

Draft recommendation to the European Personnel Selection Office in complaint 1000/2006/TN

Recommendation

Case 1000/2006/TN - Opened on 10/05/2006 - Recommendation on 11/07/2008 - Decision on 19/12/2008

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

THE COMPLAINT

Background

In February 2005, the complainant made a complaint to the European Ombudsman against the European Personnel Selection Office ("EPSO") concerning Open Competition COM/A/2/02 - Environment, in which she had participated (complaint 422/2005/TN). However, since after correction of the tests she was not among the 80 best candidates, she was not placed on the reserve list.

The complainant stated that she had written to EPSO in March 2004, asking for information on (i) her results in the different parts of the oral test, and (ii) how many Swedes had participated in the oral test. She received a reply from EPSO stating that it could not give her the requested information since it was confidential. She considered EPSO's argument to be unreasonable. The complainant therefore alleged that EPSO had given an unreasonable answer to her requests for information. She argued that it was unreasonable to keep secret from the candidates what their strong and weak points had been in the test (2) .

The Ombudsman concluded that, in accordance with Article 195 of the EC Treaty, there were not sufficient grounds for investigating the allegation since the complainant had not supplied enough evidence to support her allegation that EPSO had given an unreasonable reply. The Ombudsman considered that, before opening an inquiry, it would be useful to make an analysis of EPSO's answer. The case was therefore closed and the complainant was advised that, if she wished to pursue the issue by making a new complaint to the Ombudsman, she should make sure to supply the relevant supporting evidence, that is, a copy of EPSO's letter of reply.

The present complaint

The complainant made a new complaint to the Ombudsman regarding the matter, basically restating the above arguments. She also provided a copy of EPSO's letter of reply of 2 April 2004 and of the test results that EPSO had provided her with.

The complainant also made a number of allegations and one claim that were declared



inadmissible by the Ombudsman since the complainant did not, as required by Article 2(4) of the Ombudsman's Statute, seem to have made any prior administrative approaches to EPSO regarding the matters in question.

However, the Ombudsman decided to open an inquiry into the following allegation:

The complainant alleged that EPSO had given an unreasonable answer to her request for information about (i) her results in the different parts of the oral test, and (ii) how many Swedes participated in the oral test.

THE INQUIRY

EPSO's opinion

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

Background

The complainant was informed of her results in Open Competition COM/A/2/02 by letter of 16 March 2004. By letter of 23 March 2004, the complainant wrote to EPSO, requesting, among other things, information about her results in the different parts of the oral test and how many Swedes had participated in the oral test.

EPSO replied by letter of 2 April 2004, explaining that the selection criteria, as well as the distribution of points, had been discussed and determined by the Selection Board at a meeting before the oral test. After the oral test, the Selection Board had deliberated and had taken a unanimous final decision for each candidate. The oral test constituted part of a competition during which a comparative evaluation of the performance of the candidates was made. The deliberations of the Selection Board are part of its work, which is secret, and the Selection Board could therefore not provide more information than that already furnished by letter of 16 March 2004. The complainant was also informed that the information about the nationality of candidates was also considered to be secret.

The present complaint *The distribution of points in the oral test*

The oral test was described as follows in part B.3 of the Notice of Competition:

" Interview with the selection board to enable it to complete its assessment of your suitability to carry out the duties referred to at A.1 above. The interview will also focus on your specialised knowledge in your chosen field, your knowledge of the main developments in European integration and Community policies, your knowledge of the second Community language which you indicated on your registration form (see A.II.3), and your ability to adjust to a multicultural working environment within the European public service. "

The oral test was marked on a scale from 0 to 40 and the pass-mark was 20.

In order to evaluate the performance of the candidates during the oral test, the Selection Board established, before the tests were held, an evaluation form in accordance with the Notice of Competition. The evaluation form contained the selection criteria laid down in the Notice of Competition, namely:



- Specialised knowledge in the chosen area;
- Main developments in European integration and Community policies;
- Ability to adjust to a multicultural working environment; and
- Knowledge of the second Community language.

In order to guarantee the objectivity and equality of the competition, these criteria were applied in a uniform and coherent way by the Selection Board when evaluating all candidates in the competition in question. However, the evaluation form constitutes part of the Board's work, which, in accordance with Article 6 in Annex III to the Staff Regulations, is secret. The Ombudsman considered this approach to be well founded in his decision in case 481/2002/IP (3) . That is the reason why the evaluation form cannot be disclosed to the candidate.

It should be recalled that, during the oral test, the Selection Board does not only note whether the candidate's answers to the questions are 'right' or 'wrong', but that it also more generally and independently evaluates whether the candidate has the ability to perform the tasks specified in the Notice of Competition. The Board's evaluation of the candidates during the oral test is not only based on the content of the answers, but also on how the answers demonstrate the candidates' ability to reason logically and to adjust to a multicultural working environment. The Board is obliged to compare the qualifications of the candidates during the oral test. The aim of each recruitment competition is to select those candidates who are best suited to perform the tasks of the posts to be filled. The Selection Board must therefore examine the candidates' qualifications in such a way so as to ensure that only the most qualified candidates are selected.

The case-law has confirmed that the work of the Selection Board during the oral tests is not automatic, but consists of an evaluation that provides for a margin of discretion.

In accordance with the obligation to state the grounds of decisions adversely affecting someone, EPSO, after having concluded that she was not among the candidates who had obtained the 80 best results, informed the complainant of her results in each one of the different tests. In addition, EPSO informed her of the results of the candidate having the 80th best mark, which was 57.7. The complainant had only obtained the result 50.5 for tests d) and e) together.

In making its decision, the Selection Board followed the case-law of the Community Courts governing recruitment competitions as well as the relevant provisions of the Staff Regulations. It has been underlined in the case-law that, since a candidate's results in the different tests in a competition constitute a sufficient explanation for the Board's evaluation, the Selection Board is not obliged to indicate which of the candidate's answers were considered insufficient and the reasons therefore, in order to explain why the candidate in question was not placed on the reserve list (4) .

Statistics

The purpose of the statistics kept by EPSO is to fulfil its own needs as the organiser of competitions. During a competition, EPSO cannot be required to provide, 'on demand' and in accordance with the specific wishes of a candidate, statistics or information that do not form part of the normal competition procedure. To go beyond what is provided to candidates during the



competition procedure would be contrary to the principle of good management of resources and could be prejudicial to the specific tasks of the personnel. It would also be contrary to the purpose of the competition, which is to enable the institutions to recruit officials of the highest standard of ability in accordance with the Staff Regulations.

It should be underlined that statistical information concerning the nationality of candidates is taken into consideration only for the purpose of organising the competitions and in order to undertake a follow-up of the procedures. The Selection Board is not entitled to take this information into consideration in relation to the tests.

However, since Open Competition COM/A/2/02 had been finalised, EPSO could answer the question and inform the complainant that only one of the two Swedes who were invited to the oral test was put on the reserve list.

The complainant's observations

The complainant was invited to submit observations on EPSO's opinion. No observations were received from the complainant.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's considerations

After careful consideration of the complaint and the opinion, the Ombudsman was not satisfied that EPSO has responded adequately to both of the complainant's allegations. This view was based on the following considerations.

1 The request for information about the results in the different parts of the oral test

1.1 The Ombudsman noted that EPSO's letter of 2 April 2004 to the complainant stated, in summary, the following: Before the oral test, the Selection Board carefully discussed the evaluation and distribution of points among the different criteria stated in the Notice of Competition. When the oral tests were finished, the Selection Board, after deliberating and taking into account each Selection Board member's evaluation of each separate criterion, unanimously established the final mark for each candidate. The questions that were asked during the oral test were mainly open. In order to determine whether a candidate simply passed the oral test or passed it with distinction, the Selection Board did not only require 'correct' answers but also a reasoning that was logical and well structured. The Selection Board recalled that the oral test formed part of a recruitment competition - not a traditional examination - during which a comparative evaluation of the performance of all the candidates was made. The evaluation of the oral test constituted a confidential part of the Board's work and EPSO could not, therefore, provide information other than the results that had been communicated in its letter of 16 March 2004.

1.2 The Ombudsman found reasonable EPSO's explanation that, during the oral test, the Selection Board not only examines the correctness of the answers given by the candidate, but also makes a more general evaluation of the candidate's ability to reason logically and to adjust to a multicultural environment, as well as of whether the candidate has the ability to perform the tasks specified in the relevant Notice of Competition. The Ombudsman also considered that it is



reasonable to regard the oral test, as described in part B.3 of the Notice of Competition, as one single exam, without clearly defined and separate parts, and that the Selection Board would indeed be entitled to make a global assessment of the candidates' performance and to provide them only with a final mark.

1.3 The Ombudsman noted, however, that in its letter of 2 April 2004 to the complainant, EPSO stated that, before the oral test, the Selection Board carefully discussed the evaluation and distribution of points among the different criteria stated in the Notice of Competition (5) . This letter led the Ombudsman to infer that the Selection Board had, in fact, made a breakdown of the candidates' marks, giving an individual mark for each of the aspects touched upon during the oral exam and mentioned in the Notice of Competition, and did not confine itself to producing one final mark only. The Ombudsman was not convinced by EPSO's argument that such an evaluation sheet of the oral test, when the Selection Board decides to use one, constitutes an element of the Board's work which is covered by the duty of secrecy, thereby preventing EPSO from communicating it to candidates. In these circumstances, the Ombudsman reached the provisional conclusion that EPSO's refusal to provide the complainant with her results in the different parts of the oral test, on the grounds that this information is confidential, could constitute an instance of maladministration.

2 The request for information about how many Swedes participated in the oral test

2.1 The Ombudsman recalled that principles of good administration require that officials of the Community institutions be service-minded and as helpful as possible and that they reply as completely and accurately as possible to questions which are asked by the public (6) . As regards EPSO's arguments for not providing the requested information, the Ombudsman considered that no evidence had been presented to show how providing the requested information would be contrary to the principle of good management of resources to such an extent as to make it possible for that principle to take precedence over the principles of good administration. The Ombudsman further noted that EPSO had not explained in what way it considered that providing the requested information would be contrary to the purpose of the competition, that is, how providing the information would be detrimental to the recruitment of officials of the highest standard of ability. Furthermore, on the basis of EPSO's reasoning that the requested information could be provided once the competition was finalised, the Ombudsman could not see why the information could not have been provided at the time of the request, given that the request appeared to have been made after the reserve list for the competition in question had been established.

2.2 In view of the above, the Ombudsman considered that EPSO appeared to have acted wrongly when refusing to provide information in question at the time of the request. However, since the information about how many Swedes participated in the oral test had been provided in EPSO's opinion, which was forwarded to the complainant, the Ombudsman found no grounds to further pursue the question as to whether EPSO's answer to the complainant's request was unreasonable as such.

The proposal for a friendly solution

Article 3(5) of the Statute of the European Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant.



On the basis of the considerations made in point 1.3 above, the Ombudsman therefore made the following proposal for a friendly solution to EPSO:

EPSO could reconsider its decision not to provide the complainant with her results in the different parts of the oral test.

EPSO's reply to the Ombudsman's proposal

In its reply to the Ombudsman's proposal, EPSO recalled that the obligation of the Selection Board was laid down in the Notice of Competition, which only stipulated that the oral test was to be marked out of 40 points. The Notice of Competition did not stipulate how the points should be distributed among the areas of knowledge to be tested. However, in order to evaluate the candidates on equal grounds, the Selection Board had decided to distribute the 40 points on the basis of how important it considered the four criteria to be. The decision whether or not to distribute the points among the criteria is the sole responsibility of the Selection Board, acting in accordance with its wide margin of discretion as acknowledged by the pertinent case-law. The fact that this was done in the present case and that EPSO, as a gesture of transparency, voluntarily informed the complainant, by letter of 2 April 2004, of its decision in this regard, does not oblige it to provide additional information. Since the Notice of Competition only provided the maximum number of points for the oral test, no candidate was informed about the distribution of these 40 points.

As acknowledged by the Ombudsman in his decision in case 481/2001/IP, the evaluation form drawn up by the Selection Board for the oral test is a secret document and is therefore not sent to a candidate upon request. The evaluation form contains, among other things, the number of points awarded when evaluating a candidate's knowledge and ability. By giving access to these details about the obtained results, EPSO would also partly reveal the content of the evaluation form drawn up by the Selection Board. However, the evaluation form is considered to be secret in its entirety.

The requirement to provide reasons for its decision concerning a candidate may not oblige the Selection Board to reveal the results of its deliberations on the evaluation of the oral test. The documents that the Selection Board decides to draw up in order to help it establish the final result are internal documents indicating the result of its deliberations and cannot be communicated.

The fact that the document in question, which describes the Board's deliberations, is secret, as well as the fact that the requested information has not been communicated to any candidate, means that EPSO cannot respond favourably to the Ombudsman's request.

However, EPSO has undertaken to inform the candidates in future competitions not only of their final mark in the oral test, but also of the breakdown of their marks, in cases where the appointing authority decides to define, in the Notice of Competition, a stricter legal framework to be followed by the Selection Board.

The complainant's observations

The complainant was invited to submit observations on EPSO's reply. No observations were



received from the complainant.

THE DECISION

1 The request for information about the results in the different parts of the oral test

1.1 The complainant participated in Open Competition COM/A/2/02 - Environment, but was not among the 80 best candidates to be placed on the reserve list. In March 2004, she wrote to EPSO, asking for information on, among other things, her results in the different parts of the oral test. Having received a reply from EPSO stating that it could not give her the requested information since it was confidential, she complained to the Ombudsman, alleging that EPSO had given an unreasonable answer to her request for information about her results in the different parts of the oral test.

1.2 Having carefully analysed the complaint and EPSO's opinion, the Ombudsman noted that in its letter of 2 April 2004 to the complainant, EPSO stated that, before the oral test, the Selection Board carefully discussed the evaluation and distribution of points among the different criteria stated in the Notice of Competition (7) . This letter led the Ombudsman to infer that the Selection Board had, in fact, made a breakdown of the candidates' marks, giving an individual mark for each of the aspects touched upon during the oral exam and mentioned in the Notice of Competition, and did not confine itself to producing one final mark only. The Ombudsman was not convinced by EPSO's argument that such an evaluation sheet of the oral test, when the Selection Board decides to use one, constitutes an element of the Board's work which is covered by the duty of secrecy, thereby preventing EPSO from communicating it to candidates. In these circumstances, the Ombudsman reached the provisional conclusion that EPSO's refusal to provide the complainant with her results in the different parts of the oral test, on the grounds that this information is confidential, could constitute an instance of maladministration. The Ombudsman therefore addressed a proposal for a friendly solution to EPSO, suggesting that EPSO could reconsider its decision not to provide the complainant with her results in the different parts of the oral test.

1.3 In its reply to the Ombudsman's proposal, EPSO recalled that the obligation of the Selection Board was laid down in the Notice of Competition, which only stipulated that the oral test was to be marked out of 40 points. The Notice of Competition did not stipulate how the points should be distributed among the areas of knowledge to be tested. However, in order to evaluate the candidates on equal grounds, the Selection Board had decided to distribute the 40 points on the basis of how important it considered the four criteria to be. The decision whether or not to distribute the points among the criteria is the sole responsibility of the Selection Board, acting in accordance with its wide margin of discretion as acknowledged by the pertinent case-law. The fact that this was done in the present case and that EPSO, as a gesture of transparency, voluntarily informed the complainant, by letter of 2 April 2004, of its decision in this regard, does not oblige it to provide additional information.

EPSO further argued that, as acknowledged by the Ombudsman in his decision in case 481/2001/IP, the evaluation form drawn up by the Selection Board for the oral test is a secret document. The evaluation form contains, among other things, the number of points awarded



when evaluating a candidate's knowledge and ability. By giving access to these details about the obtained results, EPSO would also partly reveal the content of the evaluation form drawn up by the Selection Board. However, the evaluation form is considered to be secret in its entirety. The documents that the Selection Board decides to draw up in order to help it establish the final result are internal documents indicating the result of its deliberations which cannot be communicated. The fact that the document in question, which describes the Board's deliberations, is secret, as well as the fact that the requested information has not been communicated to any candidate, means that EPSO cannot respond favourably to the Ombudsman's request.

However, EPSO informed the Ombudsman that it has undertaken to inform the candidates in future competitions not only of their final mark in the oral test, but also of the breakdown of their marks, in cases where the appointing authority decides to define, in the Notice of Competition, a stricter legal framework to be followed by the Selection Board.

1.4 The Ombudsman recalls that the reason why EPSO has refused to inform the complainant about her results in the different parts of the oral test is because it considers this information to fall under Article 6 of Annex III to the Staff Regulations, which stipulates that " *[t]he proceedings of the Selection Board shall be secret.* " The Ombudsman notes in this regard that EPSO argues that the Notice of Competition in question stipulated that a maximum of 40 points would be given for the oral test, but that it did not stipulate how these points should be distributed among the criteria to be analysed. However, where future Notices of Competitions define a stricter legal framework to be followed by the Selection Board, EPSO will inform candidates of the breakdown of their marks in the oral tests. EPSO thus appears to argue that the breakdown of marks would no longer fall under Article 6 of Annex III to the Staff Regulations if provided for in the Notice of Competition.

1.5 The Ombudsman recalls, however, that the Community institutions are bound by the Staff Regulations, such as Article 6 of Annex III, when drawing up Notices of Competitions. Recalling the case-law of the Court, the Ombudsman notes that the marks allocated to candidates reflect the comparative assessment made by the Board; this comparative assessment of the Selection Board is thus covered by the secrecy provision in Article 6 of Annex III to the Staff Regulations; therefore, strictly speaking, the final mark in an oral test also falls under Article 6 of Annex III to the Staff Regulations; however, the final mark is nevertheless communicated to the candidate in order for the institution to fulfil its obligation to state reasons for its decisions (8) .

1.6 The Ombudsman thus concludes that it is not the fact that the "legal framework" for marking is laid down in a Notice of Competition that allows for marks to be communicated to candidates. Accordingly, if EPSO considers that the breakdown of marks can be communicated to candidates in the future, the Ombudsman cannot see why the breakdown of marks, where such a breakdown of marks already exists, could not be communicated to candidates at present. The fact that the breakdown of marks has not been communicated to any other candidate does not constitute a problem in this regard since the principle of equal treatment would only be infringed if requests from other candidates to have access to these marks were to be refused.



1.7 On the basis of the above, the Ombudsman considers that the approach suggested in his proposal for a friendly solution still constitutes an appropriate way of settling the matter and he will therefore restate his proposal in the form of a draft recommendation.

Conclusion

In view of the above, the Ombudsman makes the following draft recommendation to EPSO, in accordance with Article 3(6) of the Statute of the European Ombudsman:

The draft recommendation

EPSO could reconsider its decision not to provide the complainant with her results in the different parts of the oral test.

EPSO and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, EPSO shall send a detailed opinion by 31 October 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 11 July 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) In complaint 422/2005/TN, the complainant also made a number of other allegations that were declared inadmissible. Since those allegations are not covered by the inquiry into the present complaint, they are not explicitly mentioned in this decision.

(3) The Ombudsman notes that the correct case number appears to be 481/2001/IP. The decision can be found on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(4) Case T-153/95 *Kaps v Court of Justice* [1996] ECR-SC I-A-233 and II-663.

(5) The Ombudsman's underlining. The Ombudsman recalls that EPSO, in its letter of 2 April 2004, stated that the distribution of points among the different "criteria" mentioned in the Notice of Competition was discussed before the oral test. The Ombudsman considers that this discussion enumerated the "areas" or "aspects" to be touched upon and evaluated during the orals exams rather than the "selection criteria".

(6) See, for example, Article 12 of the European Code of Good Administrative Behaviour, available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(7) The Ombudsman's underlining. The Ombudsman recalls that EPSO, in its letter of 2 April



2004, stated that the distribution of points among the different "criteria" mentioned in the Notice of Competition was discussed before the oral test. The Ombudsman considers that this discussion enumerated the "areas" or "aspects" to be touched upon and evaluated during the orals exams rather than the "selection criteria".

(8) See, for instance, Case C-254/95 *Parliament v Innamorati* [1996] ECR I-3423, paragraphs 24 and 28-31. The Ombudsman recalls that the *Innamorati* case concerned the obligation to state reasons and how to reconcile this obligation with Article 6 of Annex III to the Staff Regulations. The Ombudsman notes, however, that later case-law suggests that the absolute nature of Article 6 of Annex III to the Staff Regulations may be further curtailed by, for instance, the principle of transparency (see, for instance, Case T-72/01 *Pyres v Commission* [2003] ECR-SC IA-169 and II-861, paragraph 70).