

ard of ability, efficiency and integrity, the Court must, in reviewing the correctness of the examination of the internal candidatures, confine itself to the question whether the administration kept within proper bounds and did not exercise its power in a manifestly erroneous manner.

In that respect the mere fact that, when the recruitment procedure was opened, a candidate from another institution was regarded as being the most suitable, does not necessarily mean that the internal candidatures were not carefully considered.

In Case 10/82

SVEN-OLE MOGENSEN, CARL WALTENBURG, LENE ØHRGAARD AND JEAN-LOUIS DELVAUX, officials of the Commission of the European Communities, all residing in Belgium, assisted and represented by Jytte Thorbek, of the Copenhagen Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Johannes Føns Buhl, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION in the terms of the conclusions set out in the application,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat  
Registrar: H. A. Rühl, Principal Administrator

gives the following

## JUDGMENT

### Facts and Issues

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

#### I — Facts and procedure

In Vacancy Notice COM/1144/80 published in Vacant Posts No 49, the Commission declared vacant a post of a reviser.

The requisite qualifications as specified in that vacancy notice were as follows:

1. University education, attested by a diploma, or equivalent professional experience;
2. Long experience of translation; experience of revision;
3. Proven active command of language and a sound style."

It is not disputed that the applicants all have university degrees and professional experience extending over a number of years. The periodic reports on the four applicants show that they all have many years' experience of translation and have all carried out revision work. Each of them has received very favourable periodic reports.

It is therefore common ground that the four applicants satisfied the requirements set out in the vacancy notice. They allege, however, that the post of reviser in question was reserved in advance for

Mr Hagelin as is shown, in their view, by a series of documents submitted both by themselves and by the Commission.

For the better comprehension of that series of documents, namely the letters and notes annexed to the pleadings of the parties, it is appropriate to refer to them in the following manner and chronological order:

26 February 1980: letter from Mr Hagelin to the Head of Personnel of Directorate General IX, Mr Baxter, applying for a post with the Commission.

13 June 1980: note from the Head of the Recruiting, Appointments and Promotion Division, Mr Debois, addressed to the Head of the Translation, Documentation, Reproduction and Library Directorate, Mr Ciancio, asking the latter's opinion regarding Mr Hagelin's application; it is appropriate to cite the last paragraph of that note:

"Should the answer prove to be favourable, a vacancy for an L/A 5-L/A 4 post will have to be advertised and, after rejection of any applications from within the Commission, the post will have to be advertised in the other institutions (Article 29 (1) (c) of the Staff Regulations)".

19 December 1980: the date on which the vacancy notice relating to the post of reviser was posted up in the Commission.

12 January 1981: second letter to Mr Baxter from Mr Hagelin, in which the latter applied for the post of reviser, and

enclosed an extract from his latest periodic report.

16 January 1981: closing date for candidatures for the post of reviser; the four applicants also submitted their candidatures for the post before this date.

18 February 1981: note from Mr Ciancio to Mr Baxter in which the former stated that none of the candidates for the post of reviser could be promoted since none of them possessed the experience that he regarded as indispensable. He also reserved the right to make another proposal to fill the post by way of transfer.

20 February 1981: note from Mr Pignot on behalf of Mr Ciancio addressed to Mr Baxter proposing that Mr Hagelin be transferred from the Council to the Commission to fill the post of reviser.

17 March 1981: note from Mr Pignot to Mr Cairoli setting out the reasons for rejecting the eight candidatures from within the institution for the post of reviser.

26 March 1981: meeting of the Brussels contact group at which Mr Baxter made a statement justifying the transfer of Mr Hagelin.

28 April 1981: formal decision rejecting the candidatures of the four applicants.

28 April 1981: the Commission sent identical letters to the other European institutions asking them to publish Vacancy Notice COM/1144/80.

29 April 1981: further meeting of the Brussels contact group at which one of the four applicants, Mr Mogensen, stated that the post of reviser should be assigned to one of the internal candidates to which Mr Baxter replied that it was for the department in question to

assess its needs and the respective merits of applicants.

15 May 1981: date on which the four applicants actually received their letters of rejection (thus, as far as they are concerned, the procedure under Article 29 (1) (a) did not terminate until this date).

18 May 1981: each of the applicants submitted a complaint against the rejection of their application for the post of reviser.

19 June 1981: memorandum from Mr Ciancio to Mr Cairoli asking for the proposal to transfer Mr Hagelin to be expedited.

30 July 1981: note from the Director General for Personnel and Administration of the Commission, Mr Morel, to the Secretary General of the Council, Mr Esbøll, officially requesting the transfer of Mr Hagelin with effect from 1 September 1981.

September 1981: letter from Mr Esbøll to Mr Morel informing the latter that it would be possible to transfer Mr Hagelin only with effect from 1 January 1982.

23 September 1981: note from the Head of the Careers Division, Mr Landes, to Mr Ciancio, informing the latter that the transfer of Mr Hagelin would be possible only as from 1 January 1982.

1 December 1981: by four letters bearing the same date the Commission rejected the four complaints.

18 December 1981: the Commission adopted the decision to appoint Mr Hagelin to the post of reviser with effect from 1 January 1982.

22 December 1981: date borne by the application addressed by the four applicants to the Court of Justice.

8 January 1982: application registered at the Registry of the Court of Justice.

Upon 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 but asked the Commission to reply to the following questions by 5 March 1983:

1. The Commission is requested to inform the Court of its practice regarding promotion in the language service:

As a rule, is promotion granted (or has it been granted in the past) to officials with the minimum seniority in their grade?

Or is promotion only granted at a later stage?

2. Would the Commission inform the Court of the documents on which it relied when appointing Mr Hagelin and explain to the Court the factors that prompted its officers to propose on 20 February 1981 that Mr Hagelin be appointed by transfer?

3. The Commission is asked to explain the content and meaning of the letters in Annexes 12 and 13 to the applications.

The Court further asked the Commission to attend the hearing with one (or more) persons who would be able to reply to any questions the Court might ask regarding in particular the actual course of the procedure and any other matter or point raised.

## II — Conclusions of the parties

The *applicants* claim that the Court should:

“(a) Annul the decisions of the defendant contained in its letters of 28 April 1981 according to which the post of reviser (COM/1144/80) was not to be assigned to any of the four applicants;

(b) Order the defendant to appoint the best-qualified of the four applicants to the above-mentioned post;

(c) Order the defendant to pay the costs.”

In its defence, the *Commission* contends that the Court should:

“Reject the claims made by the applicants in their conclusions in this case;

Order the applicants to pay the costs.”

In its rejoinder the *Commission* further contends that the Court should:

“Declare inadmissible the applicants’ presentation of new submissions based on matters of fact or of law which are said to have come to light and, in the alternative, reject the applicants’ claim that the assignment of the post of reviser — COM/1140/80 — involved a misuse of powers.”

## III — Submissions and arguments of the parties

In their application the *applicants* claim first that Article 29 of the Staff Regulations requires the appointing authority to consider first of all the possibilities of promotion and transfer within the insti-

tution before holding any competition internal to the institution; furthermore, it is only as a third step that the appointing authority may examine applications for transfer from officials of other institutions of the European Communities.

In this case the Commission refused to appoint one of the four applicants although all four possessed the qualifications required for the post of reviser. The appointing authority has therefore failed to comply with the procedural rules of Article 29 of the Staff Regulations. The facts of the case also show that the post was deliberately reserved for Mr Hagelin. It was following his first request dated 18 February 1980 that a post of reviser was created in the summer of 1980, that it was filled on a temporary basis from September 1980 until the end of August 1981 and that it was left vacant until 1 January 1982 since Mr Hagelin could not come until that date. Thus phase (c) of the procedure under Article 29 (1) was commenced even before phase (a) was completed.

The applicants further submit that the Commission cannot rely on Article 27 as justification for the appointment of Mr Hagelin since "that provision is in the nature of a provision setting out general aims" whereas Article 29 is "in the nature of a special provision compared with Article 27" and therefore prevails over the latter.

Finally, the applicants ask the Commission to explain its interpretation of Article 27 of the Staff Regulations with regard, first, to its previous practice and, secondly, to promotion in the Danish Translation Division.

In its defence, the *Commission* notes first that the qualifications required for the

posts of principal translator and reviser are the same. Although the work in both cases is similar and neither of the two posts is superior or inferior to the other, it should, however, be stressed that certain tasks carried out by a reviser call for abilities which differ from those of principal translators.

The Commission points out that Mr Hagelin holds a Higher Diploma in commercial language studies (cand. ling. merc.), the languages which he studied being German and English. He was recruited by the Commission as a translator in June 1972 and transferred to the Council in September 1973. He was appointed, with effect from 1 July 1975, to a post of reviser in the Council Secretariat and occupied that post until his transfer to the Commission. In the Commission's view, therefore, Mr Hagelin possesses all the necessary qualifications for the post of reviser COM/1144/80. As regards the applicants, on the other hand, the Commission refers to the note of 18 March 1981 stating that two of them have recently been promoted to a post in career bracket L/A 5-4 as principal translators. As to the other two, Lene Ørggaard and Jean-Louis Delvaux, "the Head of the Translation Directorate did not consider that they possessed the necessary experience for the post of reviser".

Replying to the allegation that it failed to follow the promotion procedure laid down in Article 29 of the Staff Regulations, the defendant takes the view that the appointing authority is indeed required to consider first the possibilities under Article 29 (1) (a) but points out that the carefully shaded wording of Article 29 shows clearly that the appointing authority has a wide discretion in this respect: that fundamental principle has been confirmed in several

judgments of the Court of Justice.<sup>1</sup> If, therefore, having examined the candidatures from within the institutions, the appointing authority finds that promotion or transfer within the institution is not possible, it is quite at liberty either to organize an internal competition or to arrange a transfer from another institution. In this case the appointing authority considered that it would serve no purpose to organize a competition since there could be no candidatures more promising than those rejected in phase (a) of the procedure under Article 29 (1) and, since it knew that it was possible to fill the post by appointing a candidate who for some years had competently carried out the functions of reviser at the Council, it was in accordance with the provisions of Article 29 of the Staff Regulations for it to consider the possibility of appointing that person to the vacant post of reviser.

The Commission submits that posts should be filled primarily having regard to the interests of the service and that therefore the appointing authority must verify that the possibilities offered by Article 29 do indeed result in the appointment of a person of the highest standard of ability, efficiency and integrity. It follows from that principle, which is derived from Article 27 of the Staff Regulations, that the appointing authority is not obliged "to fill the post by promotion or transfer within the institution or by holding a competition internal to the institution". The applicants are misconstruing Article 29 when they claim that that article may give rise to an individual right to promotion.

The Commission expresses some reservations regarding the way in which the notes and letters annexed to the application came into the applicants' possession and it refers in this respect to a judgment of the Court of 17 December 1981 (Cases 197 to 200, 243, 245 and 247/80 *Ludwigsbafener Walzmühle v Council and Commission* [1981] ECR 3211 at p. 3245).

The Commission submits that the refusal to fill a vacant post by means of promotion within the institution was within the appointing authority's discretion. Thus, if the appointing authority decides to fill a post by way of transfer, it is not obliged to discuss the other candidates in the reasons which it gives for that decision. The appointing authority's obligation is to secure for the institution the services of officials of the highest standard of ability, efficiency and integrity whilst avoiding any discrimination. In any event, in the present case it is wrong to state, as the applicants have done, that the appointing authority decided in advance to appoint Mr Hagelin because when it declined to fill the post of reviser by promotion within the institution on 18 February 1981, the appointing authority did not yet have the documents enabling it to assess Mr Hagelin's qualifications and the latter's application was therefore examined after 18 February 1981.

Turning to the applicants' qualifications, the defendant observes in the first place that officials have no right to promotion even if they satisfy the conditions for promotion since each post has to be filled primarily in the interests of the service, as is clear from Article 27. In its

<sup>1</sup> — See judgment of 31 March 1965 in Joined Cases 12 and 29/64 *Ley v Commission* [1965] ECR 107 and judgment of 25 November 1976, Case 123/75 *Küster v Parliament* [1976] ECR 1701.

decisions the Court thus acknowledged that the appointing authority has a wide discretion in comparing the merits of candidates; that discretion can be challenged only if its exercise was manifestly erroneous which is not the case here.

The Commission refutes the applicants' insinuation that in appointing Mr Hagelin to the post of reviser, the appointing authority's aim had been other than the one legally prescribed. The Commission submits that by deciding to fill the post of reviser COM/1144/80 by transferring a qualified candidate from another institution of the European Communities instead of promoting one of the four applicants in these proceedings, the appointing authority had in no way failed to comply with its obligations under Articles 29 and 45 of the Staff Regulations and thus had not infringed the applicants' rights under the Staff Regulations.

The Commission sees no reason for complying with the request for information about its previous practice regarding recruitment and promotion since, on the one hand, that request seems to bear no relation to the conclusions in this case and, on the other hand, the applicants have not made clear what interest they have in obtaining that information.

Finally, the defendant submits that the applicants' claim that the Court should compel the Commission to appoint the best qualified of the applicants to the post of reviser is clearly inadmissible since the Court cannot issue orders to an institution.

In their reply, the *applicants* first make a number of observations regarding the facts of the case:

To explain why it had rejected the internal candidates, the Commission merely declared that those candidates did not possess the experience that was regarded as indispensable for the post of reviser. In the applicants' view, that is inadequate and they ask the Commission to explain what it means. They also consider that there is a contradiction inherent in the justification given by Mr Ciancio in so far as "certain" experience cannot at the same time be "long and extensive" and from that they deduce that the qualification "certain" was only added to justify the rejection. In any event Mr Ciancio's explanation is not in accordance with the assessments in the applicants' personal files.

The applicants do not accept what they call the Commission's "postulate" according to which the skills which a reviser must have are different from those of a principal translator, particularly since the vacancy notice indicates nothing of the kind.

The applicants consider that inasmuch as they satisfied the conditions as to qualification, the appointing authority has acted arbitrarily and then justified that action *a posteriori* by using the above-mentioned "postulate".

The chronological order of the facts show that stage (c) of the procedure under Article 29 (1) was commenced even before stage (a) had been completed. Furthermore the vacancy notice was not posted in the other institutions, which suggests that the

transfer was to be kept as quiet as possible.

Since Mr Hagelin's personal file was not in the possession of the Commission, the appointing authority could not have compared his qualifications with those of the applicants, unless parallel files existed in which case they should be produced by the Commission.

Since Mr Hagelin's personal file was not in the possession of the Commission in February 1981, either the appointing authority's assessment was arbitrary or it was based on confidential information, which would be further evidence of misuse of powers.

In the light of all these factors, as complemented by the correspondence submitted by the Commission in its defence, the applicants claim that the vacancy notice for the post of reviser was posted improperly and that there was a misuse of powers which, they claim, the defendant more or less admits in its defence.

Replying to the submissions of law put forward by the Commission, the applicants go on to point out again that there is an overriding obligation to complete stage (a) of the procedure under Article 29 first before considering the other stages; they maintain that all four applicants were suitably qualified and that the chronology of the internal notes and letters clearly show that the decision to appoint Mr Hagelin was taken in advance, in infringement of

Article 29, and constitutes a misuse of powers.

As regards the interpretation of Article 27, the applicants do not object to an interpretation of that provision to the effect that the appointment must be made in the interests of the service, on the assumption, however, that that concept finds concrete expression in Article 29, that is to say that qualified candidates in an institution are to be preferred to those from outside.

The applicants challenge the Commission's argument to the effect that the internal notes should not be used as evidence. They believe it is in the legitimate interest of the applicants to bring everything out into the open and that the sixth paragraph of Article 26 entitles them to disclosure of all the documents in files on them. They therefore request the Commission to supply the missing correspondence. Furthermore, the notes in question were not impressed with the "internal documents" or the "confidential" stamp and the applicants had gained access to them "by lawful means since they had been sent anonymously to one of the applicants". Moreover, since those notes and letters were part of the recruitment procedure, they may properly be consulted by the officials concerned.

The applicants point out, with regard to the case-law on which the Commission relies, first, that as regards promotion the judgments cited are not relevant to this case and that, in their view, there is no judgment on which the appointing authority could rely for rejecting candidatures in stage (a) of the procedure under Article 29 (1) and going straight on to stage (c).



The applicants maintain finally that in their application they argued, *inter alia*, that the defendant was guilty of a misuse of powers. That has been largely confirmed by Annexes 2 to 12 produced by the Commission and also by the content of the defence.

After citing all the requests made in the reply, the applicants further ask the Court, pursuant to the last paragraph of Article 26 of the Staff Regulations, to order that Mr Hagelin's personal file be produced together with any parallel files on Mr Hagelin or the applicants, or both, and for the Head of Division, Mr Marstrand, and for the Director, Mr Ciancio, to be heard as witnesses.

In its rejoinder, the *Commission* replies first to the factual arguments put forward by the applicants:

The explanation of the term "experience regarded as indispensable for the post of reviser" is obvious in the sense that the appointing authority has a wide discretion regarding candidates' qualifications.

The Commission supplements its statements in the defence by adding that the actual decision to fill a post must be based on the law of supply and demand. Thus if a number of highly qualified candidates apply for a post it is of course the best candidate who should win and that was the essential reason for appointing Mr Hagelin to the post of reviser.

As evidence of Mr Hagelin's qualifications, the Commission has supplied information relating to the training and career of Mr Hagelin which fully justify the appointing authority's decision.

The Commission emphasizes in addition that there is nothing unusual in the fact that the person in charge of the Commission's Translation Directorate kept himself informed of suitable candidates both within the Commission and elsewhere and that he took account, in the course of the assessments he made in February to April 1981, of the fact that a better-qualified candidate could be recruited by transfer from another institution of the European Communities.

The Commission sees no point in producing to the Court the alleged parallel files, assuming that they exist, and reserves its position regarding the use of internal documents by its officials since "it is not prepared to accept that the anonymous communication of internal documents referred to in the reply (page 11) can be treated in the same way as lawful communication of documents".

The Commission repeats and enlarges upon the legal arguments set out in its defence.

It adds that in its view the applicants' request for examination of the two witnesses named by them should be rejected because the applicants do not state the reasons for which those witnesses should be examined, as is prescribed by the Rules of Procedure, and because examination of those two officials is superfluous.

Finally the Commission asks the Court to declare that the submission of misuse of powers put forward by the applicants in their reply is inadmissible on the ground that the written procedure in this case has revealed no element of law or

fact such as to justify the applicants' raising a fresh issue in their reply.

IV — Commission's replies to the written questions put by the Court (see p. 2401 *supra*)

#### Question 1

The Commission states that it is exceptional for an official to be promoted immediately on reaching the minimum seniority under Article 45 (1). In 1981, for example, the average seniority of officials promoted to Grade L/A 5 was four years and seven months, the minimum seniority being two years and nine months.

#### Question 2

The Commission states that the documents leading up to Mr Hagelin's appointment were as follows:

- (a) The eight candidatures from within the Commission transmitted for the opinion of the director concerned, Mr Ciancio;
- (b) Mr Ciancio's opinion proposing that the applicants from within the Commission should be rejected and reserving the possibility of a proposal to fill the post by transfer;
- (c) A supplementary note dated 17 March 1981 setting out the reasons for rejecting the eight candidatures from within the Commission;
- (d) The decision of 8 May 1981 by Mr O'Kennedy, Member of the Commission, the appointing authority in this instance:  
not to fill the post under Article 29 (1) (a) of the Staff regulations,  
not to hold an internal competition.

to apply Article 29 (1) (c) of the Staff Regulations;

- (e) Communication of 3 June 1981 to Mr Ciancio of the fact that the only candidature received was that of Mr Hagelin;
- (f) Letter of application from Mr Hagelin dated 12 January 1981 which was not taken into account at that time during the procedure under Article 29 (1) (a) but was regarded as valid for the procedure under Article 29 (1) (c);
- (g) Reply dated 19 June 1981 from Mr Ciancio to the communication referred to in (e) asking that the transfer procedure be opened;
- (h) Mr Hagelin's request for a transfer, sent to the Secretary General of the Council of 6 August 1981;
- (i) The reply to that request dated 16 October 1981.

The Commission adds that it did not propose on 20 February 1981 that Mr Hagelin be appointed by means of a transfer; the note in question was merely a technical opinion from the relevant directorate and not a proposal submitted to the appointing authority.

#### Question 3

With regard to Annex 12 to the application, the Commission submits that Mr Desbois asked Mr Ciancio for his opinion on Mr Hagelin's candidature and informed Mr Ciancio of the various stages of the procedure which would enable Mr Hagelin to be transferred.

With regard to Annex 13 to the application, the Commission submits that Mr Pignot informed Mr Baxter on 20 February 1981 that Mr Hagelin was a candidate for the post of reviser and made a proposal that the latter be

transferred. The Commission maintains, however, that the “perhaps unfortunate wording of the note appears to give it a definitive character which it cannot have”, particularly since Mr Hagelin was informed on 2 February 1981 that his candidature could not be accepted. The real request for Mr Hagelin to be transferred is contained in the communication from Mr Ciancio to Mr Cairoli dated 19 June 1981.

V — Oral procedure

The parties presented oral argument and replied to questions put to them by the Court at the sitting on 21 April 1983.

The Advocate General delivered his opinion at the sitting on 19 May 1983.

## Decision

- 1 By application lodged at the Court Registry on 8 January 1982, Messrs Mogensen, Waltenburg and Delvaux and Mrs Øhrgaard, who were all officials in Grade L/A 6 employed in the Danish Translation Division of the Commission of the European Communities when they submitted their candidatures for a post of reviser pursuant to Vacancy Notice COM/1144/80, have brought an action seeking, first, the annulment of Commission decisions of 28 April 1981 rejecting their candidatures for that post and, secondly to compel the Commission to appoint to the post the best qualified of the four applicants.
- 2 In the vacancy notice in question, COM/1144/80, the Commission declared vacant a post of reviser in category and career bracket L/A 5-4 which was subject to the following conditions:

“University education attested by a diploma or equivalent professional experience;

Long experience of translation; experience of revision;

Proven active command of language and a sound style.”

- 3 It is common ground that each of the four applicants had all the qualifications stipulated in the vacancy notice. However their applications, which were submitted within the framework of the procedure under Article 29 (1) (a) of the Staff Regulations, were rejected and an official of the Council of the European Communities, who was already working as a reviser in Grade L/A 5 at the Council, was appointed under Article 29 (1) (c) of the Staff Regulations.
- 4 The applicants submitted to the appointing authority a complaint under Article 90 of the Staff Regulations and then brought the present action which is founded on two principal submissions. The first is that Article 29 (1) of the Staff Regulations has been infringed and the second is founded on the applicants' allegation that the post of reviser in question was reserved in advance for the Council official, as is evidenced, according to them, by all the notes and letters from the relevant departments of the Commission.
- 5 In their reply, the applicants further claim, largely on the basis of the arguments adduced in support of their second submission, that the Commission misused its powers.

#### The first submission

- 6 In support of their first submission, the applicants argue that the appointing authority may not fill a post by way of transfer, that is to say by using stage (c) of the procedure under Article 29 (1), until after it has established, in conformity with stage (a) of that procedure, that there are no candidates within the institution who meet the conditions set out in the vacancy notice. By not appointing any of the four applicants although they all possess the qualifications prescribed in the vacancy notice, the appointing authority therefore infringed Article 29 of the Staff Regulations. The applicants maintain, furthermore, that the Commission cannot rely on Article 27 of the Staff Regulations in order to arrive at a different interpretation since Article 29 is a special provision and therefore prevails over Article 27. On the other hand, they say that there is nothing to prevent Article 27 from being interpreted to the effect that the concept of the interests of the service is given actual concrete expression in Article 29, in other words that qualified candidates within an institution should be given preference over those from outside.
- 7 The Commission rejects that argument. In its view, although the appointing authority is certainly obliged to examine first the possibilities under Article

29 (1) (a), the carefully shaded wording of Article 29 clearly shows that the authority has a wide discretion in this respect. Thus where the appointing authority finds, as it did in the case in point, that promotion within the institution is not possible, it is quite at liberty either to hold an internal competition (stage (b)) or to arrange for a transfer (stage (c)). An internal competition would have served no purpose in this case since there could not have been any candidates within the institution who were more suitable than those rejected under stage (a), and that was why the Commission passed straight on to stage (c). The Commission considers, moreover, that posts should be filled having regard first and foremost to Article 27, that is to say with a view "to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity". Consequently the appointing authority is not obliged to adopt the method of promotion within the institution, particularly since the decision not to fill a vacant post is a matter for the appointing authority's discretion.

- 8 It should be noted first that the applicants' interpretation to the effect that the appointing authority should have appointed one of them to the vacant post is in contradiction with the fact that Article 29 (1) (a) requires the authority only to consider whether the post can be filled by promotion.
- 9 The use of the word "can" clearly shows that the appointing authority is under no absolute obligation to promote an official but merely has to consider, in each case, whether promotion is capable of leading to the appointment of a person of the highest standard of ability, efficiency and integrity as required by Article 27 of the Staff Regulations.
- 10 Although Article 29 (1) (a) requires the appointing authority to consider the possibility of promotion with the utmost care before going on to the following stage, it does not prevent the authority, in the course of such an examination, from also taking account of the possibility of obtaining better candidates by using the other procedure mentioned in that paragraph. Consequently the appointing authority is at liberty to consider the subsequent options.
- 11 In the case in point the next stage was a transfer since an internal competition would have served no purpose because, as the Commission

rightly submits, all the candidates suitable for the post had already come forward in the course of stage (a). It is clear both from the documents before the Court and from the oral argument that the candidate recruited by way of transfer had all the above-mentioned qualifications and satisfied in every respect the particular requirements of the post to be filled.

- 12 In those circumstances the Commission did not, in the case in point, infringe Article 29 (1) of the Staff Regulations and the first submission is therefore unfounded.

### The second submission

- 13 The applicants base their second submission on the assertion that the Commission deliberately reserved the post to be filled for the official from the Council. They submit that the department concerned proposed starting the procedure for transferring that official even before the qualifications of the internal candidates were known. They base their allegation essentially on notes exchanged between the departments of the Commission, and in particular on the note dated 13 June 1980 from the Head of the Recruiting, Appointments and Promotion Division indicating the course to be followed if that official was to be appointed, the note of 18 February 1981 rejecting the candidatures from within the Commission and proposing to fill the post by way of transfer and the note dated 20 February 1981 proposing that the official in question be transferred.
- 14 The Commission states that it is wrong to maintain that the post was reserved in advance for the official from the Council, since on 18 February it did not yet have in its possession the documents relating to that official. In its rejoinder the Commission further points out that its choice was dictated by the desire to choose the best candidate and that it was quite normal for the Commission to keep itself informed of highly qualified candidates from outside the institution and for it to have accordingly taken account of the existence of such a candidate when considering the internal candidates.
- 15 By thus expressly recognizing that it took account of the qualifications of that official from the Council, the Commission is in effect admitting that the Head of the translation department in question wished, even before the vacancy notice was put up, to propose that that official be appointed to the post of reviser. Such an attitude raises the question whether the post of

reviser was in fact reserved for that official even before the start of stage (a) of the procedure under Article 29 (1) of the Staff Regulations.

- 16 It has to be noted, however, that since the appointing authority is not obliged to fill a post by promotion within the institution and has a wide discretion for the purpose of finding the candidate with the highest standard of ability, efficiency and integrity, the Court must confine itself to the question whether the administration kept within proper bounds and did not exercise its power in a manifestly erroneous manner.
- 17 In that respect the mere fact that when the recruitment procedure was opened, a candidate from another institution was regarded as being the most suitable, does not necessarily mean that the internal candidatures were not carefully considered.
- 18 In this case there is nothing in the documents before the Court to show that the appointing authority did not in fact consider the qualifications and merits of the internal candidates. It should be noted in this respect, in the first place, that two of the four applicants (Øhrgaard and Delvaux) had only two years' seniority in Grade L/A 6 which is admittedly the minimum seniority required for promotion but is far below the average recorded in 1981 of four years and seven months and that the appointing authority was therefore perfectly entitled to consider that their experience was inadequate. It should also be noted that the other two applicants had also applied for posts of principal translator in Grade L/A 5 (Vacancy Notice COM/1134-1140/80) and were moreover promoted to such posts on 1 March 1981, even before the official from the Council was appointed to the post of reviser. This clearly indicates that, having regard to their files, the appointing authority decided that those two candidates could be appointed to the post of principal translator but not to that of reviser.
- 19 Furthermore, neither the allegations made by the applicants nor the documents before the Court justify the conclusion that by appointing a third party, the defendant exercised its discretion in a way that was manifestly erroneous.

- 20 It is common ground that the official who was in fact appointed had worked as a translator for more than a year for the Commission, then served as a reviser in Grade L/A 5 at the Council as from 1975 and thus had six years' experience in the post to be filled whereas the applicants had served as translators in Grade L/A 6 for little more than two years and were only incidentally engaged in revision.
- 21 Consequently the Commission was entitled to consider that the official appointed possessed, to a greater extent than the applicants, the qualifications necessary for the duties of a reviser, particularly as regards the requirement of experience of revision, and to appoint him in the interests of the service.
- 22 Since the applicants have adduced no other evidence that the appointing authority exceeded its discretionary powers in giving its preference to another candidate for the purposes of the appointment to the post of reviser in question, the second submission must be rejected.
- 23 Consequently the submission of misuse of powers, which is based essentially on the same arguments as those put forward in support of the second submission, must also be rejected as being unfounded without there being any need to decide whether that submission is, as the Commission maintains, inadmissible on the ground that it was made out of time.
- 24 The application for the annulment of the Commission decisions in question must therefore be dismissed. Consequently the request for an order directing the Commission to appoint the best qualified of the applicants must also be rejected. Furthermore that request is in any event one which the Court has no jurisdiction to entertain.

### Costs

- 25 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure costs incurred by the institutions in proceedings brought by servants of the Community are to be borne by those institutions.



On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Pescatore

Due

Bahlmann

Delivered in open court in Luxembourg on 14 July 1983.

J. A. Pompe

P. Pescatore

Deputy Registrar

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL  
VERLOREN VAN THEMAAT  
DELIVERED ON 19 MAY 1983 <sup>1</sup>

*Mr President,  
Members of the Court,*

1. The problem

Case 10/82 raises in particularly acute form the question of the limits of an appointing authority's discretion when filling vacancies under Article 29 of the Staff Regulations.

In Vacancy Notice COM/1144/80 the Commission declared vacant a post of reviser for which the following qualifications were required:

1. University education attested by a diploma, or equivalent professional experience;

<sup>1</sup> — Translated from the Dutch.