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
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 MAY 1972[1]

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.

must specify the level of experience required;

— declare that the applicant possesses the equivalent experience in employment referred to in the notice of competition;

— declare that a certain other candidate has not fulfilled the conditions set out in the notice of competition.

On the basis of these statements the Court is also requested to annul:

— the notice of the said competition;

— the competition procedure;

the decisions of 8 February 1971, 16 February 1971 and the implied rejection of the applicant's complaint through official channels and, finally,

— the appointment of a certain other candidate to one of the vacant posts.

In the reply and the oral procedure the applicant withdrew his conclusions concerning the finding that a certain other candidate did not fulfil the conditions set out in the notice of competition, and those concerning the appointment of this candidate to one of the vacant posts.
We must now consider those conclusions which still stand.

1. The applicant maintains first that the notice of competition infringes Article 1(1)(d) of Annex III to the Staff Regulations. He maintains that a notice of competition must specify the exact nature of the qualifications and the nature and duration of the practical experience required. Only in this way is an arbitrary choice prevented and a review by the Court made possible. It is because, in the present case, the Commission has not observed this requirement that the notice of vacancy in question must be annulled.
On this point it must be remembered that according to the above-mentioned provision of the Staff Regulations the notice of competition shall set out the certificates and other evidence of formal qualifications or the degree of experience required for the posts to be filled. As, in the present case, the posts to be filled were in Grade B5/B4 account must also be taken of the provision in Article 5 of the Staff Regulations, that Category B covers staff engaged in executive duties which required an advanced level of secondary education or equivalent experience in employment.
In the light of these provisions it is difficult to question the conformity of the notice of competition with the minimum legal requirements. Sufficient details have moreover been given of the duties involved in the posts to be filled—as is clear from my statement of the facts of the case. This certainly affords additional help in setting the level of experience required. In view of the large number of qualifications accepted by the legal systems of the Member States and also, therefore, the large number of standards of comparison to be applied in assessing the necessary experience, it is scarcely possible to require a more detailed specification to be given in the notice of competition. In this respect the Commission also refers to the relevant case-law, especially to the judgment in Joined Cases 18 and 19/64 ([1965] ECR 789 at p. 799). This case also concerned equivalent experience in employment in the context of a notice of vacancy. On the question how equivalent experience in employment is to be assessed in candidates without a university degree (it was a post at this level which was at issue at this time) the Court gave the general answer that, for that purpose, it is sufficient 'to require ... experience in employment acquired through promotion to activities and duties normally reserved for the holders of university degrees'.
My reply to the applicant's first criticism would therefore be that the notice of vacancy in question cannot be criticized on the basis of a lack of sufficient detail and that therefore neither the notice nor the proceedings on the basis thereof can be annulled on the grounds put forward by the applicant.

2. The second submission includes a whole group of complaints. The applicant draws attention to the absence of sufficient

reasons for the decision, that is, he maintains that it infringes Article 25 of the Staff Regulations. Furthermore, the findings of the Selection Board as to the experience of the applicant do not agree with the facts and constitute a misuse of powers.

(a) As regards, first, the alleged absence of reasons for the decision, you are well aware that the applicant's exclusion from the competition was solely on the ground that he did not satisfy that condition in the notice of vacancy which refers to an advanced level of secondary education or equivalent experience in employment.
This is certainly an extraordinarily short statement of reasons. It was, however, regarded as sufficient for the purposes of the competition procedure. This can also be inferred from the relevant case-law on this point (the judgment in Case 23/64 [1965] ECR 157). In that case the Court accepted that the proceedings of the Selection Board are secret and it accepted as sufficiently clear reasons for the decision 'that the Selection Board proceeded "to a first choice of candidates who clearly had the highest qualifications"'.
If this applied in that case it only remains here to conclude that, in the same way, the applicant cannot now succeed by reliance on Article 25.

(b) As regards the problem of the equivalent experience in employment the first question which arises from the statements made by the parties in this instance is that of the criterion to be applied. The Commission considers that, as the post to be filled is in Category B, the experience necessary is that required for a post of this level. On the other hand, the applicant maintains that such a criterion is irrelevant and that experience over a long period in a post in Category C must also be sufficient.
Here also this problem is relatively easily settled on the basis of earlier case-law. On this point we must refer again to the judgment in Joined Cases 18 and 19/64 which states that candidates without a university degree could be regarded as having sufficient equivalent experience as a result of 'promotion to activities and duties normally reserved for the holders of university degrees'. Applied to the present case this can only mean that equivalent experience could be acquired solely by promotion to activities and tasks reserved for the holders of a certificate normally granted on completion of secondary education. The decisive factor is, therefore, experience which may be acquired in a post in Category B; this solution is quite understandable, otherwise the concept of 'equivalent' referred to in Article 5 of the Staff Regulations would have no meaning. This does not, as the applicant fears, involve putting at risk the advancement of officials in Category C to Category B. Such advancement is certainly possible, for example, when candidates who, before entering the service of the Communities have acquired a higher level of experience, content themselves at first with appointment in a lower Category or when, by reason of an increase in work or the reorganization of the departments, officials in Category C are entrusted with duties of Category B for a period of time which is reasonable in the circumstances.
Further consideration of the problem must begin with acceptance of the view of the Commission that the applicant's criticism is only valid if he succeeds in producing sufficient relevant evidence, that is, if he can prove that he has acquired a sufficient amount of experience in Category B.

(c) If we consider the applicant's submissions under the heading 'erroneous evaluation of the facts' the following picture emerges.
He maintains, first, that in December 1966 he took a course in Milan on third generation computers, for which he received a diploma from IBM. Since then he has perfected his knowledge by working in data processing, as is indicated in the certificate given by one of the directors of IBM in Brussels. Moreover, it cannot be denied that since 1966 he and his colleagues have worked alternately as console operator and programme clerk in data processing and that he was performing these duties, which formed the subject of the competition, at the time the competition took

place. Finally, he can refer to letters of thanks from officials of the Commission for whom he carried out tasks in data processing.

If we consider the effect of these arguments on the consideration of the application, we must observe—as does the Commission—that the IBM diploma referred to by the applicant and the certificate given by a director of IBM cannot be recognized as certificates within the meaning of Article 5 of the Staff Regulations and the notice of vacancy, since they are not official certificates. They have of course a certain, although not very great, evidential value in the examination of the question whether the applicant possesses the equivalent experience required by the notice of competition. I also agree with the Commission that the letters from other officials of the Commission which apparently contain positive appreciations of the work of the applicant are scracely conclusive. In fact, it might be impossible for those outside the department to know who carried out the tasks in question, whether they were in fact entrusted to the applicant and whether —in that event—the applicant carried out the task perfectly at the first attempt or had to repeat it several times.

Therefore, a single point is of decisive importance. The question to be considered is whether the applicant can be said necessarily to have acquired equivalent experience as a result of the fact, accepted by the Commission, that for some years the applicant, like his colleagues, was entrusted in the computer centre on an occasional and temporary basis (that is, during the period of reoganization), with the Category B duties when there were not sufficient officials in Grade B available. As questions of assessment are at issue, it is not possible for you, in the context of these legal proceedings, to substitute your assessment for that of the Selection Board. Your established case-law does not allow you to do this in such cases (cf. for example, Joined Cases 35/62 and 16/63 [1963] ECR 197). You may only consider whether the applicant has put forward sufficiently strong evidence with which to support his argument that the Selection Board's assessment of his experience constitutes a blatantly erroneous evaluation of the facts.

If one considers the arguments put forward on this point, it is clearly difficult to justify such a claim. I consider particularly important in this connexion the Commission's emphatic statement that the applicant was unsatisfactory when he temporarily took on the duties of a console operator and programme clerk and that, therefore, after only being employed a few times in this capacity in 1970, he was no longer entrusted with such work after March 1971. Similar indications were already given in the report submitted to the Selection Board about the applicant's performance between 1967 and 1969. Furthermore, as the Selection Board largely consisted of officials from the computer centre they were probably themselves aware of further details. Nevertheless, the applicant has been unable to put forward anything really decisive in answer to this argument, to support his view that when it refused to accept that he had equivalent experience the Selection Board made an assessment which was really incorrect.

In the same way, therefore, the submission concerning the erroneous evaluation of the facts cannot be successful.

(d) I can be quite brief as regards the complaint of misuse of powers. This complaint is essentially based on the fact that other candidates also belonged to Category C, that they did not possess any more than the applicant the certificates required for entry into Category B and that on the whole they performed the same tasks as the applicant. Nevertheless they were admitted to the competition and subsequently even appointed to the vacant posts.

The Commission does not really contest the basis of this statement of the facts. However, the conclusive point as regards your consideration of the problem is that, in the last resort, the question which arises in this context is also one of assessment. It is not impossible that the different treatment of the applicant arises out of the fact that the Selection Board made differing assessments of the performance and experience of the applicants. Since, however,—as we have seen—the applicant has

failed to bring adequate evidence to upset this assessment, I can only conclude that the submission of misuse of powers is unfounded.

3. I am therefore of the opinion that you should dismiss the present application as unfounded and order each party to bear its own costs in accordance with Article 70 of the Rules of Procedure.