



Decision of the European Ombudsman closing his inquiry into complaint 2343/2008/(BU)MF against the European Commission

Decision

Case 2343/2008/(BU)MF - Opened on 24/10/2008 - Decision on 08/02/2010

THE BACKGROUND TO THE COMPLAINT

1. Article 45 of the Staff Regulations [1] and the Commission's General Implementing Provisions for Article 45 of the Staff Regulations ('GIP 45') provide that, in order to be included in the promotion exercise, officials must comply with a number of conditions. They must, among other things, obtain a certain number of merit points, which are established by the Appointing Authority and announced in the preceding evaluation exercise. They must also demonstrate the ability to work in a third language. These criteria must be fulfilled, at the latest, by 31 December of the year covered by the exercise in question.

2. The promotion threshold is established by the Appointing Authority for each year. Officials who have accumulated a number of points equal to or exceeding this threshold are proposed for promotion.

3. The following points are taken in consideration: (i) merit points (MPs); and (ii) priority points (PPs).

- MPs are awarded for " *normal* " merits and only correspond to a specific year.

- PPs consist of mainly two kinds:

(a) Directorate-General priority points (DGPP), which are awarded by Directors-General - from the quota available - to officials who have demonstrated exceptional merits; and

(b) PPs which are awarded by the promotion committees on appeal, that is, when officials appeal to these committees against the number of DGPP they have received.

4. An official may only be promoted following a comparative assessment of the merits obtained by all other officials eligible for promotion.

5. The complainant is a Commission official of grade AD 8. He expected to be promoted in 2007 for two reasons.

6. First, he successfully took part in an EPSO language test in the middle of 2007. In his view,



he therefore complied with one of the promotion conditions, namely, to demonstrate his ability to work in a third language.

7. Second, in his Career Development Review for 2006, the complainant obtained 15 MPs.

8. The Appointing Authority established the promotion threshold as 66 points for the 2007 exercise. In 2007, the complainant had 63 MPs in total. Consequently, the complainant was not promoted in 2007. He considered that this was because of the following: (i) an administrative error, as a result of which DG Human Resources and Security (formerly DG ADMIN) was not informed at the relevant time that he had sat an EPSO language test; and (ii) he was wrongly awarded no DGPPs as a result. Then, following his appeal, the Promotion Committee awarded his only one PP, which he felt was also wrong.

9. As regards point (i), he argued that, on 14 February 2007, he registered for an EPSO language test on his own initiative. In June 2007, he successfully sat the test and, on 2 July 2007, EPSO informed him of the result. However, his name was never put on the Commission's official list of persons who had successfully completed the said test. As a result, DG Human Resources and Security, which awarded DGPPs, was not aware that he had sat the EPSO test when it decided on the award of DGPPs.

10. As regards point (ii), he appeared to consider that, given the fact that he was successful in the language exam, he should have been awarded three DGPPs. In fact, he received none.

11. On 19 July 2007, the complainant lodged an appeal with the Promotion Committee, which then consulted DG Human Resources and Security.

12. DG Human Resources and Security took the view that, "*if it had been informed of the complainant's success in the language test before the coordination meeting on DGPPs and the final award of the DGPPs, there was no doubt that the complainant would have been awarded the number of DGPPs necessary for his promotion for the pending exercise as a result of his effective merits*" [2]. The DG added that "*it supported the idea that the Promotion Committee should remedy the administrative mistake that occurred and award the number of PPs to allow the complainant to reach the threshold for the promotion*" [3]. However, despite the above view, the Promotion Committee found that only one PP could be awarded to the complainant.

13. On 1 February 2008, the complainant lodged a complaint under Article 90(2) of the Staff Regulations with the Appointing Authority [4]. The complaint was against the Promotion Committee's decision to award him only one PP. He based his appeal on the above comments made by DG Human Resources and Security.

14. On 29 May 2008, the Appointing Authority rejected his complaint. It stated that the proof of his ability to work in a third language constituted only one of the conditions for being promoted. Neither in his appeal before the Promotion Committee, nor in his Article 90(2) complaint was there an indication that the complainant had exceptional merits that would justify the award of three DGPPs. The complainant's argument that he had not been awarded the three DGPPs only because DG Human Resources and Security was not aware



about his participation in the language test when it decided on the award of his DGPPs, was, therefore, not grounded.

15. The Appointing Authority further stated that, even if DG Human Resources and Security explained that the award of no DGPPs to the complainant resulted from an error on its part, it did not indicate any reasons for giving the complainant more than one DGPP. For that reason, " *it can be considered that this error was sufficiently remedied by the award of one PP by the Promotion Committee [5] .*"

16. The complainant did not agree with the Appointing Authority's reply and, on 4 September 2008, he turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

17. The complainant alleged that the Commission failed to justify that there was no causal link between its refusal to promote his and the belated information on his success in the language test.

18. The complainant claimed that the Commission should promote his retroactively for the year 2007 and should pay his the relevant remuneration.

THE INQUIRY

19. On 24 October 2008, the Ombudsman opened an inquiry as regards the complainant's allegation and above claims.

20. The Commission sent its opinion, which the Ombudsman then forwarded to the complainant with an invitation to make observations. He sent his observations on 6 April 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The Commission's alleged failure to justify that there was no causal link between its refusal to promote the complainant and the belated information on his success in the language test and related claims

Arguments presented to the Ombudsman

21. The complainant alleged that the Commission failed to justify that there was no causal link between its refusal to promote his and the belated information on his success in the language test. He argued that, in view of the belated information regarding his success in the language test, which constituted an administrative mistake on the part of the Commission and should be remedied, he should have been awarded more than one PP. In this case, he would have attained the threshold and, therefore, been eligible for promotion. The complainant claimed that the Commission should promote his retroactively for the year 2007 and should pay his the relevant remuneration.



22. In its opinion, the Commission upheld the position adopted by the Appointing Authority in its reply of 29 May 2008 to the complainant's Article 90(2) complaint. It explained that the proof of his ability to work in a third language did not constitute a precondition for the award of DGPPs, but was only one of the conditions for being promoted. The officials to be promoted were required to prove their ability to work in a third EU language as soon as possible. The EPSO language test was " *the last solution* " to prove this ability, given that other means exist in this regard. It pointed out that, in this context, as regards the 2007 promotion exercise, the officials were required to prove their ability to work in a third EU language before the end of the year 2007.

23. The Administration did not take into account the ability to work in a third language when deciding on the allocation of DGPPs, which it carried out following a comparative assessment of the merits of those officials eligible for promotion. The aim of the award of DGPPs is to reward officials who have demonstrated exceptional merits. The award of DGPPs does not depend on specific criteria, such as an individual's ability to work in a third language. In the complainant's case, even if an error occurred because DG Human Resources and Security was not informed at the time the complainant had sat the EPSO language test, the decision not to promote him for 2007 was not the result of this mistake.

24. The comparative assessment of the complainant's merits with those of his colleagues having a comparable profile led neither the Promotion Committee nor the Appointing Authority to conclude that the complainant deserved more than one MP. No exceptional merits were identified in either his appeal before the Promotion Committee or in his complaint lodged under Article 90(2) of the Staff Regulations. In respect of the principle of equality of treatment, the Promotion Committee proposed to award the complainant one PP following his appeal, which the Appointing Authority subsequently decided to award.

The Ombudsman's assessment

25. The Ombudsman finds it puzzling that the position adopted by DG Human Resources and Security (described in paragraph 12 above) appears diametrically opposed to that subsequently adopted by the Commission's Administration in its reply to the complainant's Article 90(2) complaint. The Ombudsman will examine the complaint on the basis of the Commission's opinion regarding the complainant's case, which adopts the same position as the reply to the complainant's Article 90(2) complaint.

26. The Ombudsman first notes that the EPSO language test obviously constitutes proof of the complainant's knowledge of a third language and that such knowledge was required for him to be eligible for promotion. Moreover, the complainant clearly possessed the requisite knowledge before the end of the year 2007, given that he received his test results in the middle of that year.

27. Nevertheless, the Commission explained in its opinion that promotions depend not only on the proven knowledge of a third language, but also on the aggregate number of MPs and PPs and on the subsequent comparison of merits among eligible staff.



28. The threshold required in the complainant's case amounted to 66 points. The complainant had 63 MPs. He could not have any DGPPs because, according to the Commission, they did not depend on the proven knowledge of a third language, but on exceptional merits - which he did not possess. He obtained one PP on appeal relating to the Commission's administrative mistake. He therefore had a total number of 64 points, which was below the established threshold.

29. The complainant argued that, in order to correct its administrative mistake, the Commission should have given him more than one PP. However, even if the complainant had been given enough PPs to render his eligible for promotion, he would not have been automatically promoted. In its opinion, the Commission explained that it made a comparative assessment of the complainant's merits and those of his colleagues who were eligible for promotion. This comparison did not result favourably for the complainant.

30. Against the above background, the Ombudsman recalls that, in cases where the substance of an Appointing Authority's decision not to promote an official or agent is contested, he has consistently held that the scope of his review should be based on the relevant case-law of the Union Courts.

31. The Ombudsman notes that the case-law of the Union Courts establishes that, "[a]ssessors have the widest discretion when judging the work of persons upon whom they must report and it is not for the [Union] judge to intervene in this assessment, except in case of manifest error or abuse ..." [6]. Moreover, "it is for the applicants to prove the existence of a manifest error of interpretation" [7] in the assessment of their work. Finally, according to the case-law of the Union courts [8], the Staff Regulations do not confer on officials any right to be promoted, even for those who fulfil all the conditions for promotion.

32. The Ombudsman considers that the complainant has not put forward any evidence to show that his comparative assessment was tainted by error.

33. In these circumstances, and in light of the above quoted case-law, the Ombudsman does not find any instance of maladministration as regards the complainant's allegation. Accordingly, the complainant's claim cannot be sustained.

C. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman closes it with the following conclusions:

There is no instance of maladministration as regards the complainant's allegation.

The complainant's claims cannot be sustained.

The complainant and the Commission will be informed of this decision.



P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 8 February 2010

[1] Article 45 of the Staff Regulations reads as follows:

" 1. Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be effected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them.

2. Officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language among those referred to in Article 314 of the EC Treaty . The institutions shall adopt common rules by agreement between them for implementing this paragraph. These rules shall require access to training for officials in a third language and lay down the detailed arrangements for the assessment of officials' ability to work in a third language, in accordance with Article 7(2)(d) of Annex III. " (emphasis added)

[2] Translation from the French version: " *Si sa réussite de test de langue avait été connue et transmise à temps, il n'y a aucun doute que M. X aurait reçu les points de priorité nécessaires pour permettre sa promotion pendant l'exercice en cours selon ses mérites effectifs.* "

[3] Translation from the French version: " *La DG ADMIN est donc favorable à ce que le comité de promotion puisse corriger, si possible, cette erreur [...] en attribuant des points d'appel à M. X. lui permettant ainsi d'atteindre le seuil indicatif de promotion.* "

[4] The Appointing Authority interpreted and dealt with his case as being against its decision not to promote him given that the " *decisions* " of the Promotion Committee are in fact non-binding recommendations and cannot be appealed.

[5] Translation from the French version: " *Pour cette raison, il est possible d'affirmer que cette erreur a été suffisamment réparée par l'attribution d'un point d'appel par le Comité de Promotion.* "

[6] Case T-144/03 *Schmit v Commission* [2005] ECR-SC I-A-101 and II-465, paragraph 70. Translation from the original French version.

[7] Case T-43/04 *Fardoom and Reinard v Commission* [2005] ECR-SC I-A-329 and II-1465, paragraph 79. Translation from the original French version.



[8] Case T-3/92 *Edward Patrick Latham v Commission* [1994] ECR-SC I-A 23 and II 83.