

Decision in case 1023/2014/OV on the European Commission's handling of the 2013 promotion exercise concerning AST officials

Decision

Case 1023/2014/OV - Opened on 11/07/2014 - Decision on 15/02/2016 - Institution concerned European Commission (No maladministration found) |

The complainant is a Commission official (AST) who was not promoted to the next grade in the course of the 2013 promotion exercise and complained about this to the Ombudsman. The Ombudsman informed the complainant that there were no grounds for an inquiry. The complainant however also alleged that eight officials of the same grade as his, who had not been flagged for promotion purposes (on the basis of promotion points accumulated under the previous rules), had been promoted. The Ombudsman therefore opened an inquiry into the allegation that the Commission had failed to explain why eight officials who were not flagged were promoted to the next AST grade.

In its opinion, the Commission explained that the eight officials concerned had comparatively higher merits than the complainant with regard to the three criteria for assessment set out in the General Implementing Provisions and that the flagging only played a subsidiary role. The Ombudsman found that the applicable transitional provisions did not prevent non-flagged officials from being promoted. The Ombudsman therefore found no maladministration by the Commission and closed the case.

The background to the complaint

1. The complaint concerns the Commission's 2013 promotion exercise of AST officials and more particularly the fact that, whereas the complainant was not promoted to the next grade, the Commission promoted eight officials who had not been flagged.
2. The relevant provisions on the Commission's 2013 promotion exercise were set out in Article 45 of the (old) Staff Regulations (in force until 31 December 2013) and in the Commission's Decision of 14 November 2011 on general provisions for implementing Article 45 of the Staff Regulations ("GIPs", also in force until 31 December 2013) [1]. Annex II of the GIPs contains Transitional Provisions applicable to officials who, at the start of the 2012 promotion exercise, had accumulated promotion points on the basis of the earlier rules, namely the GIPs of 18 June



2008:

"Sole article - Officials close to the promotion threshold in 2011 (...)

2. Officials who, at the end of the 2011 exercise, were twelve promotion points or less below the promotion threshold for their grade shall be brought to the attention of their directorate-general by the directorate-general for personnel .

3. If, following a comparison of merits, an official who at the end of the 2011 exercise was five promotion points or less below the promotion threshold for his or her grade is not on the list of officials proposed for promotion referred to in Article 5(6) of these provisions, the list must be accompanied by an explanation. The explanation must be based on a comparison of merits in the grade in question.

4. The explanation referred to in paragraph 3 above must also be provided in the case of officials who, following a comparison of merits, are not included on the list even though they were within six promotion points of the promotion threshold for their grade at the end of the 2011 exercise and received an average of at least six promotion points over the last three promotion exercises conducted on the basis of the general provisions for implementing Article 45 of the Staff Regulations adopted by the Commission on 18 June 2008.

5. The officials referred to in paragraph 2 will be flagged in the secure electronic system as long as they have not been promoted in application of these general provisions " (emphasis added).

3. The complainant is an AST official who was lastly promoted on 1 January 2009. In the context of the 2013 promotion exercise (covering the year 2012), after comparison of the merits of the eligible officials, the complainant was not proposed for promotion to the next grade by his DG. On 8 November 2013, the Appointing Authority adopted the list of promoted officials.

4. On 29 January 2014, the complainant made a complaint on the basis of Article 90(2) of the Staff Regulations against the Commission's decision not to put his name on the list of promoted officials.

5. The complainant pointed out that, at the time of the 2013 promotion exercise, and since his



last promotion in 2009, he had accumulated 20 promotion points in his " *rucksack* " [2] . Since the promotion threshold was 30 promotion points, the complainant had acquired " *twelve promotion points or less below the promotion threshold* " in order to be "flagged". He argued that he had seniority in the grade of 4.997 years and that, given his very good staff reports, he expected to be promoted.

6. The complainant also stated that the Commission should clarify, in case of non-promotion, what would happen to the 20 promotion points accumulated in his rucksack, which represented 4 years of good staff reports.

7. By decision of 5 May 2014, the Commission rejected the complainant's complaint, on the basis of following reasoning:

8. As regards the complainant's seniority and the quality of his staff reports, the Commission argued that Article 45(1) of the Staff Regulations provides that the Appointing Authority promotes the officials with the best merits, on the basis of a comparative analysis, and taking into account three elements: i) the staff reports, ii) the use of language in the execution of the duties other than the main language, and iii) the level of responsibilities exercised. The Commission explained that it has considerable discretion as regards the importance to be given to these three points. In this regard, the control by the Appointing Authority and the Union's courts is limited to the question of whether the administration has not used its discretionary power in a manifestly erroneous way. The Commission relied on the case-law according to which, even if an official has evident merits, this does not exclude that, in the framework of a comparative analysis, other officials have equal or better merits. It was thus on the basis of the above that the Appointing Authority had to verify whether, in comparing the complainant's merits with those of other officials, no manifest error had been committed, and whether the three criteria set out in Article 45(1) had been duly taken into account. The Commission further stated that other criteria, like seniority, which are not mentioned in Article 45 of the Staff Regulations, can only serve as additional criteria in case of equality of merits. The Commission in this respect pointed out that, on 1 January 2013, the complainant had a seniority of only **4 years**, and not 5 which was the average number of years for a promotion to his next grade.

9. The Commission clarified that, for his grade, the quota of promotions for the relevant service was 20 out of a total of 122 officials. The complainant was compared with 68 other officials of the service who were being considered for promotion. The Commission explained that, of the 20 officials who were promoted, 12 had more seniority than the complainant (and 6 of them were "flagged" as being at 12 or less promotion points from the threshold), 6 officials (not flagged) had the same seniority (4 years) as the complainant, and 2 officials (not flagged) had one year less of seniority. On the basis of a comparative analysis, the Appointing Authority concluded that the officials with the same or less seniority had superior merits than the complainant in view of the above three criteria. The Commission provided the following detailed explanations in relation to the three criteria:

10. *First* , with regard to the complainant's staff reports for the years 2009-2012, the Commission quoted large parts of the complainant's 2012 staff report and stated that this was a



very good staff report which did not mention any insufficiency or failure. The Commission pointed out that this was also the case for the complainant's staff reports for the years 2009, 2010 and 2011. The Commission however stated that, when comparing with the merits and responsibilities of the 8 other officials with the same or less seniority, these officials had better merits. The Commission, without disclosing the names of the officials concerned, quoted at length from two other staff reports (of an official with 4 years of seniority and an official with 3 years of seniority) and concluded that, upon reading those staff reports, the assessment of these two officials were more laudatory ("*élogieuses*" in French) .

11. Second , as regards the use of languages, the Commission pointed out that the complainant's staff reports indicated that he was fluent in three languages which he uses daily, but that the officials who were promoted had at least a similar if not a superior use of foreign languages than the complainant (some of them using 4 languages).

12. Third , as regards the level of responsibilities, the Commission explained that the complainant's 2012 staff report mentioned that he is responsible for the coordination of his service and that he is doing this in an independent and autonomous way. The Commission however pointed out that 8 of the 20 officials who were promoted to the next AST grade exercised tasks with a level of responsibility equal or superior to the complainant's.

13. On the basis of the above, the Commission concluded that no manifest error of assessment could be detected in the comparison of the complainant's merits with those of the other officials.

14. As regards the complainant's question regarding what would happen to his 20 promotion points, the Commission stated that these points have no value anymore other than to allow a "flagging" if the official is within less than 12 points from the threshold. However, once promoted, these points and the rucksack are not transferred to the next exercise, and serve no purpose anymore.

The inquiry

15. On 5 June 2014, the complainant turned to the Ombudsman making 10 allegations and 3 claims.

16. On 14 July 2014, the Ombudsman opened an informal inquiry into the complaint. On the basis of a careful analysis of the Commission's decision of 5 May 2014, the Ombudsman's services asked for additional explanations from the Commission with regard to the alleged fact that eight officials who were not flagged had been promoted. The Ombudsman referred to the judgment of the General Court in case T-51/08 P *Commission v Dittert* [3] in which the Court had held, inter alia, that the Appointing Authority should exercise its discretionary power by respecting all the relevant provisions, including the implementing provisions which set out the relevant promotion system, which in the present case also include the Transitional Provisions, namely Annex II of the GIPs. On this basis, the Ombudsman asked the Commission to explain how eight officials, who were not at 12 promotion points or less from the promotion threshold



(and who had thus not accumulated a minimum number of promotion points in order to be flagged) were finally promoted.

17. On 16 and 30 July 2014, the Commission informed the Ombudsman's Office that the complaint could not be dealt with in the context of an informal inquiry.

18. On 19 September 2014, the Ombudsman opened a formal inquiry. She asked the Commission to submit an opinion on the **allegation** that it had failed to explain why eight officials who were not flagged were promoted to the next grade. She also informed the Commission and the complainant that, after having carefully analysed the Commission's decision of 5 May 2014 on the complainant's Article 90(2) complaint, there were not sufficient grounds to open an inquiry into the various allegations and claims concerning the complainant's own non-promotion.

19. The Ombudsman also asked the Commission to say in its opinion what would happen to the 20 promotion points accumulated in the complainant's "rucksack" over four years in case of non-promotion. She noted in this respect that, in its decision of 5 May 2014, the Commission dealt only with the situation where someone is promoted (in which case the promotion points disappear), but did not explain what happens in case of non-promotion of an official.

20. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The complainant also sent further observations on 25 March and 23 June 2015. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation concerning the promotion of eight AST officials who were not flagged

Arguments presented to the Ombudsman

21. **The complainant** argued that the flagging system is an objective criterion for the promotion exercise. However, whereas the Commission had ignored the flagging of the complainant, it had instead promoted eight "non-flagged" officials. The complainant also stated that his promotion points would cease to exist and wondered what compensation he would get instead.

22. In its opinion, **the Commission** stated that the comparison of merits of these eight officials was based on the criteria specified in Article 45(1) of the Staff Regulations and Article 4(1) of the GIPs, namely i) the appraisal reports since their last promotion, ii) the use of languages in the course of their work, other than the one for which they have produced evidence of a thorough knowledge at the time of recruitment, and iii) their level of responsibilities. According to settled case-law, Article 4 of the GIPs provides that the comparison of merits (based in particular on appraisal reports, languages and level of responsibilities) is the essential criterion



for promotion decisions. The EU courts however acknowledged that, when choosing between officials with equal merits, the Appointing Authority may also take into account, on a subsidiary basis, other criteria, such as for instance seniority in the grade (see Case F-57/06, *Hinderickx v Council*, paragraphs 46 and 54).

23. Therefore, the "flag" criterion is not part of the essential criteria specified in Article 45(1) of the Staff Regulations. In the case at hand, after having compared the appraisal reports of the complainant with those of the promoted Commission officials in the same grade who were not flagged, the Appointing Authority concluded that these promoted officials had higher merits than the complainant. In the absence of equal merits, the Appointing Authority did not take into account other criteria, such as the "flagging" which would have played only a subsidiary role.

24. The Commission referred to the rules on promotions set out in the Transitional Provisions (Annex II of the GIPs). It argued that it was clear from these rules that an explanation/justification must be provided by the Appointing Authority when an official who was five, six or less promotion points below the promotion threshold was not on the list of officials proposed for promotion. However, the situation is different in the case of an official who was twelve promotion points below the promotion threshold, which is the case of the complainant. In such a situation, this official "*shall be brought to the attention of their directorate-general by the directorate-general for personnel*" (Article 1(2) and "*will be flagged in the secure electronic system as long as they have not been promoted in application of these general provisions*" (Article 1(5)).

25. Thus, being "flagged" at twelve promotion points does not lead to an automatic promotion nor is the Appointing Authority required to justify the non-selection of that official. The complainant, flagged at twelve points, was brought to the attention of his DG, but was then not proposed by his DG for promotion as the promoted officials had higher merits compared to the complainant, in line with the main criteria set out in Article 45(1) of the Staff Regulations and Article 4(1) of the GIPs.

26. The Commission concluded that it used its discretionary power in a fair and reasonable manner in promoting these eight officials, who although not at 12 promotion points or less from the promotion threshold, had however higher merits than the complainant.

27. As regards the question of what would happen to the 20 promotion points accumulated in the complainant's "rucksack", the Commission stated that the promotion system changed with the 2012 promotion exercise and the GIPs. Since 1 January 2012, with the new promotion system, promotion points have been replaced by *annual promotion decisions* taken by the Appointing Authority, on the basis of i) proposals by the senior management of each DG after a comparison of merits of eligible officials from each DG, and of ii) a Joint Promotion Committee (comparison of merits grade by grade, across the whole of the Commission, in order to check the DGs' proposals).

28. To avoid anyone losing out from the transition to the new promotion system, several transitional measures (Annex II of the GIPs) were put in place. In the case of the complainant,



the points accumulated under the old system were recorded in the complainant's promotion file ("Sysper2") and the complainant was flagged in the system until his next promotion.

29. The Commission added that, even if it were possible to have regard to the rucksack of the complainant, this would not be relevant as the amended Article 45(1) of the Staff Regulations (which entered into force on 1 January 2014) provides that officials may only be promoted if they occupy a post which corresponds to one of the types of posts set out in Annex I, Section A (of the Staff Regulations) for the next higher grade. As laid down in recital 19 of Regulation 1023/2013, the highest grades in the AST function group (namely AST 10 and AST 11) have been reserved for a limited number of officials with the highest level of responsibilities, who can be appointed through a selection procedure, once a corresponding post is published.

30. In his observations, **the complainant** stated that the Commission's position that the "flagging" was only a subsidiary criterion was incorrect and contrary to the Commission's own guidelines in which the appraisal report itself (and thus the points awarded to them) are an essential criterion. Indeed, as pointed out by the General Court in its *Dittert* judgment, the "flagging" is an objective and measurable quantification of merits.

31. The complainant also referred to recital 29 of Regulation 1023/2013 (amending the Staff Regulations) which provides that transitional arrangements should be laid down to enable the new rules and measures to be applied gradually, whilst respecting the acquired rights and legitimate expectations of the staff employed before the entry into force of these amendments to the Staff Regulations.

32. Thus, the complainant asked the Ombudsman to recommend to the Commission that it reconsider its decision and to retro-actively promote him to the next grade.

33. In further observations, the complainant drew the Ombudsman's attention to the judgments of the Civil Service Tribunal of 18 March 2015 in Case F-51/14 and of 3 June 2015 in Case F-78/14, in which the Tribunal ruled that equal, impartial and objective treatment of colleagues eligible for promotion cannot be guaranteed without a codified method of evaluation.

The Ombudsman's assessment

Preliminary remark concerning the scope of the inquiry

34. The Ombudsman notes that, in his complaint to the Ombudsman, the complainant made 10 allegations and three claims concerning his own non-promotion to the next grade. In her letter of 19 September 2014, the Ombudsman already informed the complainant and the Commission that there were no grounds for an inquiry concerning these allegations and claims. The Ombudsman in particular referred to the fact that the complainant had been 4 years (and not 5 as claimed) in his grade, which was less than the average promotion rate of 20% or five years.



35. In his observations on the Commission's opinion, the complainant however came back on the issue of his own non-promotion and asked the Ombudsman to recommend to the Commission to reconsider its decision. The Ombudsman however has to confirm that there are no grounds for an inquiry concerning this issue. Indeed, it appears from the file that, for the 2013 promotion exercise, the complainant had accumulated **20 points** in his rucksack. Since the promotion threshold was **30 points**, the complainant was thus at **10 points from the promotion threshold**. This meant that, on the basis of the Transitional Provisions of the GIPs (Article 1(2) and 5), the complainant, who had already been flagged, had to be brought to the attention of his DG. However, there is nothing in the Transitional Provisions which provides that an official who is at 10 points from the promotion threshold should be automatically promoted [4] , let alone that the Appointing Authority should in such a case provide an explanation for the non-selection of the official for promotion. Indeed, Article 1(3) and 1(4) of the Transitional Provisions provide that the Appointing Authority must provide an explanation for non-inclusion in the list of officials proposed for promotion only if "*following a comparison of merits, an official ... was five [or six] promotion points or less below the promotion threshold for his or her grade*". Given that the promotion threshold was 30 points, this meant that such an explanation had to be provided for all officials who had accumulated at least **24 points** and who had not been proposed for promotion. It is clear that the complainant was not in such a situation. Therefore, contrary to what he argued, and considering that he was one year less in his grade than the average promotion average rate of five years , the complainant had thus no legitimate expectation to be promoted to the next grade. There are thus no grounds for an inquiry concerning the complainant's own non-promotion. The Ombudsman will deal below with the other aspect of the complaint, namely the allegation that the Commission failed to explain why eight officials who were not flagged were promoted to the next AST grade.

Assessment

36. Before dealing with the complainant's allegation, it is important to clarify the applicable rules, in particular the relationship between the GIPs and its Transitional Provisions: The detailed rules for the 2013 promotion exercise were set out in the GIPs of 14 November 2011, including in its Annex II containing the Transitional Provisions. These GIPs replaced the earlier GIPS of 18 June 2008 which provided for a promotion procedure based on promotion points. Article 4(1) of the GIPs of 14 November 2011 changed this and provided that, for the purpose of the examination of the comparative merits of the officials, the Appointing Authority had to take into account, in particular, the following three elements:

- a) reports on the officials drawn up since their last promotion or, failing that, since their recruitment, and in particular staff reports;
- b) the use by the officials in the execution of their duties of languages other than their (main) language;
- c) where appropriate, the level of responsibilities exercised.



37. Article 4(2) of the GIPs further provided that, "[i]f officials eligible for promotion have equal merit based on the three factors referred to in the first paragraph, the appointing authority may give subsidiary consideration to other factors".

38. For officials who, like the complainant, had accumulated promotion points under the previous GIPs of 18 June 2008, the Transitional Provisions provided for some extra rules, the aim of which was to take into consideration these promotion points and to alert the Appointing Authority of those officials who had accumulated a minimum number of points. Article 1(2) and (5) of the Transitional Provisions therefore provided that officials who were 12 promotion points or less below the threshold should i) be flagged and ii) be brought to the attention of their DG by DG Personnel. This however did not mean that only those officials could be proposed for promotion and that officials who were not at 12 promotion points or less from the threshold were excluded from promotion. In fact, the Commission correctly argued in its opinion that the "flagging" was not among the essential criteria for the comparative assessment of the officials. Also, contrary to what the complainant argued, there is nothing in the Transitional Provisions to suggest that officials who were flagged needed to be considered for promotion with priority.

39. Indeed, the Transitional Provisions provided for some additional guarantees, but did not set aside or replace the very basis for the promotion exercise as set out in Article 4(1) and 4(2) of the GIPs which reiterated what is stated in Article 45(1) of the Staff Regulations. In other words, also for officials who, like the complainant, had accumulated promotion points under the previous rules, the **basis for the comparative examination was still Article 4 of the GIPs and not the flagging**, the purpose of which was simply to alert the Appointing Authority of certain officials who had accumulated a minimum number of promotion points. In addition, for those officials with accumulated promotion points, the Transitional Provisions set some additional measures. In particular, Article 1(3) provided that "[i]f, following a comparison of merits [to be understood: on the basis of Article 4 of the GIPs], an official who ... was five promotion points or less below the promotion threshold for his or her grade is not on the list of officials proposed for promotion..., this list must be accompanied by an explanation. The explanation must be based on a comparison of merits in the grade in question". As mentioned above, such an explanation was not required in the complainant's case, since he was not five (or six) promotion points below the threshold.

40. It is on the basis of the above clarifications with regard to the purpose of the flagging that the Ombudsman should examine the complainant's allegation that the Commission failed to explain why eight officials who were not flagged and where at the same grade as the complainant were promoted.

41. In the present case, it appears that 69 AST officials of the relevant service came into consideration for promotion and that 20 officials were promoted. Of the 20 officials who were promoted, 8 had not been flagged, meaning that they were not at 12 or less promotion points from the threshold. As mentioned above, this fact did not prevent them from being promoted. Six of the 8 officials had the same seniority as the complainant, namely four years, whereas 2 of them had one year less of seniority (three years).



42. In its opinion, the Commission explained that these 8 officials, despite not being at 12 points or less from the promotion threshold, had comparatively higher merits than the complainant. In its decision of 5 May 2014, the Commission also explained - with reference to each of the three criteria of Article 4(1) of the GIPs (staff reports, use of languages and level of responsibilities exercised) why the other officials had higher merits than the complainant.

43. On the basis of the above, the Ombudsman concludes that the Commission provided a sufficient explanation as to why eight officials who were not flagged were promoted to the next grade in the course of the 2013 promotion exercise. On the basis of the information available in the file, the Commission does not appear to have used its discretionary power in this area in a manifestly erroneous way.

44. Finally, in relation to the 20 promotion points accumulated in the complainant's rucksack, the Ombudsman can only note that the GIPs of 14 November 2011 introduced new promotion rules which were no longer based on promotion points, but on annual promotion decisions. Promotion points however continued to play a (limited) role under the transitional provisions of the GIPS (see above). However, these GIPS were applicable only until 31 December 2013. Therefore, as pointed out by the Commission, promotion points accumulated under the previous rules, namely the GIPs of 18 June 2008, have no value anymore and cannot therefore play any role with regard to future promotion exercises. The Ombudsman understands the complainant's disappointment with this fact, but unfortunately there is nothing to remedy that situation.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no maladministration by the Commission.

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

Emily O'Reilly

Strasbourg, 15/02/2016

[1] These GIPS, which applied as from the 2012 promotion exercise, replaced the GIPs of 18 June 2008 and were applicable until 31 December 2013.

[2] The term “rucksack” was used under the old rules to refer to the number of promotion points accumulated over the years by an official.

[3] Judgment of the General Court of 30 November 2011 *Commission v Dittert* T-51/08 P



ECLI:EU:T:2011:702, paragraphs 54-55 and 93.

[4] According to the judgment of the General Court in *Commission v Dittert* , in the case of a promotion system based on the quantification of merits (like the annual attribution of promotion points under the former GIPs), the number of points accumulated by the officials will be determinant for their promotion in the sense that **officials who exceed the promotion threshold will, in principle, ipso facto be promoted** (paragraph 93).