

Draft recommendation of the European Ombudsman in his inquiry into complaint 1576/2011/ANA against the European External Action Service (EEAS)

Recommendation

Case 1576/2011/ANA - **Opened on** 12/09/2011 - **Recommendation on** 29/08/2013 -

Decision on 14/04/2014 - **Institution concerned** European External Action Service (Draft recommendation accepted by the institution) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complaint concerns the handling, by the Commission and, following its establishment, the EEAS, of the 2009 appraisal and promotion procedure vis-à-vis the complainant, an EEAS official posted to an EU Delegation.

2. On 7 January 2009, the Commission issued an Administrative Notice setting in motion the appraisal and promotion procedure covering the period from 1 January to 31 December 2008. On 9 June 2009, the procedure was concluded and the complainant was awarded a performance level II [2] and 5 promotion points [3] .

3. In his internal appeal of 16 June 2009, the complainant argued that the statements in his 2008 appraisal report demonstrate a performance level that corresponds to performance level IB. Following the opinion of the Joint Appraisal and Promotion Committee ('JAPC'), the internal appeal process was concluded and the complainant's report was confirmed. However, the number of promotion points awarded to the complainant was raised to 6.

4. On 5 February 2010, the complainant lodged a complaint under Article 90(2) of the Staff Regulations ('SR') against his appraisal report.

5. By letter dated 10 May 2010, the Commission informed the complainant that his complaint had been upheld and his evaluation and promotion file would be returned to the competent service for review. By letter of the same day, the Commission forwarded its decision on the complainant's Article 90(2) complaint to the competent service noting the incoherence between the qualitative assessment and the performance level in his appraisal report.



6. In response to the complainant's relevant inquiries, on 3 May 2011, the EEAS informed him that his revised appraisal report for 2008 had been available on Sysper2 [4] since 6 April 2011.

7. On 8 July 2011, the EEAS reminded the complainant that he should either accept and sign the report or refuse and launch an appeal. In his reply, the complainant explained that the report available on Sysper2 still indicated performance level II and 6 promotion points. In its response of the same day, the EEAS confirmed the performance level and promotion points and explained that it was the qualitative assessment that had been changed in order to achieve coherence.

8. On 27 July 2011, the complainant lodged the present complaint with the European Ombudsman.

The subject matter of the inquiry

9. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation:

The EEAS carried out the review of the complainant's 2008 appraisal report in a manner that is inconsistent with the applicable rules and with the principles of good administration.

Claim:

The EEAS should carry out a review of the complainant's 2008 appraisal report, maintain the original qualitative part of his report and, in order to achieve coherence between the qualitative part of the report and the performance level and promotion points, amend the performance level and promotion points.

The inquiry

10. On 12 September 2011, the Ombudsman asked the EEAS for an opinion on the complainant's allegation and claim. On 13 January 2012, the Ombudsman received the EEAS's opinion on the complaint. Following a preliminary examination of the EEAS's opinion by the Ombudsman's services, it became clear that while the EEAS argued that it was not in a position to proceed with the complainant's 2008 appraisal report due to technical and procedural problems, it did not explain why these problems should prevent it from completing a review on the basis of the decision that was taken on 10 May 2010 and did not address the complainant's allegation and claim that the Ombudsman had taken up for an inquiry. On this basis, on 30 January 2012, the Ombudsman decided to carry out further inquiries and ask the EEAS to



provide him with a supplementary opinion in which the EEAS was invited to address the substance of the complainant's allegation, including his supporting arguments, as well as his claim. On 2 April 2012, the EEAS sent its supplementary opinion on the complaint. Both the opinion and the supplementary opinion were forwarded to the complainant for observations. On 29 May 2012, the complainant submitted his observations.

The Ombudsman's analysis and conclusions

A. Allegation that the EEAS carried out the review of the complainant's 2008 appraisal report in a manner that is inconsistent with the applicable rules and with the principles of good administration and related claim

Arguments presented to the Ombudsman

11. In support of his allegation, the complainant submitted the following arguments: (a) the EEAS infringed the rules governing the appraisal and promotion procedure [5] ; (b) the EEAS failed to respect the principles of fairness and objectivity; (c) the EEAS acted contrary to the logic of the appraisal and promotion system; (d) the EEAS undermined the complaint procedure under Article 90(2) SR.

12. Regarding point (a), the complainant argued that the GIP 43 decision establishes a sequence of actions. In that sequence, the qualitative assessment part of his appraisal report precedes the attribution of the performance level and the award of promotion points. In retroactively re-engineering the qualitative assessment so as to achieve coherence with the performance level and promotion points, the EEAS committed a manifest illegality.

13. Regarding point (b), the complainant argued that the qualitative part of his appraisal report constituted a true, fair and objective assessment of the complainant's actual performance which was drafted by the reporting and countersigning officers and accepted by the complainant. The EEAS changed the evaluation of his performance, as regards efficiency, from "[a] s a result, [the complainant] has more than delivered on his 2008 objectives " to "[a] s a result, [the complainant] has delivered on his 2008 objectives " and from "[o] n managing his team, he has exceeded targets " to "[o] n managing his team he has met his targets ". As regards abilities, his performance was changed from "[the complainant] is an exceptional official ..." to "[the complainant] is a very strong and capable official ..." and as regards conduct in the service from "[h] e is committed to his work and the institution - delivering above and beyond the normal call of duty for an official " to "[h] e is committed to his work and the institution ". The complainant argued that these changes have the effect that the 2008 appraisal report no longer reflects a fair and objective appraisal of his performance.

14. Regarding point (c), according to the complaint, the emphasis of the procedure is on a



merit-based promotion system. He argued that the merit of an official is established in the qualitative part of the appraisal report. By changing that part of the appraisal report so that it is coherent with a predetermined performance level and promotion points, the EEAS undermines the very objective of a merit-based appraisal and promotion system.

15. Regarding point (d), the complainant argued that Article 90(2) SR is the only means provided by the SR for a member of staff to contest a decision which affects his statutory rights. In the present circumstances, the complainant made a complaint in order to try to rectify a decision which he considered prejudicial to his interests. The Appointing Authority's ('AA') decision to uphold his complaint thus meant that it agreed with his reasoned argument that there was inconsistency between the qualitative part of his appraisal report and the performance level and promotion points awarded and that the only way of rectifying this was to award him a higher performance level and more promotion points. The result of the review which led to giving the complainant a less favourable qualitative assessment while maintaining the performance level and promotion points punished the complainant instead of giving him redress. Consequently, by implementing the AA's decision in this manner the EEAS undermined and prejudiced the very intent and purpose of the complaints procedure under Article 90(2) SR.

16. In its opinion, the EEAS stated that, on 6 April 2011, a new appraisal report was drawn up in accordance with the decision of 10 May 2010 on the complainant's complaint under Article 90(2) SR. However, on 19 July 2011, the complainant lodged another appeal against this report in accordance with the internal rules. The EEAS pointed out that dealing with an appeal once the appraisal and promotion exercise for that period has been concluded presented significant problems. The EEAS stated that, once the Commission's Directorate-General Human Resources ('DG HR') has a method in place to take into account all the IT, procedural and legal aspects, it would implement the AA's decision. The EEAS observed that DG HR hoped to have a method approved by all the departments concerned early next year, and only afterwards the EEAS would be able to take the necessary decisions regarding the complainant.

17. In his further inquiries, the Ombudsman noted that the EEAS basically argued that it was not in a position to proceed with the complainant's 2008 appraisal report due to technical and procedural problems. However, the EEAS did not show why the said problems should prevent it from completing a review on the basis of the decision that was taken on 10 May 2010. On this basis, the Ombudsman asked the EEAS to address the substance of the complaint.

18. In response, the EEAS argued in its supplementary opinion that, while the Head of Delegation wrote the qualitative part of the complainant's appraisal report, it was the responsibility of the countersigning officer to proceed to the comparison of merits in the same grade and to confirm, complement or possibly modify the qualitative appraisal. The EEAS noted that the complainant's report as it has been reviewed reaches a better level of coherence between the qualitative appraisal and the performance level granted. This has been reconfirmed by the countersigning officer.

19. The EEAS pointed out that the complainant's report acknowledges his competences and aptitudes. It argued, however, that the performance level he obtained was the result of a



comparison of the merits of the officials in the same grade (AD 12) in the EEAS, a grade that comprises a significant number of AD 12 officials holding management posts, which makes the comparison of merits even more competitive.

20. The EEAS noted that the complainant's second appeal, which was made on 19 July 2011, would be examined by the JAPC as soon as the technical and procedural problems were resolved. The EEAS confirmed that the technical and procedural problems created by the fact that an appeal has to be dealt with by the JAPC with regard to a newly established report, when the appraisal and promotion exercise for that period had been concluded, made it impossible to deal with the complainant's appeal rapidly. The EEAS underlined that all officials being in the complainant's situation were treated in the same way.

21. As regards the delay in the implementation of the AA's decision, the EEAS pointed out that DG HR had informed the complainant via direct e-mail exchanges of the technical problems involved to make sure he understands the causes of the delay. This also concerned the (partial) annulment of his report, which implied the annulment of the promotion points. However, it is impossible to delete the obsolete points in the promotion file in Sysper2 because they contain multiple links to other information contained in the database, such as the promotion lists and the results of quotas and calculations concerning the entire staff.

22. In his observations, the complainant argued that both the EEAS's opinion and the supplementary opinion were disappointing in that they addressed his arguments in a cursory and dismissive manner. The complainant also expressed his dissatisfaction about the focus of the EEAS's submissions on the procedural and technical problems related to Sysper2.

23. The complainant outlined the arguments he put forward in his complaint to the Ombudsman and observed that the EEAS had only very partially addressed points (a) and (b) of his complaint, while points (c) and (d) remained completely unanswered. Instead, the EEAS made an unconvincing attempt to hide behind supposed "*technical and procedural*" problems.

24. In general terms, the complainant argued that the EEAS's submissions were contradictory, misleading and even false.

25. In particular, the complainant argued that the EEAS's submissions are misleading and only confirm his arguments that the retroactive revision of the qualitative appraisal in his appraisal report, i.e., changing the established facts, was illegal. In this regard, the complainant disputed the EEAS's contention that the AA's decision gave it the right to revise his qualitative appraisal to reach a "*better level of coherence between the qualitative appraisal and the performance level granted*". On the contrary, the AA's decision upheld his Article 90(2) complaint based on the argument that he should have been awarded a higher performance level and more promotion points that are consistent with his performance as expressed in his qualitative report.

26. Further, the complainant contested the EEAS's opinion concerning the interpretation of how the AA's decision should be implemented and argued that his qualitative assessment was confirmed by the two countersigning officers, the JAPC and the appeal assessor. If there was



incoherence between his original qualitative assessment and the performance level and promotion points awarded, the complainant argued that that should have been corrected then; it could not be revised afterwards.

27. Moreover, the complainant argued that the re-appraisal exercise must follow the procedure laid down in the GIP 43 decision, which means that the EEAS cannot first determine a level of performance and then draft qualitative assessment that is "*coherent*". By retroactively changing the qualitative assessment in his appraisal report to conform to a pre-determined performance level, the EEAS acted in contradiction with the appraisal procedures set out in the GIP 43 decision.

28. In addition, the complainant argued that, in the original appraisal exercise, the JAPC awarded him an additional promotion point, which was confirmed by the appeal assessor. This confirms that there was incoherence between the qualitative assessment in his appraisal report and the promotion points awarded by the countersigning officer. The JAPC and the appeal assessor corrected the inconsistency by awarding him more promotion points, not by revising his qualitative assessment.

29. The complainant underlined that he made an Article 90(2) complaint to try to obtain redress in a case where he believed that his rights had been prejudiced, not to be placed in worse position. In this respect, the complainant argued that he cannot be placed in a worse position as the result of the AA's decision in his favour. On the contrary, he had been given legitimate expectations of being placed in a better position. If the EEAS's implementation of the AA's decision were to be allowed to stand this would mean that he would have a qualitative assessment in his appraisal report that is much less favourable in terms of his actual performance and also risk to be awarded fewer promotion points than was originally done. This can under no circumstances be seen as a fair outcome of a complaints process as a consequence of which his appeal was upheld.

30. The complainant argued that the EEAS's submissions substantiate its lack of respect for due process and the procedures laid down in the GIP 43 decision which is part of the complainant's "*inherent rights*" that the EEAS guaranteed would be maintained. He stressed that the EEAS's decision to revise the qualitative assessment was *ultra petita* and in breach of his due process rights. Finally, if the revised report were to be confirmed his possibilities of further appeal would be seriously undermined.

31. As regards the EEAS's arguments concerning the technical problems to which the EEAS attributed the considerable delays, the complainant noted that, in general terms, Sysper2 is nothing but an administrative IT system that cannot in itself give rise to new rights, obligations and procedures with legal effect or in any way impinge on existing legally established rights, obligations and procedures.

32. Furthermore, the complainant argued that the delay of over two years in dealing with the AA's decision in a legally correct and conclusive manner is completely unjustified. Despite the EEAS's assurances that his inherent rights at the time would be maintained, the delays and the



way his re-appraisal was handled, had already prejudiced his rights, for example in terms of legitimate expectations and due process, under the appraisal and promotion system and the complaints procedure under Article 90(2) SR.

33. Lastly, the complainant pointed out that he had tried to find a solution to his conflict with the EEAS. In the complainant's view, Article 8(6), paragraph 4 of the GIP 43 decision [6] offers a possible solution that would respect both the AA's decision and the legal basis for the re-appraisal exercise. This means that his original qualitative assessment could be re-established, which would have an effect on the performance level since the AA's decision directly implied that there was inconsistency between his appraisal reports and the performance and promotion points awarded. On that basis, the appeal assessor could attribute at least the performance level that he argued for in his Article 90(2) complaint and, in doing so, the appeal assessor would not be bound by the quotas determined for different performance levels. This would also solve some of the technical problems that the EEAS mentioned in its supplementary opinion. The complainant pointed out that he mentioned this possibility to both his countersigning officer (during the dialogue that took place on 13 December 2011) and to DG HR, however without any response.

The Ombudsman's assessment leading to a draft recommendation

34. In examining the compliance of the EEAS's review of the complainant's 2008 appraisal report with the applicable rules and the principles of good administration, it is appropriate to define the framework of the analysis.

35. Article 43 of the Staff Regulations provides that "*the ability, efficiency and conduct in the service of each official shall be the subject of a periodical report*" should be borne in mind. This provision requires the EU institutions to carry out a regular appraisal of the ability, efficiency and conduct of officials and draw up a report. These reports serve manifold objectives among which are the promotion (Article 45 of the Staff Regulations) or the demotion (Article 51 of the Staff Regulations) of officials.

36. In its case law, the Court has held that "*... every official has a right to have his work recognised by means of an appraisal carried out in a just and equitable manner.*" [7]

37. It is inherent in the transparency and accountability of the appraisal procedure and the legal repercussions that this has for EU officials that the qualitative value judgements made by the assessors in the above procedure find expression in analytical assessments, including numerical indicators. As the Court has held, there must be coherence between the qualitative assessment and the numerical indicators in the form of points [8]. In the drawing up of an appraisal report, the purpose of the descriptive comments in the report is to justify the assessments expressed as points. Those comments serve as the basis for establishing the appraisal, which constitutes a quantified transcription of those comments, and enable the official to understand the marking awarded. Consequently, in such a report, the comments must be



consistent with the marks awarded to such an extent that the marking must be regarded as a quantified or analytical transcription of the comments [9] .

38. In the specific context concerned, it is noted that Article 6(1) of the Commission's GIPs 43 decision recognises five performance levels [10] . These performance levels also correspond to the award of points used for the promotion exercise within the Commission [11] .

39. In light of the above, the Ombudsman takes the view that, in the present case, the EEAS was right to focus, in accordance with both the Court's case-law and the AA's instructions, on establishing the coherence between the qualitative assessment and the promotion points awarded to the complainant.

40. In this regard, the cardinal question is whether achieving coherence should have taken place by virtue of a revision of the qualitative assessment of the report or by adjusting the performance level and the promotion points awarded.

41. Before addressing this issue, the Ombudsman considers it appropriate to note that, as the Court has consistently held, periodic reports contain assessments which cannot be reviewed by the Court save in order to identify irregularities of form, manifest factual error or misuse by the persons involved in the drawing up of the reports of their power of appraisal [12] . The Ombudsman takes the view that his own review when dealing with complaints concerning the award of promotion points should be based on the same approach.

42. As regards the substance, it is true that Article 7(6) of the GIP 43 decision gives the countersigning officer the task to verify whether the appraisal standards have been applied consistently, to compare merits and to confirm, complete or modify the individual qualitative appraisal. In principle, therefore, the countersigning officer may not only raise the qualitative assessment of the official's appraisal but could also lower it. However, the Ombudsman considers that this can only happen before the performance level is awarded. This is because both Article 6 and 7(7) of the GIP 43 decision require that the award of the performance level to an official should be made " *on the basis of the individual qualitative appraisal* " [13] . Hence, in the present case, the lowering of the complainant's qualitative assessment finds no premise in the GIP 43 decision. In addition, should there be any doubt about the correct interpretation of the GIP 43 decision, the Ombudsman takes the view that the case-law of the Court cited above should be interpreted to mean that the qualitative assessment of an official temporally and logically precedes the award of performance level and promotion points (numerical indicators) awarded and that the latter must then correspond to that qualitative assessment in the officials' appraisal report.

43. Moreover, it should be added that, in his Article 90(2) complaint, the complainant argued that a higher performance level (IB) corresponded to his performance. Therefore, the Ombudsman considers that, having regard to the tenor and spirit of the AA's decision upholding the complaint, the complainant is right to argue that the decision should be understood as implying an improvement of his position. It follows that on the basis of the evidence on file that, as the complainant rightly argued, the lowering of the qualitative assessment part of his 2008



appraisal report also goes against the spirit of the AA's decision of 10 May 2010 upholding his Article 90(2) complaint.

44. The Ombudsman is not convinced that technical considerations relating to Sysper2 may be invoked to deny the complainant the correct and timely implementation of the AA's decision [14] . In this regard, the complainant is right to point out that Sysper2 is simply an IT tool and that the rights and obligations of officials are laid down in the SR and the implementing provisions, in this case, the GIP 43 decision.

45. The Ombudsman therefore notes with concern the EEAS's statement that obsolete promotion points may not be removed from the system following an appeal after the appraisal procedure had been finalised. This statement appears to imply that the reason for the EEAS changing the complainant's qualitative assessment rather than the promotion points was that the latter could no longer be changed on Sysper2 and thus undermines rather than supports the EEAS's position.

46. Moreover, the defence put forward by the EEAS that, while Sysper2 makes it impossible to handle appeals after the appraisal had been finalised, all officials in the same position had been treated equally is far from convincing. On the contrary, this shows that the EEAS may be faced with entrenched problems in handling appeals against staff reports and excessive delays that are of a general character.

47. In light of these considerations, the Ombudsman considers that, in general terms, the EEAS should have conformed to the AA's decision requesting it to ensure the coherence between the complainant's qualitative assessment and the performance level and promotion points awarded, by revising the performance level and promotion points in the complainant's 2008 appraisal report. By failing to do this, the EEAS committed an instance of maladministration.

48. While it may be true that the promotion exercise is based on a comparative assessment of merits in a very competitive context and grade level, the complainant rightly pointed out that, having regard to Article 8(6), paragraph 4 of the GIP 43 decision, these considerations should not set an obstacle to the EEAS in assuring the coherence between the qualitative assessment in his original report with the awarded performance level and promotion points by amending the latter. It follows that the complainant's original qualitative assessment should be reinstated as per the complainant's claim.

49. In light of the above considerations and having regard to Article 8.1(b) of his Implementing Provisions [15] , the Ombudsman notes that the instance of maladministration established here may have general implications concerning the EEAS's appraisal procedure. He, therefore, considers that it is necessary, in the circumstances of the present case, to make a draft recommendation to the EEAS, in accordance with Article 3(6) of the Statute of the European Ombudsman rather than to examine the possibility of a friendly solution.



B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the EEAS:

The EEAS should ensure that, if as a result of a complaint under Article 90(2) of the Staff Regulations, the Appointing Authority instructs it ensure the coherence between the qualitative assessment of an official and the performance level and promotion points awarded, it implements that decision by revising the performance level and promotion points.

In the present case, the EEAS should reinstate the original qualitative assessment in the complainant's 2008 appraisal report and revise the performance level and promotion points accordingly.

The EEAS and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the EEAS shall send a detailed opinion by 30 November 2013. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 29 August 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Article 6 of the Commission Decision of 18 June 2008 on general provisions for implementing Article 43 of the Staff Regulations (hereinafter, 'the GIP 43 decision') provides for five performance levels corresponding to the individual qualitative appraisal of Commission officials. These are Performance level IA: the performance of the jobholder consistently exceeded expectations with regard to efficiency, ability and conduct in the service; Performance level IB: the performance of the jobholder frequently exceeded expectations with regard to efficiency, ability and conduct in the service; Performance level II: the performance of the jobholder fully met expectations with regard to efficiency, ability and conduct in the service; Performance level III: the performance of the jobholder partly met expectations with regard to efficiency, ability and conduct in the service; Performance level IV: the performance of the jobholder did not meet any expectations with regard to efficiency, ability and conduct in the service.

[3] The promotion points awarded may range from 0 (minimum) to 12 (maximum).



[4] Sysper2 is the European Commission's IT tool dedicated to human resources management.

[5] The GIP 43 decision, the Commission Decision of 19 December 2008 on the rules for the appraisal and promotion of staff working in the External Service of the Commission, and Commission Administrative Notice No 1-2009 of 7 January 2009.

[6] " *Where the appeal assessor decides to amend the report and the amendment affects the performance level, his decision is exempt from the respect of the maximum percentages referred to in Article 6(3) "*.

[7] Case C-198/07 *P Gordon v Commission* [2008] ECR I-10701, at paragraph 45.

[8] Case T-173/04 *Carius v Commission* [2006] ECR-SC I-A-2-243, II-A-2-1269, at paragraph 106. See also Case T-157/04 *De Bry v Commission* [2005] ECR-SC I-A-199, II-901, at paragraph 67.

[9] Case F-43/06 *Talvela v Commission* [2007] ECR-SC I-A-1-249, II-A-1-1375, at paragraph 92; Case F-28/06 *Wandschneider v Commission* [2007] ECR-SC I-A-1-431, II-A-1-2443, at paragraph 109.

[10] Above footnote 2.

[11] Above footnote 3.

[12] Case 207/81 *Ditterich v Commission* [1983] ECR 1360, at paragraph 13.

[13] In the same vein, Article 4(3) and 4(4) of the Commission Decision of 19 December 2008 on the rules for the appraisal and promotion of staff working in the External Service of the Commission.

[14] By e-mail of 26 July 2013, the complainant forwarded his exchanges with the Commission's DG in which it is established that the AA's decision of 10 May 2010 has not been implemented yet.

[15] Available on the European Ombudsman's website at:
<http://www.ombudsman.europa.eu/resources/provisions.faces>