JUDGMENT OF THE COURT (SECOND CHAMBER)
29 SEPTEMBER 1976 [1]

Carmelo Morello
v Commission of the European Communities

Case 9/76

Summary

Officials — Appeals — Measure contested on the ground of absence of a statement of reasons upon which it is based — May be confirmed in the absence of a mistake of law or of fact — Inadmissibility

(Staff Regulations of Officials, Article 91)

An applicant can have no legitimate interest in the annulment on the ground of the absence or inadequacy of the reasons on which it is based of a decision which could certainly be confirmed in substance in the absence of a mistake of law or of fact.

In Case 9/76

CARMELO MORELLO, an official of the Commission of the European Communities, residing in Brussels, represented by Marcel Grégoire and Edmond Lebrun, Advocates at the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 83, boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Thomas F. Cusack, acting as Agent, assisted by Alain van Solinge, Member of the Legal Service of the Commission, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Bâtiment CFL, place de la Gare,

defendant,

Application for the annulment of the decision of the Selection Board for certain internal competitions not to admit the applicant to the list of

1 — Language of the Case: French.

candidates and, consequently, for the annulment of those competitions and the appointments made as a result of them,

THE COURT (Second Chamber)

composed of: H. Kutscher, President of Chamber, P. Pescatore and M. Sørensen, Judges,

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

gives the following

JUDGMENT

Facts

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

I — Facts and written procedure

1. On 13 August 1975, the applicant, an Italian national and an official in Grade A 6 in a post in the Directorate-General for Competition submitted his application for Internal Competitions based on qualifications and oral tests Nos COM/668/74 and COM/669/74 which concerned two vacant posts in career bracket A 5/A 4 in the Security Office of the Commission in Brussels. According to the notices of competition:

— the duties entailed in these posts were defined as follows:

'Carrying out, within general guidelines, advisory duties relating in particular to:
the enforcement of the security rules and the drawing up of the proposals and measures necessary to provide the security standards indispensable for the proper functioning of the Commission, its services and installations and for the protection of its staff, property and documents and information;'

— candidates must show, *inter alia*, 'extensive experience relevant to the post, preferably acquired in a government or international service.'

The form used by the applicant for his application contained a section entitled 'Previous Posts including those with the European Communities' in which the applicant set out the following details:

Name of post and employer	from	to	Nature of work
Administrator in an agricultural undertaking and in agricultural cooperatives of Mr Morello Orazio	1. 1. 1962	31. 10. 1965	Administration, finance, supervision with the post of director
The ministry of the Interior — Clerk to the commune	11. 7. 1966	31. 1. 1973	Administration, legal review, notarial duties, legal adviser to the administration of the commune. Financial control. Head of Personnel.
Administrator with the EEC with inspection duties Directorate-General for Competition. Directorate of inspection. Inspection Division.	1. 2. 1973		Inspection of undertakings carried out in application of Articles 85 and 86 of the Treaty

By a letter of 3 November 1975, the Head of the Recruitment, Nominations and Promotions Division informed the applicant that after deliberation the Selection Board for the competitions had decided that he could not be admitted to the competitions.

On 29 January 1976 the applicant lodged the present application.

By letter of 12 February 1976 the same Head of Division informed the applicant that 'having regard (to the present application)', in the terms of the report of the Selection Board the contested decision is based 'in particular (on the) lack of extensive experience relevant to the post preferably acquired in a government or international service'.

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

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul the decision of the Selection Board for Internal Competitions Nos COM/668/74 and COM/669/74 not to admit the applicant to the said competitions;
2. Annul Competitions Nos COM/668/74 and COM/669/74 and the appointments made as a result of those competitions;
3. Order the defendant to pay the costs.

The *Commission* contends in its defence that the Court should:

— as regards the first conclusion: rule that it is inadmissible and in any case unfounded;
— as regards the second conclusion: rule that it is unfounded;
— order the applicant to pay the costs.

In its rejoinder it states that it withdraws its conclusions concerning admissibility.

III — Submissions and arguments of the parties put forward in the course of the written procedure

1. First submission: Infringement of Article 25 of the Staff Regulations of Officials and of Article 5 of Annex III in that the letter of 3 November 1975

does not state the reason for which the jury decided not to accept the application of the applicant

A — Admissibility

In its defence, the *Commission* raises two objections of inadmissibility in respect of this submission based respectively:

— on the fact that the applicant, contrary to the requirement set out in Article 91 (2) of the Staff Regulations of Officials has not submitted a complaint to the appointing authority before lodging this application before the Court of Justice;

— on the fact that the applicant no longer has any interest in pressing the submission as the reasons on which the Selection Board relied were communicated to him in the letter of 12 February 1976.

The *parties* discuss these objections at length in the defence and the reply. In its rejoinder, the *Commission* states however that it withdraws the objections.

B — The substance of the case

The *applicant* states that Article 25 of the Staff Regulations of Officials provides that 'Any decision adversely affecting an official shall state the reasons on which it is based'. Furthermore the Court of Justice has ruled that the first stage of the tasks of a Selection Board entails 'particularly where the competition is based on formal qualifications, ... the matching of the qualifications offered by the candidates against the qualifications required by the competition notice'; the qualifications 'must be matched on the basis of objective facts which are moreover known to each candidate in his own case' and the results must 'be supported by sufficiently clear reasons' (Judgment of the Court of 15 March 1973, Case 37/72, *Marcato* v *Commission* [1973] ECR 361 at page 369 and Judgment of the Court of 4 December 1975, Case 31/75, *Costacurta* v *Commission* [1975] ECR 1571).

The *Commission* states that it is evident from the letter of 12 February 1976 that the Selection Board has stated the reasons on which the contested decision was based and that the submission is therefore unfounded.

The *applicant* replies that it is evident that the submission is well founded alone from the fact that 'the contents of a decision are legally, in respect of the person to whom it is addressed, those which appear from the notification' with the result that, in the present case, the contested decision is deemed not to state the reasons on which it is based.

If the Court were not to accept this view the reasons which were subsequently communicated to the applicant nevertheless do not satisfy the requirements laid down by law. The Selection Board merely repeated the text of the competition notice without making any reference to the individual situation of the applicant. Its report, which the applicant annexes to his reply, contains no comparative analysis at all of the candidates' files of the applicant and the other officials excluded from the tests on the one hand and on the other, those of the applicants who were admitted to the competition.

The *Commission* replies that the first argument raised by the applicant would deny the administration the possibility of correcting any administrative, drafting or typing error. The fact that the reasons for a decision are communicated after the communication of the substance of the decision does not adversely affect the official provided that the reasons were in fact formulated by the author of the decision at the time of making the decision. In the present case the applicant's demands are satisfied by the communication contained in the letter of 12 February 1976; in these circumstances it is evident from the case-law of the Court of Justice that the submission is unfounded (Judgment of the Court of 12 December 1967, Case 15/67, *Bauer* v

Commission [1967] ECR 397; Judgment of the Court of 30 October 1969, Case 33/68, *Rittweger* v *Commission* [1969] ECR 393).

If it becomes evident from the application that the person concerned has not acquired the necessary professional experience it is sufficient, for the purposes of a statement of reasons, for the Selection Board to repeat the wording of the competition notice. Finally it is clear from the passages from the judgment in the *Costacurta* case referred to by the applicant that the Selection Board was not obliged to undertake a comparative analysis of the candidates' files.

2. Second submission: Infringement of Article 25 of the Staff Regulations of Officials and of Article 5 of Annex III thereto in that the contested decision is based on incorrect factual considerations

The *applicant* states that, contrary to the opinion of the Selection Board, he possesses the necessary professional experience. In support of this statement he repeats the information given in his application and set out above, adding that the staff which he had managed as clerk to the commune included the municipal police force.

The *Commission* states that comparison of the description of the duties in question with the qualifications stated in the application clearly shows that the applicant had not acquired 'extensive experience relevant to the post'.

The *applicant* replies that this laconic statement is not sufficient to refute the submission. Moreover it is incorrect:

— by virtue of certain provisions of Italian law which are specified by the applicant and which he states that he is ready to produce if the Court so wishes, the clerk to the commune, an official who, is responsible through his office through the hierarchy to the Ministry for the Interior:
  - is responsible for carrying out police duties assigned to the communes including the maintenance of public order and public security within the territory covered by the commune;
  - as such, manages the members of the municipal police force who are also responsible for criminal investigation;
  - has to work with the mayor in preparing the drafting on the one hand, of police measures necessary for the maintenance of public order, the safety of the inhabitants and the safeguard of their property and, on the other, in emergencies, of orders for the protection of public safety and public health;
  - is responsible for the keeping of all the documents of the commune.

  This list of tasks contains the components of the duties described in the competition notice in question.
— The same applies to the duties at present performed by the applicant in the Commission which entail in particular access to all books and documents of undertakings (Article 14 of Regulation No 17 of the Council) and the duty to protect these documents so that no disclosure is possible.

The *Commission* replies that the applicant has stated nowhere in his application that he has carried out police duties. It is difficult to regard this omission as the result of an oversight. In fact the applicant was well aware of the importance of such activity in relation to the conditions set out in the competition notice.

The experience acquired in the Directorate-General for Competition is in no way comparable to the drawing up and application of rules relating to the security of persons and property. All

officials of the Communities are under a duty of professional secrecy.

IV — Oral procedure

The parties presented oral argument at the hearing on 1 July 1976. At this hearing they stated the following in particular:

The *applicant* claims that the reasons on which the decision of the Selection Board for the competition were based, as communicated to the applicant in the letter of 12 February 1976, do not enable the Court to review the legality of the decision. Indeed it is not known whether the Selection Board considered that the duties of clerk to the commune in Italy do not include security duties or whether it was of the opinion that although they include such duties they do not constitute the required experience.

The Selection Board was aware of the fact that the post included such tasks, as in August 1975 the applicant had an interview with the Chairman of the Selection Board who was also Director of the Security Office of the Commission, in the course of which the applicant stated in detail the duties which he had carried out in Italy, in particular the police and security duties involved in his work. The applicant offers to give evidence of this by calling the Director of the Security Office as a witness.

Furthermore one of the members of the Selection Board was of Italian nationality and must have known of the nature of the duties in question.

Finally according to the very wording of the competition notice the Selection Board was empowered to undertake, by means of an interview with the candidates, an examination of the diplomas and other documents relating to qualifications and the statements of the candidates concerning the qualifications which they claimed.

The *Commission* describes in detail the qualifications of the three candidates who were admitted to the competition and emphasizes that they were clearly superior to those of the applicant.

It states that the Italian communes in which the applicant had performed the duties in question were very small, the number of their inhabitants ranging from 824 to 5 371.

The Advocate-General delivered his opinion at the hearing on 16 September 1976.

Law

1 The application is for the annulment of the decision of the Selection Board for Internal Competitions Nos COM/668/74 and COM/669/74 of the Commission not to admit the applicant to these competitions and, consequently, for the annulment of the competitions themselves and the appointments made as a result of those competitions.

2 For this purpose the applicant relies on two arguments, namely first the absence or at least the inadequacy of the reasons on which the decision was

based and secondly the fact that the contested decision is based on incorrect assessments.

3 As the two arguments are closely linked, they may best be examined together.

4 According to the notices of the competitions in question the competitions concerned two vacant posts in career bracket A 5/A 4 in the Security Office of the Commission in Brussels which entailed, in particular, duties relating to the enforcement of the security rules and the drawing up of the necessary proposals and measures in this connexion; the candidates therefore had to possess, *inter alia,* 'extensive experience relevant' to those posts.

5 By letter of 3 November 1975, the Administration informed the applicant that the Selection Board had decided not to admit him to the competitions.

6 The Commission informed the applicant that the contested decision of the Selection Board was based 'in particular' on the consideration that the applicant did not fulfil this requirement only by a letter of 12 February 1976, in other words, after the application had been lodged. The applicant contests this statement by arguing that, as he set out in his application, from 1966 to 1973 he had performed the duties of clerk to the commune in certain Italian communes, which he does not deny were very small, and since then, while working for the Commission, those of administrator responsible for inspection of undertakings in the Member States for the purpose of the application of Articles 85 and 86 of the EEC Treaty.

7 The applicant argues that the tasks of clerks to the commune under Italian law include police duties and responsibility for keeping the documents of the commune while the work which he performs at the Commission entails access to all the books and documents of undertakings and the duty to protect these documents so that no disclosure is possible.

8 The competition notices laid down very specific criteria in relation to qualifications resulting both from the description of the duties entailed by the posts put up for competition and the requirement of 'extensive experience' in this particular field.

9 Owing to these requirements it appears evident that, in view of the duties which the applicant had previously performed in the national administration and those which he performs at present in the service of the Commission, he is not qualified to carry out the duties involved in the posts in question.

10 Consequently by excluding the applicant from the competitions the Selection Board did not exceed the discretion conferred on it by the competition notices.

11 In these circumstances the applicant can have no legitimate interest in obtaining the annulment, on the ground of the absence or inadequacy of the reasons on which it is based of a decision which could certainly be confirmed in substance, in the absence of a mistake of law or of fact, by a new Selection Board if it were to be appointed as a result of such an annulment.

12 The application must be rejected as unfounded.

Costs

13 The applicant has failed in his submissions.

14 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.

15 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Rejects the application as unfounded;**

2. Orders each party to bear its own costs.

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 29 September 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 16 SEPTEMBER 1976 [1]

Mr President,
Members of the Court,

Mr Carmelo Morello entered the service of the Commission of the European Communities on 1 February 1973 as an administrator in career bracket A 7/A 6 in the Directorate-General for Competition with particular responsibility for inquiries within undertakings. He was placed in Grade A 6, Step 2 in view of the studies which he had completed and of his professional experience.

Following a vacancy notice for two posts in the Security Office in Brussels advertised in the Staff Courier of 21 January 1974, a notice of a competition based on qualifications and oral tests for these two posts was, more than 18 months later, published in the Staff Courier on 4 August 1975 and displayed in the usual places. It was stated that applications submitted following the vacancy notice did not need to be renewed.

The applicant submitted his application for these two posts on 13 August 1975 and, curiously, the details relating to the application are contained in a form dated 15 March 1973 thus prior to the date on which the applicant officially made his application.

By a letter of 3 November 1975 he was informed that the Selection Board had been unable to allow him to take part in these competitions. On 29 January 1976 the applicant lodged the present application for the annulment of this refusal to admit him to the competition and, consequently, for the annulment of the competition procedures and the two appointments made as a result of them.

In support of his application he first relies on the argument that the contested decision did not state the reasons on which it is based. In the alternative he argues that if the Selection Board thought that his qualifications were insufficient and inadequate with regard to the requirements stated in the notice

1 — Translated from the French.