

JUDGMENT OF THE COURT (THIRD CHAMBER)
22 SEPTEMBER 1983 ¹

Angélique Verli-Wallace
v Commission of the European Communities

(Official — Admission to a competition)

Case 159/82

Measures adopted by the institutions — Withdrawal — Conditions

The retroactive withdrawal of a legal rights or similar benefits is contrary to measure which has conferred individual the general principles of law.

In Case 159/82

ANGÉLIQUE VERLI-WALLACE, administrative assistant with the Commission of the European Communities, residing at 30 Ambiorix Square, 1040 Brussels, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by John Forman, a member of its Legal Department, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

¹ — Language of the Case: French.

APPLICATION for annulment of the decision taken by the Selection Board for Competition COM/B/328 to annul its own decision admitting the applicant to the said competition and, so far as necessary, for the annulment of the implied rejection by the Commission of the applicant's complaint against the decision,

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. The applicant, Mrs Verli-Wallace, an administrative assistant in Grade B 4 at the Commission of the European Communities since 25 February 1981, made application to take part in the open competition based on qualifications and tests to constitute a reserve for future recruitment of senior assistants (Grades B 3 and B 2) of Greek nationality (COM/B/328) organized by the Commission during 1981. The notice of competition stipulated *inter alia*:

"The following will not be allowed to compete:

- (a) applicants in possession of a certificate received at the end of a long course of studies (three years or more) at university level;
- (b) applicants in their final year of a long course of studies (three years or more) at university level."

Successive decisions by the selection board, notified to the applicant by letters dated 15 April and 24 June 1981, admitted her to the written and oral tests for the competition. At the oral tests on

13 July 1981 she stated in answer to a question put to her by the chairman of the selection board that she would be able to obtain in Greece a university degree at the end of 1981 at least on condition that her employment left her time to prepare for the examinations.

Following that meeting the chairman of the selection board informed the applicant on 28 August 1981 that the selection board had found that she did not satisfy the conditions for admission to the competition and that her admission must consequently be annulled. The substance of that meeting was confirmed by letter from the head of the Commission's recruitment division dated 7 September 1981 containing the following passage:

"On learning during the oral tests for the competition to which you were invited that you would be in a position to finish your studies in October 1981 and thus to obtain a university degree, the selection board found that you were not entitled to enter the competition. The notice of competition published in Official Journal C 24 of 4 February 1981 stated at paragraph III 2 (b) that applicants in their last year of a long course of study at university level were not allowed to compete. The selection board has therefore felt compelled to annul your admission to the competition."

It appears from the file that the applicant followed with success the first three years of legal studies at the National University of Athens and was enrolled as a student in the fourth and final year of studies for the 1974/75 academic year. Since then she has taken part in several examinations between 1975 and 1981 without however obtaining a degree, for which she still has to pass certain additional examinations.

Legal studies at the National University of Athens are organized in such a way that at the end of the fourth year, in contrast to the first to third years, students do not have to take written examinations on the material covered during the final year, but are automatically, and without having to renew their enrolment as students, allowed to present themselves during as many sessions as they wish for the oral examinations on the material covered during the four years' study for the degree.

2. On 27 October 1981 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations against the decision of the selection board annulling her admission to the competition. As she received no reply within the period prescribed, she brought this action which was lodged at the Court Registry on 26 May 1982.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Primarily:

Declare null and void the decision taken by the Selection Board for Competition No COM/B/328 to annul its own decision admitting the applicant to the said competition after she had taken the written and oral tests;

Declare that since the applicant was successful in both the written and oral

tests for the competition, she must be included in the list of suitable candidates drawn up by the board;

2. So far as necessary:

Declare null and void the implied rejection by the Commission of the complaint submitted by the applicant;

3. In any event order the defendant to pay the costs.

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

1. *Admissibility*

The *Commission* accepts the admissibility of the application in so far as it is directed against the decision of the selection board annulling the applicant's admission to the competition. It nevertheless contests admissibility in so far as the application is directed against the implied rejection by the Commission of the complaint. The case-law of the Court shows that a purely confirmatory decision to reject a complaint cannot be the subject of an action.

The *applicant* on the other hand, while admitting that the implied rejection of her complaint in fact only confirms the

contested decision of the selection board, claims that in such a case it is right to ask for annulment both of the decision of the selection board and of the confirmatory measure adopted by the Commission. The latter claim is admissible as ancillary to the main claim.

2. *Substance*

(a) Disregard of legitimate expectation, vested rights and the principles of administrative law

The *applicant* maintains that the principles of the protection of legitimate expectation and of vested rights prevent any subsequent withdrawal of the original decision of the selection board to admit her to the competition. She takes the view that the decision to admit her was lawful but considers that, even assuming it was unlawful, its withdrawal was contrary to general principles of law.

More particularly the applicant claims that the decision of the selection board to admit her to the competition was taken in accordance with the conditions laid down in the notice of competition. In those circumstances the judgment of the Court of 22 March 1961 in Joined Cases 42 and 49/59 [1961] ECR 53 is relevant where it states "The retroactive withdrawal of a legal measure which has conferred individual rights or similar benefits is contrary to the general principles of law." Withdrawal would have been unlawful even if the original decision of the selection board had been irregular, which the applicant denies. In that respect the case-law of the Court (Joined Cases 7/56 and 3 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957 and 1958] ECR 39) whilst accepting the principle that unlawful measures may be revoked, recognized that unduly late withdrawal may constitute abuse of powers.

That is the position in the present case, for the applicant fully and clearly filled in her form of application for the competition in good faith so that the selection board, on reading it, could take cognizance of her university education and decide immediately whether or not she could be admitted to the competition. In any event the admission could no longer be withdrawn after the applicant had prepared herself and taken part in all the written and oral tests for the competition, which she had moreover passed. Further the selection board had no power to "annul" its own measure since the principles of administrative law require the annulment to be pronounced by an authority other than the author of the measure.

The *Commission* objects that the applicant was admitted by mistake to take part in the competition, contrary to the conditions set out in the notice of competition. In those circumstances the original decision of the selection board was irregular and cannot thereby create any vested right or give rise to any legitimate expectation that it will not be withdrawn. The Commission adds in the alternative that even assuming that the original decision to admit the applicant had given her personal rights, its withdrawal was lawful since it had been done within a reasonable period within the meaning of the case-law of the Court.

As regards the applicant's argument to the effect that the author of a measure wrongly adopted cannot himself withdraw the measure, the Commission contends that the principle of the independence of the selection board means on the contrary that it alone has

power to amend its decision. The fact that the letter of 7 September 1981 from the administration uses the word "annul" and not "withdraw" is irrelevant in view of the case-law of the Court which has always refused to regard itself bound by what a measure is called or by its external form.

(b) Wrong assessment of the applicant's university status

The *applicant* maintains in that respect that she has not been enrolled in the faculty since 1975 and was thus no longer in the final year of a long course of studies at university level when she applied to take part in the competition. Although she had taken part in several examination sessions between 1975 and 1981 and the university still recognized her as being entitled to take examinations to obtain a final degree, nevertheless as a matter of fact it has been impossible for her since taking up her duties with the Commission in February 1981 to take the said examinations. The notice of competition is not intended to exclude students who have decided not to take the examinations or who are unable to pass them.

The *Commission* objects that the interpretation given by the applicant disregards the wording and spirit of the notice of competition. The fact that the applicant is still entitled to finish her studies without having to renew her enrolment as a student and that she has taken part in several examination sessions sufficiently shows that she is still in her final year of studies. Contrary to

what the applicant contends the question is not what her chances of obtaining a degree may be. Moreover the applicant once again entered her name for the examinations subsequent to the oral tests for the competition at issue.

The Commission explains in this context its recruitment policy which is to recruit within Category B officials who do not have university degrees and are not likely to get them within a short period. That policy aims on the one hand to prevent any reduction in the chances of applicants who have only a secondary school leaving certificate and further to avoid the problems relating to the career prospects of "over-qualified" officials.

- (c) Wrong assessment of the objective conditions for admission to the competition

In this respect the *applicant* points out that she was previously entered on the list of suitable candidates for another competition the notice for which laid down the same conditions for admission as the competition at issue regarding applicants' university qualifications. The Court recognized in its judgment of 5 April 1979 (Case 112/78 *Kobor v Commission* [1979] ECR 1573) that "it cannot be accepted that the objective requirements for admission to the tests, which are formulated in identical terms, should be given a different interpretation from one competition to another ... unless the statement of the reasons on which the decision is based clearly justifies such a difference of appraisal." In this case the statement of the reasons on which the selection board's disputed decision was based does not show the grounds on which the appraisal of the

applicant differed from that made on the occasion of the previous competition.

A liberal interpretation of the objective conditions for admission to the competition is all the more necessary since the Commission's recruitment policy is inconsistent. A subsequent notice of a competition organized by the Commission to constitute a reserve for future recruitment of administrative assistants did not exclude applicants possessing a university degree or in their final year of a long course of university studies.

The *Commission* denies first of all that the applicant's argument based on her admission to a previous competition constitutes a valid submission unless based on a breach of a provision of a regulation or a general principle of law. In that respect it states that selection boards are fully independent and cannot be bound either by a stipulation laid down by the appointing authority or by an attitude adopted by another selection board.

Further the argument that the statement of the reasons on which the contested decision is based is insufficient must be left out of discussion pursuant to Article 42 (2) of the Rules of Procedure since it was raised for the first time in the reply. In any event that argument is without foundation since the reason for excluding the applicant from the competition is clearly apparent from the wording of the letter from the administration of 7 September 1981 which also explains the different treatment as compared with the view taken at the time by the selection board for the previous competition.

3. *The conclusions contained in the application*

The Commission contends in this respect that the claim for a declaration that "since the applicant was successful in both the written and oral tests for the competition, she must be included in the list of suitable candidates drawn up by the board" must be rejected even if the application were to be regarded as well founded. Under Article 176 of the Treaty it is not for the Court to give instructions to the Community authorities but for the institution concerned to take the necessary measures to comply with the judgment of the Court. In the event of annulment of the decision at issue in the present case the selection board would have to reconsider the case, to award marks to the applicant and to decide on the basis of the results

obtained whether she should be included in the list of suitable candidates.

The applicant observes that she has limited herself to asking the Court to determine certain facts. It is for the Commission to take the necessary measures to comply with the judgment.

IV — Oral procedure

The applicant, represented by Jean-Noël Louis, of the Brussels Bar, and the Commission of the European Communities, represented by Daniel Jacob, of the Brussels Bar, presented oral argument at the sitting on 14 July 1983.

The Advocate General delivered his opinion at the same sitting.

Decision

1 By application received at the Court Registry on 26 May 1982 Mrs Verli-Wallace, an administrative assistant in Grade B 4 with the Commission of the European Communities since February 1981, brought an action seeking in substance on the one hand the annulment of the decision of the Selection Board for Competition No COM/B/328 to annul its own decision admitting her to the competition and on the other hand the inclusion of her name in the list of suitable candidates for that competition.

2 The notice announcing the said competition, organized by the Commission to constitute a reserve for the future recruitment of senior assistants (B 3/B 2) of Greek nationality mentioned, *inter alia*, that applications could not be accepted from persons who had a degree received after a long course (three years or more) of studies at university level or were in the final year of such a course.

- 3 The selection board for the competition had originally allowed the applicant to compete and she did in fact take part in all the tests for the competition. Her admission was however subsequently withdrawn on the ground that she had stated at the oral tests on 13 July 1981 that it was possible for her at least theoretically to obtain a university degree at the end of the year and in those circumstances the selection board took the view that she was in the final year of a long course of university studies within the meaning of the notice of competition.

- 4 On 27 October 1981 the applicant made a complaint under Article 90 (2) of the Staff Regulations against the decision of the selection board annulling her admission to the competition. Since she received no answer within the prescribed period she brought this action.

- 5 It appears from the file that from 1968 the applicant successfully attended the first three years of legal studies at the University of Athens and that she was enrolled in the fourth and final year in 1974/75. Since then she has taken part in several examination sessions without however being enrolled in the faculty. Nevertheless to obtain a degree at the end of her studies she must still pass examinations in three main subjects.

- 6 The applicant alleges in support of her application that she was not in the final year of a course of university studies within the meaning of the notice of competition since it has been practically impossible for her since taking up her duties with the Commission in February 1981 to take the final examinations. Consequently the original decision of the selection board to admit her to the competition was lawful and for that reason could not be withdrawn.

- 7 On the other hand the Commission claims that the applicant was allowed by mistake to compete, contrary to the conditions set out in the notice of competition. It alleges that an unlawful decision cannot create a vested right or give rise to a legitimate expectation of such a kind as to prevent its withdrawal.

- 8 As the Court held in the judgment of 22 March 1961 in Joined Cases 42 and 49/59 *Société Nouvelle des Usines de Pontlieue v High Authority* [1961] ECR 53, the retroactive withdrawal of a legal measure which has conferred

individual rights or similar benefits is contrary to the general principles of law.

9 In this case the original admission of the applicant to the competition at issue gave her a personal right to take part in the tests for the competition, to receive marks awarded on the basis of the results obtained and, if successful, to have her name entered in the list of suitable candidates.

10 In the special circumstances of this case the Court considers that the admission to the competition was lawful. The selection board was entitled to regard the applicant as not being in the final year of a long course of university studies within the meaning of the notice of competition. Although the university authorities still recognized her right to take her final examinations without having to renew her enrolment in the faculty, it is nevertheless true that such a possibility was purely theoretical in view of the situation of the applicant who, as the selection board knew, had entered employment shortly before with the Commission and whose employment left her no real opportunity to finish her studies and to obtain a university degree within a short period.

11 It follows that the applicant's original admission to the competition could not be withdrawn so that the contested decision must be annulled.

12 Since the Commission is required to take the necessary measures to comply with this judgment, there is no need to arrive at a decision on the claim that the applicant's name should be included in the list of suitable candidates.

Costs

13 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in the essential part of its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Annuls the decision of the Selection Board for Competition No COM/B/328 to annul its own decision admitting the applicant to the tests for the competition;**
2. **Dismisses the remainder of the application;**
3. **Orders the Commission to pay the costs.**

Everling

Galmot

Kakouris

Delivered in open court in Luxembourg on 22 September 1983.

P. Heim
Registrar

U. Everling
President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 14 JULY 1983

My Lords,

On the 4 February 1981 notice was given of a competition for Assistants in Grades

B 2 and B 3. The conditions of the competition stated that certain candidates would be excluded, namely those who possessed a diploma following a