

**Antonio Marcato
v Commission of the European Communities**

Case 44/71

Summary

1. *Officials — Recruitment — Selection Board — Decision — Exclusive jurisdiction of the Court*
(*Staff Regulations of Officials of the EC, Article 91*)
 2. *Officials — Recruitment — Notice of competition — Equivalent experience in employment — Partial and arbitrary nature of a specification — Application of general formula contained in the third subparagraph of Article 5(1) of the Staff Regulations — Powers and duties of the Selection Board*
(*Staff Regulations of Officials of the EC, Annex III, Article 1(1)(b)*)
 3. *Officials — Recruitment — Consideration of applications — Duties of the Selection Board*
(*Staff Regulations of Officials of the EC, Annex III, Article 5*)
1. The only form of appeal open to individuals in relation to a decision taken by a Selection Board lies in an application to the Court, which alone has jurisdiction to annul such decisions.
 2. If, in a notice of competition the term 'equivalent experience in employment' cannot be interpreted without remaining incomplete or arbitrary, recourse must be had to the general formula contained in the third subparagraph of Article 5(1) of the Staff Regulations and the Selection Board for the competition must be left to assess in each case whether the certificates produced or the experience of each candidate correspond to the level required by the Staff Regulations and, therefore, by the notice of competition. The adoption of this solution implies, however, that the Selection Board shall be bound to give reasons for its decisions on this question, if only in summary form.
 3. The Selection Board is obliged to give sufficient reasons for the conclusions it reaches on the comparison of the qualifications submitted by the candidates with those required by the notice of competition.

In Case 44/71

ANTONIO MARCATO, an official of the Commission of the European Communities, residing in Luxembourg at 48, rue de la Toison-d'Or, represented by Ernest Arendt, Advocate of the Luxembourg Bar, assisted by Tonia Scheifer, Advocate of the

1 — Language of the Case: French.

Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Arendt, 34b rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Pierre Lamoureux, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of:

- (1) Notice of Competition Nos COM/484 to 487/70 on the grounds of a procedural irregularity;
- (2) the decision notified to the applicant by the Commission on 8 February 1971 informing him that his application in respect of the notice of competition was not accepted and the letter confirming the decision of the Commission notified to the applicant on 16 February 1971;
- (3) as far as may be necessary: the implied decision rejecting his complaint indicated by the failure of the administration to reply within two months to that complaint made through official channels by the applicant to the President of the Commission on 25 March 1971 and received on 29 March 1971,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner (Rapporteur) and R. Monaco, Judges,

Advocate-General: K. Roemer

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The applicant entered the service of the Commission of the European Economic Community on 12 November 1958 as a night watchman in Grade C 3. On 1 January 1962 he was engaged as a messenger in Grade D 2 and promoted to Grade D 1 on 1 September 1963. After following a course with the Belgian Machines Bull company from 19 October to 28 November 1962 he obtained an operator's certificate. On 1 October 1963 he was appointed a Clerical Officer in Grade C 3 and after a probationary period of six months in that post was assigned to the data processing department as a punch-card operator.

Since 1966 he has performed the duties of console operator and programme clerk.

The applicant submitted his application for the competition referred to in Notice of Competition Nos COM/484 to 487/70 but was informed by letter dated 8 February 1971 that his application had not been accepted.

On the applicant's request, the Commission informed him on 16 February 1971 that his application had been rejected on the ground that he did not have the necessary qualifications, that is:

'an advanced level of secondary education or equivalent experience in employment'.

On 25 March 1971 the applicant submitted a complaint through official channels to the President of the Commission requesting that the competition be annulled on the grounds of a procedural irregularity and his unfair exclusion from the list of suitable candidates. As this complaint, which was received on 29 March 1971, remained unanswered for the period of two months, the applicant referred the matter to the

Court of Justice in an application filed at the Registry on 23 July 1971.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

The parties presented oral argument at the hearing on 17 February 1972.

The Advocate-General delivered his opinion at the hearing on 4 May 1972.

II — Conclusions of the parties

The *applicant* claims that the Court should:

- (1) declare that the application is admissible;
- (2) declare that it is well founded;

A — *Primarily*

- (a) declare that Notice of Competition Nos COM/484 to 487/70 must specify the level of experience required for the posts to be filled;
- (b) declare that the applicant possesses 'equivalent experience in employment';
- (c) declare that applicant X does not satisfy one of the requirements of the competition;

And accordingly, annul:

- (I) Notice of Competition Nos COM/484 to 487/70 on the grounds that it infringes Article 1(1)(d) of Annex III to the Staff Regulations;

(II) on the ground that they infringe Article 25 of the Staff Regulations and Article 5 of Annex III to the Staff Regulations and constitute a misuse of powers

- the entire competition procedure;
- the express decision of the Commission notified to the applicant on 8 February 1971 and the letter confirming that decision addressed to him on 16 February 1971, as well as the implied decision refusing to annul the abovementioned express decision;
- the appointment of Mr X to the post offered in Competition No COM/484 to 487/70.

B — In the alternative

Allow the applicant to show by all legal means, and in particular:

- (a) by means of an inquiry or expert assessment, that he has an advanced level of secondary education or equivalent experience in employment;
- (b) by means of an expert assessment or by interrogation of Mr X personally that, apart from his mother tongue, that official does not have any adequate knowledge of another Community language;
- (3) order the defendant to pay the costs of the action.

The defendant contends that the Court should:

- (1) dismiss the application in its entirety as unfounded;
- (2) order the applicant to pay the costs.

During the oral procedure the applicant withdrew his conclusions concerning the appointment and personal interrogation of Mr X.

III — Submissions and arguments of the parties

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

(a) The *applicant* maintains that by requiring merely an 'advanced level of secondary education, evidenced by a diploma or equivalent experience in employment', the notice of competition does not satisfy the requirement contained in Article 1(1)(d) of Annex III to the Staff Regulations. The notice of competition in question contains no details regarding the level of experience required and this opens the way to arbitrary action on the part of the Selection Board or the appointing authority. The failure to specify the level of experience required renders it impossible for the Court to exercise its power of review.

The *defendant* observes that there is no doubt as to the regularity of Notice of Competition Nos COM/484 to 487/70. By providing under the heading 'Qualifications required' the following specification:

'An advanced level of secondary education, evidenced by a certificate or equivalent experience in employment',

the notice in question completely satisfies the requirements of the third subparagraph of Article 5(1) of the Staff Regulations which provides that Category B shall comprise five grades ... which require an advanced level of secondary education or equivalent experience in employment. In view of the great variety of secondary education certificates which exist in the six Member States and the wide and varied content of the expression 'equivalent experience in employment' a more explicit and detailed specification serves no purpose. It is for the Selection Board to assess in each individual case in the light of Article 5(1) of Annex III to the Staff Regulations whether the experience claimed by each candidate corresponds to the required level. The practice in dispute, which is moreover widely followed in the institutions of the European Communities, was confirmed by the Court in its judgment of 14 July 1965 in Joined Cases 18 and 19/64,

Filippo Alvino and Others and Jacqueline Benoit and Others v Commission of the European Economic Community [1965] ECR 789.

(b) The *applicant* criticizes the decision refusing him admission to the competition for the following reasons:

— as it only contained the standard formula, to the effect that the applicant

‘does not have an advanced level of secondary education, evidenced by a certificate or equivalent experience in employment’

the decision fails to set out the necessary statement of reasons and thereby infringes Article 25 of the Staff Regulations;

— by failing to put the applicant’s name upon the list of suitable candidates the Selection Board failed to take into account the established facts of the case and changed the nature of one of the conditions of the competition, this constituting an infringement of Article 5(1) and (3) of Annex III to the Staff Regulations;

The applicant sets out the details of his career and concludes that during the eight years in which he has worked in the data processing department he has acquired solid experience in the field of computers which is certainly at the level of a secondary education certificate. For this reason, the lack of sufficient reasons for the decision in question also conflicts with the facts which have been established or put forward in the case.

— the administration itself recognized the existence of sufficient experience, since the type of work entrusted to the applicant in the data processing department requires such experience. By denying that the applicant had such experience in order to prevent his entering the competition the administration was going against its own actions and therefore misusing its powers.

The *defendant* replies that sufficient reasons for the decision in question are contained in the finding that the applicant does not have an ‘advanced level of secondary education, evidenced by a certificate or equivalent experience in employment’. More detailed reasons are not compatible with the secrecy of the proceedings of the Selection Board. The defendant refers to the judgment of the Court of 31 March 1965, *Thérèse Marie-Louise Vandevyvere v European Parliament*, Case 23/64 [1965] ECR 157, in support of its argument.

The applicant brings no concrete evidence to prove that his experience is equivalent to an advanced level of secondary education, evidence by a certificate. As the applicant has performed for eight years the duties of Grades C2 and C3 he cannot claim to have experience equivalent to that required for the duties of Category B.

The submission of misuse of powers is unfounded since, in the light of the duties performed, the applicant cannot have experience of the required level.

The applicant’s offer to show by all appropriate means that he has sufficient experience must be declined, since the arguments set out above already show that no such evidence can be brought.

In his reply, the *applicant* contests the defendant’s argument that he does not have the experience required by the notice of competition. Reasoning which maintains that an official in Category C who does not have a secondary education certificate can never enter Category B since *a priori* he lacks experience of an equivalent level is incompatible with the very purpose of the competition which is precisely to enable officials in Category C to enter Category B. The experience referred to in the notice of competition must necessarily be that which an official in Category C has acquired in the performed of his duties, otherwise there is no point in referring to it. Moreover, the defendant’s reasoning is contradicted by the facts established in this instance:

— all the candidates allowed to enter the competition were officials in Category C and none held a secondary education certificate;

- they all performed the same duties as the applicant within the institution;
- for those candidates without certificates the Selection Board had necessarily to accept that the experience which they acquired in the performance of their duties within the institution in Category C was equivalent to a secondary education certificate.

It was reasonable for the Selection Board to take into account also the experience acquired by the applicant in the performance of tasks which are identical or similar to those involved in the posts to be filled and which are, at all events, similar to those performed by the candidates allowed to enter the competition. By rejecting the applicant's application alone on the ground that his experience is not equivalent to an advanced level of secondary education evidenced by a certificate, the Selection Board seriously infringed the important principle of the equality of treatment as between candidates.

The papers contained in the schedule to the originating application show that inequality of treatment as between the applicant and the other candidates was unjustified and therefore constituted a misuse of powers.

The *defendant* observes that the applicant's argument that by doing Category C work an official may acquire experience appropriate to Category B is only valid in

exceptional cases, in particular, where by reason of a lack of manpower or an increase in work, officials of Category C have carried out tasks at a higher level than those of their category. It is clear that the administration and the relevant departments take this into account when such officials submit applications for a competition for the higher category. This applies in the present case to the officials admitted to the competition. As the re-organization of the computer centre during the two years preceding the competition made it necessary to resort to exceptional measures, officials from Category C, including the applicant carried out duties of Category B. This solution, which was imposed by the circumstances, enabled the abilities of each official to be assessed, as well as his efficiency as regards particular duties. The candidates whose applications were accepted were in fact officials in Grades C3 and C2 who have demonstrated their abilities. On the other hand, the applicant has not proved satisfactory and for approximately one year he has only performed the duties of an operator in career bracket C3/C2. It was in the light of these facts that the Selection Board found that the applicant did not satisfy the qualifications required by the notice of competition, since he did not possess experience equivalent to the training obtained by having an advanced level of secondary education, evidenced by a certificate.

Grounds of judgment

- 1 By an application lodged at the Registry on 23 July 1971 the applicant referred to the Court the implied refusal of the Commission to accept his complaint through official channels filed on 29 March 1971.
- 2 This complaint through official channels referred to Notice of Internal Competition No COM 484 to 487/70 and the competition procedure consequent upon this notice, in particular, the decision of the Selection Board rejecting the application submitted by the applicant on the grounds that he did not satisfy one of the re-

quirements of the competition, that is, an advanced level of secondary education, evidenced by a certificate or equivalent experience in employment.

- 3 During the oral procedure the applicant withdrew his conclusions concerning the appointment of Mr X.

Admissibility

- 4 The defendant does not question the admissibility of the application.
- 5 Nevertheless, it must be observed that a complaint to the Commission through official channels against a decision adopted by a Selection Board appears to be pointless, as the Commission is not competent to annul or amend the decisions of such a board.
- 6 Therefore, the only legal remedy open to individuals in relation to such a decision lies in an application to the Court, which alone has jurisdiction to annul such decisions.
- 7 The preliminary reference of the matter to the Commission is, however, explained by the practice of officials of never referring directly to the Court those measures which affect them adversely, but of appealing first, even though it be unnecessary to do so.
- 8 In the light of the foregoing, the appeal against the implied refusal of the Commission must not be declared inadmissible for this reason but it must be admitted as directed against the decision of the Selection Board and the time-limit for appeals against this decision, which was communicated on 18 February 1971 at the latest, must be considered not to have expired.
- 9 In the circumstances set out above the application is admissible.

Notice of Competition No COM 484 to 487/70

- 10 The applicant claims that this notice infringed Article 1(1)(b) of Annex III to the Staff Regulations by showing, under the heading 'Qualifications required', only 'an advanced level of secondary education, evidenced by a certificate or equivalent experience in employment'.
- 11 In doing so the notice merely reiterated the wording of the third subparagraph of Article 5(1) of the Staff Regulations without specifying the certificates and other qualifications or the level of experience required for the posts to be filled.

- 12 In the light of the great number of secondary education certificates in the Member States and the wide and varied content of the phrase 'equivalent experience in employment', even a more explicit and detailed requirement may, in certain cases, be incomplete and, for that reason, arbitrary.
- 13 This may, in particular, be the case where, as in this instance, the notice of competition is addressed to a group of individuals of differing origin and education.
- 14 Therefore, the only alternative is to employ a general formula such as that contained in the third subparagraph of Article 5(1) of the Staff Regulations and to leave the Selection Board for the competition to assess in each case whether the certificates produced or the experience of each candidate correspond to the level required by the Staff Regulations and, therefore, by the notice of competition.
- 15 The adoption of this solution implies, however, that the Selection Board shall be bound to give reasons for its decisions on this point, if only in summary form.
- 16 Therefore, in so far as it refers to the notice of vacancy, the application must be dismissed.

The decision of the Selection Board not to consider the applicant's candidature

- 17 It is clear both from the communications from the relevant departments of the Commission and from the report of the Selection Board that the latter rejected the applicant's candidature on the grounds that it did not meet the first of the qualifications required by the notice of competition, that is, an advanced level of secondary education, evidenced by a certificate or equivalent experience in employment.
- 18 The applicant claims that no reasons were given for this decision, that it conflicted with the established facts and constituted a misuse of powers.
- 19 As regards the absence of reasons for the decision, the proceedings of a Selection Board involve at least two distinct stages, that is, first consideration of the applications, in order to sort out the candidates allowed to enter the competition and, secondly, consideration of the abilities of the candidates for the post, in order to draw up a list of those suitable.
- 20 If the second stage above all consists of making comparisons and is, therefore, governed by the principle of secrecy inherent in the proceedings of a Selection Board, the first consists, in particular in a competition on the basis of qualifica-

tions, of a comparison of the qualifications produced by the candidates with those required by the notice of competition.

- 21 As this comparison is carried out on the basis of information which is objective and, moreover, known to each of the candidates in so far as it concerns his case, sufficient reasons must be given for the results arrived at.
- 22 No reasons were given in this instance, as the report merely indicated the qualification which the applicant was considered not to satisfy, although at first sight his experience was comparable to that of the other candidates allowed to enter the competition.
- 23 The report of the Selection Board infringes Article 5 of Annex III to the Staff Regulations and must therefore be annulled.

Costs

- 24 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to bear the costs.
- 25 As the defendant has failed in its pleas, it must be ordered to bear the costs.

On those grounds,

Upon reading the pleadings;
 Upon hearing the report of the Judge-Rapporteur;
 Upon hearing the parties;
 Upon hearing the opinion of the Advocate-General;
 Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 5 and 25, and Article 5 of Annex III;
 Having regard to the Protocols on the Statute of the Court of Justice;
 Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (First Chamber)

hereby:

- 1. Annuls the report of the Selection Board in Internal Competition No COM 484 to 487/70;**

2. Orders the Commission of the European Communities to bear the costs of the action.

Mertens de Wilmars

Donner

Monaco

Delivered in open court in Luxembourg on 14 June 1972.

A. Van Houtte

J. Mertens de Wilmars

Registrar

President of the First Chamber

**OPINION OF MR ADVOCATE-GENERAL ROEMER
DELIVERED ON 4 MAY 1972¹**

*Mr President,
Members of the Court,*

The plaintiff in the action in which I am giving my opinion today entered the service of the Commission of the European Communities as a night watchman on 12 November 1958. On 1 January 1962 he was appointed as a messenger in Grade D2 and on 1 September 1963 was promoted to Head of Unit in Grade D1. From 19 October to 28 November 1962 the applicant apparently took part in a training course organized by the Belgian Machines Bull company at the end of which he received a certificate stating that he was qualified as an operator. On 1 October 1963 he was appointed Clerical Officer in Grade C3 and assigned to the computer centre of the Commission as a punch-card operator.

Four posts in this department in career bracket B5/B4 were announced as vacant in Notice of Competition No COM 484 to 487/70; these were to be filled by internal competition on the basis of qualifications. The duties of the posts in question were defined as follows: 'to carry out normal office routine under supervision and in particular to make arrangements for a series of administrative or statistical tasks, to act as console operator on the computer and to perform tasks in "Operating System" on third generation computers'. The candidates concerned had to fulfil the

following conditions: 'An Advanced level of secondary education, evidenced by a certificate or equivalent experience in employment; experience of multi-programming of computers; familiarity with Cobol or Assembler programming desirable; appropriate experience'.

The applicant was one of the candidates for this competition. However, he was informed in a letter of 8 February 1971 from the Directorate General for Personnel and Administration that it had not been possible to accept his application. At his request, he was subsequently informed in a letter of 16 February 1971 from the Head of the Recruiting, Appointments and Promotions Division that the Selection Board had not accepted his application because he did not fulfil one of the conditions set out in the notice of competition.

As the applicant disagreed with this decision, he addressed a complaint through official channels to the President of the Commission on 25 March 1971. In this complaint, which was received on 29 March 1971 he protested against his exclusion from the competition and sought its annulment on several grounds. As he received no reply to his complaint he made an application to the Court on 23 July 1971.

The applicant claims that the Court should:

— declare that the notice of competition

¹ — Translated from the German.