administration in making its assessment, it has remained within reasonable bounds and has not used its authority in a manifestly incorrect manner. It is for the institution alone, in the exercise of its discretion, to judge whether the health of the successful candidate allows him to carry out his duties properly.

REPORT FOR THE HEARING
delivered in Case 26/85 *

I — Facts and written procedure

The applicant joined the Language Service of the Commission on 20 October 1958 as a reviser in the grade of auxiliary translator.

By a decision of 3 November 1959 he was established, with effect from 1 January 1959, in Grade LB 3, a provisional post in the organizational structure of the period before the adoption of the Staff Regulations.

By a decision of 3 December 1962 the applicant was appointed in Grade L/A 5, fifth step, with effect from 1 January 1962, and by a decision of 23 September 1963 he was promoted to Grade L/A 4 with effect from 1 February 1962. With effect from 1 February 1981 he was appointed head of a section.

By a decision of 7 February 1984 the Commission appointed the applicant temporary head of Division IX C 7 (French translation) for the periods from 1 May 1981 to 30 September 1981 and 1 June 1982 to 24 October 1982. The applicant also carried out the duties of head of the division from 20 January to 16 May 1984.

On 17 February 1984 the Commission published Vacancy Notice No COM/407/84 concerning the post of head of the French Translation Division (Grade L/A 3) in the Directorate General for Personnel and Administration (IX C 7). The vacancy notice called for the following qualifications:

'(1) University degree or equivalent professional experience;

(2) Thorough knowledge of the problems associated with the management of a large translation division;

(3) Very extensive experience in translation and revision.'

By a decision of 16 May 1984 the Commission promoted Henry Dubois, who had until then been head of the section

* Language of the Case: French.

'General and Administrative Affairs — Development', to fill the vacant post.

On 25 June 1984 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations in which he requested the annulment of the decision rejecting his candidature and the decision to appoint Mr Dubois to the post in question. The substance of his complaint was that in its consideration of the comparative merits of the candidates the Commission had failed to take into account the applicant's report for the period from 1 July 1981 to 30 June 1983, since that report was not in his personal file.

In its reply dated 7 November 1984, the Commission acknowledged that the applicant's periodical report was not in his personal file when the comparative merits of the candidates were considered. Its letter continues as follows:

'On 24 October 1984 the Commission therefore carried out a further examination of the comparative merits of the candidates, and in so doing also took into account the said periodical report. It concluded that the vacant post published in Vacancy Notice No COM/407/84 should be filled by the promotion of Henry Dubois. The Commission thus confirmed its decision of 16 May 1984 and decided that there were no grounds for annulling the appointment of Henry Dubois to the post of head of the French Translation Division.

Since the Commission was aware of all the relevant factors when it made that decision, it considers that your complaint no longer has any basis.'

By an application dated 31 January 1985 and lodged at the Court Registry on the same day the applicant brought this action for the annulment of the Commission's decisions.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It did however ask the Commission to produce certain documents regarding the conduct of the procedure leading up to the appointment in question.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(1) Declare the application admissible and well-founded;

(2) Before ruling on the matter, ask the defendant to produce the following:

2.1. The documents concerning the referral to the 'Groupe Noël' in May and October 1984 of the procedure for filling the vacant post;

2.2. Evidence that the personal files of the candidates were in fact transmitted to the said group and examined by it;

2.3. The minutes of the discussions of that group regarding the examination of the comparative merits and periodical reports of the officials concerned;

2.4. The minutes (No 737) of the meeting of the Commission of the European Communities of 16 May 1984;

2.5. The minutes (No 755) of the meeting of the Commission of the European Communities of 24 October 1984;

2.6. The special minutes concerning 'other discussions of the Commission on this question' contained in documents COM(84) PV 737, point 2, part XII A 1, and COM(84) PV 755, part 2, point X A 3;

2.7. Accelerated written procedure No E/1302/84 of 26 October 1984 containing the proposed reply to the applicant's complaint.

(3) Accordingly, annul:

(a) The decision of the Commission of the European Communities of 16 May 1984 appointing Henry Dubois head of Division IX C 7 (French translation) at the Directorate General for Personnel and Administration, in Grade L/A 3.

(b) The implied decision rejecting the applicant's application for that post;

(c) The decision of the Commission of the European Communities of 24 October 1984 confirming its decision of 16 May 1984 appointing Henry Dubois to the said post;

(d) The decision of the Commission of the European Communities of 7 November 1984 rejecting the complaint lodged by the applicant on 22 June 1984.

(4) Order the defendant to pay all the costs of the proceedings, pursuant to Article 69 (2) of the Rules of Procedure, and the expenses necessarily incurred by the applicant for the purpose of the proceedings, in particular travel and subsistence expenses and lawyers' fees, pursuant to Article 73 (b).

The *Commission* contends that the Court should:

(i) Dismiss the application as unfounded;

(ii) Rule on costs in accordance with the applicable provisions.

(iii) In addition, the Commission reserves the right to make such further submissions as it may deem appropriate.

III — Submissions and arguments of the parties

A — *Admissibility*

1. In support of the admissibility of his action the *applicant* states that it is directed against an act adversely affecting him within the meaning of Article 91 of the Staff Regulations; he states that the action was brought within the prescribed period, after he had first sought recourse through administrative channels, and that his interest in bringing the action derives from the fact that his career has been affected by the contested decision.

2. The *Commission* disputes the admissibility of the action on the basis of the following arguments:

The complaint, it says, related mainly to the fact that the applicant's report for the period from 1 July 1981 to 30 June 1983 was not in his personal file when the appointing authority considered the comparative merits of the applications received. On 24 October 1984, following the submission of a complaint by the applicant, the Commission carried out a further examination of the merits of the candidates and at that time also took into account the said periodical report. The basis for the complaint thus disappeared.

Consequently, the act adversely affecting the applicant is not the appointment decision of 16 May 1984 but the second

decision of 24 October 1984, against which the applicant raised no complaint.

B — *Substance*

The action is based on submissions relating to the infringement of Article 45 of the Staff Regulations and misuse of powers or *ultra vires* acts.

Infringement of Article 45 of the Staff Regulations

1. According to the *applicant* the appointing authority failed to carry out a scrupulous examination of the candidates' personal files and in particular their periodical reports, contrary to Article 45 of the Staff Regulations, under which officials may be promoted only 'after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'.

In respect of the promotion of officials from Grade L/A 4 to Grade L/A 3, the highest grade in the Language Service, that comparative examination, he says, is carried out by the 'Groupe Noël', composed of the Secretary General, the Director General for Administration and Personnel and the Director General of the Directorate General in which a post is vacant.

It appears from the Commission's reply to the complaint that in May 1984 the 'Groupe Noël' was not in fact in a position to carry out a complete and objective examination of the applications received in the light of the most recent periodical reports, inasmuch as a number of these reports had not yet been finally drawn up.

Consequently, the Commission could not confine itself to adopting a new decision on 24 October 1984 confirming its previous decision, which was void, but should, after establishing that the contested decision was unlawful, have annulled that decision and adopted a new decision according to the proper procedure.

2. The *Commission* replies that it carried out a scrupulous examination of the personal files of the candidates on two occasions, that is to say, before the decision of 16 May 1984 and before the adoption of the decision of 24 October 1984, after the applicant had submitted his complaint.

It is inconceivable that the legality of that second decision should be put in question simply because it was referred to as a confirmation of the appointment previously made and not as a new appointment.

Misuse of power and ultra vires *acts*

1. The *applicant* denies that the Commission did in fact carry out a further examination of the comparative merits of the candidates in October 1984. He asserts that it did no more than attempt to place a veneer of legality over its decision of 16 May 1984.

It is worthy of note, he says, that the successful candidate does not have more seniority in the service or seniority in the grade than the applicant; nor do his periodical reports reflect a more favourable assessment of him than of the applicant. Furthermore, the health of the successful candidate makes it impossible for him to take charge of the management of a division numbering more than 80 translators and revisers.

The course of the procedure leading up to the decision of 24 October 1984 furnishes grounds for disquiet: if the Commission is to be believed, in a single day the 'Groupe

Noël' not only carried out a new comparative examination of the candidates' files but also drafted its conclusions and sent them to the responsible member of the Commission. That member considered those conclusions on the same day and prepared a draft decision which was adopted, still on 24 October, by the Commission. On the other hand it was only on 26 October 1984 that the Secretary General sent a memorandum to the members of the Commission, in an accelerated written procedure, proposing the adoption of a draft reply to the applicant's complaint.

2. The *Commission* considers that, even if it were assumed that a breach of Article 45 of the Staff Regulations was committed, which it denies, there was no *ultra vires* act or misuse of power, since the latter is defined as the pursuit by the author of an administrative measure of an objective other than the lawful one. On 24 October 1984 the Commission adopted a new decision with knowledge of all relevant factors. The annulment of the decision of 16 May 1984 does not therefore automatically entail the annulment of the second decision, which is independent inasmuch as it was adopted after a further examination of all relevant information.

The applicant's assertions regarding the seniority of the successful candidate and the assessments made of him in his periodical reports are irrelevant in so far as the applicant does not assert that the appointing authority committed a manifest error in the exercise of its discretion. Furthermore, the health of the successful candidate in no way affects his professional abilities, in particular his ability to carry out his duties as head of division.

In conclusion, the Commission submits that the decision of 24 October 1984, confirming the decision of 16 May 1984, was adopted in accordance with the lawful procedure: the manner in which it is described does not determine its legal value. The applicant's candidature was rejected in the Commission's discretion, on no grounds other than his professional merits and qualities.

IV — Replies to questions put by the Court

In reply to questions put by the Court, the Commission stated that there were no general criteria concerning the assessment of the merits of officials eligible for promotion to Grade L/A 3, since such an assessment must be carried out in each particular case in accordance with the qualifications required by the vacancy notice. In the case of the appointment in question account was taken, *inter alia*, of the qualities of leadership, sense of initiative and organizational ability of the successful candidate.

On the request of the Court, the Commission also produced a copy of the minutes of the meeting of 10 May 1984 of the 'Groupe Noël' and stated that the matter was not referred to that group a second time in October 1984.

U. Everling
Judge-Rapporteur