JUDGMENT OF THE COURT (First Chamber)
16 June 1987 *

In Case 40/86

Georges Kolivas, 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 Alex Schmitt, Avocat, 13 boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Marie Wolfcarius, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decisions of the selection boards for Competitions Nos COM/LA/4/84 and COM/LA/5/84 notified to the applicant by letter of 13 November 1985,

THE COURT (First Chamber),

composed of: F. Schockweiler, President of Chamber, G. Bosco and R. Joliet, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 4 February 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 April 1987,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 February 1986, Georges Kolivas, an official of the Commission of the European Communities, brought an action for the annulment of the decisions of the selection boards for Competitions Nos COM/LA/4/84 and COM/LA/5/84 notified to him by letter of 13 November 1985 by which he was refused admission to the oral tests in those competitions.

2 Competitions Nos COM/LA/4/84 and COM/LA/5/84 were internal competitions on the basis of qualifications which were organized in order to create a reserve list of Greek-language principal translators and revisers.

3 According to the guidelines laid down for the marking of the written tests in the competitions in question, the selection boards for those competitions had decided to have recourse to two external examiners in order to ensure objectivity in the marking of the tests. It is clear from the documents before the Court and from the information obtained at the hearing that, after taking note of the marks awarded by the two external examiners, the selection boards disregarded those marks and had the test papers re-marked by a third examiner, and that the decisions complained of were adopted by the selection boards solely on the basis of the marks awarded by the third examiner.

4 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the claims and submissions of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 In his first submission, the applicant alleges the infringement of the third and fourth paragraphs of Article 5 of Annex III to the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations'): before having the test papers marked and interviewing the candidates admitted to the oral tests, the selection boards failed to establish the criteria for assessing the written and oral tests, which is essential in order to ensure that the tests are marked objectively and without any possibility of arbitrariness.

6 With regard to that submission, it should be noted first of all that, according to its actual wording, the third paragraph of Article 5 applies only to competitions held on the basis of qualifications. As for the fourth paragraph, it provides that, where the competition is on the basis of both tests and qualifications, the selection board is to state which of the candidates on the list of those who applied to take part in the competition held on the basis of qualifications are to be admitted to the tests. Since, in this case, the competitions were held solely on the basis of tests, those two provisions are inapplicable.

7 Next, it must be pointed out that, as is clear from the documents before the Court, the notices of competition in this case specified, in accordance with Article 1 (1) (e) of Annex III to the Staff Regulations, the kind of tests and how they would be marked, and that before the written tests the selection boards had laid down the guidelines for marking them.

8 In his first submission, the applicant also criticizes the selection boards' decision to have the test papers marked by a third examiner. He claims that the decision was not based on objective considerations in the general interest and that it is also contrary to the previous undertaking to have the test papers marked twice by external examiners.

9 Since that criticism amounts to a claim that the selection boards exceeded their powers, it is necessary to consider whether that was in fact the case.

10 In that regard, it should be noted that the Commission had stated in its discussions with the Staff Committee, although no formal undertaking was given in this respect, that, in order to ensure that the test papers were marked impartially, they would be marked by two examiners not belonging to the Greek Translation

Division. Since the selection boards decided to have the test papers marked twice by two examiners who satisfied that criterion, it is necessary to consider whether, after taking note of the marks awarded by those examiners, the selection boards were entitled to disregard them and call in other examiners.

11 The Court has consistently held that, in assessing tests, selection boards for competitions enjoy a wide discretion. That discretion, which must be exercised on the basis of objective criteria (see the judgment of the Court of 14 July 1983 in Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421), is not, however, exempt from review by the Court the purpose of which is to ascertain whether a manifest error or misuse of powers occurred in the exercise of the discretion or whether the limits of the discretion have been manifestly exceeded.

12 In its defence, the Commission stated that the reason for the selection boards' decision to have the test papers marked by a third examiner was that noticeable differences had emerged in the assessments made by the first two examiners. However, it is clear from the minutes of the meetings of the selection board for Competition No COM/LA/4/84, which are on the file, and from the information obtained at the hearing, that that decision was taken because some members of the selection boards had expressed the view that the first two examiners had marked the test papers 'generously' and that the marks awarded did not correspond to the qualitative criteria usually applied in the Community.

13 Even though it is not specified how those criteria were not observed, the last-mentioned reason certainly entitled the selection boards to disregard the marks awarded by the first two examiners and to have the test papers marked a third time. In so doing, the selection boards did not exceed the limits of the discretion which they must be recognized as having, since they have a responsibility to ensure compliance with the criteria which, as far as is possible, guarantee the uniform assessment of tests set in different competitions.

14 The applicant also alleges that the principle of equal treatment was infringed inasmuch as some test papers were marked in the presence of members of the selection board whilst others were not.

15 That argument cannot be accepted since there is no rule or higher principle of law requiring a selection board for a competition to have all the categories of test papers marked by the same examiner. In this case, it is clear from the documents before the Court that the selection boards had decided to entrust the marking of certain categories of test papers to certain examiners alone whilst certain other categories of test papers were to be marked by an examiner together with the members of the selection boards.

16 In arranging for the tests to be marked in that way, the selection boards did not exceed the powers which must be accepted as being vested in them in this sphere and which enable them to have recourse to the assistance of examiners whenever they consider this necessary. There is no irregularity if the methods of marking do not differ from one to another candidate and the selection board retains the power to make the final assessment, which was the case in this instance.

17 In his second submission, alleging the infringement of Article 6 of Annex III to the Staff Regulations, the applicant maintains that the secrecy of the selection boards' proceedings was breached. Certain members of the selection boards disclosed, at staff information meetings, before the selection boards had completed their deliberations, that the selection boards had unanimously decided to have the test papers marked by a third examiner. The position adopted within the selection board by the staff representative was thus made public.

18 As far as the existence of a duty of secrecy is concerned, the Court held, in its judgment of 28 February 1980 in Case 89/79 *Bonu* v *Council* [1980] ECR 553, that the secrecy of the proceedings of selection boards for competitions was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, and consequently it precludes the divulging of attitudes adopted by individual members of selection boards and also the disclosure of any details relating to individual or comparative assessments of candidates.

19 In this case, the information provided, which merely disclosed a procedural decision concerning the actual way in which marking was to proceed does not fall within either of those categories of matters that may not be divulged and the applicant has failed to establish that it had any effect on the objective conduct of the selection boards' proceedings. The second submission is therefore unfounded.

20 In his third submission, the applicant alleges a breach of the principle of the protection of legitimate expectation and of the principle of fairness.

21 As regards the principle of the protection of legitimate expectation, the applicant submits that, in view of the assurances given by the Commission, as set out in particular in a memorandum dated 13 April 1983, he was entitled to expect that the selection boards would be composed of three persons who were not members of the Commission's Greek Translation Division and that the test papers would be marked twice.

22 Upon consideration of the documents before the Court, in particular the memorandum dated 13 April 1983, it is clear that the Commission had not undertaken to set up selection boards that did not include any member of the Greek Translation Division. On the contrary, the aforesaid memorandum specifies that one of the three members (including the chairman) of the selection boards should logically be drawn from the Greek Translation Division. Moreover, as the Court stated with regard to the first submission, the selection boards were entitled to have the test papers marked a third time.

23 With regard to the alleged breach of the principle of fairness, the applicant contends that one of the members of the selection boards and the alternate member were able as superiors to identify the candidates and thus to provide information regarding certain candidates without affording them an opportunity to reply to their superiors' comments.

24 In that regard, it should be noted, first of all, that the selection boards had taken care to preserve the anonymity of the candidates' test papers by means of a numbering system, and secondly that there is no evidence whatever to support the applicant's allegations of a possible subjective assessment of the candidates by their superiors.

25 It follows from the foregoing considerations that the third submission is also unfounded.

Costs

26 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, under Article 70 of the Rules of Procedure, in proceedings brought by servants of the Communities, institutions are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Schockweiler Bosco Joliet

Delivered in open court in Luxembourg on 16 June 1987.

P. Heim
Registrar

F. Schockweiler
President of the First Chamber