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# ARMED FORCES OF MALTA

## GENERAL ORDERS

BY : BRIGADIER MG XUEREB  
COMMANDER ARMED FORCES OF MALTA

11 November 2011

### ADMINISTRATION

#### 86. COMPLAINTS – OFFICERS

1. Officers who feel aggrieved by the Commander's decision may:
  - a. in respect only of complaints concerning appointments, promotions, pay and pension rights refer their complaint for investigation by the Ombudsman in terms of Act XXI of 1995,
  - or
  - b. in respect of any type of complaint refer their complaint directly to the President of Malta for review in terms of Act XXVII of 1970.
2. Officers who decide to refer their complaint directly to the President of Malta would be renouncing to their right to have recourse to the Ombudsman in terms of Act XXI of 1995.

AFM/4763/002/2010  
AFM/5320/000/2010

MG XUEREB  
Brigadier  
Commander, AFM



Ombudsman

DdB

Case D 0447

16 October 2003

Major Pierre Vassallo  
Melnibone  
Dun Mikiel Xerri Street  
Attard BZN 05

Sir

I refer to your letter dated 15 October 2003, stating that on 1 and 21 July 2003, and on 7 October 2003 you lodged a complaint on failure to be promoted to Lieutenant Colonel in the Armed Forces. You complain that Commander AFM has failed to reply to your letters and you are therefore seeking the intervention of this Office.

As you may know, complaints by officers are regulated by Section 160 of the Malta Forces Act 1970. According to sub-section (2) if a complaining officer so requires, the Commander shall through the Minister make his report on the complaint to the President of Malta.

As there are other adequate means of redress in your case, your complaint is not admissible for investigation in accordance with the Ombudsman Act. However, you are therefore advised to be guided by the provisions of the Malta Armed Forces Act and, if you so wish, may request the Commander to report on your complaint to the President of Malta.

Yours faithfully

Dr Ivan D Mifsud  
Investigating Officer

Copy: The Commander  
Armed Forces of Malta  
Headquarters



HEADQUARTERS  
ARMED FORCES OF MALTA  
Luqa Barracks  
Malta

Dd c.

AFM/5752/000/2000

Tel: 22494022  
Fax: 21241001  
Email: [hq.afm@gov.mt](mailto:hq.afm@gov.mt)

10 December 2013

Dr Brian Said LL.D.  
Senior Investigating Officer  
Office of the Ombudsman  
11, St. Paul's Street,  
Valletta.

**COMPLAINTS – OMBUDSMAN**

**CASE NO N-0272**

**CASE NO N-0269**

**CASE NO N-0280**

**CASE NO N-0292**

**CASE NO N-0294**

**CASE NO N-0296**

**CASE NO N-0299**

**CASE NO N-0301**



Sir,

Reference made to your letters regarding the above cases, where you requested documents and information further to complaints by various officers who failed to be promoted to the rank of Lieutenant Colonel or Colonel.

We note that Article 12.3(b) of the Ombudsman Act states that: *"This Act shall not apply to the bodies listed in Part B of the First Schedule to this Act, unless proof to the satisfaction of the Ombudsman is produced showing that all available means of redress have been exhausted"*.

It has always been held on the basis of Article 160 (2) of the Malta Armed Forces Act that an officer may in any case require reference of his complaint to the President of Malta through the Minister and that this constitutes an "available means of redress" in terms of Article 12.3(b) of the Ombudsman Act. Vide Ombudsman Case D 0447 dated 16 October 2003 regarding complaint by Major Pierre Vassallo (copy attached). In the circumstances, the Armed Forces of Malta submits in the first place that the Ombudsman Act does not apply to the present cases on the basis of Article 12.3(b) of that Act read in conjunction with Article 160 of the Malta Armed Forces Act.

From this it clearly transpires that your Office has also retained this irrebuttable interpretation. Therefore, we feel that in line with consistency and fairness, your Office should uphold its contention and instruct applicants to the appropriate channels according to law.

Yours sincerely,

G GALEA  
Colonel  
for Deputy Commander, AFM



HEADQUARTERS  
ARMED FORCES OF MALTA  
Luqa Barracks  
Malta

AFM/5320/434/2013 Vol I

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23 December 2013

Dr Brian Said LL.D.  
Senior Investigating Officer  
Office of the Ombudsman  
11, St. Paul's Street,  
Valletta.



**COMPLAINTS – OMBUDSMAN**

Dear Dr. Said,

Re: Cases No: No 269, No 272, No 280, No 299, No 292, No 294, No 296, No 301, No 307 and No 310.

Thank you for your letter of the 17 December 2013.

With all due respect to the Ombudsman we submit that the conclusion reached in your letter is not in line with the Ombudsman Act (Art 12 (3) (b) and with the Malta Armed Forces Act (Art 160 (2)).

The legal position as it results from the above quoted provisions is to the effect that an officer may not complain to the Ombudsman unless he has exhausted the remedy whereby he may refer his complaint to the H.E. The President in terms of Article 160 (2) of the Malta Armed Forces Act.

This legal position was confirmed by the Ombudsman's decision in case D0447.

It appears that at some point it was felt that an effort should be made to avoid a situation where the Ombudsman would have to review a decision taken by H.E. The President. An attempt to resolve this issue was made through the General Order of the 11 November 2011 to which reference is made in your letter.

That General Order however did not change the law to his right of recourse to the President.

Neither does the fact that there were occasions where the Government went along with recommendations from the Ombudsman in circumstances where the case had not been referred to H.E. The President change the law.

It is clear that the law cannot be changed by an internal General Order issued by the Commander or by adherence to the Ombudsman's recommendations in particular disputes.

In the circumstances we reiterate that it is the law which should be observed and that at this stage the office of the Ombudsman has no jurisdiction to enter into the merits of the above complaints.

Yours sincerely,

G GALEA  
Colonel  
for Commander, AFM

MINISTERU GHALL-INTERN  
U S-SIGURTA' NAZZJONALI



MINISTRY FOR HOME AFFAIRS  
AND NATIONAL SECURITY

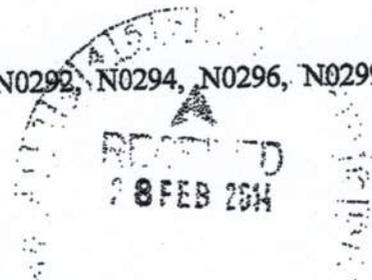
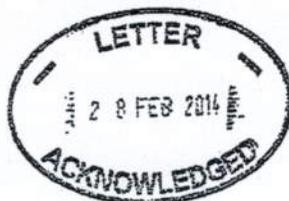
Uffiċċju tas-Segretarju Permanenti

Office of the Permanent Secretary

Our Ref: MHAS 4/2014  
Your Ref: Case Nos. N0269, N0272, N0280, N0292, N0294, N0296, N0299,  
N0301, N0307, N0310, N0325, O0003

27<sup>th</sup> February, 2014

The Ombudsman  
Office of the Ombudsman



Re: Case Nos. N0269, N0272, N0280, N0292, N0294, N0296, N0299, N0301,  
N0307, N0310, N0325, O0003

Your letter dated the 24<sup>th</sup> instant and other previous correspondence dated 9<sup>th</sup> and 22<sup>nd</sup> January 2014 re above-quoted cases refer.

I have discussed the issue at stake within the Ministry and also with the Attorney General and the original position as stated by MHAS in my letter of the 3<sup>rd</sup> January 2014 still holds. I would also refer to our meeting last month wherein you had indicated to me the exchange of views between your Office, the Office of the President of Malta and the Attorney General on a possible breakthrough in the apparent conflict between the two laws. This exchange of views was followed by your letter of the 22<sup>nd</sup> October 2009 (reference number I0187, I0168, H0656 and J0147) addressed to the Deputy Attorney General and copied to H.E. the President of Malta requesting him for his views. Regrettably there had been no reply forthcoming from the D/Attorney General and none have been found either at his office or at the AFM. Hence, his views on the matter were never communicated in writing, in which case, this might have given some level of comfort to the Ministry.

In view of the forgoing, our position remains as that communicated in our letter of the 3<sup>rd</sup> January 2014.

  
Kevin Mahoney  
Permanent Secretary

OMB/6/10/C01

Dd R.

9 April 2014

Mr Kevin Mahoney  
Permanent Secretary  
Ministry for Home Affairs and National Security  
201 Strait Street  
Valletta

Sir

As you are aware this Office is investigating complaints which various officers of the Armed Forces of Malta have submitted to my attention. These complaints refer to two promotion exercises which were carried out last year.

The promotion process giving rise to these grievances was initiated by means of a circular which was issued on 20 May 2013. Subsequently an interview was held in front of a Selection Board chaired by you.

On 16 September 2013 a number of Majors were promoted to Lieutenant Colonels and nineteen days later four of these Lieutenant Colonels were promoted to Colonels. A number of unsuccessful candidates felt aggrieved by this decision and petitioned me individually.

After assessing the merits of these complaints, this Office commenced its investigation on 27 November 2013 by notifying the Commander AFM of the allegations brought forth and by requesting that files and documentation relative to the promotion process be submitted to us without delay.

The reply from the AFM dated 20 December 2013 was to the effect that the complainants had not exhausted the existing means of redress contained in Article 160(2) of the Armed Forces Act. This refers to the redress which officers may have by petitioning the President of Malta.

Further correspondence with the AFM and yourself did not elicit any progress. Indeed your letter of 3 January 2014 states that this Office does not have any jurisdiction in the matters raised for our investigation.

Your standpoint is not accepted by this Office for the following reasons –

- a) It is the Ombudsman who determines whether complaints fall within his jurisdiction. The Ombudsman Act in the Second Schedule specifies what the matters which are not subject to investigation are. The present complaints do not fall within these exceptions;
- b) The Ombudsman Act empowers the Ombudsman to investigate grievances raised by officers and men of the force on appointments, promotions, pay and pension rights in terms of Article 12(3)(b). There should also be proof to the satisfaction of the Ombudsman that the available means of remedy have been exhausted.
- c) This notwithstanding, the Ombudsman still retains the discretion to decide whether to investigate or whether it was reasonable to expect that the available means of redress be used by the complainants.
- d) You should note that the general discretion of the Ombudsman to investigate complaints does not preclude him from exercising his discretion in this matter as the law allows.

Article 13(3) states that the Ombudsman “*may, if he considers it desirable so to do, decline to exercise his power ... in any case where adequate means of redress are or have been available to the complainant under any other law*”.

In spite of this provision, the Ombudsman may proceed to investigate in terms of the proviso to Article 13(3) cited before. Thus –

*“... the Ombudsman may conduct an investigation if satisfied that in the particular circumstances it is not reasonable to expect the complainant to resort or have resorted to such means of redress”.*

I am satisfied, that, in the circumstances of these cases, complainants could not be reasonably expected to resort to the President as a means of redress since this would effectively amount to a renunciation of their right of recourse to the Ombudsman.

e) The jurisdiction of the Ombudsman is not fettered by any limitation except what the law specifically prohibits as is the situation with the Second Schedule of the Ombudsman Act.

f) In addition to what the law states, I wish to point out that the General Order issued on 11 November 2011 clearly and unequivocally states that officers could present their grievances on appointments, promotions, pay and pension to the Ombudsman. They could also, if they so wish, petition the

President of Malta. This Order has not been revoked and as such, still holds with respect to any course of action which an officer may wish to take if he or she feels that redress to the Ombudsman is necessary for any action which adversely affected him or her.

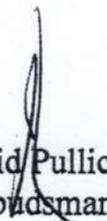
In the light of the said General Order and Act XXI of 1995, I declare that complainants have produced proof to my satisfaction showing that all means of redress available to them at this stage have been exhausted.

Recourse to the President of the Republic, as a superior authority to the Ombudsman, would still be available to them once I have concluded my investigation. Since complainants opted to exercise their right to have recourse to the Ombudsman, their right to redress from the President is no longer available to them at this stage.

Considering the foregoing, you are being requested to hand over all files pertinent to the promotion exercise including the personal files of all the candidates, the selection processes and other documentation which may shed light on this matter.

In default, I shall have no option but to use the powers vested in me by the Ombudsman Act to procure compliance with the law in terms of Section 19 of Act XXI of 1995 (copy attached). A reply is expected by 25 April 2014.

Yours sincerely



J Said Pullicino  
Ombudsman

Encl.

Copy – Hon Minister for Home Affairs and National Security  
201 Strait Street  
Valletta  
VLT 1433

The Commander  
Armed Forces of Malta  
Headquarters  
Luqa Barracks

Evidence.  
Amended by:  
L.N. 425 of 2007;  
L.N. 105 of 2008.

19. (1) Subject to the provisions of this article and of article 20 of this Act, the Ombudsman may from time to time require any person who in his opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him any such information, and to produce any documents or papers or things which in the Ombudsman's opinion relate to any such matter as aforesaid and which may be in the possession or under the control of that person. This subarticle shall apply whether or not the person is an officer, employee, or member of any department, organisation or local council, and whether or not such documents, papers, or things are in the custody or under the control of any department, organisation or local council.

(2) The Ombudsman shall have power to summon witnesses and to administer an oath to any witness and to any person concerned in the investigation, and require them to give evidence.

(3) Any person summoned as aforesaid who refuses, or without sufficient cause fails, to attend at the time and place mentioned in the summons, or refuses, without sufficient cause to answer or to answer fully and satisfactorily, to the best of his knowledge and belief all questions put to him by the Ombudsman, or refuses or fails, without sufficient cause, to produce any document he was required to produce by the Ombudsman shall be guilty of an offence and shall be liable on conviction to a fine (*multa*) not exceeding one thousand and one hundred and sixty euro (1,160) or to imprisonment not exceeding three months, or to both such fine and imprisonment:

Provided that, without prejudice to the generality of the provisions of subarticle (2), no person giving evidence before the Ombudsman may be compelled to answer any question which tends to expose him to any criminal prosecution, and every such person shall, in respect of any evidence given by him before the Ombudsman, be entitled to the same privileges to which a witness giving evidence before a court of law is entitled.

OMB/6/10/C01

Doh H

9 April 2014

Hon. Dr Manuel Mallia  
Minister for Home Affairs and National Security  
201 Strait Street  
Valletta  
VLT 1433

Hon Minister

I am forwarding to you a copy of a letter I sent to your Permanent Secretary regarding the lack of progress in the investigation of a number of complaints regarding promotions made by high ranking Officers in the Armed Forces of Malta.

The Permanent Secretary appears to be contesting my jurisdiction to investigate these complaints. The sensitive nature of the issues raised by the Permanent Secretary could result in unnecessary confrontation with the inevitable negative publicity that can only be harmful. I believe that your personal intervention is required to resolve this impasse.

You will understand that I cannot and will not entertain any suggestion that would effectively deprive the citizens of their right of recourse to my Office.

Regards



J Said Pullicino  
Ombudsman

Encl.

MINISTERU GHALL-INTERN  
U S-SIGURTA' NAZZJONALI



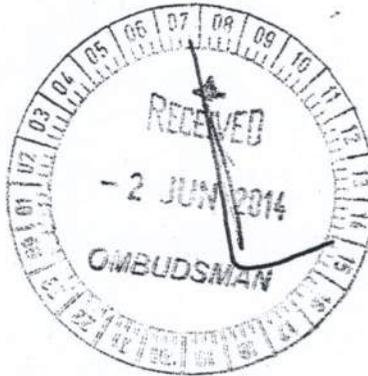
MINISTRY FOR HOME AFFAIRS  
AND NATIONAL SECURITY

*Uffiċċju tas-Segretarju Permanenti*

*Office of the Permanent Secretary*

2<sup>nd</sup> June 2014

Dr. Joseph Said Pullicino  
The Ombudsman  
11 St. Paul Street  
Valletta



Thro': Minister for Home Affairs and National Security

Dear Sir,

**RE: Complaints lodged by officers of the Armed Forces of Malta**

Thank you for your letter of the 16<sup>th</sup> May 2014.

This Ministry has already made it clear that its position is to the effect that the Ombudsman does not have jurisdiction to investigate the above complaints at this stage.

The reasons are the following:

1. All officers concerned (Majors and Lieutenant Colonels) complained to the Commander AFM but the Commander limited himself to giving them some information and writing to the undersigned suggesting that the Senior Ranks Appointments Advisory Committee (SRAAC) should formulate a reply to some of the queries raised by the Officers.

The undersigned informed the Commander that he was not intent on convening a meeting of the SRAAC (given that the SRAAC has nothing to do with the redress procedure under Article 160 of the Malta Armed Forces Act). The undersigned also informed the Commander that the officers were free to seek redress in any manner that is regulated by the Malta Armed Forces Act. However the Commander has not yet concluded his investigation of the complaint.

In the circumstances, in the absence of an investigation of the complaint by the Commander and in the absence of a decision by the Commander on the complaints, there are no grounds to proceed to the Ombudsman (even in terms of the General Order of the 11 November 2011 which requires "the Commander's decision") or unless the proper procedure is followed, to proceed to refer the complaints to the President.

2. As already explained in previous correspondence of the 23 December 2013 from the AFM and of the 3<sup>rd</sup> January 2014 from the undersigned, the office of the Ombudsman also lacks jurisdiction to investigate the above complaints at this stage given that the Ombudsman Act does not apply in terms of article 12 (3) (b) of the same ("This Act shall not apply to the bodies listed in Part B of the First Schedule to this Act, unless proof to the satisfaction of the Ombudsman is produced showing that all available means of redress have been exhausted"). The proof that the available means of redress have been exhausted must therefore be produced by the complainants. In these cases the "available means of redress" are found in Article 160 (2) of the Malta Armed Forces Act. Therefore in the absence of proof being brought forward by the complainants to the effect that they exhausted all means of redress available under Article 160 (2) the Ombudsman has no discretion to investigate the complaints.

Neither does the Ombudsman have discretion to decide that in the particular circumstances it is not reasonable to expect the complainants to resort or to have

resorted to other means of redress in terms of the proviso to Article 13 (3) of the Ombudsman Act and this because if the Act itself is not applicable neither is Article 13 thereof.

In the circumstances I respectfully submit that your summons for me to appear before you on the 3<sup>rd</sup> June 2014 and exhibit a number of documents relating to the above cases is "ultra vires" and should be withdrawn.

I am also concerned that the manner in which the above cases have started to be investigated by your office displays bias.

In fact in your office's letter of the 27 November 2013 a number of questions are asked which relate to the application of the AFM policy on promotions which was applicable between the 9 February 2011 and the 20 May 2013 when it was replaced by another policy.

The appointments and promotions to which the above complaints relate were regulated by the policy of the 20 May 2013, and therefore the information requested on the basis of the previous policy misdirects the investigations.

Moreover the assumption which results from the letter of the 27 November 2013 to the AFM (fully endorsed in your letter of the 9 April 2014) to the effect that the promotions complained of were "accelerated promotions" in terms of the Appointments and Conditions of Service of the Regular Force Regulations also indicates pre-judgement on this issue.

This all the more so given that according to regulation 4 (1) (a) of the said regulations "Appointments to the staff in the rank of Colonel and above shall be made by the Minister" and that therefore the Minister is not limited by the requirement of any recommendation of the Commander in making such appointments.

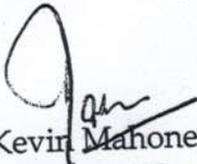
It should also be pointed out that an "accelerated promotion" is a single promotion whereby an officer receives a promotion of more than one rank and that the technical concept of "accelerated promotion" as results from the regulations therefore does not apply to this case.

With all due respect all these matters give the Ministry the well founded feeling that it will not be receiving a fair treatment if the above complaints were to be decided by your Honour.

In these circumstances the Ministry considers that in these cases you should abstain from hearing these complaints in terms of Article 8 of the Ombudsman Act in view of the opinions which you have expressed on them, which opinions reasonably convey an appearance of bias.

Alternatively may I suggest that the complainants should be advised to request the Commander to report on their complaint to the President for direction in terms of Article 160 (2) of the Malta Armed Forces Act as was done in previous AFM cases.

Yours sincerely,



Kevin Mahoney  
Permanent Secretary  
MHAS

**OMB/6/10/C01**

13 June 2014

Mr Kevin Mahoney  
Permanent Secretary  
Ministry for Home Affairs and National Security  
201 Strait Street  
Valletta  
VLT 2000

Sir

*Complaints Lodged by Officers of the Armed Forces of Malta*

Your letter dated 2 June 2014 refers. Your comments have been duly noted.

Your contention that the complainants had to await a decision by the Commander on their complaint *“in the absence of an investigation of the complaint by the Commander and in the absence of a decision by the Commander on the complaints, there are no grounds to proceed to the Ombudsman”* is essentially incorrect since these complaints are not against the decisions taken by the Commander, but refer to decisions taken by the Selection Board and the Minister.

On the other hand, even if your submissions were to be correct, one can state that the officer complainants used the procedure mentioned in Article 160(2) of the Malta Armed Forces Act in that they sought redress from Brigadier Martin Xuereb, then Commander AFM. Once the Commander could not afford them redress they had a choice in line with the *General Order* of the 11 November 2011. They could either petition the President or they could submit their grievance to the Ombudsman. It



should be emphasised that in the case of the Majors, their grievance was against the decision of the Selection Board in which the Commander AFM was a member and you yourself were Chairman. In the case of the Lieutenant Colonels the decision on the promotion was made by the Minister. In either case it is unreasonable to maintain that these officers should ask the Commander for redress.

As a matter of fact, all the officers initially followed the provisions of Article 160(2) of the Malta Armed Forces Act and sought redress from Brigadier Martin Xuereb who met them. For the reasons given, the Commander could not satisfy their grievance. The proper procedure was followed. The submission of their complaint to the Ombudsman did not in any way deviate from this procedure.

Your comments regarding the jurisdiction of this Office and whether the available means of redress was exhausted are, at this stage, inadmissible since these issues do not fall within your purview. You have already been informed by my letter dated 9 April 2014, that this Office has jurisdiction and that the complainants produced proof, to my satisfaction, that all available means of redress have been exhausted.

I turn onto your assertion that my summons to you was *ultra vires*. The Ombudsman Act gives the Ombudsman power to summon anyone and to retrieve any documentation and information once these are required during the investigation of a complaint. The mere fact that you have decided arbitrarily and wrongly that this Office does not have jurisdiction does not justify your refusal to present the documents and yourself for questioning, in line with this provision of the law. I trust you understand that your actions are a violation of an express provision of the law.

You also state that the appointments are the prerogative of the Minister. This is an issue which will be considered in the course of the investigation once the matter of jurisdiction has been settled. It can be pointed out, however, that your citing Regulation 4(1)(a) of the *Appointments and Conditions of Service of the Regular Force Regulations* would have to be substantiated considering that this Regulation refers to “*appointments to the staff*” of the Army. The fast advancement of an officer appears to fall within the definition of Regulation 6(2).

You have also felt fit to question the integrity of this Office on the basis of reasoning which is difficult to decipher. The letters which this Office sent to the Commander AFM and to you are in line with normal practice when investigating similar



complaints. The allegations of the complainants were set forth, the comments of the organisation sought and a request for the relevant documentation made. If this shows bias or partiality or lack of fair treatment then, no doubt, you are seriously misinformed on the functions of this Office.

Yours sincerely

J Said Pullicino  
Ombudsman