

Draft recommendation of the European Ombudsman in his inquiry into complaint 344/2007/WP against the European Parliament

Recommendation

Case 344/2007/(WP)BEH - Opened on 21/02/2007 - Recommendation on 15/10/2008 - Decision on 22/12/2009

THE BACKGROUND TO THE COMPLAINT

1. At the time of his complaint to the European Ombudsman, the complainant was an official at the European Parliament. He was seconded in the interest of the service.
2. According to Article 37 of the Staff Regulations of officials of the European Communities ('the Staff Regulations'), an official on secondment " *shall continue to enjoy all his rights under the conditions contained in Articles 38 and 39 (...) as an official of his parent institution* ". According to Article 38(f), this includes eligibility for promotion for officials seconded in the interest of the service.
3. Promotions within Parliament take place on the basis of an annual staff assessment procedure, in which a staff report is made and a maximum of three merit points is awarded. On 6 July 2005, Parliament's Bureau adopted a Decision on Promotion and Career Planning Policy ('the Bureau's Decision'). It contains the following provisions:

" 1.1 Merit and career progression

Merit is a dynamic rather than a static concept which takes account of consistent efforts over time. The concept of merit covers, for instance, the way in which an official/servant carries out the tasks entrusted to him or her in line with the job description set out in the staff report, level of performance, successful moves between departments, level of responsibility exercised, completion of a complex project or study and of special work, work experience in a given area, and ability to take on additional responsibilities.

The merit of an official/servant determines the rate of his or her career progression.

1.3 Assessment of merit



1.3.1 The merit of an official/servant is assessed each year. Since the staff report is the main factor in assessing merit, it is of course essential that the annual level of a staff member's merit points should be in keeping with the rating obtained in the reference year.

The basic principle is that each director general or head of an autonomous unit receives a total number of points equal to twice the number of officials/servants (...) with at least three months' service in a European institution or Community body during the reference year, plus an additional quota of points calculated by multiplying one point by 3% of the staff complement concerned, the total being rounded up or down (if necessary). The Secretary-General has a reserve of merit points by means of which he can, among other things, correct distortions caused by the limited number of officials/servants in a given grade.

Each official/servant (...) who is assessed as 'deserving' receives one or more merit points within a range of one to three. An undeserving official/servant receives no points. "

The corresponding Implementing Measures concerning the Award of Merit Points and Promotion ('the Implementing Measures') lay down the procedure to be followed in the award of merit points:

" 1.3 Procedure for the award of merit points to officials/servants

(b) Merit points are awarded by each head of a functional entity at a meeting of the entity's body of assessors. This body of assessors may hear the views of the superiors who have been involved in drawing up the annual staff report of the officials/servants in the entity. It also has the task of ensuring consistency between the assessment resulting from the most recent staff reports procedure and the merit points.

The points will be awarded grade by grade in each category/function group in compliance with the Staff Regulations and on the basis of a comparative assessment of merits, in accordance with the following procedure:

- (...)

- award of any remaining points available to officials deserving to receive a third point, at the level of category/function group;

- award of third points available from the additional quota which, unlike those from the basic quota, are not attached to a function group;

- drawing up of a list of possible requests for points from the Secretary-General's reserve.

(c) Special cases:

- staff seconded in the interests of the service or placed at the full-time disposal of a body within



the institution or in another institution: merit points are awarded by the original functional entity, after consulting the body to which the official is seconded;

- (...)

1.4 Notification of officials/servants and appeals

(...) The letter [to the assessed member of staff] containing the proposal [for the number of merit points to be awarded] shows the number of points for the reference year and details of the procedure and the deadline for referrals to the Reports Committee, should the staff member being assessed disagree with the proposal. This procedure must be followed before any complaint is submitted pursuant to Article 90(2) of the Staff Regulations. (...)

1.6 Final decision on the award of merit points

The final decision on the award of points is taken by the head of the functional entity following the opinion of the Reports Committee and the decision of the Secretary-General concerning the points in his reserve. The reasons must be stated for any decision running counter to the opinion of the Reports Committee. "

4. In 2005, the complainant submitted a complaint to the Ombudsman about the fact that Parliament had awarded him only two merit points for the year 2003 (complaint 3051/2005/(PB)WP). Amongst other things, he alleged that Parliament had failed to carry out a proper comparative assessment of his merits.

5. Parliament argued that it had followed the correct procedures and that the decision to award the complainant two merit points was well founded. It submitted that a comparison with the complainant's Parliament colleagues was not required and would not have been relevant because such a comparison would have been awkward in view of the complainant's secondment.

6. The Ombudsman noted that there appeared to be nothing to indicate that officials on secondment were to be excluded from the comparative evaluation. Furthermore, the Reports Committee did not appear to have had any difficulties in comparing the complainant's work to that of his Parliament colleagues. Therefore, in a proposal for a friendly solution, the Ombudsman asked Parliament to consider reviewing its decision by resuming the procedure at the stage where a proposal for the award of merit points is sent.

7. In its reply, Parliament maintained that it had complied with its internal rules, but proposed to forward the complainant's file to the Reports Committee for a comparative assessment of his merits. However, even though the Reports Committee concluded that the complainant's merits were comparable to those of his colleagues who had received a third point, Parliament's Secretary-General finally decided not to award him a third point. The complainant thereupon informed the Ombudsman that he had challenged this decision by way of an internal complaint.



8. The Ombudsman found that it was not clear whether the complainant's merits had been compared within the correct reference group and that, if this were the case, there was nothing to suggest that a careful comparison had subsequently been carried out, in particular because Parliament appeared to have based its new decision on the view that, in order to justify the award of a third merit point, the complainant's merits would have had to be *superior* and not "only" *comparable* to those of his colleagues who had received a third point. The Ombudsman considered this approach to be incorrect. He therefore restated his friendly solution proposal as a draft recommendation.

9. In reply, Parliament forwarded its decision on the complainant's new internal complaint to the Ombudsman, stating that the procedure for the award of merit points had been completed correctly. This decision confirmed that two merit points should be awarded to the complainant.

10. The Ombudsman regretted that Parliament had not, in any way, commented on the content of his draft recommendation. He also found that, while it remained unclear whether the complainant's merits had been compared within the correct reference group, Parliament again appeared to have based its position on the approach he considered to be incorrect. Therefore, the Ombudsman closed the case with a critical remark. Subsequently, the complainant informed the Ombudsman that he had brought the matter before the Civil Service Tribunal. The case is pending.

11. The present complaint concerns the complainant's staff assessment for the year 2004. In the framework of the staff evaluation procedure for that year, the complainant's superior until June 2004 provided the following comment:

" Given the nature of [the complainant's] tasks and the high standard of his performance, I strongly recommend awarding to him the maximum of promotion points. "

12. In a meeting of 14 July 2005, the college of assessors of the complainant's " *home Directorate-General* " in Parliament decided to award him two merit points. The complainant turned to the Reports Committee, which came to the conclusion that the award of a third merit point would be justified because his merits were " *equivalent or even superior* " to those of at least two out of three officials in the same grade who had received a third point. Nevertheless, the final assessor decided to award the complainant two merit points.

13. The complainant lodged a complaint under Article 90(2) of the Staff Regulations, which was rejected by decision of 25 October 2006.

14. In his complaint to the Ombudsman, the complainant contested this decision. He also reported that, following an application for access to documents, he had obtained a copy of the minutes of the assessors' meeting of 14 July 2005, which was sent to him with the remark that this document did not contain any data concerning him.

8. Consequently, the complainant submitted the present complaint to the Ombudsman.



THE SUBJECT MATTER OF THE INQUIRY

15. In summary, the complainant made the following allegations:

- (1) The Secretary-General's decision on his complaint under Article 90(2) of the Staff Regulations did not give sufficient reasons for the rejection of his complaint;
- (2) The decision infringed the principle of equal treatment;
- (3) The college of assessors of his Directorate-General did not conduct a thorough comparative assessment of his merits with those of his colleagues;
- (4) His secondment had detrimental consequences for him; and
- (5) The decision on his complaint was wrongly taken by the Secretary-General and not by the President of the European Parliament.

16. The complainant claimed that his file should be re-examined and that it should be transmitted to the President of the European Parliament for decision.

17. The complainant asked the Ombudsman to try to bring about a friendly solution, which, according to him, could consist of a re-examination of his file and its submission to the President of the European Parliament for decision.

18. The Ombudsman's inquiry related to all of the above allegations and to the complainant's claim.

19. In his observations, the complainant came back to an allegation which he had raised in his complaint under Article 90(2) of the Staff Regulations, but which the Ombudsman had not identified as a separate allegation in the complainant's complaint to him. The Ombudsman decided to extend his inquiry to include this allegation, which was worded as follows:

- (6) The complainant alleges that his first assessor failed to consult his superior for whom he worked from 16 June 2004 onwards.

20. Moreover, the Ombudsman clarified that he interpreted the complainant's first allegation (concerning allegedly insufficient reasoning) as referring not only to the decision on his complaint under Article 90(2) of the Staff Regulations, but also to the final decision on the award of merit points to the complainant (decision taken by the complainant's final assessor on 13 January 2006). Given that this interpretation had not been clear from the Ombudsman's letter opening the inquiry, for which he apologised, he invited Parliament to make additional comments on this allegation if it so wished.

21. In his observations, the complainant also raised concerns in relation to the confidentiality



and completeness of certain documents that Parliament had enclosed with its opinion. In this respect, the Ombudsman informed the complainant that he had decided not to pursue these concerns further in the context of the ongoing inquiry because they did not appear to be essential for the Ombudsman's assessment of the core of the case. The Ombudsman informed the complainant that, if he wished to see the documents in question, he could consider asking Parliament for access to them. Should Parliament fail properly to deal with such a request, he could submit a new complaint to the Ombudsman. The complainant does not appear to have made use of this possibility up to now.

22. In his observations, the complainant also informed the Ombudsman that he no longer wished him to seek a friendly solution in this case. As a reason for this, he referred to disappointing experiences he had had when trying to find a friendly solution in relation to his complaint 3051/2005/(PB)WP.

THE INQUIRY

23. The Ombudsman asked Parliament for an opinion on the complainant's five allegations and on his claim. Upon examination of Parliament's opinion, the Ombudsman noted that at least some of the annexes enclosed with this opinion seemed to contain sensitive or confidential information. In view of his Office's practice to forward the institution's opinion, including all annexes, to the complainant in order to enable the latter to make observations, the Ombudsman decided to return the annexes in question to Parliament and asked it to make available a nonconfidential version that could be forwarded to the complainant. He also informed Parliament that, should it be necessary for him to see documents that could not be disclosed to the complainant, he would make use of the possibility available to him to inspect files. Parliament complied with the Ombudsman's request. Since, according to Parliament, it was not possible to conceal the confidential information contained in some of the documents concerned without their losing all evidential value, Parliament did not enclose these documents, but stated that the Ombudsman could inspect them.

24. Having examined Parliament's opinion and the complainant's observations thereto, the Ombudsman considered that he needed further factual information in order to be able to reach a decision in this case. Accordingly, he asked Parliament for additional information in relation to four specific questions. At the same time, he also asked it for a supplementary opinion on the complainant's sixth allegation and, if it so wished, for further comments as regards the complainant's clarified first allegation.

25. Parliament's reply to this request for further information and for a supplementary opinion was forwarded to the complainant, who made observations on it.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks



26. The Ombudsman recalls that it emerges from the established case-law of the Community Courts that:

" in assessing the interests of the service and the qualifications and merits of the candidates to be taken into consideration in making a promotion decision pursuant to Article 45 of the Staff Regulations, the appointing authority possesses a wide discretion, and in that connection the Community Court's review must be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Community Court cannot therefore substitute its assessment of the qualifications and merits of the candidates for that of the appointing authority " (2) .

In his decision on complaint 1634/2003/(ADB)GG and in his draft recommendation in case 3051/2005/(PB)WP, the Ombudsman took the view that his own review should be based on the same approach. Consequently, the review in the present case is limited to ascertaining whether Parliament followed the correct procedures in arriving at its decision and whether this decision was tainted by a manifest error.

27. As regards the structure of the present decision, the Ombudsman considers it useful to examine the complainant's allegations in the following order: (i) The first assessor's alleged failure to consult the complainant's superior for whom he worked from mid-June 2004 (sixth allegation); (ii) the alleged lack of sufficient reasons in the final assessor's decision to award the complainant two merit points and in the Secretary-General's decision on the complainant's Article 90(2) complaint (clarified first allegation); (iii) the alleged lack of a proper comparative assessment of the complainant's merits by the college of assessors (third allegation); (iv) the alleged infringement of the principle of equal treatment (second and fourth allegation); and (v) the Secretary-General's competence to take the decision on the complainant's complaint under Article 90(2) of the Staff Regulations (fifth allegation). Finally, the Ombudsman will assess the complainant's claim that his file should be re-examined and that it should be transmitted to the President of Parliament for decision.

28. Before embarking upon this assessment, the Ombudsman will briefly address two further issues which the complainant raised in his observations and which the Ombudsman took up in his request for further information to Parliament.

29. First, the complainant noted that the version of his staff report which was enclosed with Parliament's opinion was not its final version, but a draft that did not contain his comments, and his Director-General's reaction to them. The Ombudsman therefore asked Parliament to inform him on what version of the complainant's staff report it had based its opinion. Parliament replied that the version which was considered at the assessors' meeting was the original and final report, containing all the comments that had been made. This was the version of the staff report which had been included in the complainant's personal file. Since the complainant was in possession of this document and had attached a copy of it to his complaint, Parliament had, for the sake of convenience, attached with its opinion a copy of the report which was printed from



its database. Parliament assured the complainant that all the details contained in his report had been brought to the assessors' attention.

30. The complainant pointed out that Parliament had thus not replied to the Ombudsman's question. It had not contradicted his view that its opinion was apparently only based on a draft of his staff report.

31. The Ombudsman regrets to note that Parliament did indeed not provide a straightforward reply to his question. Therefore, in order to clarify this issue, he would have to conduct further inquiries. However, he considers that the outcome of such further inquiries could not affect his conclusions concerning the essence of the present complaint, set out below. The Ombudsman therefore does not consider it necessary to pursue this question any further.

32. Second, the complainant observed that Parliament appeared to have deleted parts of a document which it enclosed with its opinion, namely, a note from the Director-General to the Secretary-General, but did not mention this in its letter to the Ombudsman. The Ombudsman asked Parliament to comment on this observation. Parliament explained that this note contained personal data concerning the complainant's colleagues. Therefore, it had been obliged to delete such references before the document could be forwarded to the complainant. However, the full version of this document was available for the Ombudsman's inspection. The complainant did not make any observations in this regard.

33. The Ombudsman considers that it would have been preferable if Parliament had mentioned the deletions in this document in its letter to the Ombudsman, as it did with the other deletions it made, in order to prevent any suspicions on the part of the complainant. However, the explanation that Parliament now provided in reply to the Ombudsman's question appears reasonable. Should the complainant nevertheless have doubts as regards the deleted parts of this document, he could ask Parliament for access to it and, should Parliament fail properly to deal with such a request, submit a new complaint to the Ombudsman.

A. Allegation of failure to consult the complainant's new superior *Arguments presented to the Ombudsman*

34. As regards the complainant's argument that Parliament had failed to consult his new superior, for whom he had worked from 16 June 2004 onwards, Parliament pointed out, first, that the complainant had not challenged his staff report before the Reports Committee within the relevant time-limit. In addition, he had never lodged a complaint as regards this matter. Since his assessment had thus become definitive, the admissibility of the new plea was highly debatable. However, Parliament nevertheless commented on this issue: In line with the relevant rules, it had consulted the complainant's superior, for whom the complainant had worked for more than six months in 2004. This superior had not considered it necessary to consult the complainant's subsequent superior. It was not for Parliament to call this decision into question. Moreover, according to the complainant's staff report, he had continued to carry out some of his former duties until October 2004. Parliament submitted that, under its General Implementing Provisions, if a staff member was transferred during the year, the new assessor was competent



to draw up the staff report only if that transfer had been effective for at least six months. For these reasons, it was not for Parliament to seek the opinion of the complainant's new superior.

35. The complainant argued that it was not for his former superior, but rather for his first assessor to obtain the opinion of his new superior in order to get the full picture of his performance in 2004. Should his first assessor indeed have considered that it was his former superior's responsibility to obtain this opinion, he would have had to say so clearly in his letter requesting the opinion from his former superior, which he did not do. Moreover, in contrast to Parliament's statement, his transfer had been effective for more than six months. As proof, the complainant enclosed a copy of the relevant decision of Parliament's Secretary-General, dated 15 June 2004, which confirmed the complainant's change of position from that date onwards.

The Ombudsman's assessment

36. As regards the admissibility of this allegation, the Ombudsman recalls that, in accordance with Article 2(8) of his Statute, "*[n]o complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all possibilities for submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90 (1) and (2) of the Staff Regulations, have been exhausted by the person concerned*". The Ombudsman has always interpreted this rule strictly.

37. The complainant's allegation appears to concern the consultation about his performance, a step which preceded the drawing up of his staff report by his first assessor. The complainant raised his concerns as regards this issue in his comments on his draft staff report, which he sent to his final assessor on 12 July 2005. It appears, however, that the complainant did not subsequently refer the matter to the Reports Committee or challenge his staff report by submitting a complaint pursuant to Article 90(2) of the Staff Regulations. In these circumstances, Parliament's view that the staff report has become definitive is clearly correct.

38. It is true that the complainant raised the issue concerning the consultation of his superior in the complaint pursuant to Article 90(2) of the Staff Regulations, which he submitted against the decision to award him only two merit points. However, given that this issue concerned the preparation of the complainant's staff report for 2004 and that this report had already become definitive, the Ombudsman considers that Parliament was fully entitled to reject the relevant argument in its decision on the Article 90(2) complaint.

39. Given that the complainant did not challenge his staff report for 2004, even though he considered that Parliament ought to have also consulted his second superior, the Ombudsman is thus unable to examine the complainant's relevant allegation in the present case.

B. Allegation of failure to give sufficient reasons *Arguments presented to the Ombudsman*

40. In his Article 90(2) complaint, the complainant criticised the fact that the final assessor's decision to award him two merit points, contrary to the opinion of the Reports Committee, was



not reasoned and that this omission infringed point I.6 of the Implementing Measures. In its decision on this complaint, signed by Parliament's Secretary-General, the Appointing Authority acknowledged that the decision was indeed not reasoned. It stated that, given that the decision on the award of merit points involved a large margin of discretion, the Appointing Authority was obliged, in line with the case-law of the Community courts, to provide reasons, at the very latest, when a complaint against such a decision is rejected (3) . The Appointing Authority went on to state, essentially, that the complainant's staff report, whilst proving the high quality of his achievements, was " *not obviously superior* " to the staff reports of the 13 officials who had been awarded a third merit point. This conclusion was not affected by the Reports Committee's opinion, which did not find that the complainant's merits were superior to those of his colleagues.

41. In his complaint to the Ombudsman, the complainant argued that the Secretary-General had not explained why he disagreed with the Committee's opinion. The reasons that were given were merely formalistic.

42. In its opinion, Parliament maintained that there had been a sufficient statement of reasons in the decision on the complainant's Article 90(2) complaint.

43. In his request for further information and for a supplementary opinion, the Ombudsman clarified that he understood the complainant's allegation concerning allegedly insufficient reasoning as referring not only to the decision on his Article 90(2) complaint, but also to the final decision on the award of merit points to the complainant of 13 January 2006. He invited Parliament to make additional comments on this allegation if it so wished.

44. In its supplementary opinion, Parliament referred to the case-law that the Appointing Authority had cited in its decision on the complainant's Article 90(2) complaint. It argued that, when applying this settled case-law, by analogy, a failure to give reasons for a decision awarding merit points did not render that decision null and void. It was sufficient if reasons were given for the rejection of a complaint against that decision. The decision in the complainant's case was entirely consistent with the requirements deriving from the relevant case-law.

45. In his observations, the complainant took the view that the case-law invoked by Parliament was irrelevant for his case because it only interpreted the rules contained in the Staff Regulations. By adopting point I.6 of the Implementing Measures, Parliament had imposed on itself additional obligations which went beyond the obligations contained in the Staff Regulations.

The Ombudsman's assessment

46. The Ombudsman notes that, as Parliament pointed out, the Court of First Instance has held that " *the obligation to give reasons (...) is intended on the one hand to provide the person concerned with sufficient information to determine whether the rejection of his candidature was well-founded and whether it is appropriate to bring proceedings before the Court, and on the other to enable the Court to review the legality of the rejection* " (4) . The Court stated that " as



promotions and transfers involve choices, it suffices, according to the Court of Justice, that the statement of reasons for the rejection of the complaint deals with the existence of the legal conditions laid down by the Staff Regulations for the procedure to be lawful " (5) . It was on this basis that Parliament took the view that, by analogy, a failure to give reasons for a decision on the award of merit points did not render the decision null and void. It was sufficient if reasons were given at the stage when a complaint against that decision was rejected.

47. However, the Ombudsman is doubtful whether the analogy to which Parliament referred really applies to the complainant's situation. He notes that point I.6 of the Implementing Measures provides: "*The reasons must be stated for any decision running counter to the opinion of the Reports Committee.*" As the complainant pointed out, Parliament has thus committed itself to observing special rules as regards the assessment of its staff, which go beyond those contained in the Staff Regulations, on which the Court of First Instance based its judgment.

48. It is clear that Parliament, in the decision of 13 January 2006, did not fulfil the formal requirement to give reasons for its decision.

49. It is also true that the Appointing Authority's decision on the complainant's Article 90(2) complaint did invoke certain reasons for the decision to award the complainant two merit points. It essentially stated that his merits were "*not obviously superior*" to those of his colleagues who had received a third merit point. Therefore, and even though he remains doubtful as regards the analogy between the complainant's situation and the situation that led to the Court's judgment, the Ombudsman considers that further inquiries into this aspect of the complaint on his part would not be justified.

50. It should be emphasised, however, that this finding only relates to the formal requirement to give reasons for a decision and not to the validity or consistency of the reasons invoked by Parliament. These issues will be assessed in the following part.

C. Allegation of failure of the college of assessors to carry out a thorough comparative assessment of the complainant's merits *Arguments presented to the Ombudsman*

51. The complainant alleged that the college of assessors of his Directorate-General within Parliament had not conducted a thorough comparative assessment of his merits with those of his colleagues. According to the minutes of the meeting of assessors of 14 July 2005, during which the proposals for the award of merit points were discussed and adopted, his name had not been mentioned at all. This meant that the assessors had not even considered awarding him a third point. Since his staff report had only been finalised one day before the meeting, the complainant doubted whether the participants (apart from the Director-General and the Director, who had been directly involved in the preparation of his staff report) even knew about it. Moreover, his first assessor had added the following comment to his staff report:

" [The complainant's first superior] stated in his (...) note that [the complainant] is a deserving official. However, from the European Parliament's point of view, being seconded (...) there is no



immediate interest of his former service. "

The complainant considered that his first assessor should, in view of his clearly excellent staff report, at least have put his case for discussion at the assessors' meeting.

52. Moreover, in its decision on the complainant's Article 90(2) complaint, the Appointing Authority concluded that, following the thorough comparative assessment of the college of assessors and the processing of the complainant's complaint, his staff report, whilst proving the high quality of his achievements, was "*not obviously superior*" to the staff reports of the 13 officials who had been awarded a third merit point. This conclusion was not affected by the Reports Committee's opinion which had not found that the complainant's merits were superior to those of his colleagues. The Appointing Authority concluded that Parliament had not exceeded its large margin of discretion "*as provided for in the rules*".

53. In his complaint to the Ombudsman, the complainant recalled that the Reports Committee had compared his merits to those of three other officials of his grade in the same Directorate-General, who had been proposed for the award of a third merit point, and had concluded that his merits were equivalent or even superior to those of at least two of these colleagues. In his decision on his Article 90(2) complaint, Parliament's Secretary-General did not explain why he did not agree with the Committee's opinion. In fact, he had not even contested it. Instead, he had only referred to the Appointing Authority's large margin of discretion "*as provided for in the rules*". However, he had not explained which rules he referred to.

54. In its opinion, Parliament maintained that it had carried out a proper comparative assessment of the complainant's merits. It did not consider the statement of the complainant's first assessor, in relation to his staff report to have been relevant. The staff report which was placed in the complainant's personal file included an annex containing the entire assessment of his superior. Parliament had also only taken this assessment into account during the comparative examination. It explained that, for the year 2004, (i) five category A* officials had received third points from the quota of the complainant's Directorate-General, (ii) five A* officials as well as two B* and one C* official had received points from the additional quota and (iii) another five A* officials had received points from the Secretary-General's reserve. According to Parliament, the complainant's staff report was a very good one. However, a comparison showed that the reports of three other officials were "*undeniably superior to that of the complainant*". As to the two further officials who had been awarded a third point, concerning whom the Reports Committee had concluded that the complainant's merits were "*equivalent or even superior*", Parliament argued that, in its view, the complainant's merits were "*slightly inferior*" to theirs. As to those officials who had received a third point from the Directorate-General's additional quota, Parliament took the view that the reports of the five A* officials who had been awarded such a third point were superior to the complainant's. Taking into account the difference in category, the complainant's merits were also not superior to those of the other three officials. Therefore, Parliament took the view that there was no manifest error of assessment of the respective merits. As to the Secretary-General's reserve, Parliament argued that the Appointing Authority was not required to award a third point to any seconded official



with a very good staff report and enjoyed a wide margin of discretion in this regard. In any event, the complainant's Director-General had not requested the award of a third point to the complainant from the Secretary-General's reserve.

55. In his observations, the complainant pointed out that Parliament had changed the reasoning for its decision not to award him a third point. Whereas the Secretary-General's decision on his complaint under Article 90(2) of the Staff Regulations had stated that his staff report was "*not obviously superior*" to that of his colleagues, the opinion stated that his staff report was *inferior* to that of ten of his colleagues. Such a statement had never been made in the procedure up to that point. Parliament's statement that it had not considered the comment of the complainant's first assessor to be relevant did not change the fact that his first assessor had been prejudiced against him. Moreover, the complainant argued that there was nothing to show that he had been included in a comparative assessment concerning the points to be awarded from the Secretary-General's reserve. He added that the Secretary-General's decision had not referred to this reserve at all and that Parliament's comparative assessment, in its opinion, did not include those five colleagues who had received a third point from the reserve.

56. The Ombudsman considered that he needed additional information in order to reach a decision on this aspect of the complaint and, accordingly, asked Parliament to comment on the complainant's observation that the minutes of the meeting of the college of assessors did not mention his name.

57. Parliament replied that, given the large number of staff members involved, it was entirely normal that those officials who were to be awarded two points were not mentioned in the minutes. The award of two points was the most common case. It corresponded to a good level of merit and was consistent with an average career development. On that basis, a proposal to award two points did not warrant any particular comment. The minutes only mentioned those staff members who were to be awarded fewer or more than two points because it was important to give the reasons why their career development was slower or faster than normal. Therefore, the fact that the complainant's name was not mentioned in the minutes in no way reflected a failure to consider his merits, but was entirely consistent with the practice employed by all colleges of assessors in Parliament's various Directorates-General.

58. The complainant maintained his view that his case had not been discussed due to the negative prejudice of his first assessor. Whereas it was correct that there was no need for a close examination of all cases in which the officials' merits were "*good*", it had to be taken into account that, as Parliament had explicitly acknowledged in its opinion in the present case, his staff report was "*very good*". Moreover, his superior had emphatically recommended awarding him the maximum amount of merit points. In a fair procedure, these circumstances would have had to lead at least to a discussion of his case among the assessors.

The Ombudsman's assessment

59. The Ombudsman considers that Parliament's obligation to follow correct procedures implies, in the complainant's case, that it had to carry out a thorough comparative assessment of his



performance before deciding on the award of merit points to him. Therefore, the Ombudsman has to assess whether (i) the college of assessors examined the complainant's case and whether (ii), if this was the case, it did so in a way that guaranteed a proper comparison of the complainant's merits.

60. As regards the question whether the complainant's case was examined at all, Parliament's explanation concerning the contents of the minutes of the assessors' meeting and the reason it invoked for its practice in this respect do not appear to be unreasonable. The explanation appears to be consistent with the copy of the minutes of the assessors' meeting in question, which the complainant provided to the Ombudsman. This document does not seem to mention any officials for whom the award of fewer or more than two merit points was discussed but not agreed upon. Therefore, it appears that the minutes in themselves do not permit the conclusion that the cases of officials who are not mentioned in this document were not discussed during the meeting.

61. Apart from the minutes, the complainant referred to the comments of his first assessor on his staff report as an indication that his case had not been discussed during the meeting. In its supplementary opinion, Parliament stated that "*[t]he complainant's staff report which was considered at the assessors' meeting is the original and final report, containing all the comments made*". This statement implies that, according to Parliament, the complainant's case was discussed at the meeting. The complainant has not provided any evidence which could call this statement into question.

62. However, and as mentioned above, it also needs to be examined whether the complainant's case was discussed in a way that guaranteed a proper comparison of his merits. As regards the first assessor's comments on the complainant's staff report, Parliament acknowledged that they were irrelevant. The Ombudsman considers that they were indeed based on criteria which are irrelevant and inadmissible in a staff evaluation procedure. Moreover, he remains doubtful in relation to Parliament's submission that it did not take these comments into account in the comparative evaluation of the complainant's merits. In its supplementary opinion, Parliament stated that "*[t]he complainant's staff report which was considered at the assessors' meeting is the original and final report, containing all the comments made*". If the assessors saw the complainant's staff report "*containing all comments made*", this implies that they also saw the comments made by the complainant's first assessor. In these circumstances, the Ombudsman does not consider it plausible that the assessors, as Parliament appeared to argue, entirely disregarded the comments.

63. On the basis of the above, the Ombudsman has doubts as to whether the college of assessors carried out a proper comparative assessment of the complainant's merits.

64. However, the Ombudsman also has to examine whether the Appointing Authority's decision on the complainant's Article 90(2) complaint and Parliament's submissions during the Ombudsman's inquiry show that a proper comparative assessment of the complainant's merits was carried out.



65. As regards the decision on the Article 90(2) complaint, the Ombudsman regrets to note that Parliament adopted the same reasoning which the Ombudsman regarded as invalid in the context of the complainant's prior complaint 3051/2005/(PB)WP. Parliament based its decision on the view that, in order to justify the award of a third merit point, the complainant's merits would have had to be *superior* to those of his colleagues who had received a third point and not " *only* " *comparable* . In case 3051/2005/(PB)WP, this incorrect approach led to a draft recommendation by the Ombudsman, on which Parliament did not comment in its detailed opinion. Therefore, Parliament's reply to the complainant's Article 90(2) complaint does not dispel the Ombudsman's doubts as regards the comparative assessment of the complainant's merits.

66. As regards Parliament's opinion in the present case, the Ombudsman is pleased to note that Parliament appears to have re-examined the matter and to have reconsidered its reasoning. However, he is not convinced by the new arguments on which Parliament bases its position. In its opinion, Parliament quotes from the complainant's staff report as follows:

" - *Experience and judgment: Outstanding. His advice is balanced and always helpful.*

- *Analytical/summarising skills: has demonstrated outstanding capacity to extract the essentials from all kinds of complex texts.*

- *Drafting skills (...): Excellent. (...)*

- *Work rate: Exceptional. Copes with a wide range of tasks efficiently.*

- *Speed and organisational efficiency: A model. Has put in place excellent retrieval systems, is able to cope even in the absence of secretarial back up. "*

In view of this clearly outstanding evaluation of the complainant's performance, the Ombudsman finds it difficult to believe that, as Parliament states, ten officials of the same category had merits which were superior to his.

67. In particular, Parliament's reasoning as regards the performance of two officials, concerning whom the Reports Committee had concluded that the complainant's merits were " *equivalent or even superior* ", should be noted. Parliament now states that the staff reports of these two officials were " *better substantiated than that of the complainant. They make more reference to specific examples of successful performance, while the complainant's report is more general* ". The Ombudsman does not consider this argument to be plausible. It seems to be based on a factor which is largely the responsibility of Parliament itself, namely, the decision as to how detailed the assessment of an official's performance is meant to be. Therefore, the Ombudsman is not convinced of the reasons for Parliament's decision to depart from the position of the Reports Committee.

68. Moreover, the Ombudsman notes that Parliament does not give any reasons as to why it considers the reports of five further officials of the same category, who received a third point



from the Directorate-General's additional quota, to be superior to the complainant's.

69. As regards the comparison of the complainant's merits with the merits of three colleagues in other categories, Parliament maintained its view that the complainant's merits were " *not superior* " to theirs. This means that, in this respect, Parliament maintained the very same approach which the Ombudsman has already criticised as being incorrect.

70. As regards the award of points from the Secretary-General's reserve, Parliament does not refer to any individual cases, but limits itself to pointing to its wide margin of discretion in this respect.

71. On the basis of the above, the Ombudsman considers that neither in the internal complaints procedure, nor in the course of the Ombudsman's inquiry, did Parliament establish that it carried out a proper comparative assessment of the complainant's merits. He takes the view that Parliament thus failed to show that it complied with correct procedures. This constitutes maladministration.

D. Allegation of unequal treatment *Arguments presented to the Ombudsman*

72. As regards his allegation that Parliament infringed the principle of equal treatment, the complainant referred to the fact that, according to the logic applied by Parliament, he could only have been awarded a third merit point if his merits had been superior to those of his colleagues who had received a third point. Moreover, he argued that his first assessor's comments on his staff report suggested that irrelevant criteria had influenced the evaluation of his merits.

73. Parliament submitted that the complainant's secondment had not led to any disadvantage in comparison to his colleagues within Parliament.

74. In his observations, the complainant noted that Parliament had not commented at all on the alleged prejudice of his first assessor against him. His secondment had also led to the fact that his new superior had not been consulted. Moreover, there was no indication that the Director-General, whom the complainant had made aware of the problem in his comments on his staff report, attempted to correct his disadvantage.

The Ombudsman's assessment

75. The Ombudsman recalls that the principle of equal treatment requires that persons who are in the same situation be treated in the same way, unless there is an objective justification for a difference in treatment. The complainant argued that he was treated differently from his Parliament colleagues who were in the same situation as he was. Thus, in order to establish his allegation, the complainant would have to show that he was treated differently because of his secondment.

76. It has been found above that Parliament failed to show that it carried out a proper comparative assessment of the complainant's merits and that this constitutes maladministration.



Given that the allegation of unequal treatment is closely related to that issue, the Ombudsman considers that he does not need to examine this allegation further.

E. Allegation of lack of competence to take a decision on Article 90(2) complaint

Arguments presented to the Ombudsman

77. In his complaint, the complainant took the view that the Secretary-General had to leave the decision on the Article 90(2) complaint to the President of the European Parliament. The Reports Committee had only addressed its opinion to the complainant and to the Secretary-General and had explicitly referred to the Secretary-General's reserve of merit points. Therefore, it could be assumed that the Secretary-General had already dealt with his case before the complainant submitted his Article 90(2) complaint and that the Secretary-General had already decided not to follow the Committee's recommendation and thus not to award him a third merit point from his reserve. If this was the case, the Secretary-General had examined a complaint against a decision which he had taken himself or in which he had played a major part. Under such circumstances, it would have been correct to transmit the complaint to the President of the European Parliament for decision. The complainant stated that this had been done in a similar situation regarding the 2003 staff evaluation exercise.

78. In its opinion, Parliament stated that Directors-General had the power to award merit points, by virtue of the Bureau's Decision and the Implementing Measures. By virtue of the same provisions, the Secretary-General had the power to award points from his reserve. Parliament submitted that, in the present case, the complainant's Director-General had not requested the award of a third point from the Secretary-General's reserve. Pursuant to Article 10 of the Bureau's Decision of 3 May 2004 on the delegation of the powers of the Appointing Authority and of the Authority Empowered to Conclude Contracts of Employment ('the Bureau's Decision of 3 May 2004'), the Secretary-General had the power to assess the merits of the complainant's complaint, since the decision on the points to be awarded had been taken by the complainant's Director-General.

79. In his observations, the complainant submitted that Parliament had not brought forward any arguments that could have refuted his position. In particular, the fact that the final decision on the award of merit points had been taken by the Director-General did not change the fact that the Secretary-General had significantly been involved in the decision not to award him a third point.

80. In view of the above, the Ombudsman drew Parliament's attention to the fact that the Reports Committee sent its opinion on the complainant's case to the complainant and to the Secretary-General, making express reference to the latter's reserve of merit points. He asked Parliament to inform him if and how this opinion was followed up by the Secretary-General.

81. Parliament replied that, according to Article I.3 of the Implementing Measures, it was for the Directors-General, and not for the Reports Committee, to request the award of a third point from the Secretary-General's reserve. The complainant's Director-General had drawn up a list of officials on behalf of whom he requested the award of such a third point. The complainant's



name had not figured on this list.

82. In his observations, the complainant pointed out that Parliament had not replied to the Ombudsman's question.

The Ombudsman's assessment

83. The Ombudsman notes that the complainant's submissions as regards this aspect of his complaint might be understood as suggesting that the Secretary-General was biased when he took his decision. Therefore, it appears useful to clarify that the Ombudsman's inquiry into this aspect did not relate to a possible bias, but only to the Secretary-General's competence to take the decision in question.

84. Article 10 of the Bureau decision of 3 May 2004 provides:

" Decisions on complaints lodged pursuant to Article 90(2) of the Staff Regulations (...) shall be the responsibility of:

- the Bureau, in the case of decisions adopted by the Bureau or by the President;*
- the President, in the case of decisions adopted by the Secretary-General;*
- the Secretary-General, in the case of decisions adopted by the other authorities. "*

Since the decision on the award of merits points to the complainant had been taken by the complainant's Director-General, the Secretary-General was in principle competent to take the decision on the Article 90(2) complaint.

85. It cannot be excluded that there could be exceptional circumstances in which it would be good administrative practice for the Secretary-General to leave the decision to the President, even if he is competent according to the above rule, for example, if he was directly involved in the contested decision without having taken it himself. Therefore, the Ombudsman has to examine whether such exceptional circumstances existed in the present case.

86. As regards the complainant's submission that, in a similar situation concerning the staff assessment exercise for the year 2003, the decision on his Article 90(2) complaint had been taken by Parliament's President, the Ombudsman notes that, in that case, the Secretary-General had formally taken a position on the complainant's case before receiving his Article 90(2) complaint (6) . This does not appear to have been the case in relation to the 2004 assessment procedure.

87. The Ombudsman regrets to note that Parliament has not answered his question as to whether the Secretary-General followed up on the letter sent to him by the Reports Committee. However, in the absence of any evidence showing that the Secretary-General received and acted upon the letter, the Ombudsman arrives at the conclusion that the complainant has not



established his allegation that the Secretary-General was not competent to take a decision on his Article 90(2) complaint.

F. The complainant's claim *Arguments presented to the Ombudsman*

88. The complainant claimed that his file should be re-examined and that it should be submitted to Parliament's President for decision.

89. Parliament took the view that the decision to award the complainant two merit points for 2004 was justified and that the correct procedure had been followed. It did not comment on the complainant's claim.

The Ombudsman's assessment

90. The Ombudsman considers that, in view of his above findings, the complainant's claim appears to be well-founded. He will therefore take it up in his draft recommendation below.

G. Conclusions

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

The draft recommendation

Parliament should revisit its decision on the award of merit points to the complainant for the year 2004 by (1) conducting a proper comparative assessment of his merits and of the merits of officials in the relevant reference group in that year, taking into account all relevant facts, and by (2) transmitting a new and properly reasoned decision to the complainant.

The European Parliament and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the European Parliament shall send a detailed opinion by 31 January 2009. 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.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 15 October 2008

(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, Official Journal 1994 L 113, p. 15.



(2) Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, paragraph 35.

(3) The Appointing Authority referred to the judgment of the Court of First Instance in Case T-52/90 *Volger v Parliament* ECR [1992] II-121. Paragraph 36 of this judgment is worded as follows: "*It should be noted at the outset that in the case of a decision rejecting a candidature, the appointing authority is bound to give a statement of reasons, at the very least when it rejects a complaint about such a decision. That accords with Article 90(2) of the Staff Regulations, which requires that the appointing authority give a "reasoned decision" in reply to a complaint. As promotions and transfers involve choices, it suffices, according to the Court of Justice, that the statement of reasons for the rejection of the complaint deals with the existence of the legal conditions laid down by the Staff Regulations for the procedure to be lawful.*"

(4) Judgment in Case T-52/90 *Volger v European Parliament*, ECR [1992] II-121, paragraph 40.

(5) Paragraph 36 of the judgment.

(6) The Secretary-General, by letter of 24 June 2004 (annex 9 to the complainant's complaint 3051/2005/(PB)WP), informed the complainant of his position in relation to procedural irregularities identified by the Reports Committee. Thereupon, the complainant's Article 90(2) complaint, addressed to the Secretary-General, was dealt with by Parliament's President.