

OPINION OF MR ADVOCATE GENERAL LENZ  
delivered on 26 June 1986\*

*Mr President,  
Members of the Court,*

A — 1. The applicant in these proceedings became a reviser in the Language Service of the Commission in October 1958. In December 1962 he was appointed as an official in Grade L/A 5, and in September 1963 he was promoted to Grade L/A 4. By a decision of March 1981 he was appointed head of a section, apparently without any alteration in grade.

On a number of occasions he has been called upon to act as temporary head of the French division of the Language Service, in particular (as may be seen from a decision of February 1984) during the periods from 1 May to 30 September 1981 and from 1 June to 24 October 1982. When that post became vacant, upon the retirement of the incumbent, the applicant was again asked to carry out the duties associated with it.

2. By Vacancy Notice No COM/407/84 the Commission made known that the post of head of the French Translation Division was vacant. Eleven applications were submitted, among them that of the applicant in this case.

3. The applications were examined first of all by a committee established under a decision of July 1980 to advise on the filling of A 2 and A 3 posts, composed, as the Commission has stated, of four members:

the Secretary General of the Commission, the Director General for Personnel and Administration, a Director General or Head of Service nominated by the President of the Commission and a representative of the Member of the Commission responsible for Personnel and Administration (the applicant stated, incorrectly, that the committee consisted of the Secretary General of the Commission, the Director General for Personnel and Administration and the Director General for the Directorate General in which a post was vacant).

As a result of that examination it was determined that five of the applicants for the post, listed in alphabetical order (among them the applicant in these proceedings), 'devraient être particulièrement pris en considération'. Of those persons, Mr Dubois was then appointed to the post in question, by way of promotion, by a decision of 16 May 1984.

4. On 22 June 1984 the applicant submitted a complaint against that appointment. He argued first of all that there had been no proper consideration of the merits of the candidates for promotion and of the reports on them in accordance with Article 45 of the Staff Regulations. In the case of the other applicants the most recent periodical report prepared pursuant to Article 43 of the Staff Regulations was taken into account, but not in his case (since his most recent report, which was communicated to him on 16 May 1984 and amended on 28 May 1984 on the basis of his comments, was not in his personal file at the time the decision was adopted). The applicant also

\* Translated from the German.

complained that no grounds had been given for the rejection of his application.

On those grounds he sought the annulment of the tacit rejection of his application and of the decision appointing Mr Dubois.

5. His complaint was unsuccessful. In a reply dated 7 November 1984 he was expressly told that on 24 October 1984 the Commission had again examined the merits of the applicants for the post and at that time had taken into account the applicant's most recent periodical report. As a result of that examination it had come to the conclusion that the post in question should be filled by the promotion of Mr Dubois; the Commission had thus confirmed its decision of 16 May 1984 and decided that there was no ground for annulling the appointment of Mr Dubois. The applicant was also informed that according to the relevant case-law of the Court the appointing authority was not required to state grounds for its decisions in matters of promotion to candidates who were not promoted.

6. On 31 January 1985 proceedings were therefore brought before the Court. The applicant's claim is for the annulment of the following acts:

- (1) The decision of the Commission of 16 May 1984 appointing Mr Dubois;
- (2) The tacit rejection of the applicant's candidature for the post of head of the French Translation Division;
- (3) The decision of the Commission of 24 October 1984 confirming the decision of 16 May 1984, and

(4) The decision of the Commission of 7 November 1984 which expressly rejected the applicant's complaint made through official channels.

That claim, which is opposed by the Commission, must now be examined in detail.

### B — I — Admissibility

7. As the Court is aware, the Commission has expressed doubts as to the admissibility of the action, without, however, making a formal objection. Attention must first be given to those and to related issues.

#### *1. The claim for the annulment of the decision of 16 May 1984*

8. It is apparent from the description of the facts of the case (and is particularly clear from the reply to the applicant's complaint) that on 24 October 1984 the Commission carried out a 'further examination of the comparative merits of the candidates' and that it consequently came to the conclusion that 'the post published in Vacancy Notice No COM/407/84 should be filled by the promotion of Henry Dubois'.

9. It may thus be said that on 24 October 1984 the decision of 16 May 1984 was re-examined and *replaced*, as the Commission put it, by another decision to the same effect. That means that the decision referred to in the applicant's first claim no longer actually exists and that there is therefore no point in attacking it, since even if it were annulled the post which the applicant seeks to obtain by means of these proceedings would not become vacant.

If the first claim is taken literally and as standing on its own, there are therefore grounds for the conclusion that it is inadmissible.

10. However, the inclusion of the decision of 16 May 1984 in the proceedings may be understood, and even justified, if reference is made to the reply to the applicant's complaint, where it is stated (misleadingly, as the Commission agrees) that the Commission had 'confirmed' the decision of 16 May 1984.

*2. The claim for the annulment of the rejection of the applicant's candidature for the post in question*

11. If that claim had been made independently, it too would give rise to serious doubts. Strictly speaking it was a claim for a finding that the applicant's candidature should in fact have been accepted and that he should have been appointed to the post in question. As a matter of principle the Court cannot make such a finding in respect of a promotion procedure for the filling of a vacant post. Under Article 45 of the Staff Regulations the appointing authority has a degree of discretion which can certainly not be usurped by the Court. I refer in that regard to the judgments in Cases 27/63,<sup>1</sup> 188/73,<sup>2</sup> 280/80<sup>3</sup> and 173/84<sup>4</sup> (which speak of the wide discretion provided for in Article 45 of the Staff Regulations) and to the judgment in Case 62/75,<sup>5</sup> which emphasizes that it is for the appointing authority to choose the appropriate manner

of considering the merits of officials under Article 45 of the Staff Regulations. I refer in particular to the judgment in Case 282/81,<sup>6</sup> in which it is made very clear that the Court of Justice cannot substitute its assessment of the qualifications of candidates for promotion for that of the appointing authority.

Since the applicant has not conclusively shown that in this case the discretion of the appointing authority was so restricted that a properly conducted procedure could have no other result than his appointment to the vacant post by way of promotion, his second claim must indeed be considered inadmissible.

*3. The claim for the annulment of the decision of 24 October 1984*

12. The Commission refers in this regard to Article 91 (2) of the Staff Regulations, which requires as a condition precedent for the bringing of an appeal to the Court of Justice that the applicant should, within the prescribed period, have submitted a complaint within the meaning of Article 90 (2) of the Staff Regulations against the act adversely affecting him, and that that complaint should have been rejected. Since under Article 90 (2) the complaint is directed against the measure adversely affecting the applicant, that is to say, the decision whose annulment is sought, it is clear, continues the Commission, that these proceedings are defective in so far as the decision of 24 October 1984 is concerned, since a complaint was submitted only against the decision of 16 May 1984.

13. On this point the Commission's view might well be thought plausible, with the obvious consequence that the third claim too should be regarded as inadmissible on

1 — Judgment of 19 March 1964 in Case 27/63 *Raponi v Commission* [1964] ECR 129.

2 — Judgment of 30 October 1974 in Case 188/73 *Grassi v Council* [1974] ECR 1099.

3 — Judgment of 3 December 1981 in Case 280/80 *D'Aloja v Council* [1981] ECR 2887.

4 — Judgment of 23 January 1986 in Case 173/84 *Rasmussen v Commission* [1986] ECR 197.

5 — Judgment of 1 July 1976 in Case 62/75 *de Wind v Commission* [1976] ECR 1167.

6 — Judgment of 21 April 1983 in Case 282/81 *Ragna v Commission* [1983] ECR 1245.

the ground that it does not comply with the condition laid down in Article 91 (2) of the Staff Regulations. It cannot be denied that the complaint submitted by the applicant was based substantially on the argument that the decision of 16 May 1984 was not made in a proper manner since the applicant's most recent report was not available at the time of its adoption. According to its own assertions, the Commission cured that defect by adopting the decision of 24 October 1984. It could thus be said that at that time a new decision was made on the basis of new facts, and that it was therefore necessary to submit a new complaint since, as these proceedings show, the criticism of that decision is of a somewhat different nature.

14. If I nevertheless hesitate to propose that the third claim should be declared inadmissible it is in the first place because the object of the applicant's complaint was the reversal of the decision appointing another official, and in that respect there can be no suggestion of its having been met. Secondly, and the applicant lays particular emphasis on this point, in the decision rejecting his complaint the decision of 16 May 1984 is said to have been *confirmed*. That could well give rise to the impression that since the confirmed decision had already been the object of a complaint procedure there was no need to submit a further complaint and thus prolong the proceedings.

In those circumstances it seems hardly justifiable to impose strict requirements with regard to the preliminary administrative procedure and to treat the claim as inadmissible if they are not met.

*4. The claim for the annulment of the decision expressly rejecting the applicant's complaint made through official channels*

15. As a matter of principle it can be said that according to the system of the Staff

Regulations, as laid down clearly in Articles 90 and 91, only measures adversely affecting officials, that is to say original administrative decisions, are subject to review by the Court, and not decisions made in reply to complaints concerning such decisions and allowing them to stand.

If the fourth claim is re-interpreted accordingly, and attention is focused on the decision against which the complaint was directed, doubts may immediately be raised as to the admissibility of the claim, since, as has already been shown, after the replacement of the decision of 16 May 1984 it is without object.

Since the decision rejecting the complaint also notified to the applicant a new decision appointing another official to the post in question, however, the fourth claim may be interpreted as relating to that appointment, that is to say the confirmatory decision of 24 October 1984. As has already been seen, if the matter is viewed in that way there are no conclusive objections to admissibility.

16.5. In view of the foregoing, it would be difficult to consider the action inadmissible in its entirety; at most, the first two claims might be considered inadmissible.

## II — The substance of the application

In spite of my remarks with regard to the issue of admissibility, the substance of the application should be examined in its entirety in the following section of my opinion.

17.1. Under the rubric 'breach of Article 45 of the Staff Regulations' the applicant submitted that according to the relevant judgments of the Court there were grounds for complaint in the fact that the decision of 16 May 1984 was adopted at a time when the most recent report concerning him was not in his personal file. He also made the further criticism that the advisory committee included no staff representative; furthermore, its composition gave rise to some difficulties since one Director General (that is to say the Director General for Personal and Administration, within whose area of responsibility the post to be filled came) took part in a dual capacity. The applicant went on to argue, in reference to the fact that the decision of 24 October 1984 speaks of a *confirmation* of the decision of 16 May 1984, that a decision void because of the deficiency mentioned above cannot be confirmed. Finally, in the oral procedure, if I have correctly understood the matter, it was also complained that in the application of Article 45 of the Staff Regulations in this case no criteria were laid down beforehand for the assessment of qualifications and experience.

I think the following remarks are appropriate in that respect:

18.(a) To the decision of 16 May 1984 the objection could certainly be made that at the time of its adoption the personal file of the applicant was not complete, since it did not include his most recent report (see the judgment in Case 29/74,<sup>7</sup> [1975] ECR 35). There is no ground, however, for annulling that decision (should that be the applicant's wish) or declaring it illegal since, as we have already seen, in October 1984 it was *replaced* by another decision which the Commission says (and I shall come back to

that point) was not tainted by the irregularity referred to.

19. I certainly do not wish to adopt the applicant's view that it was not possible to *confirm* the void or defective — the applicant's terminology is not consistent in this respect — decision of May 1984 by the decision of 24 October 1984. A defective measure — and the decision of May 1984 is certainly no worse than that — can naturally be repeated subsequently, the defect being cured. According to the Commission's description of the events that is exactly what happened, and the mere fact that in adopting the new measure it used the misleading term 'confirmed' is of no importance for the assessment of the validity of the 'confirmatory' measure.

20.(b) The remarks concerning the composition of the advisory committee (it is not entirely clear whether they are in fact intended to constitute a formal submission) might well be thought irrelevant, since according to the statements of the Commission reference was made to that committee only before the adoption of the decision of 16 May 1984 (which is no longer in issue), but not before the adoption of the decision of 24 October 1984.

21. If it is desired nevertheless to consider those remarks — since a framework decision of the Commission provides for the consultation of that committee in connection with the filling of A 2 and A 3 posts and since the referral of the matter to it in spring 1984 may also have some relevance to the 'confirmatory' decision of October 1984 (I shall come back to that point) — it is quickly apparent that they do

<sup>7</sup> — Judgment of 23 January 1975 in Case 29/74 *Raphael de Dapper v European Parliament* [1975] ECR 35.

not constitute a relevant criticism of the promotion decision made by the Commission. That is so first of all because according to the Commission's statements it is simply not true that the Director General for Personal and Administration took part in the work of the committee in a dual capacity, since the committee, as I stated at the outset, is composed of the Secretary General of the Commission, the Director General for Personnel and Administration, a Director General appointed by the President and a representative of the Member of the Commission responsible for personnel and administration.<sup>8</sup> It must be recognized, moreover, that under the Staff Regulations decisions on promotion and the filling of posts in that manner are a matter for the appointing authority alone. If as a *preliminary* to such decisions it consults an advisory committee not provided for in the Staff Regulations the fact that that committee does not include a staff representative cannot constitute grounds for complaint.

22.(c) In reply to the applicant's point that no criteria were laid down for the assessment of the qualifications and merits of candidates for promotion, raised once more during the oral procedure, it need merely be pointed out that nowhere in the Staff Regulations or in measures implementing them is provision made for the establishment of such criteria in the context of procedures for promotion. Nor can it be said that it is only in that manner that a correct and proper promotion procedure can be carried out. Cases such as this involve not only an assessment of the candidates' merits — an assessment, moreover, for which fixed criteria are often inadequate — but also more general consideration of the candidates' suitability for the post to be filled, which naturally requires complex subjective judgments.

<sup>8</sup> — See paragraph 3, above.

23.(d) I think therefore that none of the matters raised by the applicant in connection with his first submission is sufficient to make out his claim.

2. Under the rubric '*ultra vires* and misuse of powers' the applicant has raised a number of other complaints, some of which he expanded on during the oral procedure and subsequently. The following remarks may be made in respect of those complaints.

24.(a) In the written procedure the applicant stated first of all that it was not conceivable that on 24 October 1984 the Commission could in fact have made an assessment of the merits of candidates for promotion. That is to say, it is unthinkable that on that day the advisory committee arrived at an opinion and transmitted it in writing to the appropriate Member of the Commission; that on the same day the latter examined the proposal and prepared a draft decision; and that, still on the same day, a decision was adopted by the Commission. When it became apparent in the course of the proceedings that the advisory committee was not again consulted before the adoption of the decision of 24 October 1984, the applicant contended that this was a procedural error. Finally, when the Commission, in reply to questions put to it by the Court, explained in detail the manner in which the decision of 24 October 1984 was prepared and adopted (in particular its statement that after the communication to them of the administrative points on the agenda of the meeting of 24 October 1984 the Members of the Commission had the possibility, from the previous Friday onwards, of becoming familiar with the relevant documents; on the Monday before the meeting of the Commission there was a meeting of their chefs de cabinet at which a proposal for a decision was mentioned;

finally, at the meeting on 24 October 1984 the Secretary General had with him the personal files of all the candidates), the applicant expressed the view that the Commission had not shown that before the adoption of the decision of October 1984 its members had in fact considered the personal files of the candidates as required by Article 45 of the Staff Regulations, and that the conclusion must therefore be that its decision was not correctly made.

25.(aa) In so far as it is complained that in October 1984 the advisory committee was not once more consulted with regard to the assessment of the candidates, I do not think there can be any question of a breach of an essential procedural requirement which might affect the validity of the contested decision.

Since the involvement of such a committee is not provided for in the Staff Regulations there is some support for the view that internal rules adopted by the Commission with regard to it have no more value than a fixed practice from which it is possible to depart in the event of *special circumstances*.

26. The following might be thought to constitute such circumstances: in spring 1984 the defendant had to select the most suitable of 11 candidates. In those circumstances it was appropriate, perhaps even indispensable, to consult the advisory committee in the preparation of the Commission decision.

In autumn 1984 it was necessary to decide only whether the applicant's report for the period from 1 July 1981 until 30 June 1983,

initially absent from his file but subsequently made available, required a different decision, that is to say, whether in view of the applicant's most recent periodical report the selection of Mr Dubois could stand. All that it was necessary to consider, therefore, was the very narrow question whether the applicant or Mr Dubois was the more suitable candidate. The committee's advice was certainly not necessary for that purpose.

I may be permitted, therefore, to reject the argument that the candidates were not treated equally: in May, it is said, the committee was complete but not the candidates' files; in November the files were complete but not the committee. The circumstances were different: in the spring it was necessary to consider the complete personal files of 11 candidates, while in the autumn it was merely necessary to consider a single supplementary report on the applicant and its possible effects on the appointment of a single other candidate. Where the circumstances were not the same the fact that the procedure was not the same is no ground for complaint.

27. The Commission's statements also leave the impression that the function of the advisory committee is only to consider the *suitability* of the candidates for a particular post, not to carry out a comprehensive assessment of the merits of the candidates for promotion (and that impression is supported by the content of the minutes of the meeting of the advisory committee of May 1984, submitted to the Court, in which five officials, listed in alphabetical order, were described as suitable for the post in question, without any one of them being singled out in particular).

The committee in fact performed that function in spring 1984, and included the applicant in its list of suitable candidates. There was thus no reason to consult it again in autumn 1984, since at that time, as we

have seen, the only question which remained to be resolved was whether the applicant or Mr Dubois was more worthy of promotion, and that was in any event a matter for the appointing authority.

was no longer involved and the sole question which remained to be decided was whether the applicant should be appointed in the place of Mr Dubois.

28. However, should the committee indeed have more extensive functions, that is to say, where possible to propose the candidate most deserving of promotion (for which it must of course be aware of all relevant factors, in particular periodical reports), in this case there is no indication that its assessment of the applicant (whose most recent periodical report was not available) would have been otherwise had the contents of that report been known to it, in other words that he would have been singled out among the group of candidates deemed by the committee to be suitable for the post. It is significant that the applicant, who must show some foundation for this complaint, has not asserted that his most recent periodical report was such as to have a substantial influence on the committee's general assessment of him (based on a large number of earlier reports). It is also significant that the appointing authority, which has the final responsibility for selecting candidates and was aware of the applicant's most recent report in autumn 1984 (I shall come back to that point later), did not consider it appropriate, on the basis of that report, to give the applicant preference over the successful candidate.

Indeed, it is quite conceivable that an examination of such a restricted nature was carried out in a comparatively short time. The decision of 24 October 1984 could thus quite well have been adopted in a short time and yet in a proper manner.

30.(cc) In his last statement in reply to the Commission's answer to questions put by the Court of Justice the applicant also expressed the view that with regard to the preparation of the decision of 24 October 1984 it should have been shown that the Members of the Commission actually examined the personal files of the candidates for promotion, and that it is not sufficient to show that they merely had the possibility of making such an examination; in reply to that and to related specific arguments it need only be said that they establish no serious defect in the decision.

In principle I think that it is not for the Commission to furnish such proof but for the applicant to put forward clear indications that the decision-making procedure was defective. In my opinion there are no such indications.

29.(bb) In so far as the applicant doubts—as he initially did—that there was sufficient time on 24 October 1984 for the repetition of the entire appointment procedure (including consultation of the advisory committee), which would lead to the conclusion that the contested decision was adopted without adequate consideration, the reply need merely be that after all we have heard regarding the preparation of the decision there is no ground for such doubts, since the advisory committee

31. The manner in which the contested decision was prepared and adopted is described in the Commission's statement of 25 March 1986. In so far as the examination of the applicant's personal file (the main issue here) is concerned, it may be pointed out that the Members of the Commission and their staff had the opportunity for



several days before the meeting of 24 October 1984 to gain access to the file, and that on that day the Secretariat General held the personal files of all candidates at the disposal of the Members of the Commission.

The Commission has expressly assured the Court that before the adoption of the contested decision regard was also had to the most recent report on the applicant (which was not on his file in May 1984), and in view of all we have been told I can see no good reason to doubt that statement.

32. In any event such doubts cannot be raised on the basis of the fact that according to Article 26 of the Staff Regulations personal files are confidential and may be consulted only in the *offices* of the administration. It seems obvious that that restriction does not apply to the highest levels of the Commission.

Furthermore, it must not be forgotten that the applicant himself states that in the course of his investigations in the administration he found that his personal file had been consulted three or four times during the period from May to 24 October 1984. It may therefore be assumed that at least the Member of the Commission responsible for administration made the necessary examination and also informed his colleagues. That should probably be regarded as sufficient for the proper preparation of the contested decision.

33.(b) The applicant also criticized the contested decision on the ground that the appointed official had no more seniority in the service or in Grade L/A 4 than the applicant and that his periodical reports were no more favourable. Furthermore, the

health of the appointed candidate is said to be such that he is obliged to be absent two half days a week, which, says the applicant, gives rise to doubt as to whether his appointment was compatible with the interests of the service.

In reply to that it may be pointed out first of all that there is no reason to suppose that seniority was the decisive factor for the Commission (indeed, the applicant has an advantage of only a few months total seniority and two years seniority in Grade L/A 4). Under Article 45 of the Staff Regulations a 'consideration of the comparative merits' of candidates is the most important factor in decisions on promotion; it may be assumed that the Commission acted accordingly.

34. In so far as the Court is being asked to reassess the periodical reports of the applicant and of the official appointed, it should be recalled that according to the Court's case-law that is impossible as a matter of principle. As the Court has held (see for example the judgment in Case 280/80), in connection with the application of Article 45 of the Staff Regulations only the manner in which the assessment was carried out is reviewed, and it is ascertained whether or not there were manifest errors in that respect.

I have already stated my position on the first point, and with regard to the second it may be pointed out that the applicant's arguments contain no such suggestion.

Furthermore, should it be assumed that the reports on the applicant and on the appointed official were more or less equivalent, it may be observed in this connection that other factors such as qualities of leadership, sense of initiative and organizational abilities may have been decisive, and to that there can be no objection. The defendant referred to that point during the

oral procedure; the applicant's submissions, however, did not address that point at all.

35. Finally, I think that the allegations regarding the appointed official's health can be of no assistance in raising objections to the decision appointing him. It is primarily for the Commission to decide what is and is not compatible with the interests of the service. It cannot in any event be viewed as a serious error since it seems quite possible, with the necessary organization, to direct a service without being there all the time.

36.(c) Lastly, as part of his second submission the applicant also asserted that his candidature was rejected for other reasons (during the oral proceedings he spoke of reasons of nationality), and he referred to the fact that on two previous occasions his applications for the same post had been rejected.

In my view that fact is not sufficient to raise a presumption of the *improper use of*

*discretion*, as the applicant has suggested. It is clear that the applicant's name was on the list of suitable candidates drawn up by the advisory committee in May 1984. Furthermore, there are no indications that on the occasion of the decision of 24 October 1984 the merits and suitability of the applicant were not weighed against those of the successful candidate and that the decision may have been made on improper grounds, in particular those of nationality.

With regard, moreover, to the treatment of the applicant's candidature on previous occasions, it is significant that he has not asserted that the previous rejections were not objectively justified. There is therefore no basis for the supposition that in this case there were grounds for such a fear.

37.(d) It must therefore be observed that none of the matters put forward in support of the second submission constitute grounds for criticism of the contested decision.

C — 38. I can only propose — it does not appear necessary to give effect to the applicant's further requests for the hearing of evidence — that the Court dismiss the application and rule on costs in accordance with Article 70 of the Rules of Procedure.