

## **Decision in case 2111/2014/ANA concerning the handling by the European Union Agency for Network & Information Security of a recruitment procedure**

Decision

**Case 2111/2014/ANA - Opened on 14/01/2015 - Decision on 11/07/2016 - Institution concerned** European Union Agency for Cybersecurity ( No maladministration found ) |

The case concerned the manner in which the European Union Agency for Network & Information Security (ENISA) handled a recruitment procedure.

The Ombudsman inquired into the issue and found no maladministration concerning the complainant's allegation that his application had been treated unfairly.

However, the Ombudsman identified certain shortcomings in ENISA's procedural handling of the case and has made suggestions to ENISA for improvement in the future.

### **The background to the complaint**

1. The complainant is a journalist who took part in a recruitment procedure for the post of Administrative Officer to the Management Board, the Executive Board and the Permanent Stakeholders Group (Reference Number: ENISA-TA-AD-2013-11).
2. On 28 March 2014, he was informed that his application was not successful and that he was not being invited to interview. He appealed against the decision and asked to be informed of (a) his marks and (b) the marks obtained by the last candidate invited to an interview.
3. Not having received a reply, on 15 May 2014, the complainant turned to the Ombudsman (Complaint 879/2014/ANA). Following the Ombudsman's intervention, ENISA replied on 14 July 2014, apologised for the delay, provided general information about the competition and enclosed a copy of the complainant's individual evaluation sheet.
4. The complainant was unhappy with ENISA's reply because:
  - 1) It did not include the excel spreadsheet containing the marks for all candidates, printed and signed by the selection panel members, [1] but merely an individual evaluation sheet bearing



no registration number and no signature.

2) It did not explain why he was excluded from the competition. The complainant disagreed with the marks received and argued that he should have obtained higher marks. In support of his views, the complainant enclosed his CV and a copy of his competency passport from a previous competition organised by EPSO.

5. On 19 August 2014, the complainant submitted a complaint to ENISA in accordance with Article 90 of the Staff Regulations and asked to have his application reviewed.

6. Not having received a reply to his Article 90 complaint, on 15 December 2014, the complainant lodged this complaint with the European Ombudsman.

## The inquiry

7. The Ombudsman opened an inquiry into the following allegation and claim:

### **Allegation:**

ENISA treated the complainant's application unfairly and committed manifest errors.

### **Claim:**

ENISA should take all necessary measures to ensure the application would be treated correctly and fairly.

8. In the course of the inquiry, the Ombudsman received the opinion of ENISA on the complaint and, subsequently, the comments of the complainant in response to the ENISA opinion.

9. In addition, the Ombudsman inspected ENISA's file on the case. The inspected documents included: 1) the correspondence between the complainant and ENISA; 2) the CVs of the candidates invited to an interview; and 3) the excel spreadsheet compiled by ENISA. The excel spreadsheet contained a column with the candidates' names and a further column with the marks given by the Evaluation Board. The latter column was divided into four columns: (a) Formal Requirements (subdivided further into three columns plus one column to note whether the candidates meet the formal requirements), (b) Selection Criteria - Essential (subdivided further into seven columns plus one column with the total mark under the essential criteria), (c) Selection Criteria - Advantageous (subdivided further into two columns plus one column with the total mark under the advantageous criteria), and (d) Final Total mark. A report on the inspection was sent to ENISA for information and to the complainant for comments.

10. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.



## **Allegation that the complainant's application was treated unfairly and the related claim**

### **Arguments presented to the Ombudsman**

#### **The complainant's main arguments**

**11.** The complainant argued that he should have been awarded a much higher score (34 points) and, consequently, been invited to an interview.

**12.** The complainant disputed the evaluation of his application under the selection criteria and asked the Ombudsman to establish whether these criteria had been applied in an equal and fair manner.

**13.** The main specific arguments the complainant put forward are:

Criterion a): "*Excellent written communication and presentation skills*" (hereinafter, '*Communication*'). Marks awarded: 2/5.

The complainant argued that he has been awarded two European Prizes for Journalism from the European Commission and has worked for several years in the Press Office of Ministries in his native country drafting press releases.

Criterion b): "*Good knowledge of both written and spoken English*" (hereinafter '*English*'). Marks awarded: 2/5.

The complainant argued that he holds a Bachelor's degree from a UK University, which, according to EPSO, implies excellent knowledge of the English language.

Criterion c): "*Familiar with the European Institutions and Bodies*" (hereinafter, '*EU familiarity*'). Marks awarded: 2/5.

The complainant argued that, through his work for the Press Office of various Ministries, he has collaborated with the European Commission, the World Health Organisation and the World Tourism Organisation and that, in carrying out the research that led to the prizes he won, he established contact with EU institutions.

Criterion d): "*Proven experience in the areas mentioned in the job description*" (hereinafter, '*Experience*'). Marks awarded: 3/5.

The complainant argued that the job description for the post overlaps perfectly with his expertise, as provided in his application.



## ENISA's opinion

**14.** ENISA informed the Ombudsman that it had received 540 applications for the post, 8 candidates were invited to an interview and 1 appointed to the post. The threshold for the interview was set by the Evaluation Board at 34 points. The complainant scored 20 points. As a result, he was not invited to an interview. The Evaluation Board noted that the standard of the applications received for the competition was high, with several candidates "*possessing experience similar in nature to that required by the post*".

**15.** The Evaluation Board stated that it used generic metrics, which ENISA uses in all competitions it organises, but focused on the applications that gave direct evidence of supporting Management Boards and Executive Boards or other corporate structures.

**16.** As regards the complainant's application, the Evaluation Board stated by way of general comment that it contained repetitive text and that the applicant missed the opportunity to "*develop and differentiate his experience*" in the positions held in the various Ministries. The Evaluation Board noted that the complainant also missed the "*opportunity to display a good command of English to describe his contributions and achievements in various positions*".

**17.** Concerning the complainant's evaluation under the selection criterion a) Communication, the Evaluation Board noted that, unlike candidates called to an interview, the complainant had experience with the media sector, but not with Management Boards, Executive Boards and similar corporate structures. Concerning his journalistic awards, the Evaluation Board stated that the complainant did not provide information as to what language his articles were written in and where they were published. In addition, the Evaluation Board mentioned that the complainant's application was repetitive and that his CV was not well drafted.

**18.** Concerning the complainant's evaluation under the selection criterion b) English, the Evaluation Board stated that candidates invited to interview "*demonstrated full-time working experience in English in EU institutions or other similar bodies*", while some of them had also worked in areas where technical vocabulary would have been used.

**19.** Concerning the complainant's evaluation under the selection criterion c) familiarity with the EU, the Evaluation Board stated that, unlike the complainant, candidates invited to an interview demonstrated detailed and wide experience of working at policy level in or for EU institutions.

**20.** Concerning the complainant's evaluation under the selection criterion d) Experience, the Evaluation Board found that the complainant lacked experience in project management and working with Management Boards, Executive Boards and other similar corporate structures. Moreover, the Evaluation Board stated that the evaluators found it difficult to reconcile the complainant's freelance experience with his full-time work in the various Ministries of his native country.



**21.** In conclusion, the Evaluation Board declared itself satisfied that it had reached the correct conclusion.

## The complainant's observations on ENISA's opinion

**22.** In his observations on ENISA's opinion, the complainant found ENISA's reply full of generalisations and inaccuracies. He also found it to be evasive. He took issue with the fact that ENISA " *disputed his professional standing* ". The complainant argued that ENISA responded in this way so as to cover up an unfair recruitment procedure. He asked the Ombudsman to intervene so as to remedy the moral damage he has suffered as a result of ENISA's conduct.

**23.** Regarding the selection criteria and, more specifically, Communication, the complainant stated that his award-winning articles were published both in his native language and in English. With reference to the Evaluation Board's statement that his application was repetitive and not well drafted, the complainant argued that his CV had already been awarded a high score in a number of previous competitions run by EPSO.

**24.** Regarding his knowledge of English, the complainant argued that EPSO has accepted his Bachelor's Degree as evidence that he was proficient in English. He argued that ENISA failed to apply the criteria used by EPSO for the evaluation of his knowledge of English. In this regard, he referred to previous competitions organised by EPSO and by the European Central Bank in which his application and CV had received, on the basis of the EU-accepted criteria, a high score.

**25.** Regarding his familiarity with the EU, the complainant argued that familiarity does not mean professional experience working in an EU institution. Regardless of how high candidates with such experience may have scored, the complainant argued that this does not explain the low score he received.

**26.** Regarding his experience, the complainant argued that experience with a Management Board, Executive Board and similar corporate structures was not a selection criterion.

## The complainant's observations on the inspection report

**27.** The complainant pointed out that the report does not indicate that the excel spreadsheet was signed by the members of the Evaluation Board (as required by Section 6.2.1 of ENISA's Recruitment Guidelines). Taking into account that there is no proof of the date on which the excel spreadsheet was drawn up and given that it was not signed, the complainant argued that the excel spreadsheet was drawn up long after the recruitment procedure was completed, so as to cover up a failed, and possibly corrupt, recruitment procedure.

## The Ombudsman's assessment



**28.** The Ombudsman analyses the issues raised under these three headings: 1) the substantive evaluation of the complainant's application, 2) the alleged moral damage suffered by the complainant, and 3) the procedural shortcomings in the handling of the complainant's application.

## 1) Substantive evaluation of the complainant's application

**29.** It is relevant here to have regard to the case-law of the Union Courts [2] and the Ombudsman's settled jurisprudence [3] according to which Selection Boards enjoy a wide discretion in assessing and scoring candidates' performance in a given competition. Hence, the Ombudsman's review of such cases aims to ascertain whether the Selection Board's evaluation was undermined by a manifest error of assessment.

**30.** The Ombudsman notes the complainant's general argument that his application should have been given a higher score and, hence, should have met the threshold for admission to the next step of the competition, the interview. However, according to the case-law of the Union courts, a candidate's personal conviction as to how his merits should have been evaluated cannot replace the Selection Board's assessment and does not constitute valid evidence establishing a manifest error committed by the Selection Board [4] .

**31.** The Ombudsman notes also the complainant's further general argument that the marks awarded by ENISA's Evaluation Board were substantially lower than the evaluation of his CV by EPSO or, in one case, the European Central Bank. Selection Boards enjoy wide discretionary powers in determining whether the qualifications and professional experience of candidates correspond to the level required by the Staff Regulations and the notice of competition itself. [5] The terms of the notice of competition constitute both the legal framework of a Selection Board's proceedings and the assessment framework for its evaluation of the candidates [6] . Given that each competition is different, the level of performance in one competition is not necessarily relevant to another competition. Accordingly, the Ombudsman is not persuaded by the complainant's argument that ENISA must have erred in its assessment of the complainant's application because its assessment of his performance in the ENISA competition was comparatively weaker.

**32.** Against this background, the Ombudsman now assesses the complainant's specific arguments in light of the most relevant selection criteria of this specific competition. In doing so, the Ombudsman considers that the requirements of the competition should be interpreted in line with the purpose of the competition, which follows from *the description of the duties* relevant to the post to be filled [7] .

**33.** In the cases of criteria a) Communication, and d) Experience, the main weakness the Evaluation Board identified in the complainant's application was the lack of experience with Management Boards, Executive Boards and similar corporate structures. The job description reads " *The Administrative Officer to the Management Board, the Executive Board and the*



*Permanent Stakeholders Group will be requested to support the Agency's operational activities in the implementation of its yearly work program notably liaising with the Management Board, the Executive Board, the Permanent Stakeholders Group, key Agency's stakeholders, international institutions, and cooperate with Member States and European Bodies "*. Taking into account the wording of the job description, the Ombudsman considers that the Evaluation Board, in carrying out the comparative assessment of candidates, did not err in considering experience in supporting Management Boards, Executive Boards and similar corporate structures as particularly relevant.

**34.** Regarding c) familiarity with the EU, the complainant is correct to point out that familiarity with EU institutions should not be equated with professional experience in the EU institutions. The Ombudsman notes that ENISA shares that view. However, it is also logical - and certainly does not constitute a manifest error - to regard candidates with professional experience in EU institutions as being, in principle, more familiar with EU institutions than those who do not have such experience.

**35.** Regarding b) English, following an examination of the complainant's CV, the Ombudsman notes that the complainant was awarded a Bachelor's degree by a UK university whose campus is located in the complainant's native country. The Ombudsman acknowledges the complainant's argument that, given his Bachelor's degree from a UK university, he would expect to be given a higher score for knowledge of English, has some merit. However, a Selection Board's assessment of a candidate's knowledge and ability is a comparative exercise [8] . The Selection Board is required to conduct a comparative examination of the knowledge and skills of the candidates in order to select the most suitable with regard to *the duties to be performed* . It follows that the arguments put forward by ENISA's Evaluation Board, that the complainant did not make the case for his proficiency in English in his application and that preference was given to candidates with experience in and knowledge of technical terminology, are reasonable.

**36.** In view of the above, the Ombudsman considers that the complainant has not adduced sufficiently convincing arguments to support his view that ENISA's Evaluation Board committed a manifest error when assessing his application. A careful examination of the applications of the 8 shortlisted candidates, seen by the Ombudsman, confirms this finding.

## **2) The alleged moral damage suffered by the complainant**

**37.** The Ombudsman understands that the submission of a job application, which is assessed in the EU context by a Selection Board, implies that the applicant makes his qualifications, knowledge and achievements subject to examination and scrutiny by that Selection Board. The manner in which value judgements of that Selection Board [9] may be perceived by an applicant is subjective and may generate all kinds of reactions and feelings. In this case, the complainant considers that the comments of ENISA's Evaluation Board were an insult to his professional standing and dignity.

**38.** However, for the Ombudsman to find in ENISA's conduct, the complainant's (subjective)





perception is not sufficient; what matters is whether the comments of ENISA's Evaluation Board went beyond the expression of value judgements and could be *objectively* perceived as insulting towards the complainant.

**39.** Following a careful examination of ENISA's comments, the Ombudsman considers that this is not the case. First, the Ombudsman found that, in carrying out the assessment of the complainant's application, ENISA's Evaluation Board identified aspects in which it was found wanting in comparison with the applications of those candidates who were invited to an interview, and that ENISA did not commit a manifest error of assessment. Second, ENISA's comments concerning the complainant's diligence in preparing the application (use of headings, repetitiveness, use of English, lack of information about the articles for which he received prizes) which the complainant finds offensive do not go beyond the duty of a Selection Board to provide clarifications of its assessment of the complainant's application and, thus, could not be objectively considered as insulting or disputing his professional standing.

**40.** For these reasons, the Ombudsman does not find maladministration in this aspect of the complaint.

### 3) The procedural shortcomings in the handling of the complainant's application

**41.** The Ombudsman identifies two procedural aspects of this complaint which need to be further addressed: a) ENISA's reticence in providing additional information and feedback about the complainant's evaluation and the delay in the handling of his complaint, and b) the formal requirements concerning the excel spreadsheet of the selection procedure in question.

**42.** Regarding a), the Ombudsman refers ENISA to the principles of good administration, in accordance with which EU institutions should be as helpful and service-minded as possible. They should not wait passively for citizens to find their way through administrative procedures, but should instead assist them to achieve a satisfactory outcome. In this case, ENISA's feedback to the complainant, and its replies to his appeals, were considerably delayed. This contributed to his loss of trust in ENISA. While the Ombudsman's inquiries did not reveal anything that cast doubt on the way the selection procedure was carried out, the perception, in the eyes of the complainant, that something might have gone wrong was not helped by ENISA's unhelpful attitude. In order to ensure that this is avoided in the future, the Ombudsman makes the suggestion that, in competition and selection procedures organised by it, ENISA should provide timely and useful feedback to candidates, process requests for review and appeals without undue delay, and indicate the available remedies to the applicants.

**43.** Regarding b), the complainant argued that nowhere does the inspection report establish that the excel spreadsheet was signed by the Evaluation Board members; hence, the excel spreadsheet is legally void. The Ombudsman confirms that the excel spreadsheet obtained on inspection was indeed not signed by the Evaluation Board members, as required by Article 6.2.1 of ENISA's Recruitment Guidelines [10] . The Ombudsman finds that by presenting an





excel spreadsheet, which fails to meet the conditions laid down in Article 6.2.1 of ENISA's Recruitment Guidelines, ENISA infringed an important procedural requirement. This constituted maladministration.

**44.** However, the Ombudsman disagrees with the complainant's argument that the absence of signatures means that the excel spreadsheet constitutes a legally void administrative act. First, the excel spreadsheet is not an 'administrative act'. Even if the contrary were to be assumed, an administrative act could only be declared void where the infringement concerned an *essential* procedural requirement. In accordance with the settled case-law of the Union courts, an essential procedural requirement implies that the act is tainted by a defect in the absence of which the result would have been different [11] . However, this is clearly not the case here.

**45.** Regarding maladministration found here, the Ombudsman considers that this is best dealt with by an improvement in practices for the future. More concretely, the Ombudsman believes that ENISA must organise selection procedures in such a way that they enjoy the confidence of all candidates. For this to happen, ENISA must, as a minimum, respect the procedural rules laid down by itself. To this end, the Ombudsman makes a suggestion that ENISA ensures that, when conducting selection procedures, it adheres strictly to the relevant applicable procedural rules.

## Conclusion

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

**No maladministration has been established in relation to the complainant's allegation that his application was treated unfairly.**

The complainant and ENISA will be informed of this decision.

## Suggestions

**In competition and selection procedures organised by it:**

**1) ENISA should provide timely and useful feedback to candidates, process requests for review and appeals without undue delay, and inform applicants of the remedies available to them should they be unhappy with the outcome.**

**2) ENISA should ensure that it adheres strictly to the relevant applicable procedural rules.**

Emily O'Reilly



Strasbourg, 12/07/2016

Final English version of the decision on complaint **2111/2014/ANA**

- [1] Section 6.2.1 of ENISA's recruitment guidelines.
- [2] Case T-233/02 *Alexandratos and Panagiotou v Council* [2003] SC-I-A 201, paragraph 50.
- [3] Decision of the European Ombudsman in Complaint 2050/2011/RT; Decision of the European Ombudsman in complaint 1339/2014/DK.
- [4] Case T-53/00 *Angioli v Commission* [2003] SC-I-A 13, paragraph 94.
- [5] Case T-332/01 *Pujals Gomis v Commission* [2002] ECR-SC I-A 233, paragraphs 39-41.
- [6] Case T-80/96 *Fernandes Leite Mateus v Council* [1997] ECR-SC-I-A 87, paragraph 27.
- [7] Case T-146/99 *Teixeira Neves v Court of Justice* [2000] ECR-SC-I-A 159, paragraphs 34-36.
- [8] Case T-352/13 P *BX v Commission* , ECLI:EU:T:2015:225, paragraphs 23-26 and the case-law cited.
- [9] Case T-19/03 *Konstantopoulou v Court of Justice* , EU:T:2004:49, paragraph 24.
- [10] " 6.2.1 Screening:

*Applications are sent to a specific HR mailbox. PDF data is extracted in order to compile the list of applicants and their data, which allows to automatically create an excel file with the following documents:*

....

*HR prepares this excel file, creates a folder to save it together with all PDF applications received and the vacancy notice. This folder is uploaded on three secured laptops (locked USB access, no internet access) to be made available to the selection members for the screening. The selection committee is then invited by HR via an outlook invitation to the screening session. Panel members are advised to compile their definitive marks in the excel file of one of the three laptops. Once the screening is completed the laptops are given back to HR who save back the filled excel final draft to the HR drive, prints the documents, and have them all signed by the panel members. .... Selection members make a comparative review of qualifications and professional experience against the requirements and criteria stated in the vacancy notice of the position concerned. Candidates who fail to meet any of the formal requirements are not be evaluated on the essential and advantageous criteria ."*



[11] Case 30/78 *Distillers v Commission* ECLI:EU:C:1980:186.