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Staff Matters

Legal News from Union Syndicale

Impartiality – appraisal report – Art. 11, Art. 11a SR – request for assistance - Art. 24 SR – alleged harassment – administrative inquiry – prima facie evidence

Court annuls appraisal report: Impartiality during appraisal was not guaranteed due to inquiry against reporting officer

Case T-158/23, Colombani v EEAS, judgment of 4 December 2024

In this newsletter we present a case in which the Court annulled an appraisal report. The applicant had requested assistance for alleged harassment and the administration opened an inquiry against the reporting officer. That inquiry was closed, but its outcome was not yet known at the time of the appraisal. The case is enlightening on the principle of objective impartiality in the context of the appraisal procedure, the allocation of reporting responsibility by the institutions in the appraisal exercises, the potential need of reporting officers to recuse, and on the effect of requests for assistance and administrative inquiries on appraisals.

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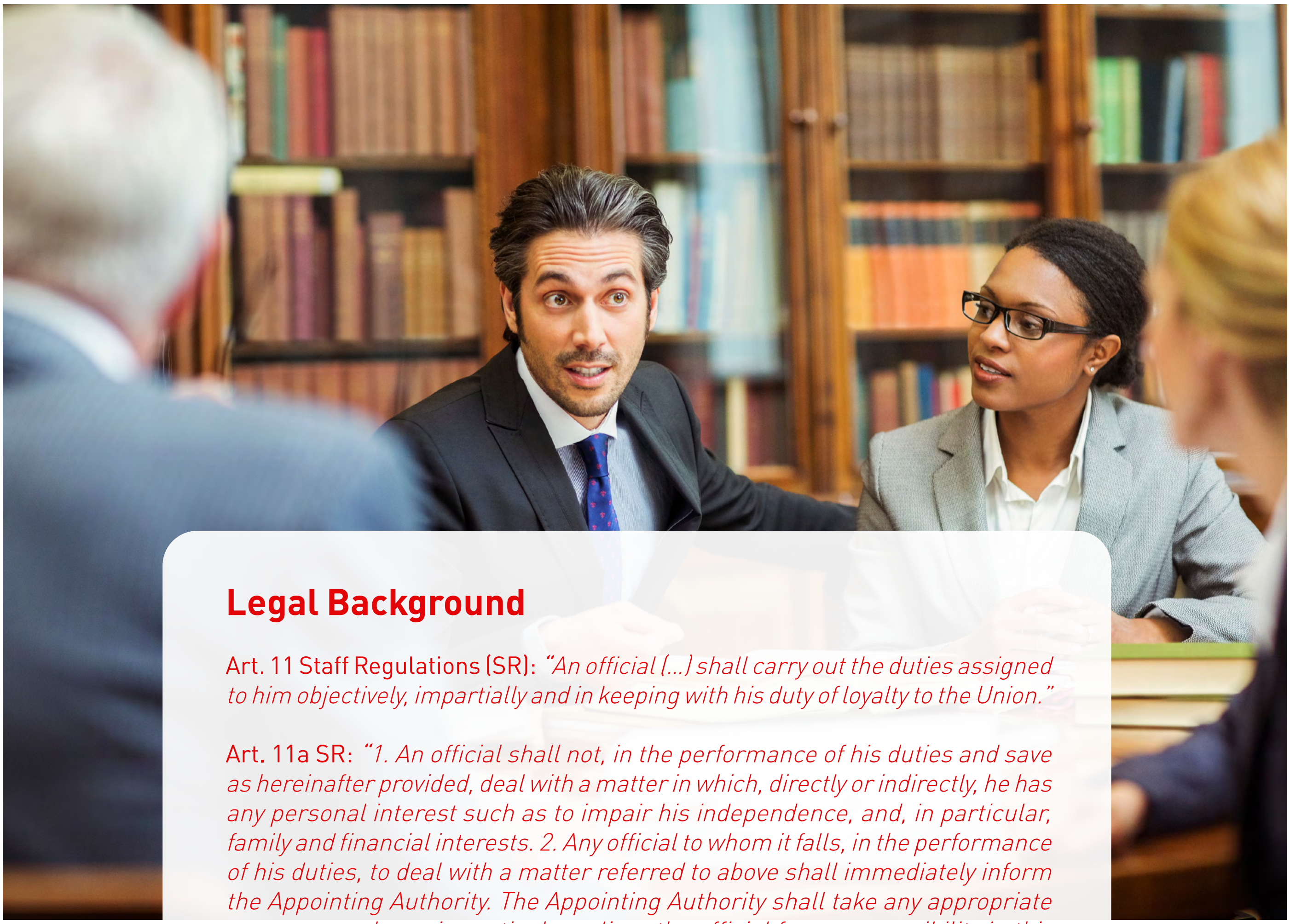

Legal Background

Art. 11 Staff Regulations (SR): *"An official (...) shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union."*

Art. 11a SR: *"1. An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests. 2. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter."*

Facts of the Case

The applicant, an official of the EEAS, submitted a request for assistance under Art. 24 SR in February 2021 on account of alleged psychological harassment which he attributed to four persons, including his immediate superior. Following that request, the EEAS decided to open an administrative investigation against his immediate superior and another person. The appraisal procedure of the applicant for 2021 was initiated in February 2022. In June 2022, the immediate superior, acting as reporting officer, signed the contested appraisal report. It considered the applicant's performance to be satisfactory, but pointed to a failure in one of the three professional priorities assigned to him. In October 2022, the EEAS decided to close the administrative investigation into alleged psychological harassment without further action in so far as it concerned the applicant's immediate superior. With his action before the Court the applicant sought annulment of the appraisal report.

The Decision of the Court and Reasoning

In its judgment, the General Court annuls the appraisal report of the applicant for the year 2021. The EEAS did not organise the appraisal procedure in such a way as to provide the applicant with sufficient guarantees as to the objective impartiality of the reporting officer.

The Court first determines that the requirement of impartiality as enshrined in Art. 11 SR covers all circumstances which an official must reasonably consider to be viewed by third parties as a possible source of impairment of his or her independence. By virtue of the right to good administration stipulated in Art. 41(1) of the Charter of Fundamental Rights (FRC), it is incumbent upon the institutions of the European Union to comply with the requirement of impartiality. Under the subjective impartiality, no member of the institution concerned may show personal bias or prejudice. Under the **objective impartiality**, the institution must offer sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned. In order for an applicant to show that the organisation of an administrative procedure does not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it is not necessary to prove lack of impartiality. It is **sufficient for a legitimate doubt to arise which cannot be dispelled.**

Where a request for assistance under Art. 24 SR is made, the institution must conduct an administrative investigation, if the official who is seeking the protection of his institution provides prima facie evidence of the attacks of which he claims to have been the victim to determine the facts which gave rise to the complaint. It follows that, in deciding to open an administrative investigation in respect of the applicant's immediate superior, the EEAS considered that the applicant had provided prima facie evidence against him. Such a situation is capable of giving rise, in the eyes of third parties, to a legitimate doubt concerning possible bias on the part of that superior in the performance of his duties as the applicant's reporting officer.

The EEAS had a sufficient period to adopt appropriate measures to avoid any risk of a lack of objective impartiality with regard to the applicant's immediate superior in his capacity as reporting officer for the applicant. The appraisal procedure relating to 2021 was not initiated until almost a year after the applicant submitted his request for assistance. Moreover, on the date of the appraisal interview and at the time when the applicant signed the appraisal report, the outcome of the administrative investigation was not yet known, with the result that the closure of that investigation without further action was not known during the appraisal procedure.

Finally, the Court examines the relevance of the mistake for the outcome: a procedural irregularity can justify the annulment of an act only if, without such an irregularity, the outcome of the procedure might have been different. Here, in view of the widest discretion enjoyed by reporting officers in the appraisal exercise with its complex value judgments, it cannot be ruled out that the appraisal procedure in question could have led to a different result in the absence of the irregularity found, namely the lack of objective impartiality on the part of the applicant's immediate superior acting as reporting officer, in particular if the duties of that person's reporting officer had been assumed by another person. Therefore, the contested appraisal report had to be annulled.

Comments :

1. The case treats a situation in which the objective impartiality of the institution, in the person of the reporting officer, was at risk during the appraisal exercise. The appraisal report was being prepared at a time when the administrative inquiry against the reporting officer was still ongoing. This circumstance is capable of giving rise, in the eyes of third parties, to a legitimate doubt concerning possible bias on the part of that superior in the performance of his duties as the applicant's reporting officer.

2. What the case is not about: **(a)** the case is not related to an act in connection with a request for assistance itself, but only intended to annul the appraisal report. The applicant has successfully achieved this goal. **(b)** The judgment neither criticizes the appraisal officer for having shown a lack of impartiality (this would have addressed the concept of subjective impartiality) nor for not having recused himself from the role as reporting officer, but instead only determined the institution's irregularity in that it did not replace the immediate superior of the applicant for the purposes of the appraisal exercise.

3. 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. In order to comply with the objective impartiality the institution must offer sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned. Where the appraised staff member argues that an administrative procedure does not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it is not necessary to prove lack of impartiality. It is sufficient for a legitimate doubt to arise which cannot be dispelled. For more details in respect to impartiality, see our StaffMatters Newsletter No. 25.

4. In legal terms, it is interesting to note that the obligation of impartiality is – as in earlier case-law - based on Art. 11 SR (objectivity and impartiality), on Art. 11a SR – under which the "Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter" -, and on the subjective fundamental right enshrined in Art. 41(1) FRC of every staff member to have their affairs handled impartially by the institutions. We have seen this approach of reliance on a FRC right earlier, whereas the

obligation to act in compliance with the right falls on the institution, for whom the superior acts, not on him/her personally.[1]

5. An inquiry can be started not only after a complaint, denunciation, self-incrimination or a request for assistance, but also ex officio by the institution itself. When instituting an inquiry, there must be a reasonable suspicion (prima facie evidence) that a breach of discipline has been committed. This means that the administration must have information suggesting that the person concerned has breached his/her obligations under the SR, and must have "reached a certain level of certainty" as regards the provisions which have been infringed.[2]

6. Conversely, as shown in the present case, the opening of an administrative inquiry demonstrates vice-versa that there is enough prima facie evidence. If there is prima facie evidence, the "legitimate doubt which cannot be dispelled" is sufficient to assume a risk for the impartiality in the appraisal exercise and therefore requires the institution to take appropriate measures, e.g. the re-assignment of reporting responsibilities to another person than the superior who is the subject of the administrative inquiry.

7. The case at hands treats the special scenario in which the result of the inquiry against the appraisal officer (namely a closure without further action) was not yet known at the time the appraisal was going on, and in which the institution had the opportunity for about one year to replace the appraisal officer. Presumably, the Court would have decided differently in case the same result of the inquiry (closure without further action) had been known at the time of the appraisal. Because in that case the prima facie evidence would have been wiped away by the inquiry, the impartiality would not have been at risk, and there would not have been a reason to re-assign the appraisal responsibilities to another officer.

8. It could be speculated how the Court would have decided another scenario, in which the administrative inquiry is only opened after the report has been concluded, and whether this would make the report challengeable. The high esteem for the guarantee of impartiality comes in counterbalance of the wide discretion of the reporting officer in the appraisal exercise. The central test is whether it is *"sufficient for a legitimate doubt to arise which cannot be dispelled"* and whether the alleged behaviour is *"capable of giving rise to a legitimate doubt in the eyes of third parties concerning possible bias"*.

So if there are enough facts to assume that there was a potential bias that has had an effect on the appraisal and potentially the outcome would have been different without this irregularity, then a report would be tainted (lack of objective impartiality) even if it was concluded before the inquiry is opened and completed, at least as long the inquiry confirms the facts around the alleged wrong behaviour of the reporting officer. However, in this scenario the question remains why the administrative inquiry has not been initiated at an earlier stage.

9. In this context, it is recommended that, where the impartiality in an appraisal procedure is doubtful related to purported harassment, staff members file their request for assistance under Art. 24 SR early enough and – where possible – cooperate in securing evidence.

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1 Mader, EU Civil Service Law (2024), p. 126.

2 Mader, EU Civil Service Law (2024), pp. 204f