

Draft recommendation to the European Parliament in complaint 457/99/IP

Recommendation

Case 457/99/IP - Opened on 06/05/1999 - Recommendation on 27/07/2000 - Decision on 11/05/2001

(Made in accordance with Article 3 (6) of the Statute of the Ombudsman. (1))

THE COMPLAINT

On 28 April 1999 Mr A. lodged a complaint with the European Ombudsman against the European Parliament, concerning his participation in open competition EUR/C/135 organised by the European Parliament. On 30 March 1999, the complainant requested the Selection Board to re-examine his tests and to be allowed to have a copy of his own marked examination papers. No written reply was given to him. However, the complainant stressed that during a telephone call with the Chairman of the Selection Board, he was told that he could not have access to his own marked examination papers. In his complaint to the Ombudsman, he made the following allegations: 1) The Selection Board failed to reply in writing to his letter of 30 March 1999. 2) The Selection Board refused to allow him access to his own marked examination papers. By letter of 28 May 1999, the complainant informed the Ombudsman that on 19 May 1999, he finally received a reply from the Selection Board. In its reply the Selection Board pointed out that at the complainant's request, it re-examined his tests and confirmed that the marks he had received were correct. It refused to allow him to have a copy of his own marked examination papers on the basis of the confidentiality of the Selection Board's work.

THE INQUIRY

The Parliament's opinion In summary, the Parliament's opinion on the complaint was as follows: As concerns the alleged failure to reply to the complainant's letter dated 30 March 1999, the Parliament pointed out that on 19 May 1999 the Chairman of the Selection Board replied in writing to the complainant, informing him that it had acceded to his request to re-examine his tests. After the re-examination, the Selection Board confirmed the marks received by the complainant. The complainant had only reached 13 points in test 1.c whereas the minimum required was 25 points. He was therefore excluded from the competition and informed accordingly. As regards the refusal to give access to his marked examination papers, the Parliament reiterated its position. It refused the access on the basis of the confidentiality of the Selection Board's work and recalled the case-law of the Community Courts in this field (2) . According to the Parliament interpretation, the Appointing Authority is prohibited from providing candidates with their test papers with the corrections and comments made by Selection Board



members. **The complainant's observations** In his observations on the Parliament's opinion, the complainant maintained his original claims. Moreover, he referred to the Selection Board's reply of 19 May 1999, in which the institution had made clear that, if correction of test 1.a and test 1.b was made by an optical reader, test 1.c was corrected by several correctors with all the guarantees of anonymity. The complainant contested this claim. According to him, the candidates' anonymity during the selection procedure was not respected because the personal data of each candidate were indicated on the examination papers.

FURTHER INQUIRIES

On 21 October 1999, the Ombudsman wrote to the institution in order to clarify the reference to the "guarantee of anonymity" made by the Parliament in its letter sent to the complainant on 19 May 1999. **The Parliament's second opinion** In its reply of 10 December 1999, the Parliament pointed out that it is normal practice that the name of the candidate appears on the examination papers. As regards the multiple choice tests, the data are already printed on the paper and the candidate has only to put his/her signature in the proper place. In case of a written test, the candidate himself indicates his personal data. This is essential to guarantee the identity between the candidate and the person who takes the test. Moreover, since the complainant did not complain on this point when the tests took place it has to be considered that he automatically accepted such a procedure. Finally, the Parliament stressed that the personal data plus the signature of the candidate are hidden before the papers are forwarded to the Selection Board, thereby guaranteeing the anonymity of candidates. **The complainant's observations** By letter of 24 January 2000, the complainant expressed his dissatisfaction with the Parliament's second opinion of 10 December 1999 and, more generally, reaffirmed that the institution had not ensured the necessary transparency during the selection procedure.

THE DECISION

1 Alleged lack of reply 1.1 The complainant claimed that the European Parliament had not replied to his letter of 30 March 1999 in which he had asked the institution to re-examine his tests. 1.2 In its opinion the Parliament pointed out that by letter of 19 May 1999, the President of the Selection Board wrote to the complainant and informed him that it had accepted to re-examine his tests and informed him of outcome. The complaint did not contest this in his observations. The Ombudsman's inquiries therefore do not reveal any instance of maladministration in relation to this aspect of the case. **2 As regard the anonymity of candidates during the selection procedure** 2.1 The complainant considered that since in the written examination papers each candidate was requested to write his own personal data, his/her anonymity could not be totally guaranteed, in spite of the Parliament's assurances. 2.2 In its opinion the Parliament stressed that the personal data as well as the signature of candidates are hidden by the Selection Board's assistants before being forwarded to the evaluators. By doing so both the anonymity and the identity between the candidate and the person who takes the examination are assured. 2.3 It appears that the complainant has not supported his allegations with any evidence showing that the anonymity of candidates has been breached by the Parliament. The Ombudsman's inquiries therefore does not reveal any instance of maladministration in relation to this aspect of the case. **3 Access to the marked examination papers** 3.1. One of the complainant's claims concerned the Selection Board's refusal to allow him access to a marked copy of his examination. 3.2. The Parliament refused



the access on the basis of the confidentiality of the Selection Board's work and recalled the case-law of the Community Courts. According to the Parliament interpretation, the Appointing Authority is prohibited from providing candidates with their test papers with the corrections and comments made by Selection Board members. *The European Ombudsman own initiative inquiry 1004/97/(PD)GG* 3.3. The secrecy of recruitment procedures has been the subject of an own initiative inquiry (1004/97/(PD)GG) addressed by the European Ombudsman in November 1997 to the European Commission. In his letter opening the own initiative inquiry, the Ombudsman referred to a number of complaints he has received about lack of transparency in recruitment matters. He also pointed out that since for many citizens competitions represent their first contact with the Community institutions, it would be valuable if the impression received by citizens in these occasions were positive. 3.4 Concerning candidates' access to their own marked examination papers, the institution justified its refusal on the basis of Article 6 of Annex III of the Staff Regulations and on the wide discretionary powers of Selection Boards. 3.5. According with the Court of Justice (3) , the secrecy of the Selection Board's work was introduced with a view to guaranteeing the independence of members of selection boards and the objectivity of their proceedings, by protecting them from all possible external interference or pressures. However, the Ombudsman pointed out in his own initiative inquiry that if on the grounds of Article 6 of Annex III of the Staff Regulations the deliberations of the Selection Board must remain secret, this does not necessarily mean that a candidate should be prevented from seeing his/her marked examination papers. Furthermore, the Ombudsman underlined that he was not aware of any provision of Community law or case-law which would prevent the institutions from allowing candidates to have access to their tests. When a candidate requests to have access to the marked examination papers of which he/she is the author, the Ombudsman considered that there were no reasons to justify a refusal. The disclosure of such a document is in no way in conflict with the requirement that the proceedings of Selection Boards shall be secret since it does not concern the deliberations of Selection Boards. On the contrary, if candidates were given access to their own marked examination papers, they would have the opportunity to see their mistakes and thus to improve their future performances. Their confidence in the Community administration would thereby be strengthened. 3.6. As a result of his own initiative inquiry, the Ombudsman made a draft recommendation to the institution on 8 March 1999. He considered that, in its future competitions, the Commission should give candidates in written examinations access to their own marked examination scripts upon request. He also prepared a special report that has been sent to the European Parliament on 18 October 1999. By letter of 13 December 1999, the President of the European Commission accepted the recommendations made by the Ombudsman in his report and informed him that all the necessary legal and organisational arrangements would be proposed in order to give candidates access to their own marked examination papers, upon request, from 1 July 2000. *Specific points raised by the Parliament in the present case* 3.7. The European Parliament claims that it follows from the judgement of the Court of Justice in case C-254/95 (4) that it could not grant the complainant access to his marked examination papers without infringing its obligation to maintain the secrecy of the proceedings of the Selection Board, in accordance with Article 6 of Annex III to the Staff Regulation. In that case, the Court had to rule on the question whether the communication of the marks obtained in the various tests constituted an adequate statement of the reasons on which the Selection Board's decision was based. The Court answered this question in the affirmative, pointing out that the obligation to state reasons had to



be reconciled with observance of the secrecy of the proceedings of selection boards. The Court concluded that observance of this secrecy therefore precluded both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates (5) . 3.8 The Ombudsman notes that the said judgment of the Court is concerned with the administration's duty to give reasons for its decisions. However, the Ombudsman's view that failure to grant a candidate access to his or her marked examination papers constitutes maladministration is based not on the duty to give reasons but on the obligation to take decisions as openly as possible which, as the Treaty of Amsterdam has confirmed, represents one of the fundamental principles of the administrative law of the European Communities. The European Parliament's reliance on the judgment of the Court of Justice in the *Innamorati* case is therefore mistaken. The Ombudsman considers that the Parliament's refusal to give the complainant the possibility to have a copy of his own marked examination papers, constitutes therefore an instance of maladministration. Given that in view of the position adopted by the Parliament it does not appear possible to achieve a friendly solution, the Ombudsman considers it appropriate to make the following draft recommendation, in accordance with Article 3 (6) of his Statute: The Parliament shall allow the complainant to have access to his own marked examination papers. In accordance with Article 3 (6) of the Statute of the Ombudsman, the European Parliament shall send a detailed opinion by 31 October 2000. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the recommendation. The complainant will be informed of this draft recommendation. Strasbourg, 27 July 2000 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, OJ 1994 L 113/5.

(2) Case C - 254/95 P *Angelo Innamorati v European Parliament* , [1996] ECR I - 3423.

(3) Case 89/79 *Bonu v Council* [1980] ECR 553, par. 5.

(4) *European Parliament v Angelo Innamorati* [1996] ECR I - 3423.

(5) Paragraph 24 of the judgment.