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Staff Matters

Legal News from Union Syndicale

This newsletter deals with a recent decision of the General Court on the question whether the law allows a superior to be an impartial appeal body for review of the appraisal report of a staff member, in case the same superior had played an important role in setting up the respective appraisal report before, as a reporting officer. The Court has decided on this that the obligation of impartiality constitutes a fundamental guarantee which must be respected, since otherwise the staff member would be deprived of his effective right to a genuine review.

Please continue to send us your suggestions for topics to address, or your questions and comments, at StaffMatters@unionsyndicale.eu.

Appraisal reports, impartiality of appeal procedure, Art. 11 SR, Art. 41 Charter of Fundamental Rights

Staff appraisal reports: impartiality is a fundamental guarantee of the procedure - the Court quashes a decision of EUIPO

Case T-808/17, Pethke / EUIPO, of 3 December 2019

Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.



Background and facts of the case

The applicable general implementing rules for staff reports foresee that the direct superior (“assessor” or reporting officer) is charged with the assessment of a staff member, and that the appeal assessor shall be the staff member who is the direct superior of the assessor.

In the present case, the direct superior of the applicant drafted the annual appraisal report for the year 2016. He also consulted the Executive Director of EUIPO, who for a period of nine months was the former superior of the applicant. In his written assessment he referred to the appraisal provided by the former superior for that nine months period. The applicant disagreed with the appraisal and requested an appeal assessment by the superior of the assessor, i.e. the Executive Director of EUIPO.

In his complaint and subsequent court action, the applicant pleaded a breach of essential procedural requirements and a manifest error of assessment. Specifically, he criticized the lack of an independent review of his assessment for 2016, arguing that the appeal assessor for this year was his former superior who had been instrumental in preparing the 2016 assessment.

Decision of the General Court

The Court decided to annul the appraisal due to a lack of impartiality of the appeal assessment. It is of the opinion that without this procedural error of law, the report’s content could have been different. The right of the applicant to a genuine review of his assessment would be deprived of any practical effectiveness in case the fundamental guarantee of impartiality was not respected.

The argument that the internal directives of EUIPO or the implementing rules did not stipulate an explicit rule of how to

handle the concrete situation was of no importance to the Court: although such a prescriptive rule was missing, the obligation to ensure the impartiality of the internal review procedure would have justified to depart from the existing EUIPO instructions concerning appraisal.

The Court emphasizes the importance of the duty of officials to be impartial, as enshrined in Art. 11 (1) of the Staff Regulations (SR), according to which the official shall carry out the duties assigned to him objectively and impartially. The institutions, bodies, offices and agencies of the Union are required to respect the fundamental rights guaranteed by EU law, including the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. According to Article 41 (1) of the Charter, each person has a right to have their affairs handled impartially by the institutions, bodies, offices and agencies of the Union.

The Court describes the content of impartiality in two manifestations: on the one hand a subjective impartiality, according to which no member of the institution concerned may show bias or personal prejudice, and, on the other hand an objective impartiality in the sense that the institution must provide sufficient guarantees to rule out any legitimate doubt as to any prejudice. The Court further explains that the requirement of impartiality imposed on the institutions, bodies, offices and agencies in the exercise of their functions seeks to ensure the equal treatment on which the European Union is founded. That requirement is intended, in particular, to avoid any conflict of interests of officials and other servants acting on behalf of the institutions, bodies, offices and agencies. Given the fundamental importance of ensuring independence and integrity, both for the internal functioning and the outward appearance of the Union institutions, bodies, offices and agencies, the requirement of impartiality covers all circumstances in which the official or

servant must reasonably see that, in the eyes of third parties, they may appear to be capable of impairing his independence in that area.

Reporting officers cannot be regarded as being biased and non-objective solely because as superiors they are involved in the professional activities of their staff. It is rather that involvement that enables them to give the most appropriate assessment of the activities of the staff member. Here, however, the applicant's former superior, in charge during three quarters of the period in question, was instrumental for drawing up the respective assessment. The fact that he decided again in the internal appeal procedure raised doubts as to his impartiality as appeal assessor.



Comments:

1. The judgment provides a clear support to the procedural rules guaranteeing the impartiality required for the appraisal review, and in more general terms to the obligation of officials to act impartially, in accordance with Art. 11(1) SR. The judgment deducts this obligation also from the fundamental right to Good Administration stipulated in Art. 41 of the EU Charter of Fundamental Rights. That deduction is of special importance because it implies the obligation of the superior of the staff member towards his colleague as bearer of the right. The superior is bound by and the staff member can rely on the Charter right despite the internal administrative nature of the dispute.

2. This judgment follows the recently confirmed line of case law of the Court of Justice that an internal appraisal review procedure can only contribute to the objectivity of the assessment and thus prevent litigation if it offers assurance to the member of staff that a genuine review will be carried out. The Court has formerly ruled on this in its judgment of 3 April 2019, CJ / ECDC, C-139/18 P, para. 44. That decision annulled the earlier dissenting judgment of the General Court in Case T-602/16, CJ / ECDC, of 13 December 2017, exactly on these grounds.

3. The judgment gives an example of how the Court values the importance of procedural rights: On the one hand side, the assessors enjoy a high degree of discretion when assessing the work of the staff members, and it is not for the

judge to intervene in this assessment and to verify its validity, unless there is a manifest error or a manifest excess of the limits of discretion (cf. Cases T-23/91, *Maurissen / Court of Auditors*, para. 40; T-144/03, *Schmit / Commission*, para. 7; 36/81, 37/81 and 218/81, *Seton / Commission*, para. 23). The judicial review of assessments is limited to the control of the regularity of the procedure, the accuracy of the facts and the absence of a manifest error of assessment or of misuse of powers (Case T-18/93, *Marcato / Commission*, para. 45). On the other side, this wide margin of discretion must be counterbalanced by a particular attention given to the rules governing the organization of that assessment and the course of the procedure for that purpose (cf. judgments in Case T-92/01, *Girardot / Commission*, para. 24; T-336/02, *Christensen / Commission*, para. 38).

Case-law stipulates that where an EU institution has wide discretionary powers, compliance with the procedural safeguards provided for in the EU legal order is even more fundamental (Case C-269/90, *Technische Universität München*, para. 14). Those guarantees include, in particular, the duty of the institution to examine carefully and impartially all the relevant aspects of the case. In other words, an infringement of procedural rules in administrative areas granting wide discretion to decision-makers is scrutinized by the Union judge with particular attention.