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Art. 45 SR - promotion - appraisal report - probation report – non-material damage

Vitiated promotion procedure: in principle, promotions must be based solely on appraisal reports

Case T-511/18, XH / Commission, of 25 June 2020

In this newsletter we report about a case decided by the General Court in which it annulled the decision not to promote an official. The promotion procedure was vitiated because it took into account also earlier reports relating to the probation period of the applicant, instead of being solely based on appraisal reports. "Other information" concerning the administrative and personal situation of the candidates for promotion (i.e. other than appraisal reports) may only be taken into account in exceptional circumstances. The Court determines these exceptional circumstances in an obiter dictum.

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Background

The central norm for promotions, which was infringed in the present case, is Art. 45(1) Staff Regulations (SR). It provides that, when considering comparative merits, the appointing authority has to, in particular, take account of the reports on the officials. Art. 4(1)(a) of the GIP (general implementing provisions) stipulates, inter alia, that, for the purposes of the examination of the comparative merits of the officials eligible for promotion, the appointing authority has to take into account, in particular, 'reports on the officials drawn up since their last promotion or, failing that, since their recruitment, and in particular staff reports drawn up in accordance with the general provisions for implementing Article 43 of the Staff Regulations'.

Facts of the Case

The applicant (an official of OLAF) was recruited at grade AD5, subject to a probationary period. An interim probation report indicated difficulties that the applicant encountered with colleagues at the start of her probationary period. This was annexed to the end-of-probation report. Later, the applicant was not promoted in the 2017 promotion exercise. She lodged a complaint and subsequently filed an action for annulment of the decision not to promote her. She alleged, inter alia, that Art. 45 SR had been infringed, in so far as her interim probation report and end-of-probation report had been taken into account in the consideration of the comparative merits in the 2017 promotion exercise. She was promoted in the subsequent 2018 promotion exercise.

The Decision of the Court

The General Court annulled the decision of the Commission not to include the applicant in the list of officials promoted in the 2017 promotion exercise. The Court further awarded compensation (2.000 €) to the official for the non-material damage that she had suffered.

The Court ruled that, in accordance with Art. 45(1) SR and Art. 4(1)(a) of the GIP, the appointing authority - when considering the comparative merits in a promotion exercise - is required to take into account, in particular, the **appraisal reports** that are drawn up for officials. Those appraisal reports constitute an essential criterion for assessment each time the official's career is taken into consideration for the purposes of adopting a decision concerning his or her promotion.

The appointing authority, says the Court, may only take into account **other information** concerning the administrative and personal situation of the candidates for promotion **in exceptional circumstances**. This can particularly be the case when an appraisal report does not exist. However, such additional information cannot remedy the lack of an appraisal report, except if four conditions are fulfilled: (1) it must be sufficiently objective to allow judicial review, (2) it must contain an assessment of the official's merits by the persons responsible for drawing up his or her appraisal report, (3) it must have been disclosed to the official in such a way as to guarantee his or her rights of defence, and (4) it must be known to the promotions committee when it considers the comparative merits of all the candidates. This means that information capable of compensating for the lack of an appraisal report must be **broadly comparable to that report, as regards its provenance, the procedure for drawing it up and its purpose**.

According to the Court, appraisal reports and reports drawn up during the probationary period have separate purposes and functions, and they cannot be subject to an "automatic and absolute comparison", because "the

two types of reports have different assessment headings and grading systems". The assessments in an appraisal report target on performance and are intended to provide the administration with periodic information, while the end-of-probation report is principally intended to evaluate the fitness to carry out the work corresponding to his or her post and to become an established official. The assessments contained in a probation report cannot be **equated to or substitute or compensate** for those carried out in an appraisal report.

While the appraisal reports are acts adversely affecting the official since they are capable of having an influence over the entire course of that official's career, that is not the case for measures relating to the progress of the official's probationary period, such as probation reports, the purpose of which is to prepare the decision of the administration whether to appoint the person concerned as an established official at the end of the probationary period or to dismiss that person. For the same reason the end-of-probation report cannot be contested independently by an action for annulment: it only has the purpose to prepare the mentioned decision.

Thus, the Court concluded that an end-of-probation report, even if it contains a certain number of observations on the official's or other staff member's fitness for work, cannot, in principle, be taken into account by a promotion committee. Therefore, noting that, in the present case, two appraisal reports (2015 and 2016) had been drawn up in respect of the applicant and that the assessments contained in those reports constituted a proper basis for the consideration of the comparative merits provided for in Art. 45(1) SR, the Court held that there were no exceptional circumstances justifying the taking into account of the end-of-probation report and the interim probation report annexed to it in the consideration of the applicant's comparative merits in the 2017 promotion exercise. In any event, unlike the appraisal reports, the applicant's interim probation report had not been drawn up either in order to allow for an objective appraisal of the applicant or in order to assist in assessing her career development and, moreover, it contained unusual and harsh criticisms, which was a further reason for precluding the interim probation report from being taken into account in the consideration of the applicant's comparative merits.

The Court concluded that the taking into account, on the part of the competent appointing authority, of the reports relating to the applicant's probationary period constituted an irregularity capable of vitiating the 2017 promotion procedure in so far as it concerned the applicant. Since the outcome of the 2017 promotion procedure could have been different in the absence of that procedural irregularity, the Court annulled the decision not to promote the applicant.

Furthermore, it ordered the Commission to pay to the applicant the sum of 2.000 € ex aequo et bono as compensation for the non-material damage that she had suffered for the anxiety and uncertainty she experienced as to her reputation and professional future.

Comments :

1. First, as a practical hint: the notice of those candidates promoted which does not contain the name of the person concerned is the decision that can be challenged in a complaint and subsequent court action (it is the decision not to promote the official).

2. As a general remark on appraisals: the superior drafting an appraisal report enjoys a broad margin of discretion and must, in order to fulfil his or her responsibilities, make comments about the quality of the official's work. This starting point is in line with standing case law (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). An infringement of procedural rules in administrative areas granting wide discretion to decision-makers is scrutinized by the Union judge with particular attention (s. our StaffMatters newsletter No. 12, about the Pethke case).

3. In the case at hands, the Court interprets the wording of Art. 45 SR and Art. 4(1) GIP on "reports" in the promotion process. The judgment states that appraisal reports constitute an "indispensable criterion" of assessment when considering promotion of an official. The decision not to promote an official is tainted with irregularity where the appointing authority did not consider the comparative merits of officials eligible for promotion, because one or more appraisal reports were not available owing to an error on the part of the administration (s. also Case F-118/15, Kotula, para. 38; Case T-25/92, Vela Palacios, para 43, and Case T-93/03, Konidaris, para. 88).

4. An end-of-probation report must not be re-used in a promotion procedure, next to appraisal reports. The reason is that end-of-probation reports and appraisal reports are different in nature and function, and the respective assessments under these reporting obligations "cannot be equated to or substitute or compensate for" one another.

5. Nevertheless, the Court acknowledges that in exceptional circumstances (cf. Case T-202/99, Rappe, para. 40 and 54) "other information concerning the administrative and personal situation of the candidates for promotion" can be taken into account, such as here an end-of-probation report, especially when an appraisal report does not exist. This is an obiter dictum of the judgment, because the present case did not require to state on this question, since even two appraisal reports were in the file. It could have sufficed for the Court to state that a report on the probation period cannot be re-used in the promotion process.

6. Nevertheless, the Court even proceeded to lay down, in general, four cumulative conditions under which "additional information" can replace or amend an appraisal report: (1) it must be sufficiently objective to allow judicial review, (2) it must contain an assessment of the official's merits by the persons responsible for drawing up his or her appraisal report, (3) it must have been disclosed to the official in such a way as to guarantee his or her rights of defence, and (4) it must be known to the promotions committee when it considers the comparative merits of all the candidates. It should be noted that from the judgment it is not fully clear whether the Court is going to apply this concept only to situations where an appraisal report is completely missing, or (broader) to each "other information" that is being added to the promotion exercise (i.e. next to an appraisal report). We assume that in practice the difference is not significant because of the tightness of the conditions described above.

7. It is interesting to note that the Court thus opens the door for a promotion procedure that allows to take information into account that is not contained in appraisal reports, as long as it is "broadly comparable" to a report, as regards its "provenance, the procedure for drawing it up and its purpose". Although this could pave the way for administrative flexibility in the promotion process, it should however not be interpreted as an invitation for the superior or the competent authority to skip appraisal reports or to amend them by "other information" that would jeopardise the purpose and the balanced nature of the appraisal exercise.

8. What seemed to have influenced the present decision of the Court was the harsh and personalised language of the interim-probation report, at least for the question whether probation report and appraisal report can be equated to or compared with one another. The Court accepted the argument that the interim probation report became part of the promotion procedure, although there was no strict evidence provided in that sense: it basically sufficed for the Court to state that a member of the promotions committee had accessed the file of the interim probation report before the promotion decision had been taken. Also the fact that the applicant was promoted in the next following promotion exercise supported the assumption that the challenged decision could have been different in the absence of the procedural irregularity (i.e. the infringement of Art. 45 SR).

9. Practically, this means that an official can argue that a critical comment relating to the probation period must not become part of the appraisal reports and subsequently of a promotion exercise. Where it is already part of the file, a request to remove the report from the file might be appropriate.

10. On the damages: the failure on the part of the competent appointing authority to comply with its obligations under Art. 45 SR caused the applicant to suffer a particular non-material damage, which cannot be adequately compensated for by the mere annulment of the decision not to promote her. She was however promoted in the subsequent promotion cycle, so that – in view of the Court - the damage was somehow limited.[1]

[1] For further reading on compensation for damages ex aequo et bono see O. Mader, Le droit à l'indemnisation ex aequo et bono dans la fonction publique européenne, KritV/CritQ/RCrit 2/2013 (Nomos) ISSN 2193-7869.