

Draft recommendation to the European Agency for the Evaluation of Medicinal Products in complaint 1678/2005/(GK)ID

Recommendation

Case 1678/2005/(GK)(OV)(GK)(ID)MF - **Opened on** 31/05/2005 - **Recommendation on** 11/06/2008 - **Decision on** 28/10/2008

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

THE COMPLAINT

In his complaint to the European Ombudsman, the complainant, who had been excluded from certain recruitment procedures organised by EMEA, made, in summary, the following submissions.

In September 2004, the complainant applied for the post of a temporary agent in the context of recruitment procedures EMEA/A/190 and EMEA/A/191. The necessary qualifications were a degree in the field of medicine, pharmacy or other relevant life science; at least three years of professional experience; a good command of English; a good command of one or more additional official Community languages; and experience in a multicultural and multilingual environment. The complainant has a veterinary degree and a medical degree, as well as professional experience of 15 months as a doctor and of 18 months as a veterinarian. On the website of EMEA, it was clearly mentioned that, with regard to the institution's recruitment policy, any relevant period of studies, after the first degree, is considered as professional experience, as long as it is accompanied by a degree. The notice did not specify how experience in a multicultural and multilingual environment could be proven, but in the application form there was a field to be filled in concerning professional experience abroad.

On 15 October 2004, EMEA informed the complainant that the Selection Committee had excluded him from recruitment procedure EMEA/A/190, because his application did not satisfy the eligibility conditions. During a telephone conversation with an EMEA official, he was informed that he lacked three years of professional experience as well as experience in a multicultural and multilingual environment. The complainant then made an appeal to the Selection Committee, which replied on 15 November 2004, stating that he had been excluded for lack of experience in a multicultural and multilingual environment. The Committee did not refer to his professional experience.



By letter of 23 December 2004, the Selection Committee also informed him that, following a comparison of all the applications received, he was excluded from recruitment procedure EMEA/A/191, which had the same requirements as recruitment procedure EMEA/A/190.

In November 2004, EMEA announced another three recruitment procedures for temporary agents at grade A*5 (scientific administrators, references EMEA/A/194, EMEA/A/195 and EMEA/A/196). The required qualifications were a relevant university degree obtained after 1 April 2001, and a good command of English and of one or more additional official Community languages. By letter of 17 January 2005, EMEA informed the complainant that, following a comparison of the applications, he was excluded from recruitment procedure EMEA/A/195.

At this point, the complainant telephoned EMEA asking how it was possible that his professional experience as a doctor and veterinarian was not considered relevant to the post. By letter of 8 February 2005, written in Greek, he also appealed this decision and requested clarifications and information. By letter of 2 March 2005, written in English, EMEA informed him that it had rejected his appeal. However, EMEA's letter did not answer his questions.

As regards recruitment procedures EMEA/A/194 and EMEA/A/196, EMEA informed him on 11 February and 15 February 2005 that his application did not satisfy, by the closing date, all the conditions listed in the vacancy notice. He appealed those decisions on 15 February 2005 and 21 February 2005, but did not receive an acknowledgement of receipt or a reply, although it was explicitly mentioned in the vacancy notices that a reply to an appeal would be provided by EMEA within 45 days.

He had further learnt that, for recruitment procedures EMEA/A/194 and EMEA/A/196, a candidate had been accepted for an interview although she had exactly the same medical degree as he had.

The Ombudsman opened an inquiry into the following allegations made by the complainant:

- (1) There was unfairness and discrimination by EMEA in rejecting his applications for recruitment procedures EMEA/A/190, EMEA/A/191, EMEA/A/194, EMEA/A/195 and EMEA/A/196;
- (2) EMEA had failed to reply to his appeals of 15 and 21 February 2005 concerning his exclusion from recruitment procedures EMEA/A/194 and EMEA/A/196; and
- (3) EMEA had failed to provide him with clarifications for the rejection of his applications, which he had requested in letters sent to EMEA.

The complainant also claimed that, if the Ombudsman were to find instances of maladministration, disciplinary measures should be taken against the responsible persons. In this regard, the Ombudsman informed the complainant that (i) Article 4(2) of the Statute of the Ombudsman provides that the Ombudsman may inform the Community institution or body concerned of the facts calling into question the conduct of a member of their staff from a



disciplinary point of view and (ii) should the Ombudsman's inquiry into the complaint lead him to consider that it is appropriate to apply this provision, the Ombudsman would inform EMEA accordingly.

THE INQUIRY

EMEA's opinion

In its opinion, EMEA made, in summary, the following comments:

As regards recruitment procedure EMEA/A/190, it informed the complainant on 15 October 2005 that his application could not be accepted for further consideration and that, therefore, he was not invited for an interview. The reason for his exclusion was that he had no proven work experience in a multicultural and multilingual environment, which was an essential requirement according to the vacancy notice. On 15 November 2004, it replied to the complainant's appeal of 30 October 2004, referring to the lack of evidence of any kind of multicultural and multilingual background in his application and pointing out that his professional experience had been gained only in Greece.

As regards recruitment procedure EMEA/A/191, it wrote to the complainant on 23 December 2004 to inform him that his application could not be accepted for further consideration and that, therefore, he was not invited for an interview. The basis of the Selection Committee's decision was that the complainant did not have the relevant work experience for the position and that he did not have experience in working in a multicultural and multilingual environment. It went on to point out that the vacancy notice provided that both criteria were essential. No appeal was received from the complainant in respect of this recruitment procedure.

As regards recruitment procedure EMEA/A/194, applicants were required to have a university degree relevant to the field of medicine, pharmacy or science, which had to have been obtained *after* 1 April 2001. The university degree had to be one giving access to the grade advertised, that is, A*5. The complainant obtained his veterinary degree in 1997 and, as this was his first degree and he had obtained it before 1 April 2001, he was excluded from the recruitment procedure. No appeal was received from the complainant with respect to this procedure.

As regards recruitment procedure EMEA/A/195, the complainant was informed on 17 January 2005 that his application could not be accepted for further consideration and that, therefore, he was not invited for an interview. The basis of the Committee's decision was that the complainant did not have the relevant work experience for the position. The complainant submitted an appeal against this decision on 8 February 2005, to which EMEA replied on 2 March 2005. It informed the complainant that the Committee had reviewed his application on 21 February 2005 and that it had concluded that he did not have sufficient relevant experience for the post. It also informed him that, for reasons relating to the protection of personal data, it could not provide him with data regarding personal information concerning other candidates.

As regards recruitment procedure EMEA/A/196, applicants for this procedure were required to have a university degree relevant to the field of medicine, pharmacy or other relevant life



science, which had to have been obtained after 1 April 2001. The university degree had to be one giving access to the grade advertised, that is, A*5. The complainant obtained his veterinary degree in 1997 and as this was his first degree, a relevant life science degree, and it was obtained before 1 April 2001, he was excluded from the recruitment procedure. It was pointed out in this regard that grade A*5 was intended for candidates with no professional experience.

EMEA never received any letter from the complainant appealing against this decision. EMEA's mail service had not been able to identify receipt of the complainant's letters of 15 and 21 February 2005. Even if the letters were sent by registered mail, EMEA still had no record of their arrival. This is of course a most unfortunate occurrence.

EMEA concluded that the selection committee for each recruitment procedure had, in each case, assessed the complainant's applications in each case in accordance with the requirements stated in the vacancy announcement. There was no unfairness or discrimination by EMEA towards the complainant's applications and EMEA provided the complainant with clarification concerning the rejection of his applications.

The complainant's observations

In his observations, the complainant made, in summary, the following remarks:

As regards EMEA's reference to a "*most unfortunate occurrence*" in relation to his letter of appeal for recruitment procedure EMEA/A/196, EMEA failed to mention that there was not only one letter which was lost but two, one concerning procedure EMEA/A/196 and another one concerning procedure EMEA/A/194. In addition, both letters had been sent by registered post within one week of each other, that is, on 15 and 21 February 2005. He had spoken with the Greek postal service, which had assured him that both letters had been dispatched from the airport in Greece, destined for the United Kingdom. More than ten previous letters sent to EMEA, registered or not, had all reached their addressees.

Further to having lodged his complaint with the Ombudsman, he had noticed that his contact details used in subsequent letters received from EMEA concerning other recruitment procedures had been wrong. Before his complaint, no such mistake had ever occurred. This gave the impression that efforts were being made to justify, *a posteriori*, the "loss" of his letters of 15 and 21 February 2005 as being due to postal errors.

He attached to his observations receipts from the Greek post office for his registered letters of 15 and 21 February 2005, as well as copies of EMEA's last four letters to him, in which his contact details were wrong. He suggested that he would inform the Ombudsman of the outcome of his written application to the post office, asking to find out what had happened to his letters in question.

As regards procedures EMEA/A/190 and EMEA/A/191, he stated that he had challenged the criterion/qualification of work experience in a multicultural and multilingual environment, and that it was not specified how this experience could be proven and of what it could consist of. Furthermore, this requirement did not appear in subsequent EMEA recruitment procedures. In view of EMEA's recruitment policy, which suggested that any period of studies after the degree,



proven by a degree related to the work, was considered to be professional experience, his four and a half years of medical studies should have been recognised as professional experience. This recruitment policy had been valid until its revision on 5 January 2005.

The complainant also argued that nowhere in the recruitment notices concerning procedures EMEA/A/194 and EMEA/A/196 was the term "*first degree*" mentioned but only the term "*degree obtained after 1 April 2001*". The recruitment notices were binding on the selection committee. Cases dealt with by the Ombudsman (428/98/JMA, 464/98/JMA, 2240/2003/(AJ)TN, and 1523/2002/GG) made clear that the requirement of having a degree not older than three years at the date of the launch of a recruitment procedure for A*5 posts was justified by the argument that the institution wanted candidates to possess "recent" knowledge. He had obtained his medical degree on 19 July 2002. The professional experience he invoked consisted of his 15 months of work experience as a doctor after having obtained the said degree, that is, from 11 November 2002 until 23 February 2004. He considered that, by being excluded from procedures EMEA/A/194 and EMEA/A/196, he had been penalised for having obtained a second degree, namely, the one in medicine. EMEA had thereby acted in violation of the Lisbon strategy and of EU policy in the field of continuous education and training.

As regards recruitment procedure EMEA/A/195, which had the same requirements as procedures EMEA/A/194 and EMEA/A/196, his medical degree was recognised but he was excluded from the procedure, because, in comparison to other candidates, his 15 months of work experience as a doctor were not considered to be relevant to the post. However, this position could not be accepted. Since a Greek doctor bears the exclusive responsibility for any adverse effects that a medication he has prescribed may have on a patient, the doctor informs the Greek National Organisation for Medicines about side effects of medicines. Moreover, by definition a Greek doctor must have a very good knowledge of pharmaceutical legislation. The complainant further remarked that EMEA failed to provide information and answers to the questions posed in his letter of appeal of 8 February 2005.

The complainant therefore maintained his complaint, arguing that, apart from unfairness, discrimination, administrative irregularities, failure to reply and refusal of information, EMEA had also failed to observe the European Code of Good Administrative Behaviour.

The Ombudsman's efforts to achieve a friendly solution

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that EMEA had responded adequately to the complainant's allegations. On the basis of a reasoned analysis of the relevant issues, he proposed to EMEA a friendly solution, in accordance with Article 3(5) of the Ombudsman's Statute. More specifically, the Ombudsman suggested that EMEA:

(1) could consider addressing properly the issue raised by the complainant concerning the requirement of the recruitment notice on the basis of which his application for recruitment procedure EMEA/A/190 was not retained;

(2) could reconsider the decision to reject the complainant's applications for recruitment procedures EMEA/A/194 and EMEA/A/196. If, after such reconsideration, EMEA confirms its



above decision, EMEA is invited to provide valid and adequate reasons in this regard;

(3) could consider providing adequate reasons for the decision to exclude the complainant from recruitment procedure EMEA/A/195;

(4) could consider providing the complainant with the information he requested in his letters of 8 February, 15 February and 21 February 2005 and has not yet received (or will not have received in the context of the potential acceptance and implementation by EMEA of the Ombudsman's friendly solution proposals made above under (2) and (3)). Alternatively, if EMEA were to decide not to provide this information to the complainant, it could consider providing valid and adequate grounds for not doing so.

In its reply to the Ombudsman's friendly solution proposal, EMEA stated that it had reviewed the applications of the complainant. It referred to the results of this review, on the basis of which it maintained its position that it had not acted unfairly by rejecting the complainant's applications. In his observations on EMEA's reply, the complainant expressed his discontent about the way EMEA had dealt with his case and made certain arguments in light of which he maintained his complaint.

THE DECISION

1 Allegation about unfairness and discrimination in EMEA's rejection of the complainant's applications for recruitment procedures EMEA/A/190, EMEA/A/191, EMEA/A/194, EMEA/A/195 and EMEA/A/196 Recruitment procedure EMEA/A/190

1.1 Recruitment notice EMEA/A/190, concerning a position of "Administrator (scientific), Unit for Human Medicinal Products, Pre-Authorisation evaluation, Safety and efficacy/scientific advice and orphan drugs (A*5)" (2) , provided that " *[t]he complete conditions, the job descriptions and the necessary application form should be downloaded from the EMEA website (...)* ". According to the relevant conditions (found in the documentation provided by the complainant and EMEA) " *[c]andidates (...) must enclose documentary evidence with their application, providing proof of each of the following: (...) experience in working in a multicultural and multilingual environment.* "

1.2 By letter dated 15 October 2004, EMEA informed the complainant that the Selection Committee had not accepted his application for further consideration, because it " *did not satisfy all the conditions listed in the vacancy notice by the closing date.* " By letter of 30 October 2004, the complainant appealed against the above decision and requested that his application be reconsidered. In his appeal, the complainant noted that " *the experience of working in multilingual and multicultural environment, in all competitions of the EU Agencies is considered as desirable or additional asset and not as essential requirement, especially for competitions concerning Temporary Agents AD5 - AD7 grade.* " In its reply of 15 November 2004, EMEA remarked that (i) the Selection Committee had excluded the complainant on the grounds that his experience had been gained only in Greece and he lacked any kind of multicultural and multilingual exposure; and (ii) the advertisement for the particular recruitment procedure stated that this element was an essential criterion.



1.3 In his complaint to the Ombudsman, the complainant contested his exclusion as unfair and discriminatory. Relatedly, he asked EMEA to reply to the following questions: (i) what was the difference between the posts referred to in recruitment notices EMEA/A/190 and EMEA/A/191 and similar posts advertised in subsequent recruitment procedures (3) , which rendered working experience in a multicultural and multilingual environment a necessary qualification for the former posts alone? and (ii) was it politically and legally correct to request experience in a multicultural and multilingual environment for such posts? In its opinion on the complaint, EMEA reiterated that working experience in a multicultural and multilingual environment was an essential requirement under the relevant vacancy announcement. In his observations, the complainant recalled that he had challenged the criterion/qualification of work experience in a multicultural and multilingual environment, and that EMEA had not specified how this experience could be proven and what it could consist of.

1.4 In the relevant part of his analysis contained in his friendly solution proposal in this case, the Ombudsman, first, noted that the complainant has not argued that (i) he had "*experience in working in a multicultural and multilingual environment*" and (ii) in his application to EMEA, he had submitted documentary evidence demonstrating such experience. The complainant has rather challenged directly the relevant requirements for the recruitment procedure here concerned. In this regard, the Ombudsman remarked that EMEA enjoyed a wide margin of discretion when determining the qualifications required for the post concerned by the recruitment procedure in question (4) . The issue the complainant has raised is, in essence, whether EMEA exceeded the limits of the wide discretion it had in this context, by requiring for the post in question (documentary evidence of) work experience in a multicultural and multilingual environment. Relatedly, the complainant has argued that such working experience should be regarded as an asset or advantage, rather than a prerequisite, pointing out that this was the case in previous EMEA recruitment procedures for similar positions. The factual basis of this argument was supported by the documentation attached to the complaint (see footnote 3 above) and had not been contested by EMEA (5) . Moreover, both in its reply to the complainant's appeal of 30 October 2004 and in its opinion on the present complaint, EMEA did not actually address this issue raised by the complainant (and his relevant argumentation). Instead it simply recalled that the requirement in question was provided for by the recruitment notice. However, as the complainant indicated, inclusion of the requirement at issue in the recruitment notice was a potential instance of maladministration. Subsequently, exclusion of the complainant from the recruitment procedure in question, because of non-compliance with this requirement, might also be an instance of maladministration. Hence, EMEA's disposal of the matter raised by the complainant simply by reference to the inclusion of the requirement in question in the recruitment notice could be an instance of maladministration. Under these circumstances, the Ombudsman made point (1) of his friendly solution proposal presented above.

1.5 In its reply, EMEA stated that it reviewed again the complainant's application. Under the relevant competition notice, candidates should provide proof of at least three years of professional experience relating to the field covered by the description of duties made in the notice. The complainant did not meet this essential requirement, since, according to what he



had declared in his application, he only had experience of working as a General Practitioner and in the Medical Service of the Greek Army. The pharmaceutical legislation that governs EMEA's work is specific to the development and supervision of a medicinal product. The training and work experience of a doctor on clinical diagnosis and treatment of patients in a local or hospital setting is not directly relevant for work at EMEA, as drug development is not an automatic part of the normal clinical work of doctors. In his observations, the complainant appeared to maintain his allegation.

1.6 The Ombudsman recalls that recruitment notice EMEA/A/190, concerned a position of "*Administrator (Scientific), Unit for Human Medicinal Products, Pre-Authorisation evaluation, Safety and efficacy/scientific advice and orphan drugs (A*5)*". According to this notice, the position advertised involved responsibility, in particular, for:

" Managing the procedures concerning files for the Centralised Procedure and amendments thereto and/or Scientific Advice and/or activities in relation with designation of Orphan Medicinal Products, providing scientific, technical and administrative support for projects involving the Agency's committees and groups of experts, liaising with rapporteurs/co-ordinators and coordinating the timetabling of activities essential to the establishment of objective scientific opinions and their formal approval. "

Moreover, under the same notice, "*[c]andidates for these posts must enclose documentary evidence with their application, providing proof of (...) at least three years' professional experience (...) relating to the field covered by the above description of duties.*" In this regard, it is noted that EMEA enjoyed a considerable margin of discretion when assessing whether the professional experience demonstrated by candidates was relevant to the field of duties of the position(s) concerned (6) . Taking the above into account, the relevant arguments presented by EMEA, the complainant's observations and the working experience he had declared in his application, the Ombudsman considers that EMEA does not appear to have manifestly exceeded the limits of its aforementioned discretion by reaching the conclusion mentioned in point 1.5 above. Hence, he finds that the rejection of the complainant's application on this basis does not seem to be unfair. The complainant's allegation has, thus, not been substantiated, in relevant part.

1.7 Nevertheless, it must also be noted that the reason initially given by EMEA for the rejection of the complainant's application was that he did not have experience of working in multilingual and multicultural environment, although such experience was required by the relevant recruitment notice. EMEA's reliance on another requirement of the recruitment notice (the one concerning the existence of at least three years of professional experience in the field of the duties of the position concerned) is a new element in its position. That element may still justify EMEA's decision to reject the complainant's application, but does not seem to reflect good administrative practice about how to discharge properly its duty to provide adequate grounds for such a decision (7) . The Ombudsman will make a relevant remark in his decision closing the present inquiry.

1.8 In the relevant part of its reply to the Ombudsman's friendly solution proposal, EMEA also



stated that it noted his comments about the requirement for experience in a multicultural and multilingual environment. Relatedly, it remarked that it has a multicultural working environment both as regards its staff and the parties with whom it interacts in a professional capacity. It also stated that it considered that some multicultural exposure/experience by an applicant wishing to work for it was relevant. Taking into account these statements made by EMEA, which seem to be reasonable, and the fact that EMEA enjoyed a wide margin of discretion when determining, in the relevant recruitment notice, the qualifications required for the post concerned, including the one at issue, the Ombudsman does not find that there was, in this context, a manifest error of assessment on the part of EMEA (8) . Also in light of his conclusion in point 1.6 above, the Ombudsman, thus, does not find it justified further to inquire into this issue.

However, the Ombudsman also notes that principles of good administration, embodied in Article 10(1) of the European Code of Good Administrative Behaviour, require that EMEA display an appropriate degree of consistency when deciding on whether or not to require such an eligibility condition in its recruitment procedures. In the present case, EMEA has not explained, although it was requested to do so by the complainant and invited to do so by the Ombudsman, why this eligibility condition was not included in other recruitment notices, published at the same period of time, concerning apparently similar positions. Under these circumstances, the Ombudsman will make a relevant remark in his decision closing the present inquiry.

Recruitment procedure EMEA/A/191

1.9 Recruitment notice EMEA/A/191, concerning a position of "Administrator (scientific), Unit for Human Medicinal Products, Pre-Authorisation evaluation, Quality of Medicines (A*5)" (9) , provided that " *[t]he complete conditions, the job descriptions and the necessary application form should be downloaded from the EMEA website (...)* ". According to the relevant conditions, which are to be found in the documentation provided by the complainant and EMEA, the incumbent would be responsible for:

" [m]anaging the procedures concerning centralised files and amendments thereto, providing scientific, technical and administrative support for projects involving the Agency's committee's and groups of experts, liaising with rapporteurs/co-ordinators and coordinating the timetabling of activities essential to the establishment of objective scientific opinions and their formal approval. (...) Candidates ... must enclose documentary evidence with their application, providing proof of each of the following: (...) at least three years' professional experience, after obtaining the relevant degree that must have been obtained by the closing date, relating to the field covered by the above description of the duties; (...) experience in working in a multicultural and multilingual environment. "

1.10 By letter dated 23 December 2004, EMEA informed the complainant that the Selection Committee had been unable to accept his application, because " *only the applicants found, after detailed comparison of the applicants, to have the knowledge and professional experience most relevant for [EMEA's] purposes were shortlisted for an interview.* " In its opinion on the present complaint, EMEA clarified (10) that the basis of this decision was that the complainant did not have the relevant work experience required for the position and that he did not have experience in working in a multicultural and multilingual environment. It went on to point out that the vacancy notice provided that both criteria were essential. The Selection Committee's



evaluation sheet attached to EMEA's opinion indicates that the complainant did not meet the above-mentioned two requirements and contains, respectively, the comments " *NO RELEVANT WORK EXPERIENCE* " and " *NO SUCH EXPERIENCE* ".

1.11 As the Ombudsman has already noted in his friendly solution proposal in this case, EMEA's challenged decision was based on the self-sufficient basis that the complainant had no working experience *relating* to the field covered by the description of the duties of the post in question. Moreover, neither in his complaint to the Ombudsman nor in his observations did the complainant challenge, in a specific way, the propriety of this reasoning (11) . Under these circumstances, the Ombudsman did not find, as regards this aspect of the case, an instance of maladministration corresponding to the complainant's allegation. The Ombudsman reiterates this finding made in his friendly solution proposal.

Recruitment procedures EMEA/A/194 and EMEA/A/196

1.12 According to the documentation provided by the complainant and EMEA, in the context of these recruitment procedures, candidates should provide proof of a " *university degree relevant to the field of medicine, pharmacy or [other relevant life] science, which must have been obtained after 1 April 2001.* " (12)

1.13 As noted in EMEA's opinion on the present complaint, the complainant obtained his veterinary degree in 1997 and, because this was his first degree and it was obtained before 1 April 2001, he was excluded from the two recruitment procedures. In his observations, the complainant disagreed with EMEA's reasoning. He argued that (i) the relevant recruitment notices were binding on the selection committee; (ii) nowhere in these notices was the term " *first degree* " mentioned, but only the term " *degree obtained after 1 April 2001;* " (iii) he had obtained his medical degree on 19 July 2002.

1.14 In the relevant part of his analysis contained in his friendly solution proposal in this case, the Ombudsman remarked the following. The Community Courts have consistently held that the essential function of a recruitment notice is to give those interested in applying for the competition the most accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it. The notice of competition constitutes the legal framework of the recruitment procedure (13) . Relatedly, the Court of First Instance noted in Case T-158/89 (14) :

" 23 *The Court considers that it should also be borne in mind that notwithstanding its discretionary power, the Selection Board is bound by the wording of the notice of competition as published. According to the Staff Regulations, the basic function of the notice of competition is precisely to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them, to judge, first, whether they should apply for it (judgments in Case 255/78 Anselme v Commission [1979] ECR 2323, Ruske, cited above, and Case 289/81 Mavridis v Parliament [1983] ECR 1731) and, secondly, what supporting documents are important for the proceedings of the Selection Board and must therefore be enclosed with the application form.*

24 *The system laid down in the first subparagraph of Article 5 of Annex III to the Staff*



Regulations would be deprived of its substance if the Selection Board could, under the fourth subparagraph of that article, apply requirements which do not appear in the notice of competition and, therefore, go beyond a comparative examination of the candidates on the basis of the qualifications required. (...)

25 It follows that the Selection Board is not empowered to exclude a candidate from the tests on the ground that he does not meet a requirement which was not mentioned in the notice of competition. " (15)

Nevertheless, EMEA's Selection Committee appears to have acted in this way in the case at hand. By rejecting the complainant's applications on the grounds specified in its opinion, EMEA applied, in essence, an eligibility criterion under which, in the event that a candidate provided proof that he or she held more than one university degree which might be considered relevant to the field of medicine, pharmacy or (other relevant life) science, the degree obtained first (chronologically) should have been obtained after 1 April 2001. Nevertheless, such a rule cannot reasonably be inferred from the notice requirement mentioned above. Moreover, it is not mentioned anywhere else in the relevant notice documents. Under these circumstances, the Ombudsman reached the preliminary conclusion that EMEA's decisions to exclude the complainant from recruitment procedures EMEA/A/194 and EMEA/A/196 were unfair, since they were not based on valid grounds. These decisions could, thus, amount to instances of maladministration. The Ombudsman formulated point (2) of his friendly solution proposal, on the basis of this preliminary finding. The Ombudsman suggested that EMEA could reconsider the decision to reject the complainant's applications for selection procedures EMEA/A/194 and EMEA/A/196. If, after such reconsideration, EMEA confirmed its above decision, EMEA was invited to provide valid and adequate reasons in this regard.

1.15 In its reply to the Ombudsman's friendly solution proposal, EMEA accepted that the complainant did meet the education criterion concerning eligibility for these recruitment procedures. Nevertheless, he would not be invited for an interview, since his work experience, as a General Practitioner and in the Medical Service of the Greek Army, was not relevant for the posts concerned. In his observations, the complainant challenged this conclusion and maintained his allegation. He also pointed out that EMEA had failed to address his argument that a colleague of his, with similar qualifications and experience, had been invited for an interview.

1.16 The Ombudsman recalls that recruitment notice EMEA/A/194 concerned a position of " *Administrator (Scientific), EudraVigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*5)* ". This notice listed 12 tasks or fields of activity for which the incumbent would be responsible (16) . Notice EMEA/A/194 did not require any specific professional experience relating to these fields. It simply stated that:

" [s]uccessful candidates are likely to have a background in the following areas: Pharmacovigilance and/or pharmaceuticals in a regulatory environment or pharmaceutical industry; Competence in IT, especially in the use of a pharmacovigilance database; Experience in working in a team environment; Good oral and written communication skills. "



In its reply to the friendly solution proposal, EMEA reached its above-mentioned conclusion, after taking into account " *the requirements for the position in the area of medicines supervision*." However, it did not make, in this regard, any specific references to the recruitment notice, which, as indicated above, does not contain any provision requiring professional experience in the area of medicines supervision. Moreover, EMEA did not address at all the complainant's argument that a colleague of his, with similar a background in Greece, was invited for an interview. In light of the above, the Ombudsman considers that EMEA has still failed to provide valid and adequate grounds for its decision to reject the complainant's application for the position advertised by recruitment notice EMEA/A/194. Hence, this decision involves an instance of maladministration.

1.17 Furthermore, the Ombudsman recalls that recruitment notice EMEA/A/196 concerned a position of " *Administrator (Scientific), Pharmacovigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*5)* ". This notice listed seven tasks or fields of activity for which the incumbent would be responsible (17) . The recruitment notice did not require any specific professional experience relating to these fields. It simply stated that:

" *[s]uccessful candidates are likely to have experience and skills in the following areas: Pharmacovigilance and/or pharmaceuticals in a regulatory environment or pharmaceutical industry; Competence in IT, especially in the use of a pharmacovigilance database; Basic understanding of epidemiology; Working in a team environment; Good oral and written communication skills.* "

In its reply to the friendly solution proposal, EMEA stated that the complainant would not be invited for an interview, as his work experience was " *not in line with the nature of the work* " of the post concerned. However, it did not make, in this regard, any specific references to the recruitment notice, which, as indicated above, does not contain any provision requiring professional experience corresponding to the nature of the tasks listed in this notice. Moreover, EMEA did not address at all the complainant's argument that a colleague of his, with a similar professional background in Greece, was invited for an interview. In light of the above, the Ombudsman considers that EMEA has still failed to provide valid and adequate grounds for its decision to reject the complainant's application for the position advertised by recruitment notice EMEA/A/196. Hence, this decision involves an instance of maladministration.

Recruitment procedure EMEA/A/195

1.18 According to the relevant notice document, successful candidates for this recruitment procedure:

" *[we]re likely to have experience and skills in the following areas:*

- *Scientific training in the healthcare field (medicine, pharmacy) or other life sciences*
- *Human pharmaceuticals experience in a regulatory Agency or in Industry*
- *Basic understanding of Community Legislation in the field of pharmaceuticals*
- *Project management support*
- *Working in a team environment*
- *Good oral and written communication skills.* "



The notice did not contain any provision requiring professional experience corresponding to the nature of the tasks listed in it.

1.19 By letter dated 17 January 2005, EMEA informed the complainant that the Selection Committee had been unable to accept his application, because " *only the applicants found, after detailed comparison of the applicants, to have the knowledge and professional experience most relevant for [EMEA's] purposes were shortlisted for an interview.* " By letter of 8 February 2005, the complainant requested the re-examination of his application. He stated that, following an oral communication that he had had with the Personnel Department of EMEA, he believed that: (i) his studies had not been correctly evaluated and graded; (ii) his degrees had been set as equivalent to three-year degrees of other schools of an acknowledged lower standing; (iii) his work as a veterinary doctor with the right to prescribe medicinal products had been underestimated; (iv) his knowledge regarding the medicinal legislation and the area of medicines had been questioned, a fact which was not consonant with the object of his work; (v) his application had not been evaluated correctly, with respect to the responsibilities of the post advertised and to EMEA's role. The complainant further asked to be informed of the selection criteria that had been applied, their weighting, his evaluation and grading, the exact profile and qualifications of the candidates who were invited for an interview, and the number of candidates who took part in the competition.

1.20 By letter of 2 March 2005, EMEA informed the complainant that (i) on 21 February 2005, his application was submitted to the Selection Committee for a second time; (ii) the Committee evaluated his application in detail and compared all elements with those of other candidates who had submitted an application and had been invited to an interview; (iii) the Committee confirmed that, in comparison to all other candidates, he did not have sufficient relevant experience for the post published; (iv) for reasons of personal data protection, it was not allowed to issue any data regarding personal information of candidates. In its opinion on the present complaint, EMEA referred to its above-mentioned letters of 17 January 2005 and 2 March 2005 to the complainant. It also attached an evaluation sheet (signed by the Chairman of the Selection Committee) concerning the complainant. The evaluation sheet contains a section which, except for its last sentence (" *Good oral and written communication skills* "), reproduces the text quoted in point 1.12 above. Next to the box containing the phrase " *Scientific training in the healthcare field (medicine, pharmacy) or other life sciences* " an "X" is marked, accompanied by the comment " *No relevant experience* ". There are no marks or comments next to the boxes referring to the other four areas.

1.21 In his observations, the complainant noted that he was excluded from the procedure, because, in comparison to other candidates, his 15 months of work experience as a doctor were not considered to be relevant to the post. However, this position cannot be accepted. Since a Greek doctor bears the exclusive responsibility for any adverse effects a medication he has prescribed may have on a patient, the doctor informs the Greek National Organisation for Medicines about side effects of medicines. Moreover, by definition a Greek doctor must have a very good knowledge of pharmaceutical legislation. The complainant further remarked that EMEA failed to provide information and answers to the questions asked in his letter of appeal of



8 February 2005.

1.22 In the relevant part of his analysis contained in his friendly solution proposal in this case, the Ombudsman noted the following. According to settled case-law, the statement of reasons required by Article 190 of the EC Treaty must be appropriate to the act at issue and must disclose, in a clear and unequivocal fashion, the reasoning followed by the institution which adopted the measure in question. This should be done in such a way as to enable the persons concerned to ascertain the reasons for the measure and to facilitate its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (18) . More specifically, in the context of recruitment procedures, the purpose of the obligation to provide reasons is, in particular, to assure the candidates that the procedure was carried out fairly and without favouritism (19) , with due respect for the principle of equal treatment of candidates, which constitutes a general principle of Community law (20) .

In the case at hand, EMEA failed, when replying to the complainant's letter of 8 February 2005, to comply with the above requirement. EMEA merely confirmed that, in comparison to the candidates invited to an interview, the complainant did not have sufficient relevant experience for the post in question. This statement is formulated only in general terms, without any specific references to the experience of the complainant in comparison to that of the candidates invited to an interview. Further, in light of the relevant provisions of the recruitment notice, the statement does not adequately explain the challenged exclusion decision and does not enable verification that this decision was fair and non-discriminatory. Moreover, EMEA's argument that, for reasons of personal data protection, it was not allowed to communicate to the complainant any data regarding personal information of (other) candidates, does not satisfactorily explain its aforementioned failure. This is because, first, EMEA does not appear to have envisaged the possibility of presenting this information in a way which would not disclose the identity of the data subject. Second, even if Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (21) ("Regulation 45/2001") were applicable, this Regulation does not contain a blanket prohibition on transferring personal data to third parties, but rather allows such a transfer under certain conditions. In this regard, Articles 8 and 9 of the Regulation are particularly relevant. EMEA has not explained how it applied the relevant provisions of the Regulation in the specific case, especially in light of its above-mentioned duty to state grounds for its challenged decision. Finally, EMEA's failure to provide adequate explanations for this decision was not remedied during the present inquiry, through its opinion or the documents attached thereto. Under these circumstances, the Ombudsman concluded that EMEA's challenged decision could be considered to entail an instance of maladministration, to the extent that (a) it has not been adequately reasoned, and (b) it does not allow verification of its fair and non-discriminatory character. The Ombudsman, thus, suggested in his friendly solution proposal that EMEA could consider providing adequate reasons for the decision to exclude the complainant from recruitment procedure EMEA/A/195.



1.23 In its reply, EMEA stated that it reviewed the complainant's application and that he would not be invited for an interview, because his work experience was "not solely sufficient for the post" concerned. Taking into account the remarks made in points 1.18 and 1.22 above, this last statement does not obviously meet EMEA's duty to give adequate reasons for its contested decision, as indicated by the complainant in his observations. The Ombudsman, thus, considers that EMEA has still failed to provide valid and adequate grounds for its decision to reject the complainant's application for the position advertised by the recruitment notice EMEA/A/195. Hence, this decision involves an instance of maladministration.

2 Allegation that EMEA failed to provide the complainant with clarifications he requested in relation to the rejection of his applications for certain posts

2.1 By letter dated 15 February 2005 and by letter dated 21 February 2005, the complainant requested the reconsideration of his application for recruitment procedure EMEA/A/194 and for recruitment procedure EMEA/A/196. He also requested to be informed of (i) the conditions of the recruitment notice he did not meet; (ii) the selection criteria and their weighting; (iii) the profile and the qualifications of the candidates who were invited to an interview; and (iv) the total number of candidates. EMEA did not reply to these letters, since, as stated in its opinion, it never received them. EMEA received a copy of these letters in the context of the present inquiry, since these documents were attached to the complaint to the Ombudsman that was communicated to EMEA. In its opinion on the complaint, EMEA provided the information requested by the complainant under point (i) above. This information does not appear to amount to a valid reason for the challenged decisions (see point 1.14 above). In addition, EMEA's opinion on the complaint did not address the remaining parts of the complainant's information requests.

2.2 By letter dated 8 February 2005, the complainant requested that his application for recruitment procedure EMEA/A/195 be reconsidered. He further asked to be informed of the selection criteria that had been applied, their weighting, the evaluation and grading of his qualifications, the exact profile and qualifications of the candidates who were invited for an interview, and the number of candidates who took part in the competition. In its reply of 2 March 2005, EMEA confirmed its decision not to retain the complainant's candidacy, because, in comparison to other candidates, he did not have sufficient relevant experience for the post published. Moreover, it stated that, for reasons of personal data protection, it was not allowed to issue any data regarding candidates' personal information.

2.3 In the relevant part of his analysis contained in his friendly solution proposal in this case, the Ombudsman noted the following. Principles of good administration, embodied in Article 22 of the European Code of Good Administrative Behaviour, require that the Community Administration provide citizens with the information they have requested, unless it invokes valid and adequate grounds for not doing so. Appropriate compliance with this requirement is all the more important when the Administration's duty to provide adequate grounds for its decisions (see point 1.22 above) comes into play in such a context. The Ombudsman reached the (preliminary) conclusion that EMEA's decisions to exclude the complainant from recruitment procedures EMEA/A/194 and EMEA/A/196 were unfair, since they were not based on valid grounds (see point 1.14 above). He also recalled his preliminary finding that EMEA's decision to



exclude the complainant from recruitment procedure EMEA/A/195 could be considered to involve an instance of maladministration, since it had not been adequately reasoned. Moreover, he noted that the above-mentioned information requested by the complainant (see points 2.1 and 2.2 above) pertained, at least in part, to the reasoning of EMEA's decisions to exclude him from recruitment procedures EMEA/A/194, EMEA/A/195 and EMEA/A/196. To this extent, the friendly solution proposal the Ombudsman made in light of his findings in points 1.14 and 1.22 above also covered EMEA's failure to provide the complainant with the relevant information he had requested. As to the other parts of the information requests, since EMEA had not invoked valid and adequate grounds for not providing the requested information, the Ombudsman's preliminary assessment was that EMEA's challenged failure could constitute an instance of maladministration. Accordingly, in his friendly solution proposal, the Ombudsman suggested that EMEA could consider providing the complainant with the information he requested in his letters of 8 February, 15 February and 21 February 2005 and had not yet received (or would not receive in the context of the potential acceptance and implementation by EMEA of points (2) and (3) of the Ombudsman's friendly solution proposal). Alternatively, in the event that EMEA were to decide not to provide this information to the complainant, it could consider providing valid and adequate grounds for not doing so.

2.4 In its reply to the Ombudsman's friendly solution proposal, EMEA merely reiterated that it was unfortunate that it had not received the complainant's letters. In this regard, the Ombudsman, first, recalls that EMEA must have received, before the submission of the present complaint, the complainant's letter of 8 February 2005, since it replied to it on 2 March 2005. Moreover, EMEA must have received, in the context of the present inquiry, a copy of the complainant's letters of 15 February and 21 February 2005. Taking these elements into account, as well as the remarks made in points 2.1-2.3 above, the Ombudsman, considers that EMEA has failed to give valid and adequate grounds for its omission to provide the complainant with the information he requested in these letters, which pertains, at least in part, to the reasoning of EMEA's decisions to exclude him from recruitment procedures EMEA/A/194, EMEA/A/195 and EMEA/A/196. Hence, this omission involves an instance of maladministration.

3 Allegation that EMEA failed to reply to the complainant's appeals of 15 and 21 February 2005 concerning his exclusion from recruitment procedures EMEA/A/194 and EMEA/A/196

3.1 Relatedly, the Ombudsman, first, recalls EMEA's statement that it did not receive these appeals. The truthfulness of this statement has been challenged by the complainant. In the context of the present inquiry, EMEA reviewed the complainant's applications for the above-mentioned recruitment procedures and gave unsatisfactory explanations for their rejection. Taking into account these elements, his remarks in point 2.4 above and the factual nature of the underlying dispute (which concerns, in essence, the issue whether or not EMEA did receive the appeals) the Ombudsman does not find it justified further to inquire into this matter.

THE DRAFT RECOMMENDATION

The Ombudsman recalls the instances of maladministration found in points 1.16, 1.17, 1.23 and



2.4 above and that EMEA has failed to remedy these shortcomings in the context of the present inquiry, despite his reasoned friendly solution proposal. In particular, he notes that EMEA has been unable to provide valid and adequate grounds for the rejection of the complainant's applications for the posts advertised in recruitment notices EMEA/A/194, EMEA/A/195 and EMEA/A/196 and that it does not seem to be justified to pursue the matter by making a draft recommendation along the lines of his friendly solution proposal, which was not implemented satisfactorily by EMEA. Taking also into account the justified discontent expressed by the complainant about the way that EMEA has dealt with his case so far, the Ombudsman recommends that EMEA should offer to the complainant its apologies and reasonable compensation for the non-material damage he has suffered as a result of the instances of maladministration identified above. This compensation should not be less than EUR 1 000.

The complainant will also be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, EMEA shall send a detailed opinion by 30 September 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement his draft recommendation.

Strasbourg, 11 June 2008

P. Nikiforos DIAMANDOUROS

(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, p. 15.

(2) OJ 2004 C 193A, p. 1.

(3) In light of the documentation attached to his complaint, the complainant seems to have referred to the following recruitment procedures: (i) EMEA/A/194 Administrator, Eudra Vigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*5), under which experience in working in a multilingual/multicultural environment would be an advantage; (ii) EMEA/A/195 Administrator, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*5), pursuant to which multilingual/multicultural environment would be an advantage; (iii) EMEA/A/196 Administrator, Pharmacovigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*5), under which experience in working in a multilingual/multicultural environment would be an advantage; (iv) EMEA/A/196 Administrator, Pharmacovigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*6), under which experience in working in a multilingual/multicultural environment would be an advantage; (v) EMEA/A/200 Head of Sector Safety and Efficacy (A*9), under which successful candidates were likely to have, inter alia, experience in working in a multicultural environment; and (vi) EMEA/A/202 Administrator, Eudra Vigilance, Unit for the Post-Authorisation Evaluation of Medicines for Human Use (A*6), in the context of which experience in working in a multicultural environment would be an advantage.



(4) Cf., for example, Case 39/83 *Fabius v Commission* [1984] ECR 627, paragraph 7; and Case T-207/95 *Ibarra Gil v Commission* [1997] ECR-SC I-A-13 and II-31, paragraph 66.

(5) Furthermore, EMEA has not challenged the accuracy of the observation made in the complainant's appeal of 30 October 2004 that, in the context of competitions organised by EU agencies, this experience is an additional asset, not an essential requirement.

(6) Cf., for example, Case T-101/96 *Wolf v Commission* [1997] ECR-SC I-A-351 and II-949, paragraphs 64 and 68.

(7) Relatedly, see, for example, decision on complaint 2539/2005/ID, points 3.3-3.7 and critical remark.

(8) Cf., for example, Case T-93/03 *Konidakis v Commission*, judgment of 11 July 2007, not yet reported, paragraph 72 et seq.

(9) OJ 2004 C 193A, p. 1.

(10) In his closing decision on the complaint, the Ombudsman will make a remark about the accuracy and clarity of the reasons provided in EMEA's letter of 23 December 2004.

(11) Relatedly, it is recalled that the complainant does not appear to have appealed against the Selection Committee's challenged decision or asked for more detailed explanations. It must also be noted that the issue of possession of professional experience (of a certain duration) referred to by the complainant is distinguishable from the question of the relevance of such experience to the duties of the post to be filled.

(12) The phrase within brackets appears only in the text of the notice for procedure EMEA/A/196.

(13) Cf., for example, Case T-169/89 *Frederiksen v Parliament* [1991] ECR II-1403, paragraph 67; and Case T-80/96 *Leite Mateus v Council* [1997] ECR-SC I-A-87 and II-259, paragraph 27.

(14) Case T-158/89 *Van Hecken v Economic and Social Committee* [1991] ECR II-1341.

(15) See Case T-158/89 *Van Hecken Economic and Social Committee*, cited above. In that case, the Court assessed whether certain "supplementary criteria" established and applied by the Selection Board for the admission of candidates were additional to those required by the Notice of Competition or whether they merely defined their scope. The Court found that these criteria were in fact additional, and therefore annulled the decision not to admit the applicant to the competition.

(16) Namely, the following: "*supporting all activities related to the electronic transmission and management of individual case safety reports (ICSRs) in the frame of the EudraVigilance*



database project; supporting the EMEA project officer in the management of the EudraVigilance project; supporting the electronic exchange of pharmacovigilance data via the established data-processing network in collaboration with the administrative assistants; day-to-day management of expedited adverse drug reaction reports in collaboration with the administrative assistants; EudraVigilance database administration and maintenance; duplicate detection and administration in collaboration with the administrative assistants; performing specific scientific and administrative database queries and statistics and communication of the results to the EMEA's Scientific Committees and relevant Working Parties; supporting the implementation and use of the Medical Dictionary for Regulatory Activities (MedDRA) in the frame of the European pharmacovigilance activities; organizing meetings related to the implementation of the electronic transmission of ICSRs including the preparation of agendas and minutes; the preparation and support of training courses for regulators and pharmaceutical industry; the preparation and support of technical documentation, SOPs and guidance documents; liaising with pharmaceutical industry and Competent Authorities regarding all aspects of electronic transmission of pharmacovigilance data. "

(17) Namely, the following: " performing safety signal detection on Centrally Authorised Products by the review of all relevant information provided by companies and Member State Authorities, liaising appropriately with Rapporteurs appointed by the EMEA's Scientific Committees; using IT systems relevant to the Pharmacovigilance Sector, including the EudraVigilance database; advising other EMEA staff and Rapporteurs on the regulatory procedures applicable to the performance of pharmacovigilance at Community level; supporting the use of the Medical Dictionary for Regulatory Activities (MedDRA) in the frame of the European pharmacovigilance activities; sharing the organisation of meetings related to pharmacovigilance, particularly in the area of signal detection; preparing technical documentation, SOPs and guidance documents; liaising with pharmaceutical industry and Competent Authorities regarding all aspects of pharmacovigilance. "

*(18) See, for example, Case C-266/05 P *Sison v Council* , judgment of 1 February 2007, not yet reported, paragraph 80, citing Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63.*

*(19) Cf. Case T-110/96 *Bareth v Committee of the Regions* [1997] ECR-SC I-A-435 and II-1163, paragraph 46.*

*(20) See, for instance, Case T-173/99 *Elkaïm and Mazuel v Commission* [2000] ECR-SC I-A-101 and II-433, paragraph 87.*

(21) OJ 2001 L 8, p. 1.