

Decision of the European Ombudsman on complaint 905/97/PD against the European Commission

Decision

Case 905/97/PD - Opened on 11/11/1997 - Decision on 07/05/1999

Strasbourg, 7 May 1999 Dear Mr V., On 20 October 1997, you lodged a complaint with the European Ombudsman concerning the European Commission. You put forward that the Commission had not complied with a ruling of the Court of First Instance by which a Commission decision filling the post as head of the Commission's delegation in Kazakhstan was annulled. On 11 November 1997, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 29 January 1998 and I forwarded it to you with an invitation to make observations, if you so wished. On 26 February 1998, I received your observations on the Commission's opinion. On 4 June 1998, I wrote again to the Commission, requesting it to submit the file on the matter. On 13 July 1998, the Commission sent its second opinion with documentation in annex and I forwarded it to you with an invitation to make observations, if you so wished. On 5 November 1998, I received your observations on the Commission's second opinion. I am writing now to let you know the result of the inquiries that have been made. **THE COMPLAINT** The background to the complaint is in substance the following: In the spring of 1994, you applied for the post, published by vacancy notice COM/026/94 of 17 March 1994, of head of the Commission delegation. According to the notice, the special requirements to be met for the post were: "*..connaissance approfondie des traités et politiques communes des relations extérieures de la Communauté. Connaissance approfondie des politiques économique, commerciale et de coopération technique dans le Kazakhstan et les républiques d'Asie centrale en question. Connaissance du russe et/ou allemand, langues locales serait un avantage.*" On 8 August 1994, the Commission decided to nominate another applicant, Mr K., to the post in question. You brought legal proceedings against that decision and by judgment of 2 October 1996, the Court of First Instance annulled the decision on the grounds that the Commission had not respected the terms of the notice of vacancy and had assessed facts in a manifestly wrong way. In its judgment, the Court observed that at the hearing, the Commission had agreed that at the moment of his nomination, Mr K. did not possess "*une connaissance approfondie des politiques économique, commerciale et de coopération technique dans le Kazakhstan et les républiques d'Asie centrale.*" It shall also be observed that the Court stated that the Commission - if no applicants met the requirements stated in a vacancy notice - was free to terminate the procedure by that finding and then publish a new notice of vacancy with other requirements, made in the interest of the service. After the annulment, the Commission decided to nominate Mr K. temporarily to the post in question until a final decision could be taken on how to fill the post permanently. Under the internal complaint



procedures of the Commission, the complainant lodged a complaint against this decision. The Commission rejected the complaint by decision of 13 May 1997. In order to fill the post permanently, the Commission published a new vacancy notice, COM/083/97. In this new notice, the Commission had deleted the above quoted requirement. Furthermore, it was no longer indicated that knowledge of Russian and/or German and local languages would be an advantage. The Commission had replaced these requirements with others of a more general nature. The complainant applied under this new vacancy notice while at the same time, he lodged an internal complaint against the notice, arguing that the notice should contain the above mentioned requirement and the language provision. By note of 1 July 1997, a body called the Consultative Committee for Nominations informed the complainant that it had recommended to the appointing authority not to retain him for the job. Subsequently, Mr H. was nominated to the post with effect as from 1 October 1997. By decision of 22 September 1997, the Commission rejected the complaint which the complainant had brought against the vacancy notice. Against this background, the complaint with the European Ombudsman was lodged. The complainant put forward that the Commission had not taken appropriate steps to comply with the ruling of 2 October of the Court of First Instance. According to the complainant, it was wrong in the first place that the Commission had appointed Mr K temporarily to the post after the annulment of his permanent appointment and secondly, the Commission had not been entitled to change the requirements for the post in the second vacancy notice.

THE INQUIRY

The Commission's opinion In its opinion, the Commission firstly observed that the complainant's two internal complaints had been treated within the Commission's normal procedures which allow the complainant to develop his arguments in writing and in a meeting. As for the temporary nomination of Mr K., the Commission stated that this measure had been subject to long discussions within the services concerned which had resulted in the conclusion that in the interest of the service, Mr K. should continue temporarily on the post. This solution was considered better than leaving the post temporarily vacant, or filling it with another servant already in service in abroad or in service at the Commission's headquarters in Brussels. The Commission further stated that if it had proceeded otherwise, it would have been necessary to find a servant who fulfilled all the requirements in the first vacancy notice and that in any case, the complainant did not fulfill all the requirements himself. With all probability, there would be no person fulfilling the requirements laid down in the first vacancy notice. The Commission therefore considered that it had taken the measures required by the case law of the Community Courts, in particular the ruling Frederiksen (IV), in order to comply with the ruling of 2 October 1996. As for the change of requirements in the second vacancy notice, the Commission stated it followed clearly from the case law that it was entitled to change any job requirement in the interest of the service. Moreover, the Commission stressed that the change of the requirements in the second vacancy notice was in line with its general policy for filling posts of heads of delegations. **The complainant's observations** In his observations, the complainant maintained the complaint. He suggested that the Ombudsman should preside a meeting between the complainant and the responsible Commission officials with a view to arriving at a solution to the complainant's situation.

FURTHER INQUIRIES



After careful consideration of the Commission's opinion and the observations of the complainant, the Ombudsman asked the Commission to submit all documents and notes related to the long discussions in the responsible services, to which the Commission had referred in its opinion. Moreover, the Ombudsman asked the Commission to submit all documents and notes related to the second nomination procedure. **The Commission's second opinion** In its second opinion, the Commission stated that it did not possess any written documents related to the above mentioned long discussions in the responsible services. For the exclusive use of the Ombudsman, it submitted all documents and notes related to the first and second nomination procedure. The submission was made solely to the Ombudsman, as the material contained data on other applicants. Moreover, the Commission stated that it did not in any way seek to exclude the complainant, but that it acted in the interest of the service. **The complainant's further observations** The complainant maintained the complaint. He stated that a servant who wins a case before the Community Courts, is in reality treated badly and is banned from acceding in the future to all similar posts. He renewed his suggestion that the Ombudsman should preside a meeting between him and the responsible Commission officials with a view to finding a friendly solution for the complaint.

THE DECISION

1 The Commission's decision to fill the post temporarily 1.1 During the legal action that the complainant brought against the nomination of Mr K. to the post as head of delegation, the Commission admitted that Mr K. did not fulfill the requirements for the post. After the Court of First Instance had annulled the nomination, the Commission appointed Mr K. temporarily to the post. This temporary appointment lasted for almost one entire year. The complainant considered that the Commission had failed to take the necessary measures to comply with the ruling of the Court of First Instance. 1.2 Thus, the question is whether the Commission has complied with rules and principles binding upon it, included Article 176 EC Treaty according to which the institution whose act has been annulled is under an obligation to take the necessary measures to comply with the court ruling annulling the act. 1.3 In assessing this question, the ruling of the Court of First Instance in case T-106/92, Frederiksen v. Parliament (IV) [1995] ECR II-99 is of particular relevance. The facts of that case were briefly that the Court of First Instance had annulled a nomination, challenged by Mr Frederiksen, on the grounds that the nominated person did not fulfill the requirements laid down by the vacancy notice, the so-called Frederiksen (I) ruling. The Parliament brought an appeal against this judgment before the Court of Justice and requested at the same time the suspension of the execution of the judgment of the Court of First Instance. This request was dismissed by the Court of Justice and so was the appeal. In the time between the dismissal of the request for suspension and the dismissal of the appeal, the Parliament appointed temporarily the person whose nomination had been annulled. It is this decision which was challenged in Frederiksen (IV). The Court of First Instance found that in taking that decision, the Parliament had failed to take the necessary steps to comply with the ruling Frederiksen (I). In its reasoning, the Court stated that the temporary appointment of the person whose nomination had been annulled because she did not fulfill the requirements for holding the post in the interest of the service, was wrong unless the Parliament could show that no other solution in the interest of the service had been available to it. The Court then stated that the file did not contain the necessary elements on the question whether the appointing authority had sought to find another servant whose temporary nomination responded better to



the interest of the service. As the Parliament thus had not showed that it had no other possibility in the interest of the service than the temporary appointment, the Court of First Instance annulled that decision. 1.4 Thus, in this case the Commission must be assumed to be wrong in appointing temporarily the person whose nomination had been annulled, unless it shows that no other solution in the interest of the service is available to it. To justify its decision the Commission has referred to the likelihood of not finding any servant who would fulfill the requirements laid down by the vacancy notice. Furthermore, it has in general terms stated that the interest of the service was not served by leaving the post unfilled or filling it with somebody else. The referral to this likelihood and in general terms to the interest of the service does not permit the Ombudsman to ascertain that the Commission did in fact actively seek to explore all possibilities for complying with the ruling of the Court of First Instance, before it proceeded to the temporary appointment of the person whose nomination had been annulled. Against this background, the Ombudsman finds that the Commission has not complied with the rules and principles binding upon it and thus, it has committed an instance of maladministration. The Ombudsman shall therefore address the following critical remark to the Commission: Principles of good administration require the administration to comply with rules and principles which are binding upon it. In the context of the annulment of a nomination, the administration cannot proceed to the temporary appointment of the person whose nomination has been annulled unless it shows that no other solution in conformity with the interest of the service is available to it. In this case, the Commission made a temporary appointment, which lasted almost for one entire year, of the person whose nomination had been annulled. The Commission sought to justify this by referring to the likelihood of not finding any person, fulfilling the requirements for the post, and in general terms to the interest of the service. This referral does not warrant that no other solution was available to the Commission. Thus, the Commission failed to comply with principles of good administration. **2 The change of requirements in the second vacancy notice** 2.1 The complainant has put forward that the Commission was not entitled to change the job requirements in the vacancy notice which succeeded the annulment of Mr K.'s nomination on the basis of the original vacancy notice. 2.2 It is established case law that the institutions are free to change job requirements as long as it is in the interest of the service. There are no elements at hand which indicate that the change of job requirement was not made in the interest of the service. On the contrary, it has appeared that in changing the job requirements, the Commission brought the job description in line with the ones it normally uses for filling posts as the one in question. Furthermore, the documentation submitted to the Ombudsman does not suggest any irregularity in the Commission's action in the two procedures for filling the post in question permanently. The Ombudsman therefore finds that the examination of this aspect of the complaint has not revealed any instance of maladministration. **3 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark: Principles of good administration require the administration to comply with rules and principles which are binding upon it. In the context of the annulment of a nomination, the administration cannot proceed to the temporary appointment of the person whose nomination has been annulled unless it shows that no other solution in conformity with the interest of the service is available to it. In this case, the Commission made a temporary appointment, which lasted almost for one entire year, of the person whose nomination had been annulled. The Commission sought to justify this by referring to the likelihood of not finding any person, fulfilling the requirements for the post, and in general



terms to the interest of the service. This referral does not warrant that no other solution was available to the Commission. Thus, the Commission failed to comply with principles of good administration. The President of the European Commission will also be informed of this decision. Yours sincerely, Jacob SÖDERMAN