JUDGMENT OF THE COURT (SECOND CHAMBER)
1 APRIL 1971[1]

Dietrich Rabe
v Commission of the European Communities

Case 76/69

In Case 76/69

DIETRICH RABE, an official of the Commission of the European Communities, residing at 13 Albertlaan, Tervueren, represented by Philippe Waquet, Advocate at the Conseil d'État and the Cour de Cassation of France, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34/B/IV 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 office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of Internal Competition No COM/75 and of the appointment of Mr Peters following that competition,

THE COURT (Second Chamber)

composed of: A. Trabucchi, President of Chamber, P. Pescatore and H. Kutscher (Rapporteur), Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: French.

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

1. The applicant, who was established in 1964 as an official in Grade A 4, was first Head of the Structure and Rules of the Market Branch at the Directorate-General for Steel of the former High Authority of the ECSC. In 1966 he was appointed temporary Chief Executive Assistant to a Member of the High Authority. In 1967 he was appointed temporary Head of Division. In 1968 he was assigned to a post in the Directorate-General for General Research and Technology.

2. In June 1968 the defendant published Vacancy Notice COM/75 relating to the Grade A 3 post of Head of Division III—B-3 (Rules of the market—inspection reports) within the Directorate for Steel under the Directorate-General for Industrial affairs. This notice contained in particular the following information:

'*Nature of duties*: Head of Division

To direct an administrative unit engaged in:

— the application of the rules established by the ECSC Treaty and of the implementing regulations in the field of publication of prices and non-discrimination;
— the analysis of reports on inspections carried out at iron and steel undertakings;
— the preparation of studies on the movement of prices of ECSC products.

Qualifications required:

— University education confirmed by a degree, or equivalent experience;
— Good knowledge of the field of economic analysis;
— ability to direct an administrative unit and to take the chair at meetings of experts.'

Subsequently, the defendant decided to organize an internal competition on the basis of qualifications, also bearing the number COM/75, in order to fill the post detailed above. The notice of competition

— stated that applications presented as a result of the vacancy notice would be considered as applications for the competition;
— defined in the following manner the 'qualifications required';

'— University education confirmed by a degree, or equivalent experience;
— Detailed knowledge of the Treaties and of the machinery regulating the steel market;
— Good knowledge of the field of economic analysis;
— Proven experience of working in a group;
— Proven administrative experience and ability to direct.'

From the several officials who applied, among them the applicant, the Selection Board decided to award first place in the list of suitable candidates to Mr Peters. As a result, the Commission decided on 30 April 1969 to appoint Mr Peters to the post in question. By letter of 15 September 1969 the applicant was informed that his application had not been successful.

II — Procedure

The procedure followed the normal course.

By order of 6 May 1970 the Court (Second Chamber) requested the defendant to produce several documents.

These were added to the file during the course of the procedure.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

It nevertheless invited the defendant to reply in writing to the following questions:

1. Why did Mr Toffanin, a member of the selection board, continue to have reservations regarding the contents of the applicant's personal file when the parties seem to agree that the document which Mr Toffanin stated to be missing (the applicant's degree in business studies) had been added immediately to the file held by the selection board?
2. Why, in this case, did the Commission not stop at the 'promotion/transfer' stage (Article 29 (1) (a) of the Staff Regulations) rather than going on to hold an internal competition?

The defendant replied to the above questions.

The parties submitted their oral observations at the hearing on 21 January 1971.

The Advocate-General delivered his opinion on 4 March 1971.

III — Conclusions of the parties

The *applicant* claims that the Court should:

'declare null and void the appointment of Mr Peters and Internal Competition No COM/75, including the notice of competition;

order the defendant to bear the costs.'

The *defendant* contends that the Court should dismiss the application as unfounded and order the applicant to bear the costs.

IV — Submissions and arguments of the parties

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

In his *application,* the *applicant* makes the following observations:

1. The selection board for the competition made its decision under irregular circumstances since one of its members, Mr Desbois, was not present at the meeting when the decision was taken to propose to the Commission the appointment of Mr Peters. Since there is nothing to show what majority was obtained, the possibility cannot be ruled out that if Mr Desbois had participated in the meeting the selection board would have arrived at a different decision.

2. The applicant claims that the procedure followed for the competition shows a misuse of powers or of procedure. It appears from the facts in the case as a whole that this procedure was adopted solely for the purpose of appointing Mr Peters to the post in question, in order to reward him for services he had rendered to the Private Offices of Members of the Commission:

— Unlike the applicant, Mr Peters is not highly qualified on the subject of steel.

— By replacing the expression 'ability to direct an administrative unit and to take the chair at meetings of experts' (Vacancy Notice) by 'proven experience of working in a group; proven administrative experience and ability to direct' (notice of competition), the defendant reduced the conditions required at the outset. This can be explained only by a desire to ensure the appointment of Mr Peters who has neither the experience nor the ability necessary to direct a department.

In its *defence* the *defendant* makes, *inter alia,* the following observations:

1. The presence of Mr Desbois would not have resulted in a different decision, since he later made it known that he agreed with the conclusions of the selection board and signed the report. It is in conformity both with the requirements of law and of practical necessity that the results of a competition should be determined by the members of the selection board present.

2. The allegation of misuse of power or of procedure is unfounded:

— In his application form Mr Peters stated that he had been entrusted, since 6 July 1967 and by the Member of the Commission with whom he worked, with the task of 'following closely, in his work in the Commissioner's Private Office, all questions relating to problems of steel production'.

— The qualifications required in the notice of competition are not less onerous than those stipulated in the vacancy notice. The notice of competition even laid down an additional requirement ('detailed knowledge of the Treaties and of the machinery regulating the steel market'); as for the rest, it either repeats the terms of the vacancy notice or reproduces the substance of it.

In his *reply* the *applicant* puts forward, *inter alia,* the following points:

1. Since Mr Desbois did not participate in the second meeting of the selection board—where the candidates were interviewed and the list of those suitable decided upon—he was not entitled to sign the report. Moreover, at the first meeting, at which Mr Desbois was present, the applicant's file was not complete. If, even though inadequately informed as to the applicant, Mr Desbois agreed with the conclusions of the selection board, this merely affords additional evidence of the fact that the choice of Mr Peters had been made beforehand.

For this second reason, it is indeed to be feared that the selection board would have reached the same conclusions even if Mr Desbois had been present. It is nevertheless the case that in a competition conducted according to the rules the presence or absence of a member of the selection board may have an influence on the final decision. By taking its decision in Mr Desbois's absence the selection board infringed Article 25 of the Rules implementing Article 29 of the Staff Regulations, rules which were adopted by the Commission and which lay down with great precision the composition of selection boards. The Commission was given incomplete information on Mr Desbois's absence since the information given did not disclose that he was not present at the most important meeting of the selection board.

The procedure followed for the competition was irregular for another reason. At the first meeting of the selection board, one of its members, Mr Toffanin, expressed reservations with regard to the applicant's candidature on the ground that the latter's file was not complete and, in particular, did not contain a copy of the degree mentioned in the application form. This omission was immediately made good. Nevertheless, Mr Toffanin expressly maintained his reservations in an official statement accompanying the report of the selection board. In his opinion, the application made by the applicant was irregular, and the choice of the selection board was 'vitiated' by its erroneous assessment with regard to this point.

2. If the competition in dispute had taken the proper course, the applicant would necessarily have been successful. In support of this assertion the applicant sets out in detail his administrative career and his qualifications.

In the two-year period from 1 July 1967 to 30 June 1969 Mr Peters benefited from a 'serious inequality of treatment', to the disadvantage of the applicant: whereas the report on the former referred to the credit he acquired from the single month (May 1969) during which he exercised his new duties of Head of the Division III—B-3, the report on the applicant did not mention the way in which he carried out the duties of temporary Head of the Structure and Rules of the Market Division. According to the opinion expressed by the Joint Committee regarding the competition in dispute, the members chosen by the Staff Committee made the observation that 'the qualifications required

do not seem to correspond to a Grade A 3 post. They are surprised that, considering the qualifications required, no candidate was chosen by the procedure mentioned at Article 29 (1) (a) of the Staff Regulations'—in other words, that an appointment was not made on the basis of promotion or transfer following Vacancy Notice COM/75—' and ask that it [the notice of competition] be returned to the Directorate-General concerned since they find themselves unable to express a valid opinion'.

The fact that a competition was nevertheless held can only be explained on the basis that the appointment of Mr Peters—who did not satisfy the conditions for transfer or promotion—had been decided upon beforehand.

That also follows from the fact that the notice of competition no longer mentions 'ability to take the chair at meetings of experts' since, in fact, Mr Peters has no experience in this field.

An official who is called upon to direct a division must have considerable practical experience of the field of activity of that unit, this being a condition which the Commission has laid down in other cases. But since Mr Peters does not have such experience in relation to steel, neither the vacancy notice nor the notice of competition required this qualification.

The defendant cannot rely, in this connexion, on the statement by Mr Peters in his application form. In fact, it is stated in the judgment of the Court in Joined Cases 94 and 96/63 ([1964] ECR 297) that such documents are of an essentially subjective nature and can be evaluated only with considerable care.

The exceptional favour which Mr Peters enjoyed at the Commission is also shown by the fact that in breach of Article 3 of the Staff Regulations the decision appointing him took effect from 1 July 1968 although he took up his duties only in May 1969. In addition, Mr Peters was appointed at step 2 of his new grade with seniority from 1 August 1967, which is in breach of Article 32 of the Staff Regulations.

On the 'list of officials and other servants in employment with the Commission' drawn up for 1969 Mr Peters, at Grade A 3, appears under the Directorate-General for Transport, Directorate B, Division 2. On the other hand, it emerges from Mr Peters's periodic report and from his application form that he was employed in the Private Office of a Member of the Commission until 20 May 1969. Finally, in the table annexed to a 'Note for the attention of the Members of the Commission' issued by the Commission's Secretary-General and dated 28 May 1968, Mr Peters is mentioned as working with the aforementioned Division with his real Grade of A 5 and is not among the officials in the said Commissioner's office. The defendant must explain these contradictions.

Finally, 'in so far as necessary', the applicant requests that the Court should hear the testimony of nineteen officials who were candidates for the post mentioned in Vacancy Notice COM/75. The officials concerned can enlighten the Court as to the actual circumstances of the competition and they should reply to the following question: 'Did you know beforehand that Mr John Peters would be chosen for the post (in question)?'

In its *rejoinder* the *defendant* makes, *inter alia,* the following observations:

1. The fact that Mr Desbois signed the report of the selection board 'does indeed constitute an error', but Mr Desbois was 'convinced of the excellent qualities of Mr Peters'. It emerges from the minutes of the 76th meeting of the Commission that the latter, contrary to the applicant's allegations, was accurately informed as to the significance of Mr Desbois's absence.

The reservations expressed by Mr Toffanin and the initial absence of the document of which he complained were of no consequence since the selection

board accepted the applicant's candidature and he was among those who did well in the competition. Furthermore, the document in question gave the applicant no advantage over Mr Peters.

2. The periodic report made with regard to Mr Peters was signed, first, by a Member of the Commission and, secondly, by the Assistant Director-General for Industrial Affairs. In addition, it contains the following note: 'Mr Peters has been with Directorate-General III since May 1969'.

As regards the periodic report on the applicant, it indicates that he carried out the temporary posting in question.

The changes contained in the notice of competition by comparison with the vacancy notice were only designed to align the text with those relating to other posts at Grade A 3.

The Commission has never systematically required candidates for vacant posts to have long experience in the relevant sector. On the contrary, it may be better not to base criteria of selection solely on knowledge already acquired but to give greater importance to the ability to adapt. By indicating that he was particularly concerned with problems relating to steel production Mr Peters was only stating the truth, since he participated in the working party on industrial affairs which discussed steel problems and which contained a number of Commissioners, one of whom was replaced, when unable to attend, by Mr Peters.

On his appointment, Mr Peters retained the seniority which he had acquired when, temporarily occupying the post of Deputy Chief Executive Assistant, he held the grade of A 3. In any case, this point is irrelevant to the dispute.

Until his appointment to the post at issue, Mr Peters was 'in a special position'. Within the context of the reorganization of its departments in 1968 the Commission assigned him, as an established official at Grade A 5, to the Directorate-General for Transport; but he was given the temporary grade of A 3 as Deputy Chief Executive Assistant. The fact that in the list of officials of February 1968 Mr Peters was described as having the temporary grade of A 3 with the Directorate-General for Transport 'is obviously the result of an administrative error'.

In its written reply to the questions put by the Court, the defendant points out that Mr Toffanin, when examining the applicant's personal file at the final meeting of the selection board, noticed that the applicant's degree was not included in the file. This is why he maintained his reservations when signing the minutes.

As regards the question why an internal competition was held, the defendant refers to the minutes of the 46th meeting of the Commission of 22, 24 and 25 July 1968, an extract from which is included in the file. These minutes must be understood to mean that the Commission, having examined and compared all the applications submitted, considered that none of the candidates who had up to then applied for the post had qualifications or ability such as would have enabled the post to be filled by promotion or transfer.

The *applicant* replies, *inter alia,* as to the reservations expressed by Mr Toffanin, that the fact that the selection board came to its decision on the basis of an incomplete file constitutes a procedural defect rendered more serious by the fact that this was a competition on the basis of qualifications. Furthermore, he submits that he cannot be blamed for omissions from his file.

He claims that as regards the Commission's decision to hold an internal competition, the defendant has in effect refused to reply to the question put by the Court. The abovementioned minutes are silent as to the real reasons for this decision. The present attitude of the defendant is therefore equivalent to a confession of the misuse of power alleged by the applicant.

The *defendant* replies that the absence of certain documents in the applicant's file had no effect on the contested decision since, on the one hand, the testi-

monials which were absolutely necessary were at the disposal of the members of the selection board and, secondly, the applicant was placed second on the list of suitable candidates, a proposal with which Mr Toffanin was himself in agreement.

The decision to hold an internal competition is at the discretion of the Administration which, in accordance with the case-law of the Court and in the interest of officials themselves, is not obliged to divulge the reasons for its conduct.

Grounds of judgment

[1] This application is for the annulment of the decision of the Commission of 30 April 1969 appointing Mr Peters to the post of Head of Division III-B-3 which was the subject matter of Notice of Internal Competition COM/75, and for the annulment of the competition itself, including the notice of competition.

[2] (1) The applicant considers that the said decision is illegal by reason of the fact that a member of the selection board for the competition, Mr Toffanin, added to the final report of the selection board comments to the effect that he considered, contrary to the opinion of the majority of the selection board, that two other candidates should have been placed jointly second with the applicant on the said list, 'without removing my reservations as to the latter with regard to the contents of his personal file'.

[3] On 10 March 1969 the administration invited the applicant to complete his application form by producing the degree in business studies referred to in the form, as well as testimonials issued by previous employers.

[4] It emerges from the explanations of the parties that although the applicant acceded to this request on 18 March 1969, the administratioin did not send the documents in question to the selection board, with the result that the latter did not possess them either at its first meeting on 19 March 1969 or even at its second and final meeting on 28 March 1969, during which it drew up the list of suitable candidates as prescribed by Article 30 of the Staff Regulations.

[5] Under the terms of Notice of Competition COM/75 this competition was in principle to be conducted 'on the basis of qualifications', the candidates having to show 'university education confirmed by a degree' or 'equivalent experience'.

[6] For this reason, the existence and production of degrees and testimonials such as those in question might have great importance for the purpose of drawing up the list of suitable candidates and making the final appointment.

7 The fact that the selection board could not examine the documents in question is not the fault of the applicant but of the administration.

8 In these circumstances, the absence of the said documents constitutes a procedural defect on which the applicant is entitled to rely in this application.

9 (2) The applicant claims that the competition procedure is also vitiated by the fact, which is uncontested, that another member of the selection board, Mr Desbois, although not present at the meeting of the selection board of 28 March 1969, nevertheless signed its report and declared himself to be in agreement with the conclusions of the selection board.

10 This meeting was designed in particular to enable the members of the selection board, by means of an interview with candidates which was intended to 'examine references regarding their employment', to come to a clear conclusion as to the qualifications and personality of each of them. In these circumstances, by agreeing expressly with the conclusions of the selection board, Mr Desbois gave the impression of being as well informed about each of the candidates as the other members of the selection board, whereas in reality he was not present at the interview which, in the mind of the selection board, was an important factor in assessing the candidates.

11 Because of this fact also, the conduct of the competition in question was illegal.

12 The possibility cannot be ruled out that if all the illegal acts mentioned above had not been committed the selection board, as well as the appointing authority, might have come to a different decision.

13 Internal Competition COM/75 and the decision appointing Mr Peters to the post in dispute must therefore be annulled on the ground of infringement of essential procedural requirements, there being no need to examine whether the further submissions advanced by the applicant are well-founded.

Costs

14 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

15 The defendant has failed in its submissions.

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 Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT (Second Chamber)

hereby:

1. **Annuls Internal Competition COM/75 and the decision of the Commission of 30 April 1969 appointing Mr Peters to the post of Head of Division III-B-3;**

2. **Orders the defendant to bear the costs of the action.**

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 1 April 1971.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ALAIN DUTHEILLET DE LAMOTHE DELIVERED ON 4 MARCH 1971[1]

Mr President,
Members of the Court,

In June 1968 the post of Head of Division (Market rules, inspection reports) corresponding to Grade A3 became vacant at the Directorate-General for Industrial Affairs, Steel Division, with the Commission.
In accordance with the Staff Regulations, a vacancy notice was published in order to fill this post by transfer or promotion. Only Grade A3 officials (for transfer) and Grade A4 officials (for promotion) could be candidates. On the other hand, Grade A5 officials could not be candidates on the basis of the principle laid down by Article 45 of the Staff Regulations.
Eleven candidates applied, one at Grade A3, applying for transfer, and the other ten, which included Mr Rabe, at Grade A4 applying for promotion.
On 22 July 1968, the Commission, having considered the different applications, decided not to fill the post by transfer or promotion but to hold an internal competition as it is authorized to do by Article 29 (1) (b) of the Staff Regulations.
A selection board composed of five members was appointed to judge the

1 — Translated from the French.