

JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 13 FEBRUARY 1979 ¹

Hélène Martin
v Commission of the European Communities

Case 24/78

1. *Officials — Recruitment — Competition — Selection board — Proceedings — Absence of a member — Competition procedure — Validity — Conditions (Staff Regulations of Officials, Annex III, Art. 3)*
2. *Officials — Recruitment — Competition based on tests — Written test — Choice of subject — Unfair advantage of one candidate — Principle of equality of treatment — Infringement*

1. Although in principle a selection board cannot validly perform its duties when one of its members is absent, the need to ensure the continuity of the public service may however justify relaxing this principle if it proves impossible to ensure otherwise that the selection board functions.
2. The fact that one candidate is put at an unfair advantage by the choice of the subject for the written test in a

competition is an infringement of the principle of the equality of treatment of the candidates such as to vitiate the subsequent procedure in the competition. This is so where the concrete way in which the subject is defined enables a candidate to profit from the special experience he has acquired in the performance, as a member of the temporary staff, of the duties relating to the post put up for competition.

In Case 24/78

HÉLÈNE MARTIN, residing at 210 Avenue Molière, Brussels, an official of the Commission of the European Communities, represented by Marcel Grégoire and Edmond Lebrun, Advocates at the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

¹ — Language of the Case: French.

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Principal Legal Adviser, Raymond Baeyens, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision by which the selection board for Internal Competition COM/680/75 refused to admit Mrs Martin to the oral tests in that competition and consequently for the annulment of the subsequent procedure in that competition and of the appointment which was made as a result of it,

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, M. Sørensen and A. Touffait, Judges,

Advocate General: F. Capotorti

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, procedure, conclusions and submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. Vacancy Notice COM/1440/74, published in September 1974, concerned

a post of principal administrator at the Directorate General for External Relations, Relations with countries of Northern, Central and Southern Europe Directorate, Relations with the countries of Southern Europe; co-ordination with the Directorate General for Development and Co-operation concerning overall problems relating to the Mediterranean area; Portugal, Spain, Malta, Greece, Turkey, Yugoslavia and Cyprus Division.

The nature of the duties relating to that post was described as follows in the vacancy notice:

“Administrative, advisory or supervisory duties in connexion with the problems relating to relations between the Community and the Mediterranean countries.”

The qualifications required were described as follows:

— University education, with degree or diploma, or equivalent practical experience.

— A good knowledge of the economic and political problems arising in relations between the Community and the above-mentioned countries.

— Very good knowledge of economics, in particular in the field of external relations.

— Ability to represent the Commission in internal and external meetings.

— Wide experience relevant to the post.”

The applicant in this case, Mrs Hélène Martin, applied for this post.

2. The vacancy notice however was annulled and the annulment was published in March 1975. The same post was the subject of Vacancy Notice COM/680/75 published in July 1975 but this procedure was not continued. On the other hand, the post was the subject-matter of Notice of Internal Competition COM/680/75 based on qualifications and tests which bore the same number but was not published until August 1977.

3. Point III of the latter notice provided for a written test “on a subject ... relating to the Mediterranean countries”. Seven applications were passed on to the selection board for the competition; of these seven, the selection board decided at its first meeting to accept for the purposes of the written test the applications of Mr François Ferrandi and Mrs Hélène Martin.

4. Mr Angel Alonso, who was appointed by the Staff Committee to sit on the selection board for that competition, handed to the selection board at the first meeting a written note dated 26 September 1977 and worded as follows:

“The local Staff Committee in Brussels, confirming the appointment of Mr Angel Alonso as staff representative on the selection board for Competition COM/680/75, instructs him to refrain from taking any part in the work of that selection board. In this connexion, the Staff Committee recalls Opinions Nos 1 and 3/74 delivered by the Joint Committee. The latter opinion, which was approved unanimously by the members of the Joint Committee, specifies, as regards individual competitions in particular, that in view of the difficulties which have been discovered and the resulting discontent it is necessary to abolish them in the future. The Staff Committee also recalls that Competition COM/680/75 gave rise to an unfavourable opinion from the Joint Committee. In these circumstances, Mr Angel Alonso will not actually be able to take part.”

A postscript to the note stated as follows:

“According to the information of the local Staff Committee in Brussels, Mr F. Ferrandi will be the successful applicant and will be appointed to the post to be filled as a result of the competition.”

5. At its second meeting, in the absence of the Staff Committee's representative, the selection board fixed the subject of the written test as follows: "Community relations with the Mediterranean countries: association or non-preferential system". Mr Ferrandi and Mrs Martin took part in that test. On the basis of the marks which those two candidates obtained, the selection board decided to admit only Mr Ferrandi to the oral tests. After the oral tests, the selection board put only Mr Ferrandi's name on the list of suitable candidates. In January 1978 the latter was appointed a probationer in the post put up for competition and was classified in Grade A 5.

6. On 7 December 1977 Mrs Martin submitted a complaint under Article 90 (2) of the Staff Regulations of Officials against the decision notified on 1 December 1977 by which the selection board refused to admit her to the oral tests for the competition. By memorandum from the Commission of 9 March 1978 this complaint was rejected.

7. Mrs Martin, who has a bachelor's degree in Politics and Diplomacy (*sciences politiques et diplomatiques*) from the University of Brussels (1963), was assigned to the Directorate General for Overseas Development of the Commission from November 1963, first as a trainee and then as a member of the auxiliary staff. In July 1967 Mrs Martin was appointed a probationer in Grade A 7 in the post of administrator in the same Directorate General, General Affairs Directorate, Fundamental and Legal Problems and Right of Establishment Division. She was established in February 1968. She was promoted to Grade A 6 as from 1 January 1971.

8. Mr Ferrandi is a Doctor of Economics of the University of Paris I, Panthéon, Sorbonne (1971). He was an official at the International Bank for

Reconstruction and Development in Washington from 1972 and was taken on by the Commission as a member of the temporary staff in Grade A 5 from May 1975 to occupy the post in question in this case. He is especially responsible for matters connected with Turkey and Yugoslavia. His contract of employment as a member of the temporary staff was extended successively until May 1978.

9. The present application for the annulment of the refusal by the selection board to admit Mrs Martin to the oral tests in Competition COM/680/75 was lodged on 27 February 1978.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

1. The *applicant* claims that the Court should:

- Declare that the application is admissible and well founded;
- Annul the decision of the selection board for Internal Competition COM/680/75 refusing to admit her to the oral tests for that competition and consequently annul all the subsequent procedure in that competition and the appointment made as a result of it;
- Order the Commission to pay the costs.

2. The *Commission* contends that the Court should:

- Dismiss the application as unfounded;
- Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *The first submission of the applicant*

1. This submission is based on the infringement of the Staff Regulations of Officials, in particular of Article 3 of Annex III thereof, the infringement of essential procedural requirements, lack of competence, violation of legal principles and abuse of powers in that the member of the selection board appointed by the Staff Committee did not take part in the work of the selection board.

Within the context of this submission the applicant first considers three matters, each of which is subsidiary to the previous one:

- (a) the absence of a member of the selection board from the work of that board;
- (b) the member of the selection board is the one appointed by the Staff Committee;
- (c) the effect which the absence of the member of the selection board appointed by the Staff Committee may have had in the present case.

The applicant then deals with the reasons for and the circumstances surrounding that absence.

a. With regard to point (a) above, the applicant points out that the fact that a member of the selection board has not taken part in any of its work is by itself such as to vitiate the competition for illegality: it follows from the opinion of the Advocate General in Case 76/69, *Dietrich Rabe v Commission of the European Communities* [1971] ECR 297

at 305, that this viewpoint is confirmed by the case-law of certain Member States. This opinion is, according to the applicant, supported in addition by A. Plantey in "*Traité Pratique de la Fonction Publique*" (Practical Treatise on the Public Service), Second Edition. According to L. Dubouis, in the "*Revue Trimestrielle du Droit Européen*" (Quarterly European Law Review) 1972, p. 384, the Court, in its judgment of 1 April 1971 in the above-mentioned case ([1971] ECR 297) adopted this case-law. The applicant finally points out that the participation of all the members of the selection board in the deliberations constitutes an indispensable guarantee of objectivity for the applicants.

b. The applicant observes with regard to point (b) above that in any case the absence of the member of the selection board for the competition appointed by the Staff Committee constitutes by itself a cause of illegality. The result of this absence is in fact that the selection board is not composed both of members appointed by the appointing authority and of a member appointed by the Staff Committee, as intended by the legislature.

c. The applicant claims as regards point (c) above that in the present case the absence of the member of the selection board appointed by the Staff Committee has had an effect on the course of the procedure in the competition: this member was absent from all the work of the selection board; the selection board chose a subject for the written test which one of the applicants had already dealt with in his post; the member of the selection board appointed by the Staff Committee would have taken particular care that this did not happen; one of the prime concerns of the Staff Committee is in fact that the principle of equality of treatment should be observed especially on the occasion of a competition in which a member of the temporary staff occupying the post to be filled is taking part.

d. The applicant then retraces the history of the procedure followed for the purpose of filling the post in question and emphasizes in particular in this respect the following points: the Commission did not explain the reasons for the annulment of Vacancy Notice COM/1440/74; it is necessary to consider that by the annulment of that vacancy notice the Commission decided, albeit for the time being, not to fill the post in question; Mr Ferrandi was however assigned to that post two months after that annulment and before Vacancy Notice COM/680/75 had even been published whereas the post had not been declared vacant, contrary to Article 9 of the Conditions of Employment of Other Servants of the European Communities; the Commission should explain the reasons which led it to republish the vacancy notice in the above-mentioned circumstances; the vacancy notice was published again right in the middle of the holiday period but the period within which applications had to be lodged was nevertheless the customary one of two weeks; for unknown reasons the promotion/transfer procedure initiated by Vacancy Notice COM/680/75 was not continued; two years later the notice of internal competition was published bearing the same number, but whereas the vacancy notice required "thorough knowledge of the commercial, financial and political problems arising in relations between the Community and the countries in question", the notice of competition no longer required more than mere "knowledge" in this respect.

The applicant concludes that the decision of the Staff Committee to instruct its representative on the selection board to refrain from taking part in the work of the selection board comes within the context which she has just stated which shows the Commission's concern to reserve the post in question for Mr Ferrandi.

Since the Commission has done nothing to try to make the selection board

function in accordance with Article 3 (1) of Annex III to the Staff Regulations it cannot, according to the applicant, be heard to claim that the irregularity of that functioning must be justified on the basis of the principle of the continuity of the public services. In fact since the decision not to take part in the work of the selection board comes from a body within the Commission and is, moreover, duly reasoned, the Commission is, according to the applicant, obliged to do everything in its power so that the selection board can function. The applicant adds that it is clear that the Staff Committee did not intend in the present case to waive a safeguard which it considers to be essential. Article 3 (1) of Annex III to the Staff Regulations on the composition of the selection board for a competition is moreover, according to the applicant, a provision of public policy and any waiver of such a provision is null and void.

2. The *Commission* claims that the non-participation of the staff representative when that representative had been formally requested to take part in the work of the selection board does not have the effect of making the course of the competition procedure irregular. The principle of the continuity of the public service in fact prevents such procedures of organized obstruction from preventing the normal performance of tasks of the administration. In this case if it were

necessary to consider that the actual participation of a staff representative was essential for the regularity of the course of a competition the administration would find it impossible to fill any vacant post.

The applicant is relying in vain upon the judgment and the opinion of the Advocate General in Case 76/69, *Dietrich Rabe v Commission of the European Communities*: the situation which has arisen in this case is not comparable with the irregularities noted in the internal competition annulled by that judgment. Moreover, according to the Commission, A. Plantey considers, in his "*Traité Pratique de la Fonction Publique*", Third Edition, that "where a member of the selection board fails to appear, the administration must replace him if it has the time to do so . . . If not, the competition will take place before an incomplete selection board."

In the present case the staff representative deliberately abstained so that the appointing authority was, according to the Commission, unable to replace him and was obliged to carry out the competition procedures with a selection board reduced in number although regularly constituted.

The Commission moreover emphasizes that the rule according to which a staff representative must take part in a selection board for an internal competition has been laid down principally in favour of the staff. Therefore by waiving that principle the staff cannot subsequently avail themselves thereof so as to attack the regularity of the competition procedures in that respect.

The Commission observes moreover that Article 3 of Annex III to the Staff Regulations does not mention that the structure of the selection board must be such that it is composed both of members appointed by the appointing authority and of members appointed by the Staff Committee as is the case with regard to the Joint Committee under Article 2 and the second paragraph of Article 3 of Annex II.

The Commission then emphasizes that the publication of a vacancy notice is required for a vacant post which the appointing authority decides to fill permanently. The publication of Vacancy Notice COM/680/75 must be understood to this effect.

The Commission finally observes that the slight differences noted by the applicant between the text of Vacancy Notice COM/680/75 and that of Notice of Internal Competition COM/680/75 correspond to amendments suggested in the opinion on this competition delivered by the Joint Committee.

B — *The second submission of the applicant*

1. This submission is based, in the alternative, on the violation of the principles of natural justice, equality of treatment, distributive justice and good administration and on abuse of powers.

The applicant considers that the principles relied upon in the submission require that in a competition in which a member of the temporary staff who already performs the tasks of the post put up for competition takes part the subject of the written test should not be chosen from the subjects which that member of the temporary staff has dealt with in the performance of his duties.

In the opinion of the applicant it was necessary, in order to ensure equal opportunity, to choose a subject which Mr Ferrandi had not yet dealt with.

The applicant adds that the Commission desires a policy of mobility for its staff which implies that an official performs during the course of his career various

duties sometimes in fields very different from one another. Such mobility could not actually be achieved if in order to obtain a post it were necessary to be able to discuss the subject in the same way as a person who has already performed the duties relating to that post.

2. The *Commission* considers that the subject chosen for the written test by the selection board is justified having regard to the wording of the point entitled "written test" and of the point entitled "nature of the duties" in the notice of competition. The choice of such a general and topical subject could not as such prejudice the applicant's application in relation to that of Mr Ferrandi.

C — *The third submission of the applicant*

1. This submission is based, as a further alternative, on the infringement of the Staff Regulations, particularly of Article 7 (1) thereof, and on misuse of powers in that the objective pursued was not the interests of the service but the appointment of the person who already occupied the post put up for competition as a member of the temporary staff.

According to the applicant, it follows from the judgment of the Court of 29 September 1976 in Case 105/75, *Franco Giuffrida v Council of the European Communities* [1976] ECR 1395, that the pursuit of such an objective implies a misuse of powers.

According to the applicant, the objective pursued results from the historical context of the procedure followed for the purpose of filling the post in question. She points out in particular in this respect that Notice of Competition COM/680/75 was drafted to fit Mr Ferrandi. She claims that the period of two years which elapsed between Vacancy Notice and Notice of Competition COM/680/75 is explained by the concern of the Commission not to put the post up for competition before

the member of the temporary staff who was occupying the post had acquired some experience in it. She emphasizes in this respect that Mr Ferrandi could not take part in the promotion/transfer procedure initiated by the vacancy notice. She then refers to the difference between those two notices as regards the qualifications required to which she has already referred in her first submission. She adds that, as regards the knowledge in the field of external economic relations, the requirements in Notice of Competition COM/680/75 (good knowledge) are lower than those contained in Vacancy Notice COM/1440/74 (very good knowledge). The applicant then refers in this context to the negative opinion delivered by the Joint Committee as regards the publication of that notice of competition, to the instructions given by the Staff Committee to the member of the selection board appointed by it to refrain from taking part in the work of the selection board and to the choice, for the written test, of a subject with which one of the applicants had been dealing for two years.

2. In the opinion of the *Commission* there is no proof of misuse of powers in the present case. The Commission recalls that the appointment of a member of the temporary staff occupying a permanent post at the conclusion of an internal competition based on qualifications and tests organized so as to fill that post does not by virtue of that alone involve a misuse of powers. The applicant is moreover wrongly attempting to

compare the present case and the *Giuffrida* case, Case 105/75.

The Commission then recalls that the change in the notice of competition of certain references to the knowledge required which had appeared previously in the vacancy notice relating to the post were made by the appointing authority at the express request of the Joint Committee.

The Commission, in another connexion, does no more than recall the judgment of the Court in Case 105/75, the *Giuffrida* case, and the judgment of 16 March 1978 in Case 7/77, *Bernhard Diether Ritter von Wüllerstorff und Urbair v Commission of the European Communities* [1978] ECR 769 to show the wide powers of review which the Court of Justice exercises over the regu-

larity of competition procedures, whilst being, with justification, cautious in deciding that special circumstances alleged constitute evidence of a misuse of powers.

IV — Oral Procedure

At the hearing on 16 November 1978 Mrs Hélène Martin, represented by E. Lebrun, and the Commission, represented by its Principal Legal Adviser, R. Baeyens, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the hearing on 11 January 1979.

Decision

- 1 The application, which was lodged on 7 December 1977, is for the annulment of the decision of the selection board for Competition COM/680/75 communicated to the applicant on 1 December 1977 in which the selection board refused to admit her to the oral tests in the competition and for the annulment of the subsequent procedure in that competition and of the appointment made as a result thereof.
- 2 Notice of Internal Competition COM/680/75 based on qualifications and tests, which was published in August 1977, aimed to fill a post in category and career bracket Grade A 5 — A 4, coming within the Relations with the Countries of Southern Europe Division of the Directorate General for External Relations.
- 3 The notice provided for a written test involving “a paper on a subject selected by the selection board relating to the Mediterranean countries”.
- 4 The applicant was admitted to the written test as well as a candidate who had occupied the post in question as a member of the temporary staff since May 1975.
- 5 The other candidate, after being admitted to the oral tests, was the only one put on the list of suitable candidates and was subsequently appointed to the post put up for competition.

First submission

- 6 The applicant claims first that the decision of the selection board is vitiated for illegality because it was taken in the absence of the member of the selection board appointed by the Staff Committee under Article 3 of Annex III to the Staff Regulations of Officials.
- 7 In this respect, it is not in issue that at the first meeting of the selection board the member of the selection board appointed by the Staff Committee handed in a note from the Staff Committee according to which the Committee, confirming his appointment, “instructs him to refrain from taking any part in the work of that selection board”.
- 8 In this context the note recalls the viewpoint adopted by the Joint Committee with regard to individual competitions declaring that it is desirable to abolish them.
- 9 The member appointed by the Staff Committee in fact refrained from taking any part in the work of the selection board so that the selection board, composed of the other two members alone, continued with its work and performed its task.
- 10 Although it is true that in principle a selection board cannot validly perform its duties when one of its members is absent, the need to ensure the continuity of the public service may however justify relaxing this principle if it proves impossible to ensure otherwise that the selection board functions.
- 11 In the present case the absence of one of the members of the selection board was the result of a general viewpoint adopted by the Staff Committee as a protest against a practice adopted by the Commission in relation to individual competitions.
- 12 The Commission was thus prevented from setting up and making function a selection board the composition of which was legal in relation to Article 3 of Annex III to the Staff Regulations, according to which one of the members must be appointed by the Staff Committee.

- 13 Since vacant posts cannot be left unoccupied for an indeterminate period of time the Commission was therefore justified to proceed on the basis of the work of the selection board as performed without the participation of the absent member.
- 14 This submission cannot therefore be accepted.

Second submission

- 15 The applicant claims in the alternative that the principle of the equality of treatment of the candidates in a competition has been violated because the subject of the written test was chosen from the subjects which one of the candidates had dealt with in the performance of his duties as a member of the temporary staff occupying the post put up for competition.
- 16 The selection board chose as the subject for the written test "Community relations with the Mediterranean countries: association or non-preferential system".
- 17 The applicant occupied a post in Grade A 6 in the Directorate General for Overseas Development, Directorate D (Operations), Division 4 (Training) within which she had taken part in particular in the drawing-up of certain multi-annual training programmes and certain specific training schemes and had carried out for this purpose several fact-finding missions for training schemes in three African, Caribbean and Pacific countries.
- 18 the other candidate admitted to the written test had been responsible, in the performance of his duties as a member of the temporary staff in the post to be filled, for matters connected with Turkey and Yugoslavia.
- 19 These two countries may be considered as being typical countries benefiting one from a system of association and the other from a non-preferential system.

- 20 It is therefore clear that the other candidate was put at an unfair advantage by the choice of the subject for the written test since the concrete way in which that subject was defined enabled him to profit from the special experience acquired in the performance of his duties in the post put up for competition.
- 21 This infringement of the principle of equality of treatment of the candidates in a competition is such as to vitiate both the decision in question adopted by the selection board for the competition and the subsequent procedure.
- 22 In these circumstances it is not necessary to examine the submission put forward by the applicant as a further alternative concerning the infringement of the Staff Regulations of Officials, in particular Article 7 (1) thereof (“the interests of the service”) and misuse of powers.
- 23 It is therefore necessary to annul both the decision by which the selection board for Competition COM/680/75 refused to admit the applicant to the oral tests and the subsequent procedure in the competition and the appointment made as a result thereof.

Costs

- 24 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.
- 25 As the defendant has failed in its submissions, it is necessary to order it to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Annuls both the decision of the selection board for Competition COM/680/75 by which the selection board refused to admit the applicant to the oral tests and the subsequent procedure in the competition and the appointment made as a result thereof;
2. Orders the Commission to pay all the costs.

Mackenzie Stuart

Sørensen

Touffait

Delivered in open court in Luxembourg on 13 February 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber