

Decision of the European Ombudsman closing his inquiry into complaint 2659/2009/(BU)RT against the European Commission

Decision

Case 2659/2009/(BU)RT - Opened on 02/12/2009 - Decision on 13/12/2010

The background to the complaint

1. The complainant submitted the present complaint in his capacity as President of the Staff Committee of the European Parliament and on the latter's behalf.

2. According to Article 13(3) of Annex VII to the Staff Regulations:

*" the Council shall review every **two years** the rates [of the daily subsistence allowances and hotel costs for missions] . This review shall take place in the light of a report by the Commission on the prices of hotels, restaurants and catering services, taking into account the indexes on the evolution of such prices. For the purpose of this review, the Council shall act on a proposal by the Commission by the qualified majority provided for in the first indent of the second subparagraph of Article 205(2) of the EC Treaty. "* (emphasis added)

3. On 27 June 2006, the Council adopted Regulation (EC, Euratom) No 1066/2006 adjusting from 1 July 2006 the scale for missions by officials and other servants of the European Communities in the Member States [1] . The Regulation was adopted on the basis of the Commission's Proposal for a Council Regulation (EC, EURATOM) adjusting from 1 May 2006 the scale for missions by officials and other servants of the European Communities in the Member States.

4. On 30 October 2008, the complainant wrote to Parliament's Secretary-General in relation to the biennial adjustments to the scale setting the daily subsistence allowances and hotel costs for missions. He drew his attention to the fact that the scale set out in 2006 should have been reviewed in 2008. The complainant asked Parliament's Secretary-General to contact the Commission's Secretary-General in order to initiate the review process without delay.

5. On 26 November 2008, the Director-General of Parliament's Directorate General for Personnel (DG Personnel) contacted the complainant by letter. He outlined that, on 21



November 2008, he sent a request to the Director-General of the Commission's Directorate-General for Personnel and Administration (DG ADMIN) [2] asking the Commission to submit to the Council the report under Article 13(3) of Annex VII to the Staff Regulations.

6. On 11 February 2009, the complainant sent a further letter to the Director- General of Parliament's DG Personnel stating that, apart from the above-mentioned reply of 26 November 2008, the Staff Committee had received no information on the matter. The complainant therefore requested the Director-General to contact the Commission once again.

7. On 17 February 2009, the Director-General of Parliament's DG Personnel informed the complainant that, on 22 December 2008, the Director-General of the Commission's DG ADMIN asked Parliament to provide all the necessary data for the Commission to produce its report. The Director-General of DG Personnel added that Parliament had provided the requested information and would follow closely any subsequent action taken by the Commission.

8. On 26 February 2009, the complainant reiterated his request to the Director-General of Parliament's DG Personnel.

9. On 28 October 2009, the complainant turned to the Ombudsman.

The subject matter of the inquiry

10. In his complaint, the complainant made the following allegation and claim.

Allegation:

The Commission failed to submit, in a timely manner, the report and the proposal relating to the 2008 review, in accordance with Article 13(3) of Annex VII to the Staff Regulations.

Claim:

The Commission should submit the report and the proposal relating to the 2008 review, in accordance with Article 13(3) of Annex VII to the Staff Regulations

The inquiry

11. On 2 December 2009, the Ombudsman opened an inquiry and asked the Commission to provide an opinion on the complaint by 31 March 2010.

12. On 2 March 2010, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations.

13. On 8 September 2010, the complainant asked for a copy of the entire file of his complaint.



14. On 27 September 2010, the Ombudsman provided the complainant with a copy of his complaint file. He also renewed his invitation to the complainant to submit observations on the opinion submitted by the Commission by 31 October 2010. The complainant did not submit observations.

The Ombudsman's analysis and conclusions

Preliminary remarks

Admissibility of the complaint to the Ombudsman

15. The Commission took the view that the complaint did not comply with the conditions specified in Article 2(8) of the Ombudsman's Statute and should not, therefore, be considered admissible. In this regard, the Commission pointed out that, if the complainant considered that his mission expenses were not properly reimbursed, Article 90 of the Staff Regulations allowed him to contest the decision of the Appointing Authority taken to this end. In the present case, the complainant did not submit any proof that he had used the procedure foreseen in Article 90.

16. The Ombudsman recalls that Article 2(8) of his Statute provides that no complaints may be made to him that concern work relationships between the Union institutions and bodies and their officials and other servants unless all possibilities for the 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 and the time limits for replies by the authority thus petitioned have expired.

17. As regards the Commission's objection, the Ombudsman points out the following. Although the present complaint was submitted by an official, the complainant acted on behalf of the Staff Committee and in his capacity as its President. The Ombudsman notes, in this regard, that a Staff Committee is not entitled to have recourse to the procedure foreseen in Article 90 of the Staff Regulations because it is not possible for an administrative decision to affect it individually.

18. The Ombudsman further notes that the subject matter of the present complaint is the Commission's alleged failure to submit to the Council, in a timely manner and in accordance with Article 13(3) of Annex VII to the Staff Regulations, the report and the proposal relating to the 2008 review. The complaint does not concern, or even mention, the mission expenses of any individual officials.

19. The Ombudsman therefore considers that, even if the objective of the complaint is to defend the collective interest of officials to receive payments for missions that correspond to the real costs incurred, the alleged maladministration does not, as such, concern work relationships between the institutions and bodies and their officials and other servants. The Ombudsman



therefore takes the view that Article 2(8) of the Statute of the Ombudsman has no application in the present case.

20. Nevertheless, the Ombudsman notes that Article 2(4) of his Statute requires that any complaint made to him must be preceded by appropriate prior administrative approaches to the institution concerned. He considers that appropriate prior administrative approaches were made in the present case. The Commission was informed of the issue and had the opportunity to outline its position. In light of the above, the Ombudsman reiterates his view that the complaint is admissible.

A. Allegation of failure to act in a timely manner

Arguments presented to the Ombudsman

21. The complainant argued that the Commission failed to submit to the Council, in a timely manner and in accordance with Article 13(3) of Annex VII to the Staff Regulations, the report and the proposal relating to the 2008 review.

22. In its opinion, the Commission explained that the review of the expenses scale, provided for in Article 13(3) of Annex VII to the Staff Regulations, took place in 2007. The Council adjusted the expenses scale on 27 March 2007. Therefore, the next review should have taken place in 2009. The Commission outlined that the complaint was submitted on 28 October 2009, before the expiry of the two-year period provided for in Article 13(3) of Annex VII.

23. In the Commission's view, Article 13(3) of Annex VII does not impose an obligation on it to submit a proposal adjusting mission allowances. In this respect, taking into account the need for an increase or decrease in mission allowances, the Commission may decide not to propose adjusting them. In such a case, the Council does not have to act.

24. Finally, the Commission pointed out that the staff representatives, including those of Parliament, requested numerous meetings to be organised on this issue. In this respect, the Commission referred to several meetings organised with staff representatives in 2009. It highlighted that it is obliged to consult staff representatives and that consultations regarding the matter are still ongoing. On 14 September 2009, at the request of the trade unions, the Commission agreed to have a conciliation meeting with staff representatives. According to the Commission, this meeting had not yet taken place by the time the Commission provided its opinion on the complaint. It will be held as soon as a possibility arises. Once the consultations end, the Commission will draft a report and, if it considers it appropriate, submit a proposal to the Council.

The Ombudsman's assessment



25. First, the Commission appears to argue that the last review of the scale took place in 2007 instead of 2006. Therefore, the next review should have taken place in 2009. The Ombudsman is unable to accept the Commission's argument.

26. The Ombudsman notes that, on 26 June 2006, the Council adopted Regulation (EC, Euratom) No 1066/2006 adjusting from 1 July 2006 the scale for missions by officials and other servants of the European Communities in the Member States . (emphasis added)

27. On 27 March 2007, the Council adopted Council Regulation (EC, EURATOM) No 337/2007 of 27 March 2007 adjusting from 1 January 2007 the scale applicable for missions by officials and other servants of the European Communities in Romania and Bulgaria (emphasis added). The Ombudsman notes that the fifth recital of this Regulation reads as follows:

" Because of the accession of the Republic of Bulgaria and Romania to the European Union on 1 January 2007, the reimbursement to officials and other servants of expenditure incurred on missions in these countries should from that date be subject to the rules set out in Article 13 of Annex VII to the Staff Regulations. "

28. The Ombudsman points out that the latter Regulation only extended the application of the expenses scale provided for in Article 13(3) of Annex VII to a specific category of missions, namely, the missions which take place in Romania and Bulgaria. However, it did not constitute a substantive review, in the sense of Article 13 of Annex VII to the Staff Regulations. The Ombudsman is unaware of any 2007 regulation concerning missions in all Member States or even selected ones which modified the previous rules.

29. The Ombudsman also notes that the provisions of Article 13(3) of Annex VII mention the fact that the Council shall review the expenses scale. The above provisions thus impose a clear obligation on the Council, which has to act on the basis of a relevant Commission proposal. In the Ombudsman's view, although the Commission could decide that the ceilings for missions should not be adjusted, such a conclusion should be based on a report and, as a result, a formal Proposal in this sense should be submitted to the Council. The mere fact that the Commission decides that it should not adjust the ceilings for missions does not exempt the Commission from its legal obligation, provided for in Article 13(3) of Annex VII, to draft a report and submit a Proposal.

30. In light of the above, the Ombudsman considers that the Commission failed to submit a report within the two-year deadline, starting from the date when the Council last reviewed the expenses scale provided for in Article 13(3) of Annex VII to the Staff Regulations, which was based on the Commission's relevant proposal.

31. The Commission justified the delay in adopting the above report, and thus in submitting a proposal to the Council, by mentioning the ongoing and prolonged consultations with staff representatives, including the Staff Committee of Parliament. Although the Ombudsman accepts that the Commission's objectives in this regard were reasonable, they cannot justify its failure to comply with legal deadlines. Since the Commission has failed to show that there was an



objective impossibility to comply with its legal obligation (*ultra posse nemo obligatur*), the Ombudsman finds an instance of maladministration.

32. Given that (i) the Commission stated in its opinion that it wanted to bring the procedure in question to an end and (ii) the complainant did not challenge the Commission's above statement, the Ombudsman does not consider it appropriate to pursue a friendly settlement of the matter or to make a draft recommendation. He closes the case with the critical remark below.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission failed to submit, within the deadline provided for in Article 13(3) of Annex VII to the Staff Regulations, the report and the proposal relating to the review of the expenses scale for missions. This was an instance of maladministration.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 13 December 2010

[1] OJ 2006 L 194, p. 1.

[2] The Commission's Directorate-General for Personnel and Administration (DG ADMIN) is now the Directorate-General for Human resources and Security. However, in the present decision reference will be made to 'DG ADMIN', which was the correct name at the time of the relevant facts.