitive and in reality the unsuccessful applicant has no possibility of challenging it. It is therefore even more important that the public has full confidence in the proceedings of Selection Boards. 4.3 After this preliminary remark, it shall be observed that the marked copy of an exam paper consists of two components, the exam paper itself and the marks. It must be clear that the applicant concerned, being the author of the exam paper, cannot be refused access to that same paper. 4.4 As concerns the second component, the Ombudsman has to recall that a fundamental principle of transparency is that the citizen and not the administration decides whether it is reasonable to request information. The administration may reject the citizen's request on due grounds of confidentiality, but it may not reject on the ground that the request does not make sense to the interested citizen. Independently of the question whether marks may be challenged or not, the applicant has a fundamental interest in knowing the errors he has made. Therefore the Ombudsman cannot accept that the Commission refuses to disclose the marked exam papers of the applicant concerned who requests it, on the grounds that it does not serve any purpose. 4.5 As concerns administrative and financial costs, the Ombudsman shall observe that the Commission has not substantiated this by evidence. If it appears that a high number of applicants request copies of their exam papers, the Commission could consider levying a reasonable fee for the costs. 4.6 Against this background, the Ombudsman must conclude that the Commission has not referred to any ground which justifies its refusal to communicate copies of marked exam papers to the applicant concerned. In the interest of enhancing transparency and the public's confidence in the activities of Selection Boards, the Commission should therefore give to the applicant concerned who requests it, access to his own marked exam papers. In order to allow the Commission to take the necessary steps in organising such a disclosure, this finding shall be limited to the future competitions that the Commission organises.

5 Draft recommendation 5.1 In accordance with Article 3 (6) of the Statute of the European Ombudsman, the Ombudsman therefore makes the following draft recommendation to the Commission: The Commission shall make known to applicants in oral exams the names of the Members of the Selection Board. In its future competitions, the Commission shall give applicants access to their own marked exam papers upon request. In accordance with Article 3 (6) of the Statute, the Commission shall send a detailed opinion before 30 June 1999. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented. Strasbourg, 8 March 1999 Jacob SÖDERMAN

(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, 1994 OJ L 113/15.

