Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of Justice of the European Coal and Steel Community;
Having regard to the Staff Regulations of Officials of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (Second Chamber)

hereby:

1. **Dismisses Applications 22/60 and 23/60;**

2. **Orders the applicant to pay the costs; the costs incurred by the defendant shall be borne by that institution.**

Hammes Rueff Rossi

Delivered in open court in Luxembourg on 13 July 1961.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 JUNE 1961[1]

Mr President,
Members of the Court,

The applicant, an official of the High Authority of the European Coal and Steel Community, has submitted two applications to the Court for the purpose of settling his position in the service. His applications involve an action for failure to act, which constitutes his reaction to the fact that no reply was given to a request made by him, and a claim for compensation in relation to another posting. The Court has joined the two applications as they are so closely connected, so I may deal with them both in a common opinion.

The applicant himself and the development of his career with the High Authority are known to the Court from an earlier case (Case 34/59) in which he had unsuccessfully sought a regrading in the salary scale on the basis of his duties in the service.

The present applications arise out of an amendment made to the administrative organization of the High Authority, which was linked to a change in the detailed list of posts. This amendment was adopted on 25 May 1960 and came into force on 1 July

1 – Translated from the German.

1960. It was notified to the staff on 19 July 1960. At the same time members of the staff were invited to submit applications for the posts which were vacant. In the Accounts Department, in which the aplicant has been employed since October 1955, the post of Principal Administrative Assistant (Category B, Grades 7 and 6 in the salary scale) was declared vacant.

As at that time the applicant was in Grade 9 there was no question of being directly *promoted* to the vacant post. For this reason he approached the Director-General for Administration and Finance in a letter dated 9 August 1960 and requested that he be appointed to the post in question. He pointed out that he had already been performing the duties involved in the post *ad interim* for several years.

This letter, the contents of which must be considered in detail, constitutes the beginning of the legal proceedings. As the applicant received no answer he lodged both of the present applications on 8 November 1960. He is seeking the annulment of the implied decision of the High Authority, in other words, the refusal of his request for the completion of his personal file and the recognition of his rights resulting from the temporary posting, as well as for the award of a differential allowance in respect of his temporary employment in another post.

The Court has jurisdiction under Article 58 of the Staff Regulations of Officials of the ECSC. As both applications concern an employee of the High Authority, they must be considered in the light of the conditions of service of the staff of the ECSC.

1. The action for failure to act

The legal consideration of this action raises first certain *questions of admissibility*.

The High Authority objects that the rules concerning an action for failure to act have been infringed in that the purpose of the application in Case 22/60 is not identical with that of the applicant's request brought before the High Authority in his letter of 9 August 1960.

This objection leads to the preliminary question whether, in disputes concerning the conditions of service, the principles governing an action for failure to act must apply as set out in Article 35 of the ECSC Treaty as regards Member States, the Council of Ministers and undertakings. As the former supplementary Rules of Procedure of 21 February 1957 were repealed by the new Rules of Procedure of the Court of Justice, there are no longer any special express provisions governing applications brought by officials.

I consider, however, that even without such provisions there is a need for a proper administrative procedure for actions for failure to act brought by officials for the following two reasons:

(a) the duty of loyalty of every official requires that before he seeks publicly to assert his right by bringing proceedings he gives his administration the opportunity to examine his claims internally and, thus, to avoid an action;

(b) the applicant must only be recognized as having an interest in obtaining protection under the law when it is certain that the administration refuses to uphold his claims. Only after a refusal by the administration has the applicant an interest in seeking to uphold his rights by bringing legal proceedings.

It is therefore necessary to consider whether, before lodging his application, the applicant followed the proper procedure by submitting to the High Authority the subject-matter of the subsequent legal proceedings. According to a correct interpretation the request submitted to the administration must be sufficiently clear to show which measures are expected of the High Authority and will, if necessary, be enforced by bringing legal proceedings.

The purpose of the action for failure to act is clearly set out on page 7 of the application: the completion of the applicant's personal file by drawing up annual reports. Although the application later refers to 'the recognition of the rights attaching to a temporary posting' these words cannot refer to any additional claim within the context of the action for failure to act. According to the Staff Regulations, this right consists

only in a differential allowance. However, this allowance forms the subject-matter of a separate application (Case 23/60).

The contents of the determining letter of 9 August 1960, which placed the matter before the administration, may be summarized as follows: the applicant seeks appointment to the vacant post, but explains at the same time that he cannot submit his application in the normal way, since for promotion to Grade 7 (a new post) he should have been in Grade 8 since at least 1 July 1958. He points out that for some years he has performed the relevant duties 'as a temporary posting', without receiving any 'differential allowance'. He maintains that a temporary posting must be limited to one year. In addition, he criticizes the fact that his personal file contains no annual report and concludes as follows:

> 'I am sorry to have had to draw your attention to these irregularities which are damaging to my career and I am sure you will readily acknowledge that my complaints are justified.'

A reading of this letter shows that the applicant's basic idea was to be appointed to the post declared vacant, since in the first sentence he refers expressly to the vacancy notice. In an attempt at justification he then maintains that it was the absence of any annual report which prevented him being promoted earlier which, in turn, prevents him now applying for the vacant post by way of promotion.

It cannot be maintained that the aim of his letter was to have 'his personal file completed by the annual report . . . and for his entitlement to the rights and privileges attaching to a temporary posting to be acknowledged' (the wording of the conclusions in the application) even if one were inclined to give a liberal interpretation to the obligation on officials to bring the matter duly before the High Authority. What has in fact taken place, as the high Authority has pointed out in its pleadings, is that the applicant has turned one of the *'submissions'* in his request to the administration into one of the *purposes* of his application. As the purpose of the request to the administration must be the same as that of the application I consider that the rules governing the preliminary administrative procedure, which form part of the proceedings for failure to act, have been infringed.

The action for failure to act which seeks to have the applicant's personal file completed by drawing up the annual reports must, therefore, be dismissed as inadmissible.

If the Court were not to accept this view but were to acknowledge that the complaint that the personal file is incomplete may be regarded not only as a 'submission' ('moyen') but also as the purpose of the request to the administration, it would then be necessary to take the following considerations into account.

The application and the earlier documents submitted by the applicant show that he seeks to have his personal file completed in order to satisfy the conditions necessary for promotion to the advertised post in Grade 7. As I have already pointed out, such a promotion assumes that the applicant has already been in Grade 8 for two years (see Article 39 of the Staff Regulations in conjunction with Article 2 of Annex IV thereto).

As the applicant was in Grade 9 from the entry into force of the Staff Regulations until the lodging of the application, he can only satisfy the abovementioned condition if he is retroactively promoted into Grade 8. It is for this reason alone that he attaches importance to the preparation of the annual reports.

This is shown by his letter of 9 August 1960 and in particular by his request to the President of the High Authority in which, after he had lodged his application before the Court, he requests that the competition for the advertised post be postponed because he hopes that his application will lead to the completion of his personal file and that he will subsequently be retroactively promoted to Grade 8.

It is inappropriate to go into the question whether officials are entitled to claim a yearly assessment. The case-law of the national courts shows that the question whether a yearly report is in the nature of a decision

and can therefore form the subject of proceedings before the administrative courts or tribunals is still contested (cf. on the one hand, the negative decision of the Conseil d'État in Recueil 1937, p. 833, and, on the other hand, a more recent, positive judgment in 1948, Recueil, p. 622; cf. in addition, the negative opinion of the German experts in administrative law, for example, the 'Kommentar zum Bundesbeamtengesetz' ('Commentary on the Law relating to Public Servants' by Plog-Wiedow, Note 11 on Paragraph 172). The aim of the annual reports which, according to Sénégas in 'Droits et Obligations de Fonctionnaires' ('Rights and Duties of Officials') is also 'to enable the official to be aware of his weak points and to make an effort to improve' (p. 87), appears to justify the view that where such a provision exists in the Staff Regulations there is not only an objective legal duty on the part of an employer to draw up an annual report, but the official in addition has a subjective right in relation to his employer. In this instance, however, the problem is of no great importance since the question must be asked whether the interest of the applicant described above is sufficient to enable him to pursue such a claim.

It must first be observed that the applicant must obtain a report for the year 1957/58, since only a report drawn up in respect of that period can contain any information relating to his entitlement to promotion in 1958. Even if no time-limit has been fixed for the enforcement of this right, it must be doubtful whether an application may be lodged at the end of 1960 for the regularization of the personal file in respect of a period several years earlier.

However, there is another factor which I consider to be even more important. Even if the applicant's claim were allowed and a report for 1957/58 were therefore drawn up, this would not guarantee his subsequent, retroactive promotion to Grade 8. A document produced by the High Authority during the proceedings shows that in July 1958 the applicant's work formed the subject of a special report. It is true that this report was not placed in the applicant's file because the method of assessment used by the administration at that time did not appear to be satisfactory. However, it shows clearly that the applicant's work was assessed in 1958 and that the administration did not consider him to be especially worthy of promotion. It cannot be accepted that a report could result after three years in a more detailed or appreciably more favourable report for the applicant. Even assuming that the result were more favourable to the applicant, it would not affect his final objectives. There is a generally recognized principle of administrative law that there is no right to promotion. On the contrary, the administration takes a decision on such questions on the basis of its own opinion formed in accordance with its duty (cf. Plog-Wiedow, 'Commentary on the Law relating to Public Servants' ('Kommentar zum Bundesbeamtengesetz'), note 8 on Paragraph 23, with many references to a unanimous series of cases. As regards French law see Plantey 'Traité Pratique de la Fonction Publique' ('Practical Study of the Public Service'), 1956, p. 270 et seq. As regards Italian law see Zanobini, 'Corso di Diritto Amministrativo' ('Course in Administrative Law'), 1955, p. 328. As regards Netherlands law see Van Urk, 'Ambtenarenrecht' ('Law relating to Public Servants'), 1938, p. 154. This finding shows that it is of no great importance for the applicant to seek to enforce a claim to have his annual report drawn up belatedly. This demonstrates that the applicant has no direct and serious interest in the proceedings and that therefore his action for failure to act is inadmissible.

2. Application for payment of the differential allowance provided for under Article 26 of the Staff Regulations (Case 23/60)

If, as I have already suggested, preliminary administrative proceedings must be initiated in order to bring the matter before the administration, not only in the case of an action for failure to act whose purpose is to obtain a decision but also in order to pursue claims for payment of a sum of money, the objections which applied to Application 22/60 also apply to Application 23/60. It is

difficult to maintain that it is clear from the applicant's letter of 9 August 1962 that the purpose of the appeal through official channels is to obtain the payment of a differential allowance by the administration. The corresponding claim is only mentioned in passing and no further details are given (such as the duration of the temporary posting, the nature of the duties involved or the difference in the grading of the posts in the salary scale).

Thus, the fact that is has not been duly referred to the administration must render this application also inadmissible.

Even if one overlooks this defect, which may be easier in that in his letter the applicant at least states ' . . . that I am *entitled* to the allowance in this case', the imprecise nature of the conclusions might also give rise to objections to the admissibility of the application. All the applicant asks is that the High Authority be ordered to pay the sum representing the difference between Grade 7 and Grade 9 for the period of the temporary posting, but he does not state precisely how the amount of the allowance and the period over which it is to be paid are to be calculated. It is true that the question arises whether, in proceedings such as in this case, the Court ought not to use its power to put questions in order to make the conclusions clearer.

However, I shall set aside these objections and, as there are no further questions concerning the admissibility, consider whether the claim is well founded.

Article 26 (2) of the Staff Regulation, to which the applicant refers, is worded as follows:

> 'A servant may be called upon to occupy temporarily a post in a category or service corresponding to his grade or to a higher grade. From the third month of such temporary posting he shall receive a differential allowance.'

The condition for the payment of the differential allowance is, therefore, employment in *another* post, that is, in a post provided for in the detailed list of posts and (temporarily or permanently) vacant. It is from this point of view that the applicant's arguments must be given closer examination. He maintains in his letter of 9 August 1960 that the duties involved in the advertised post 'correspond exactly to those which I have performed for some years'. This statement appears again in the application (p. 2) ' . . . for several years he has performed duties corresponding to those of servants in Grades 6 and 7 of Category B'.

In a special statement he refers to 2 December 1957 as the day on which his temporary posting began. He explains in the application that it was on this date that an 'assistant accountant' ('comptable adjoint') started work in the Accounts Department. The applicant maintains that from that date it was his task to train and supervise that book-keeper.

On the other hand, the applicant does not claim that at this date a higher post in the Accounts Department either became vacant or was created.

Thus, the submission in the application already appears not to correspond to the conditions laid down by Article 26 of the Staff Regulations. In essence, the applicant is not referring to a temporary assignment to another post, but rather to the fact that as a result of new responsibilities his own post had gained in importance, which should either have entailed its higher grading in the detailed list of posts or at least his promotion. In fact, the applicant is thus coming back, although with new arguments, to the complaint in his earlier application (Case 34-59); he is objecting to his classification in the salary scale, that is, the evaluation of his duties in the detailed list of posts. In the light of his new arguments (the entry of a new book-keeper into the service), which refer to a later period, I certainly would not like to go so far as to apply the force of *res judicata* of the judgment in the first application, which concerned the classification made in 1956. I consider, however, that the submission has not been shown to be well founded from the point of view of Article 26 of the Staff Regulations and that for this reason the application may be dismissed.

This finding might render unnecessary further explanations and inquiries.

However, for the sake of completeness, the following points must be made:
According to the undisputed statements of the High Authority, a detailed list of posts only existed for the Accounts Department from 1 October 1957. According to this list the Accounts Department consisted of an 'accounting officer' ('comptable') (Category B, Grades 6 and 7), a second 'accounting officer' (Category B, Grades 7 and 8) and two 'assistant accounting officers'('comptables adjoints') (Category B, Grade 9 and 10), one of whom is the applicant. None of these posts was vacant in December 1957 (that is, at the beginning of the alleged temporary posting). This list of posts was modified with effect from 1 July 1960. The new list of posts contained the following posts: an 'administrator' ('administrateur') (Category A, Grades 4, 5 and 6), a 'principal administrative assistant' ('assistant principal') (Category B, Grades 6 and 7), four 'assistants' ('assistants'), including the applicant (Category B, Grades 7, 8 and 9) and two 'clerical officers' ('commis'). In this list a post in Grade B 7 and 8 became free in February 1960 on the retirement of a woman accounting officer which, like the other posts in the Accounts Department, had been reclassified. Thus, only after February 1960 was there a vacant post in the Accounts Department which could have been filled on a temporary basis. It was nowhere stated that the applicant has been assigned to this post and according to the High Authority this was not the case.

Thus, not only are the submissions in the application not well founded, but also the undisputed facts show that an essential condition for entitlement to the differential allowance, namely, the temporary occupation of a vacant post, is not fulfilled. Hence, the question whether such a post can only be occupied following an express decision of the appointing authority, or whether an implied assignment is sufficient, need not be discussed here.

Similarly, the Court may dispense with hearing witnesses who could clarify the question whether the applicant's duties should have been evaluated at a higher level than those of the woman accounting officer, who was classified in a higher grade and whose post became vacant in February 1960. To do so is unnecessary for the purposes of giving a decision in this action, since the question at issue is not the correct classification of the post in the light of the services provided but only the conditions for entitlement to a differential allowance in respect of another posting.

In conclusion, I suggest that the Court should:

1. Dismiss Application 22/60 as inadmissible;

2. Dismiss Application 23/60 as inadmissible or alternatively as unfounded.

In accordance with Article 69 (2) in conjunction with Article 70 of the Rules of Procedure of the Court, the applicant must be ordered to bear his own costs.