JUDGMENT OF THE COURT (SECOND CHAMBER)
14 JUNE 1977 [1]

Mario Costacurta
v Commission of the European Communities

Case 73/76

1. *Officials — Recruitment — Competition — Selection board — Secrecy of proceedings — Breach — Effects*
(Staff Regulations of Officials, Annex III, Article 6)

2. *Officials — Recruitment — Competition — Candidate — Experience — Equivalent to university degree — Assessment by selection board — Criteria*
(Staff Regulations of Officials, Annex III, Article 5)

1. An unauthorized disclosure of the decision of a selection board does not constitute a sufficient reason for annulling that decision if it is not capable of affecting the guarantees as to the regularity of the proceedings of the board. In any event if the secrecy is only violated at a moment when the decision of the board has been taken, such a failure to comply with the provisions of the Staff Regulations cannot throw doubt on the regularity of the decision.
2. In considering whether a candidate possesses experience equivalent to a university degree the selection board must base its assessment on objective facts such as the nature of the applicant's duties and the length of time during which he has performed them.

In Case 73/76

MARIO COSTACURTA, an official of the European Communities, residing at 12 Montée de la Pétrusse, Luxembourg, represented by Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at 34 B/IV, rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Sergio Fabro, acting as Agent, with an address for service in Luxembourg at

1 — Language of the Case: French.

the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Plateau de Kirchberg,

defendant,

Application for the annulment of the decision of the Selection Board for Competition COM/A/15/73 not to admit the applicant to that competition,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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 procedure

1. The applicant has an Italian secondary school-leaving certificate (classics) and attended a course for two years at the French Conservatoire des Arts et Métiers.

He entered the service of the High Authority of the ECSC on 1 August 1966 at the age of 30, as a member of the auxiliary staff, in Category C, at the Publications Office. His duties were those of a linofilm operator. He was established in Grade C 3 with effect from 1 April 1969. After being transferred at his own request to the Directorate-General for Personnel on 1 July 1971, he was again appointed to the Publications Office as an assistant in Grade B 3 with effect from 1 June 1972.

In his periodic reports for the period 1 July 1971 to 30 June 1975, his duties are described as follows: 'Official carrying out advisory duties, charged with carrying out, under general directives, difficult and complex tasks as regards printing, in particular: preparing manuscripts from the point of view of language and typography, correcting proofs in Italian and checking the pagination, and declaring documents as "ready for press".'

The applicant put forward his application for Internal Competition COM/A/15/73 organized in order to constitute a reserve for future recruitment of administrators in the career bracket A 7/A 6 in the fields of 'printing and publishing' but was informed, by letter of 27 June 1974, that he had not been accepted as a candidate.

In the notice of competition in question, the conditions of admission were worded as follows:

'The competition is open to candidates who produce evidence that they fulfil the following conditions:

...

1. *Qualifications and experience required:*
   a university degree or equivalent experience; some experience appropriate to the duties to be performed.
   ...'

By judgment of 4 December 1975 in Case 31/75, *Mario Costacurta* v *Commission* ([1975] ECR 1563), the Court annulled the refusal of the Selection Board to admit the applicant to the competition in question. It held that since no sufficiently clear reasons had been given for regarding the applicant's experience as not being equivalent to a university degree, the Selection Board, having failed to give adequate reasons for its decision, had infringed Article 25 of the Staff Regulations and Article 5 of Annex III thereto.

After the judgment of the Court, the Selection Board for the competition again met on 17 and 25 May 1976. By letter of 26 May 1976 the applicant was informed that he had not been accepted as a candidate. This time the Selection Board gave more detailed reasons for its decision:

'...

Although you have a secondary school-leaving certificate, you do not possess a university degree and when you left school you did not apply for admission to a university course.

...'

After having mentioned the applicant's experience the Selection Board added:

'...

Having regard to the training and experience mentioned above, the Selection Board is of the opinion that the duties performed since 1 June 1972, consisting primarily of executive duties, could not lead, particularly in view of the level of the faculties of understanding and of judgment which they require, to the acquisition of knowledge of university level.

...'

By the present application, lodged on 23 July 1976, the applicant contests the decision of the Selection Board, which was communicated to him by a letter of 26 May 1976.

The written procedure followed the normal course.

Upon hearing 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.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'1. Declare the application admissible;
2. Declare it well founded.
   (a) *In the first place:*
      (1) Rule that the Selection Board or the Commission, as the case may be, has infringed Article 6 of Annex III to the Staff Regulations;
      (2) Rule that the Selection Board or the Commission, as the case may be, has been guilty

of a misuse of powers in refusing to acknowledge that the applicant possesses experience equivalent to a university degree;

Consequently:

Annul the decision taken and refer the matter back for reconsideration by the Commission;

(b) *In the second place:*

(1) Permit the applicant to prove by all legal means and in particular by the evidence of witnesses that the Selection Board for the competition divulged the decision taken before the conclusion of its proceedings;

(2) Permit the applicant to prove by all legal means and in particular by the evidence of witnesses, by an inquiry or by an expert's report that he possesses experience equivalent to a university degree;

(3) Order the defendant to pay the costs'.

The *Commission* contends that the Court should:

'1. Reject the application as unfounded;

2. Order the applicant to bear the costs'.

III — Submissions and arguments of the parties during the written procedure

A — Infringement of Article 6 of Annex III to the Staff Regulations

The *applicant* points out that although the second meeting of the Selection Board only took place on 25 May 1976 and although he was only officially informed of the decision of the Selection Board by a letter of 26 May 1976 from the Commission, a colleague had already informed him on 19 May 1976 that the Selection Board had decided not to accept his application to enter for the competition. By a memorandum of 19 May 1976, he protested to the Director of Personnel and Administration.

It is argued that in divulging the decision taken before the conclusion of its proceedings the Selection Board infringed Article 6 of Annex III to the Staff Regulations which provides that 'the proceedings of the Selection Board shall be secret'.

The *Commission* replies that even if the description of the facts such as they appear in the application was accurate, which, moreover, is contested, there is nothing therein that proves that the Selection Board failed to keep its proceedings secret. For a Selection Board cannot be held responsible for a failure to carry out its duty on the sole ground that a third party, who was never a member of the Selection Board in question, is of the opinion that a certain decision has been taken.

In its reply, the *applicant* states that at a private party held during the evening of 18 May 1976 at Luxembourg, a member of the Selection Board divulged the decision taken on 17 May 1976 not to admit him to the competition. This information was passed on to the applicant the next day. It is apparent from those facts that a member of the Selection Board knowingly divulged the decision taken before the proceedings had been concluded.

In its rejoinder the *Commission* points out that before the full value of the applicant's statements can be assessed, it will be essential to be able to name the persons who allegedly disregarded the duty of secrecy. The Commission leaves to the Court the question of the evidence tendered by the applicant.

The Commission adds that even if the allegations made by the applicant could be proved, they would in no way affect the validity of the proceedings in dispute.

It may be pointed out that both the case-law of the Italian Consiglio di Stato and that of the Belgian Conseil d'État support the proposition that it was provided that proceedings should be secret in order to ensure that selection boards should be independent. Article 6 of Annex III to the Staff Regulations should be interpreted in the light of that case-law. Although the secrecy of the proceedings has been laid down in order to ensure that selection boards shall be independent, it is obvious that it is not the decision as such that is covered by secrecy, for there comes a time when that decision is necessarily communicated to the person concerned.

The Commission is of the opinion that from the legal point of view no consequence can be drawn from the facts alleged in the present case first because the secrecy of the deliberations has not actually been disregarded, and secondly because none of the rights of the candidate has been disregarded, since the fact alleged has not caused him any injury.

French case-law corroborates this opinion. In a similar case (Conseil d'État, judgment of 19 December 1973, *Ministre de l'Éducation Nationale* v *Sieur Chambe,* Droit Administratif 1974, No 21) the court took the view that a failure to observe the secrecy of the selection board's proceedings is not enough to bring about the nullity of the competition, once it is established that the failure cannot have had any effect on the determination of the results of the tests.

B — Misuse of powers

The *applicant* points out, in respect of the Selection Board's finding that the duties performed by him from 1 June 1972 onwards were primarily executive duties, that it appears from his periodic reports for the period in question that, on the contrary, his duties were advisory ones.

He notes, as regards the Selection Board's finding that he does not have a university degree, that the great majority of the candidates accepted for the competition did not have university degrees either. Therefore, just like the applicant, they did not fulfil that first condition required by the notice of competition. Moreover, not only have certain other candidates not commenced higher education, as the applicant has, but they do not even possess secondary school-leaving certificates.

As regards experience, he notes that the Selection Board accepted for the competition at least two candidates whose experience was manifestly less than his own. In doing so, the administration has itself accepted that the applicant possesses adequate experience. In refusing to take that experience into account, the Commission has committed a misuse of powers.

The *Commission* points out that according to the case-law of the Court a misuse of powers involves a use by an administrative authority of a power conferred on it for a purpose other than that for which the power was conferred (Opinion of Mr Advocate-General Warner in Case 31/75 mentioned above; [1975] ECR 1579).

The fact that the applicant was appointed to Grade B 3 before two other persons taking part in the competition does not mean that he possesses better experience. The officials in question acquired equivalent experience in employment prior to their recruitment by the Communities. Furthermore, while not holding university degrees, they completed some years of university studies and sat for certain examinations; all this places them at a higher level of general culture than the applicant.

The applicant's offer to prove that he possesses experience equivalent to a university degree is inadmissible. That question is so elusive that it is capable of

solution only by means of a value judgment, that is to say by means of a judgment which, by definition, is not capable of judicial review. On this point, the Commission refers, *inter alia,* to the judgment of the Court of 5 December 1963 in Cases 35/62 and 16/63, *Leroy* v *High Authority* ([1963] ECR 197) and to the judgment of 17 March 1971 in Case 29/70, *Marcato* v *Commission* ([1971] ECR 243).

The *applicant* replies that the Selection Board for the competition seems to hold against him his not having applied for admission to a university. That criterion has been invented in order to justify *ex post facto* the admission of candidates without university degrees who commenced university studies but never sat for any examinations.

He mentions four candidates who had less experience than himself as assistant proof-correctors at the Publications Office at the time of the competition, but who nevertheless were accepted as candidates.

The experience of the two candidates who, according to the Commission, possessed equivalent experience acquired in a post prior to their recruitment by the Communities, was based, according to their applications forms, on the performance of executive duties: type-setting by hand, pagination, stitching, folding, cutting of overlays and entering of statistical records, that is to say duties analogous to those which the Selection Board refused to take into account in examining his application form.

In view of these facts, he is astonished that the Selection Board did not hold interviews with the candidates, as provided for by the notice of competition, so as to proceed 'to a further consideration of the qualifications and other references with regard to employment and of the statements relating to the qualifications required'.

It has been held in previous cases that value judgments come at the second stage in a selection board's work. As Mr Advocate-General Warner said in his opinion in Case 31/75 already mentioned, the first stage of the competition procedure is subject to review by the Court.

The applicant argues that the experience which he has acquired since 1966, if not since 1972, is superior to that of the other candidates.

In its rejoinder, the *Commission* examines the applicant's allegation that the Selection Board seems to have held it against him that he never applied for admission to a university course. As to this, it replies that it would be absurd to draw from the letter of 26 May 1976, the conclusion that the Selection Board intended to grant a privilege to candidates having enrolled at a university. The Selection Board merely found that the applicant had not completed a university course and obtained a degree, as required by the provisions of the first indent of the aforesaid point 1 of the qualifications required as stated in the notice of competition.

Contrary to the applicant's opinion, the experience of the four candidates mentioned in the defendant's reply was not acquired in the performance of mere executive duties, but was experience at a given level. The applicant, however, upon entering the ECSC, did not have any experience in the field of printing and editing. From 1966 to 1971, he was an assistant proof-corrector. Thus he performed mere executive duties, which could not have given him experience equivalent to a university degree.

As for the applicant's astonishment as regards the fact that the Selection Board did not proceed to an additional inquiry into qualifications and other employment references, the Commission points out that in the case at issue

qualifications do not play a preponderant part. The main problem is rather to examine candidates' experience. Moreover, the matter was one for the Selection Board's discretion.

The applicant's reasoning to the effect that value judgments only arise at the second stage of the work of a selection board is not convincing. In the present case, the first stage of the competition involved not only an objective examination of the qualifications of the candidates in order to establish whether they were those required by the vacancy notice, but also an assessment of whether a certain level of experience was equivalent to a certain level of education. Such a question can only be answered by a value judgment.

The Commission contends that the applicant has not proved either that his knowledge was of a university level or that the experience of the other candidates was inferior to his own.

IV — Oral procedure

The parties submitted their oral observations and answered questions put by the Court at the hearing on 28 April 1977.

The Advocate-General delivered his opinion at the hearing on 26 May 1977.

Decision

1 The application, lodged on 23 July 1976, is for the annulment of the decision of the Selection Board for Competition COM/A/15/73, communicated to the applicant by letter of 26 May 1976, rejecting his application to be admitted to the competition.

2 The contested decision was adopted subsequent to the judgment of the Court (First Chamber) of 4 December 1975 in Case 31/75 ([1975] ECR 1563), which had annulled an earlier decision of the Selection Board to the same effect on the ground that insufficient reasons had been stated.

3 The applicant argues, first, that Article 6 of Annex III to the Staff Regulations of Officials, which provides that the proceedings of selection boards shall be secret, has been infringed because the decision of the Selection Board was revealed to some of his colleagues at a time when the members of the Selection Board had not yet either signed the minutes of their proceedings or drawn up their statement of the reasons for which his application had been rejected.

4 The Commission does not contest the facts thus alleged.

5 However, it does not necessarily follow that this breach of the secrecy of the proceedings of the Selection Board, however regrettable it may be and however offensive the applicant may have felt it to be, constitutes a sufficient reason for annulling the decision thus divulged.

6 It is necessary to examine whether the unauthorized disclosure of the decision was capable of affecting the guarantees as to the regularity of the proceedings of the Selection Board, amongst which the provision as to secrecy is included.

7 In this regard it should be observed that if the secrecy is only violated at a moment when, as in the present case, the decision of the Selection Board has been taken, such a failure to comply with the provisions of the Staff Regulations cannot throw doubt on the regularity of the decision, notwithstanding the fact that the decision has not been committed to writing.

8 Therefore this submission cannot be accepted.

9 The applicant argues, secondly, that the Selection Board wrongly took the view that the duties performed by him for two years prior to the competition were not sufficient to count as knowledge of university level, particularly since the Selection Board admitted to the competition certain candidates whose experience was inferior to his own.

10 According to the wording of the notice of competition, the competition was open to candidates who possessed, *inter alia,* 'a university degree or equivalent experience'.

11 It is not disputed that the applicant does not possess a university degree and the question at issue is therefore whether he has acquired equivalent experience.

12 In order to justify its negative answer to this question, the Selection Board, in the contested decision, pointed out first that the duties performed by the applicant from 1956 to 1972 were of a technical or administrative character and then found that from 1 June 1972, that is to say over a period of two years prior to the date of the competition, the applicant had performed 'duties involving the correcting of proofs and preparing of manuscripts for printing'.

13 On that basis, the Selection Board took the view that 'the duties performed since 1 June 1972, consisting primarily of executive duties, could not lead, particularly in view of the level of the faculties of understanding and of judgment which they require, to the acquisition of knowledge of university level'.

14 The wording of those reasons makes it very clear that the assessment of the Selection Board was based on objective facts consisting in the nature of the applicant's duties and the length of time during which he performed them.

15 That assessment, moreover, does not substantially differ from the description of the applicant's duties in the periodic reports made by his superiors, even though the description 'impiegato di concetto' (official carrying out advisory duties) appears in those reports.

16 Finally, as regards the other candidates admitted to the competition, the defendant has stated that account was taken of their experience acquired not only in the service of the Commission but also in previous posts and that this constitutes adequate grounds for the view that they fulfilled the conditions set out in the notice of competition.

17 In those circumstances there are no grounds for regarding the contested decision as vitiated by illegality.

18 Therefore the application must be rejected.

Costs

19 By Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to bear the costs.

20 The applicant has failed in his submissions.

21 Nevertheless, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by servants of the Communities are not recoverable.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 14 June 1977.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 26 MAY 1977 [1]

Mr President,
Members of the Court,

The present case is the sequel to Case 31/75 which resulted in a judgment of the Court (First Chamber) dated 4 December 1975 ([1975] 2 ECR 1563).

I do not think that there is any point therefore in examining the facts which gave rise to Mr Costacurta's previous application and in retracing the course of his career, for all relevant information is amply set out in that judgment as also, moreover, in the opinion delivered on 20 November 1975 by Mr Advocate-General Warner.

It will be enough to recall that in that case the applicant claimed that the Court should annul the decision of the Selection Board for the internal competition on the basis of qualifications and tests which was instituted under notice COM/A/15/73 in order to constitute a reserve for future recruitment of administrators in the career bracket A 7/A 6 in the field of printing and publishing. He also claimed that the Commission's decision of 13 January 1975 rejecting his complaint made through official channels should be annulled.

The application was based in particular on infringement of Article 25 of the Staff Regulations, in that insufficient reasons were given for the decision, and on the misuse of powers allegedly committed by the Selection Board and at a later stage

1 — Translated from the French.