In Case 67/81

MARIE HÉLÈNE RUSKE, an official of the Commission of the European Communities, residing in Brussels, represented by Jean-Noël Louis of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Pipkorn, a member of its Legal Department, acting as agent, assisted by R. Andersen of Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Selection Board for Internal Competition No COM/B/4/80 of 25 September 1980 not to admit the applicant to the tests for that competition and, in the alternative, for the annulment of the implied decision of the Commission rejecting the applicant's complaint against the decision of the said Selection Board,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. In 1980, the Commission organized Internal Competition No COM/B/4/80 within the institution to constitute a reserve of administrative assistants in the field of records and library work in the career bracket covering Grades 5 and 4 of Category B.

Under heading II.1 of the notice of competition, "Certificates, diplomas, etc. and practical experience", candidates had to satisfy the following requirements:

"Either

A.1: Advanced secondary education with final diploma of certificate

and

A.2: Diploma as a records clerk and/or library assistant

and

A.3: A total of four years' service with the Communities on 30 June 1980 as an official or other servant.

or

B.1: Secondary education, with diploma

and

B.2: Certificate or other acceptable statement of qualification as a records clerk and/or library assistant

and

B.3: At least three years' experience on 30 June 1980, not necessarily in the service of the Communities, in Category C duties (as principal clerical officer, but not as clerical assistant) or of similar duties relating to the field specified at I. Nature of duties.

and

B.4: A total of four years' service with the Communities on 30 June 1980 as an official or other servant.

or

C.1: Certificate or other acceptable statement of qualification as a records clerk and/or library assistant

and

C.2: At least nine years' experience on 30 June 1980, not necessarily in the service of the Communities, in Category C duties (as principal clerical officer or clerical officer, but not as clerical assistant) or of similar duties relating to the field specified at I. Nature of duties

and

C.3: A total of four years' service with the Communities on 30 June 1980 as an official or other servant."

At the same time, the Commission organized Open Competition No COM/B/185 to constitute a reserve of administrative assistants in career bracket B 5-B 4 in three different fields, including that of records and library work. The relevant notice of competition was published in the Official Journal of 5 June 1980, C 134, p. 7. Under point III. B.2, "Qualifications and practical experience", the notice laid down the following conditions:

"on the closing date for receipt of applications:

Candidates must have completed a course of secondary education and received a final certificate (the Selection Board, in assessing the certificate, will take into account the differing educational systems in the Member States).

...

Must have at least two years' practical work experience relevant to the option chosen (i.e. have carried out tasks similar to those described in paragraph I above). Supplementary training, either theoretical or practical in the chosen field, may be considered as practical work experience."

2. The applicant, Mrs Marie Hélène Ruske, took up her duties at the Commission on 15 February 1960 as a clerical officer in Grade C 3. Since 1 January 1971 she has been engaged in records and library work as principal clerical officer in Grade C 1.

On 18 September 1980, Mrs Ruske submitted her application to take part in Internal Competition No COM/B/4/80. On her application form, she specified the duties which she had performed until that date, and, in particular, that she had been responsible for the administration and the organization of the library of the new Directorate-General III since October 1977.

By letter of 25 September 1980, the Head of the Recruitment Division, Y. Desbois, Chairman of the Selection Board for the competition, notified her of the Selection Board's decision not to admit her to the tests on the ground that she did not satisfy the requirements set out at points II.1.A.1 and II.1.B.2 of the notice of competition.

By a note dated 1 October 1980, Mrs Ruske informed Mr Desbois that she had not based her application on the requirement for eligibility stipulated at point II.1.A.1 but on the requirements set out at points II.1.B.1, B.2, B.3 or under points II.1.C.1, C.2, C.3. As regards the requirement stipulated under point II.1.B.2 in particular, she included in her note, a summary, accompanied amongst other things, by a reference dated 1 October 1980 from Mr Christopher Layton, a Director in Directorate-General III, of her duties spanning a period of seven years as a records clerk and a period of three years in charge of the library of Directorate-General III.

By a note dated 29 September 1980, A. Mulfinger, Assistant to the Director-General of Directorate-General III, requested Mr Desbois to check Mrs Ruske's application against the criteria for eligibility set out at points B.1, B.2 and B.3, laying emphasis on Mrs Ruske's experience and, in particular, on the fact that as librarian in Directorate-General III for four years she had performed, to the complete satisfaction of her superiors, the duties of an official in Category B.

By a note dated 2 October 1980, Mr Desbois replied that in order to perform the duties of a records clerk or library assistant at the level of Category B, specialized basic training of a theoretical nature was required in accordance with a decision taken by the joint committee convened to approve Notice of Competition No COM/B/4/80 and by the appointing authority. The Selection Board examined the candidates' files on that basis and took a decision regarding Mrs Ruske's application which was quite justified. Furthermore, he saw no objection to his notes being forwarded by Mr Mulfinger to Mrs Ruske by way of reply to her note of 1 October 1980.

On 10 October 1980, Mr Mulfinger sent Mr Desbois a second note in which he pointed first to the difference between the competition in point and certain previous competitions as regards the criteria for admission, in particular as regards the requirement of a "statement of qualification" ("sonstiger Befähigungsnachweis") as a records clerk or library assistant, or both, as well as experience attested by periodic reports and, secondly, he referred to the absence of any theoretical training course for records clerks.

In a note dated 16 October 1980 addressed by Mr Mulfinger, Mr Desbois again confirmed that in addition to the requisite seniority in the service and the levels of basic training and experience, candidates for the competition had to produce a statement of qualification issued by a specialized educational establishment.

Meanwhile, by a note dated 14 October 1980 marked for the attention of Mr Desbois, Mrs Ruske requested that the Selection Board deal with her objection and reply in precise terms to her note of 1 October 1980.

3. On 28 October 1980, the applicant lodged a complaint under Article 90 (2) of the Staff Regulations of Officials against the decision not to admit her to Competition No COM/B/4/80.

In view of the appointing authority's failure to convey to the applicant a reasoned decision within the prescribed period of four months, the applicant brought the present application which was received at the Court Registry on 2 April 1981.

By decision of 23 April 1981, the Commission rejected the applicant's complaint.

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

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare that the decision taken by the Selection Board in Competition No COM/B/4/80 of 18 September 1980 not to admit her to the said competition is null and void;

   Declare and rule that the competition must be reopened for her;

2. In so far as may be necessary:

   Declare that the Commission's implied rejection of her compliant is null and void;

3. Order the Commission of the European Communities to pay the costs.

The *defendant* contends that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

In support of her application, the *applicant* relies upon the following submissions: inadequate statement of the grounds on which the contested decision is based; mistake in the assessment of the conditions for admission; misuse of powers, and discrimination by comparison with the conditions for admission to Open Competition No COM/B/185.

As regards the statement of the reasons for the decision of the Selection Board, the applicant points out that a mere reference to the conditions for admission which were not fulfilled by her "is not capable of providing the person concerned with a sufficient indication to allow [her] to know whether the refusal is well founded or on the other hand whether it is vitiated by a defect which would make it possible to contest its legality" (see judgment of the Court of 30 November 1978 in Joined Cases 4, 19 and 28/78 *Salerna and Others* v *Commission* [1978] ECR 2403).

In her application form and in the certificates annexed thereto, the applicant provided the Selection Board with all the information it required to enable it to establish that she actually fulfilled the requirements set out at points B and C of the notice of competition. By not defining the concept "certificate or other acceptable statement of qualification as a records clerk and/or library assistant" (points B.2 and C.1), the notice of competition left it to the Selection Board to determine, case by case, whether the statements or certificates produced or the experience offered by each candidate actually corresponded to the level stipulated in the notice of competition. In accordance with that procedure, the Selection Board should have stated the reasons for its decisions.

Furthermore, the Selection Board took no action on the note which the applicant sent to its Chairman, Mr Desbois, on 1 October 1980.

As regards the assessment of the conditions for admission, the applicant observes that the notice of competition did not expressly exclude any specific type of certificate or statement of qualification as a records clerk or library assistant, or both. The Selection Board had therefore disregarded the requirements at points II.1.B.2 and C.1 of the notice of competition by excluding candidates who produced a certificate or statement of qualification issued by an employer or superior, or both, attesting their experience in the field concerned but who were unable to produce a diploma, certificate or statement of qualification relating to theoretical training issued by an educational establishment. Moreover, the effect of that restrictive approach adopted by the Selection Board was to neutralize the individual efforts of certain officials to acquire training in fields in which no courses have been provided for several years in the Commission's training programme.

Next, the applicant claims that the Selection Board deliberately excluded from the competition officials in Category C who were unable to produce

a diploma attesting special skills, in order to promote external recruitment in connection with Open Competition No COM/B/185.

In fact, the condition relating to theoretical training as a records clerk or library assistant, or both, was only subsequently imposed in order to justify the decision not to admit 39 candidates to the competition.

That practice constitutes a misuse of powers, as is confirmed by the minutes of the discussions between certain colleagues of the applicant on the one hand and Mr Gaskell, Head of the Library, and Mr Desbois on the other, from which it is apparent that the last of the three internal training courses for which provision was made in 1975/76 at the insistence of the Head of the Library to offset the lack of training of the members of staff in his department never took place for fear that the participants might consider the courses as an open door to Category B.

Finally the applicant maintains that the Selection Board applied the conditions for admission to Internal Competition No COM/B/4/80 in a discriminatory fashion by comparison with the conditions applicable to Open Competition No COM/B/185. The only evidence which candidates for the open competition were required to provide was that they had completed a course of advanced secondary education with a final diploma or certificate and had two years' practical work experience relevant to the option selected, whereas according to the interpretation of the Selection Board, the notice of internal competition also requires evidence of theoretical training as a records clerk or library assistant, or both.

The applicant also contends that, on the basis of a comparison with the other candidates for the internal competition, the successful candidate chosen did not fulfil all the conditions for admission.

The *Commission* considers that the applicant, by taking note of the letter of 25 September 1980 and of the notice of competition attached thereto, was duly notified of the reasons for the Selection Board's decision not to admit her to the competition. In any event, she was fully informed of the decision both by the communication to her of the correspondence exchanged between Mr Mulfinger, Assistant to the Director-General of Directorate-General III and Mr Desbois, head of the Recruitment Division, who was also Chairman of the Selection Board, and by the latter's explanations furnished in the course of a discussion with the applicant on 16 October 1980. Besides, the note sent as early as 1 October 1980 by the applicant to the Chairman of the Selection Board shows that she was fully aware of the reasons for the Selection Board's decision not to admit her to the competition.

Furthermore, the aforesaid judgment of 30 November 1978 was concerned with a reference to the conditions for admission which was too general whereas in the present case the various requirements which were not fulfilled were specified with precision. The reference to the condition set out in point B.2 necessarily applied to point C.1 also.

As regards the assessment of the conditions for admission, the defendant recalls in the first place that the principle according to which the main purpose of the notice of competition is to provide those concerned with information does not absolve them from a careful reading of such notices. The defendant maintains that in this case it becomes immediately apparent on reading the notice of

competition that the conditions relating to theoretical training as a records clerk or library assistant, or both, (points A.2, B.2, and C.1) and experience acquired in the same field (B.3 and C.2) constitute separate requirements.

The Commission considers that it has not exceeded the limits of the wide discretion conferred upon it to determine the criteria as to ability required in the case of newly-created posts and hence the conditions governing the competition (see judgment of the Court of 16 October 1975 in Case 90/74 *Deboeck* v *Commission* [1975] ECR 1137). In that regard, it refers to the note of 2 October 1980 of the head of the Recruitment Division.

The requirement as to specialized theoretical training is in no way arbitrary and the periodic reports can be no substitute for a diploma, certificate or statement of qualification issued by an educational establishment which provides such training. They merely make it possible to ascertain whether a candidate satisfies the condition relating to experience.

In order to refute the applicant's argument concerning a misuse of powers, the defendant emphasizes that the joint committee had unanimously recommended — and its recommendation was accepted by the appointing authority — that the competition in question should be organized and had made it quite clear that candidates were required to produce a statement of qualification issued by a specialized educational establishment. That was an objective condition and had, moreover, been satisfied by a number of candidates.

As far as theoretical training courses are concerned, the defendant points out that the sole purpose of the two courses organized in 1975 was to introduce the participants to the techniques involved in records and library work. In order to avoid any misunderstanding, it was explained that the fact of attending these courses would not confer any right or qualification on the participants. In view of the absence of sufficient openings at the time for anyone who might have considered taking part, the advanced courses planned for 1976 did not take place. The Commission observes, moreover, that it is not an educational establishment. In any event, there are educational establishments offering evening courses in record-keeping and librarianship in most of the Member States, and also in Brussels.

As regards the alleged discrimination, the Commission replies in the first place that the successful candidate in the internal competition satisfied all the conditions for admission. It questions the interest of the applicant in formulating this submission in so far as it relates to the conditions of the open competition. She would have an interest, in the Commission's view, only if she satisfied the condition relating to the possession of a certificate of advanced secondary education required for admission to the open competition.

Furthermore, the comparison should focus on all the conditions laid down for both the open and the internal competition. The notice of internal competition does not require possession of a certificate of advanced secondary education. Thus, although the internal competition lays down conditions which are less strict as regards general training, that difference is offset by the conditions

concerning specialized training, experience and seniority.

In her reply, the *applicant* points out that according to Article 1(1)(d) of Annex III to the Staff Regulations, the notice of competition must specify "the diplomas and other evidence of formal qualifications or the degree of experience required for the posts to be filled". A careful reading of the requirements set out under headings B. and C. in Notice of Internal Competition No COM/B/4/80 does not reveal any requirement relating to theoretical training as a records clerk or library assistant, or both.

Next, she contends that the conditions set out at points B.3 and C.2 in the notice of competition do not necessarily require specific experience in the field in question.

Since the conditions set out under heading A. in the notice of competition do not require any experience comparable to that required under headings B. or C., a requirement of specialized theoretical training under heading A. would appear to be normal.

It is clear, in the applicant's opinion, that the conditions set out under headings B. and C. of the notice of competition have as their purpose to offset the absence of theoretical training in secondary education and of specialized training in the field in question by the possession of relevant experience.

The applicant refers to the differences between the types of theoretical instruction given in the various Member States in support of her assertion that the experience acquired by her in recent years is more valuable, from the point of view of the post to be filled, than theoretical training acquired by attending a course of 150 hours not leading to a final examination.

Finally, she recalls the Opinion delivered by Mr Advocate General Roemer in Case 44/71 *Marcato* v *Commission* [1972] ECR 427 in which he pointed out that the experience acquired by an unqualified official in Category C in a post in Category B was the decisive factor in comparing his candidacy with that of qualified candidates. In that regard, he referred to Article 5 of the Staff Regulations in which reference is made, in the case of Category B, to experience of a level equivalent to secondary education.

In its rejoinder, the *Commission* replies that the experience required by the conditions set out at points B.3 or C.2 must have been acquired as a records clerk or library assistant, or both.

It explains that a distinction is drawn in the notice of competition between a final diploma or certificate issued on completion of advanced secondary education and a certificate of attendance of courses, precisely in order to take into account the differences between the types of theoretical instruction given in the Member States.

It observes in conclusion that Article 5 of the Staff Regulations is not concerned by the conditions for recruitment. The latter are governed by the provisions of Article 29 of and Annex III to the Staff Regulations (see judgment of the Court of 2 October 1979 in Case 178/78 *Szemerey* v *Commission* [1979] ECR 2855).

IV — Oral procedure

The parties presented oral argument at the sitting on 26 November 1981.

The Advocate General delivered his opinion at the sitting on 28 January 1982.

Decision

1 By application lodged at the Court Registry on 2 April 1981, Mrs M. H. Ruske, an official of the Commission of the European Communities, brought an action under Article 91 of the Staff Regulations for the annulment of the decision of the Selection Board for Internal Competition No COM/B/4/80 of 25 September 1980 not to admit her to the tests.

2 The applicant has performed her duties in the field of records and library work since 1 January 1971 in the capacity of principal clerical officer in Grade C 1. In September 1980, she submitted her application to take part in Internal Competition No COM/B/4/80 which was organized in order to constitute a reserve of administrative assistants in the field of records and library work in the career bracket covering Grades 5 and 4 of Category B.

3 The Selection Board for the competition decided not to admit the applicant to the tests on the ground that she failed to satisfy the conditions laid down in points II.1.A.1 and II.1.B.2 of the notice of competition.

4 Heading II.1 of the notice of competition, entitled "Certificates, diplomas, etc. and practical experience", laid down the following requirements which candidates for the competition had to satisfy:

"Either

A.1: Advanced secondary education with final diploma or certificate

and

A.2: Diploma as a records clerk and/or library assistant

and

A.3: A total of four years' service with the Communities on 30 June 1980 as an official or other servant.

or

B.1: Secondary education, with diploma

and

B.2: Certificate or other acceptable statement of qualification as a records clerk and/or library assistant

and

B.3: At least three years' experience on 30 June 1980, not necessarily in the service of the Communities, in Category C duties (as principal clerical officer or clerical officer, but not as clerical assistant) or of similar duties relating to the field specified at I. Nature of duties.

and

B.4: A total of four years' service with the Communities on 30 June 1980 as an official or other servant.

or

C. ..."

5 The applicant acknowledges that she did not base her application on the requirements set out at point A. of heading II.1 of the notice of competition but maintains that she satisfied all the requirements stipulated at point B. including that at point B.2. In her second submission, she contends that the decision of the Selection Board is based on an incorrect assessment of that requirement.

6 It is apparent from the documents in the file on the case that the Selection Board took the view that exercise of the duties of a records clerk or library assistant at the level of Category B required specialized basic training of a theoretical nature. That requirement was adopted by the joint committee when it approved Notice of Competition No COM/B/4/80 and, subsequently, by the appointing authority. The requirement in question is set out at point B.2 of the notice of competition.

7 The applicant maintains that point B.2 does not exclude any type of certificate or statement of qualification as a records clerk or library assistant, or both. The Selection Board has therefore disregarded the notice of competition by not admitting candidates, including the applicant, who produced a certificate or statement of qualification issued by an employer or a superior attesting the candidate's experience in the field in question.

8 The Commission has defended the Selection Board's decision by contending, in the first place, that the appointing authority enjoys a wide discretion for the purpose of determining the criteria as to ability required in the case of newly-created posts and to establish, on the basis of those criteria, the conditions governing the competition and, secondly, that specialized theoretical training was required by point B.2 of the notice of competition since experience was already covered by point B.3.

9 It should be emphasized in the first place that although the appointing authority enjoys a wide discretion to determine the conditions governing a competition, the Selection Board is bound by the text of the notice of competition as published. According to the Staff Regulations the basic function of the notice of competition is precisely to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it.

10 That principle does not absolve the officials who are interested from a careful reading of the notice of competition. Although in the present case the applicant was able to discover from a careful reading of the notice that the certificate or statement of qualification required had to be related to her training as a records clerk or library assistant, there was nothing in the notice to indicate to her that such training had to be theoretical. On the other hand, a comparison of the requirement relating to the possession of a "diploma", stipulated at point A.2, with that concerning the possession of a "certificate" or "statement of qualification", stipulated at point B.2, might have led her to believe that the training as a records clerk or library assistant required under heading B. of the notice of competition did not necessarily have to be specialized or theoretical in nature.

11 It follows from this that the notice of competition, which makes no mention of any requirement as to theoretical training under heading B., may not be interpreted as laying down a condition to that effect.

12 Accordingly, the Selection Board based its decision on criteria other than those laid down by the notice of competition and has therefore infringed the first paragraph of Article 5 of Annex III to the Staff Regulations.

13 Therefore, since the Court accepts the applicant's second submission, the Selection Board's decision not to admit the applicant to the tests must be annulled without its being necessary to examine the other submissions put forward by the applicant. In view of the fact that the purpose of the competition in question was to constitute a reserve for future recruitment, the competition will have to be reopened in relation to the applicant.

Costs

14 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the defendant has failed, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the Selection Board for Internal Competition No COM/B/4/80 of 25 September 1980 not to admit the applicant to the tests;**

2. **Orders the Commission to pay the costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 18 February 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber