discretion, the appointing authority did not take into account solely the candidates' diplomas and chose to promote a person whose diplomas were of a lower level than his.

3. For the purpose of promotion, seniority is merely one of a number of criteria of assessment and it can never take precedence over the merits of candidates.

In Case 9/82

LENE ØHRGAARD AND JEAN-LOUIS DELVAUX, officials of the Commission of the European Communities, both residing at 11 A Avenue Champel, B-1650 Rhode St. Genèse, Belgium, assisted and represented by Jytte Thorbek, of the Copenhagen Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Johannes Føns Buhl, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Plateau de Kirchberg,

defendant,

APPLICATION in the terms set out in the applicant's conclusions,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

In Vacancy Notice COM/1134-1140/80, published in Vacant Posts No 49, the Commission announced that six posts of principal translator in Grade L/A 5-4 would be filled as and when posts became available in the budget.

The necessary qualifications for the post were as follows:

"University education attested by a diploma, or equivalent professional experience;

Long experience of translation; experience of revision;

Proven active command of language and a sound style."

Thirteen applications were submitted within the time limit set by the vacancy notice, including those of the two applicants and of Tilly Bye Rasmussen and Anker Rasmussen.

It is appropriate to make the following observations regarding the qualification of the four officials in question:

(a) Both of the applicants in these proceedings had obtained a university degree before passing the open competition for the Community and also had long experience. They were both recruited in 1974, Øhrgaard to Grade L/A 7 and Delvaux to Grade L/A 8, and were promoted to Grade L/A 6 on 1 January 1979. In the intervening period they were granted leave on personal grounds for one year and seven months which they used to continue their studies in the interests of the service.

(b) Tilly Bye Rasmussen holds a Højere Handelseksamen [Secondary School Certificate in Commercial Studies] and a diploma as a trilingual commercial correspondent. From 1966 to 1973 she worked as foreign languages correspondent, multilingual secretary and taught French at evening classes. During the same period she obtained an erhvervssproglige afgangseksamen [Final Diploma in Language and Business Studies] in 1971. She also worked as a free-lance translator for the Commission and the Parliament and followed a training course with the Commission's joint interpretation and conference division. She was recruited as an assistant translator in Grade L/A 7, step 1 in 1974 and was promoted to Grade L/A 6 on 1 February 1978 and to Grade L/A 5 on 1 March 1981.

(c) Anker Rasmussen holds a "handelsvidenskabelig afgangseksamen" (HA) [Final Diploma in Business Studies], a Diploma in French commercial correspondence from the handelshøjskole [College of Commerce], both obtained in 1973,

and the erhvervsøkonomiske kandidatseksamen [Higher Diploma in Economics] awarded by the same college in 1979. He was recruited as an assistant translator in Grade L/A 7, step 1, in 1974 and promoted to Grade L/A 6 on 1 June 1978 and to Grade L/A 5 on 1 March 1981.

The Commission thus appointed Tilly Bye Rasmussen and Anker Rasmussen to posts of principal translator on 1 March 1981 and on 3 April 1981 rejected the candidatures submitted by the two applicants who lodged complaints against that rejection under Article 90 (2) of the Staff Regulations on 3 June and 15 May 1981 respectively. The Commission rejected those complaints by decisions dated 1 December 1981 and the applicants on 22 December 1981 brought the present application which was received at the Court of Justice on 8 January 1982.

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 holding any preparatory inquiry but asked the Commission to furnish replies to the following questions before 5 March 1983:

1. Is the requirement laid down in the second subparagraph of Article 5 (1) of the Staff Regulations of Officials, namely university education or equivalent professional experience, interpreted or applied any differently in the case of Category A officials and in the case of officials in the Language Service?

2. How does the Commission combine in practice the first two qualifications mentioned in the vacancy notice, particularly where a candidate's qualifications are based on professional experience rather than on a university degree?

II — Conclusions of the parties

The *applicants* claim that the Court should:

"(1) Annul the rejection, notified by the defendant in the letter of 3 April 1981, of the applicants' candidatures for the post of principal translator (COM/1134-1140/80);

(2) Order the defendant to appoint the applicants to the post of principal translator, with seniority calculated from 1 March 1981, either by the permanent creation of two new posts of principal translator or by annulling the appointment of Tilly Bye Rasmussen and Anker Rasmussen and appointing the applicants to those posts;

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

In its defence the *Commission* claims that the Court should:

"Declare the applicants' conclusions inadmissible or, in the alternative, reject them as unfounded;

Order the applicants to pay the costs."

In its rejoinder it further claims that the Court should:

"Declare inadmissible the raising by the applicants of fresh issues based on matters of fact and of law which are said to have come to light and, in the alternative, reject the applicants' claim that the Commission was guilty of misuse of powers in filling the posts COM/1134-1140/80."

III — Submissions and arguments of the parties

In their application the *applicants* submit that the posts should not have been assigned to Tilly Bye Rasmussen and Anker Rasmussen on the grounds, on the one hand, that the former did not fulfil the conditions in the vacancy notice since the erhvervssproglige afgangseksamen does not correspond to university education attested by a diploma or to equivalent professional experience, and, on the other hand, that the latter did not meet the second requirement in the vacancy notice since he did not possess long experience of translation after obtaining his university degree.

The applicants claims that the posts should, on the contrary, have been assigned to them since they fulfilled the conditions in the vacancy notice as they both have a university degree and long experience of translation and revision.

In its defence the *Commission* contends principally that the application should be dismissed. It maintains that there are no grounds for annulling the Commission's decision of rejection since the appointing authority enjoys a wide discretion in comparing the merits of candidates and since appointments made on the basis of general assessments can be called in question only if there has been a manifest error which is not the case here. Furthermore the Court has no power to issue an order to an institution and cannot therefore direct that the applicants be appointed to a post of principal translator.

In the alternative, the Commission takes the view that even if the applicants' conclusions were examined, it would have to be pointed out in the first place that the applicants have not alleged that the appointing authority has committed a formal or substantive error such as to justify the annulment of the appointing authority's decision, as sought in their conclusions.

The Commission contends, in addition, that the Staff Regulations do not grant officials who fulfil the requirements for eligibility for promotion an individual right to promotion. In any event the Commission submits that the selection procedure was carried out quite properly as is shown by comparing the careers of the two applicants on the one hand and those of Tilly Bye Rasmussen and Anker Rasmussen on the other.

It further states that the decision rejecting the candidatures submitted by the applicants does not preclude their subsequent promotion but it reiterates that it can not accept that the applicants have any right under the Staff Regulations to compel the Commission to create new posts of principal translator to be assigned to the applicants with seniority backdated to 1 March 1981.

As to the possibility of annulling the appointments of Tilly Bye Rasmussen and Anker Rasmussen, the Commission maintains that the former's qualifications consisted of a combination of professional experience and formal education covering studies "that should be treated as being of university level", and that the latter's education was interrupted in 1974 but culminated in a university degree in June 1979. Furthermore, before completing his education, Anker Rasmussen worked as a full-time translator.

Furthermore in the Commission's view the applicants' submission must be based on Article 45 (1) of the Staff Regulations. The applicants are misconstruing that provision of the Staff Regulations since promotion is made on the basis of a general assessment of the merits of officials and comparison of diplomas is

not a decisive factor. The applicants' arguments are therefore not supported by the Staff Regulations.

In their reply, the *applicants,* before examining the legal arguments raised, make a number of observations on points of fact.

They draw particular attention to the assessments in their periodic reports for the period from 1 July 1977 to 30 June 1979, submitting that those assessments are confirmed by the subsequent periodic reports and that they contradict those expressed in the note dated 18 February 1981 from Mr Ciancio, Director of the Translation, Documentation, Reproduction and Library Directorate, as grounds for rejecting their candidatures, namely that they did not have the essential qualities of principal translator, that is to say the reliability and sureness of expression needed for revision to be dispensed with. They make the point that Mr Ciancio's assessment is also at variance with the observations made regarding the applicants by the Commission in Case 10/82.

The applicants further express their surprise that candidates who do not even meet the conditions set out in the vacancy notice should come within the exceptional provision relating to a "rapid career"; in the applicants' view such conduct on the part of the administration is contrary to Article 5 (3) of the Staff Regulations.

The applicants maintain that their leave on personal grounds in the interests of the service should be taken into account in calculating their seniority; this would mean, on the one hand, that Lene Øhrgaard would have more seniority than Tilly Bye Rasmussen and Anker Rasmussen together with a higher level of education at the time of her recruitment, and, on the other hand, that Jean-Louis Delvaux, who also had a higher level of education at the time of his recruitment, would have the same seniority as Tilly Bye Rasmussen and Anker Rasmussen.

As regards submissions on matters of law, the applicants consider in the first place that by appointing persons who did not meet the qualifications required in the vacancy notice, the appointing authority was guilty of a manifest error. Furthermore, even if the two persons appointed did not possess the required qualifications, the Commission was still manifestly in error since the qualifications of the two applicants are clearly better than those of the two officials appointed. For the purpose of proving that superiority, the applicants request the Court to commission an expert's report to elucidate the content of the courses leading to the following qualifications: cand. mag., cand. phil., cand. ling. merc., erhvervssproglige afgangseksamen, korrespondenteksamen and cand. merc.

Since the appointing authority wrongly rejected the candidatures of the two qualified officials and appointed instead two other officials who did not fulfil the requirements in the vacancy notice or who are in any event clearly less qualified, it automatically follows that the appointing authority should make good the damage caused to the applicants by assigning two L/A 5 posts to them. Those posts are available in the budget and the Court could therefore grant the relief sought by the applicants without there being any necessity to withdraw from Tilly Bye Rasmussen and Anker Rasmussen the posts which they occupy.

As regards the Commission's argument to the effect that the promotion was made after comparing the merits of the candidates, the applicants maintain that, apart from the personal files, Mr Marstrand and Mr Pignot possess parallel files — in contravention of the Staff Regulations — which are used in appointment procedures. The applicants

base their assertion on the fact that during a promotion procedure in 1981, a mistake was allegedly made in calculating points awarded to Jean-Louis Delvaux according to the "Noël method". The applicants therefore ask the Commission to produce the parallel files on the four persons concerned.

The applicants state that they have never claimed that they should be entitled to promotion. On the other hand, they consider that they have been "leap-frogged" in this instance by two candidates who do not fulfil the required conditions. Such a situation differs from the one envisaged by the defendant and is also contrary to Article 27 of the Staff Regulations under which the best qualified of the candidates fulfilling the minimum requirements must be appointed. The applicants further submit that in so far as it was the appointing authority itself which laid down the conditions in the vacancy notice, it is bound by those conditions and thus may no longer rely on Article 45 since any derogation from the conditions formally laid down in the vacancy notice constitutes a misuse of powers.

In this respect, the appointing authority's error in appointing officials who do not satisfy the conditions stipulated in the vacancy notice shows furthermore that the appointing authority "is pursuing interests other than those legally permissible" and so the applicants are justified in alleging misuse of powers in this respect too. In the applicants' view that submission is admissible although it was raised only in the reply since it is based on new information contained in the defence.

The applicants express, in addition, very strong reservations regarding their subsequent promotion prospects, pointing out that in the 1981 promotion procedure Jean-Louis Delvaux was placed 16th on the list and Lene Øhrgaard's name was not even included on the list.

The applicants submit finally that the judgments on which the Commission relies in this case are irrelevant.

In its rejoinder the *Commission* maintains, as regards the applicants' promotion prospects, that the appointing authority has never stated that the applicants are not eligible for promotion in the department in which they are now employed. According to the Commission this is confirmed by the fact that Jean-Louis Delvaux was proposed for promotion in 1981. His position on the list by no means implies that his candidature was improperly rejected since the list was not confined solely to the Danish translation division.

The reply does not, in the Commission's view, appear to contain any matters which differ from those on which it has already expressed its views in its defence in relation to the requirements concerning the qualifications of the candidates for the posts of principal translator. The applicants repeat "the conclusion which is the leitmotiv of their action, namely that the decisive factor for promotion is university education evidenced by a diploma". However the vacancy notice expressly stipulates the alternative of "equivalent professional experience" and thus the applicants' reference to a diploma as the sole criterion for promotion is at variance with the qualifications set out in the vacancy notice. The appointing authority decides on promotions, in accordance with the criteria set out in Article 45 of the Staff Regulations, following a comparative examination of the candidates' merits, and not just on the basis of university qualifications. Furthermore, preference cannot be given to candidates with qualifications in foreign languages

and literature over those whose theoretical and practical linguistic studies are geared to the needs of business. The Commission does not accept such a limitation of the appointing authority's power to appoint its staff.

Turning to the question of calculating seniority, the Commission points out that Article 24 of the Staff Regulations does not require leave on personal grounds for the purposes of further vocational training to be taken into account in calculating seniority. It stresses in that regard that it is possible for such training to take place while an official is in active service. It also makes the point that length of service under contract is taken into account in calculating seniority.

The Commission does not accept the applicants' argument to the effect that L/A 5 posts are available in the budget and maintains that although the table of posts available under the budget in March 1982 included a number of L/A 5 posts, that does not necessarily mean that those posts are vacant as they are used for recruitment to Grades L/A 8 and L/A 7.

On the question of parallel files, the Commission states that the error affecting Jean-Louis Delvaux has been corrected. In its view such errors are unfortunately always possible but Article 26 of the Staff Regulations, which provides that all documents must be communicated to the official, affords an adequate guarantee against such errors finding their way into the official's personal file to the detriment of his interests. The defendant adds that the alleged "parallel files" do not replace the personal files made up in conformity with the Staff Regulations and there is no justification for the applicants to claim that in regard to their candidatures for promotion the appointing authority used any information other than that contained in their personal files. The Commission therefore cannot accept the applicants' request that those alleged parallel files be produced.

Finally the Commission considers that the submission of misuse of powers, which was raised only in the reply, should be declared inadmissible pursuant to Article 42 (2) of the Rules of Procedure since no matters of fact or law such as to justify the raising of a fresh issue have come to light in the course of the written procedure.

IV — Replies given by the Commission to the written questions put to it by the Court

In reply to the first question (see *supra* p. 2382) the Commission states that Category A officials are essentially recruited from candidates with a university education whereas in the language service "it has happened that candidates with equivalent professional experience are admitted to the competition and some of them have been recruited". However the difference between recruitment to Category A and recruitment to Category L/A is not based on a different interpretation of Article 5 of the Staff Regulations but is attributable merely to the different factual circumstances applying to the two categories.

In reply to the second question, the Commission states that when it comes to subsequent promotion, it no longer makes a distinction between officials recruited on the basis of a university education and those recruited on the basis of equivalent professional experience. Promotions are based on an

assessment of the merits and the work of the official

V — Oral procedure

At the sitting on 21 April 1983, Torben Rode, an expert appearing on behalf of the applicants, explained what the different courses of Danish higher education entailed. The applicants, represented by Jytte Thorbek, and the Commission of the European Communities, represented by Johannes Føns Buhl, acting as Agent, then presented oral argument and replied to questions put by the Court.

In the course of the oral procedure the applicants admitted that the point at issue was a promotion decision under Article 45 of the Staff Regulations raising the problem of the appointing authority's discretion in making an appointment following a vacancy notice.

The Advocate General delivered his opinion at the sitting on 19 May 1983.

Decision

1 By application lodged at the Court Registry on 8 January 1982, Lene Øhrgaard and Jean-Louis Delvaux, both officials in Grade L/A 6 in the Danish translation division of the Commission of the European Communities, brought an action, first, for the annulment of the Commission's decision, notified by letter dated 3 April 1981, rejecting their candidatures for posts of principal translator in Grade L/A 5 submitted pursuant to Vacancy Notice COM/1134-1140/80 and, secondly, for an order compelling the Commission to appoint them to such posts either by means of the creation of two new posts of principal translator or of the annulment of the appointment of two officials who were appointed and whose qualifications they challenge.

2 In the above-mentioned Vacancy Notice COM/1134-1140/80 the "qualifications required" included the following:

"University education attested by a diploma, or equivalent professional experience;

Long experience of translation; experience of revision;

Proven active command of language with a sound style".

3 It is not disputed that the applicants fulfilled the conditions for promotion to Grade L/A 5. However they were not selected and on 1 March 1981 the Commission appointed the two officials whose appointments have been contested.

4 The applicants submitted complaints to the appointing authority under Article 90 of the Staff Regulations and subsequently brought this action which was originally based on two principal submissions. The first is that the two officials promoted by the Commission do not fulfill all the conditions set out in the vacancy notice and that by appointing them the Commission was guilty of a manifest error. The second is that the posts in question should have been assigned to the applicants, primarily on the ground that they possess better qualifications.

5 In their reply the applicants further claim that the Commission has misused its powers as is shown by new information produced by the Commission in its defence.

6 The Commission maintains that the latter submission should be rejected as inadmissible under Article 42 (2) of the Rules of Procedure. However, before examining the Commission's objection that that third submission was raised at too late a stage, the following observations should be made on the first two submissions.

The first submission

7 The applicants base their first submission essentially on the fact that in their view, since professional experience can be counted only after the requisite diploma is obtained, the two main conditions in the vacancy notice, namely a university degree and professional experience, are cumulative. They submit that in this instance neither of the two persons promoted fulfilled the two conditions. One did not have a university degree and therefore could not have any professional experience either while the other obtained his university degree only in 1979 and thus had only two years' seniority when he was promoted, which cannot constitute "long experience".

8 As the Commission has rightly observed, the vacancy notice, by using the word "or", clearly indicates that the conditions are alternative. It is thus necessary, but it is also enough, to possess either a university degree or equivalent professional experience and this also follows from Article 5 (1) and (2) of the Staff Regulations according to which, *inter alia*, the duties of staff in the category L/A "require university education or equivalent professional experience".

9 It is sufficient to note in this respect that the two officials in question passed a competition held in 1974 to enter the service of the Communities and that the appointing authority had at that time considered that they possessed equivalent professional experience; both officials therefore undeniably satisfy the first condition in the vacancy notice.

10 In those circumstances, the two officials, who have been working as translators for the Commission since 1974, undeniably possess long experience of translation and thus also fulfil the second requirement in the vacancy notice.

11 The first submission must therefore be rejected.

The second submission

12 The applicants submit that even if it is accepted that the two officials whose appointment they dispute had the qualifications required in the vacancy notice, the appointing authority should nevertheless have appointed the applicants not only because they satisfy all the conditions required but also because the Commission committed a manifest error in not appointing them since, particularly in view of their university education, they were better qualified than the two persons who were promoted.

13 The Commission rejects the applicants' arguments which, it claims, are in contradiction with Article 45 of the Staff Regulations under which promotion is to be effected after consideration of the comparative merits of the candidates and not merely on the basis of university qualifications.

14 Since what is at issue is a decision on promotion, it should first be pointed out that the appointing authority has a wide discretion in evaluating the interests of the service and the merits to be taken into consideration in the context of a decision under Article 45 of the Staff Regulations and that in regard to those matters the Court must confine itself to the question whether the administration kept within proper bounds and did not exercise its power in a manifestly erroneous manner.

15 In this case there is nothing in the documents before the Court to show that the appointing authority failed to make a proper assessment of the qualifications and merits of the various candidates, including those of the applicants.

16 Regarding in particular the question of the diplomas referred to by the applicants, it should be borne in mind that as the Court stated in its judgment of 17 March 1983 (Case 280/81 *Hoffmann* v *Commission* [1983] ECR 889) in the case of promotion other factors must be taken into account when the merits of officials eligible for promotion are compared, in particular the general standard of the work which they have performed in carrying out their duties.

17 Consequently the applicants cannot complain that, in the exercise of its discretion, the appointing authority did not take into account solely the candidates' diplomas and chose to promote two persons whose diplomas were of a lower level than those of the applicants.

18 The applicants have further submitted that the leave on personal grounds granted to them for the period from 1 January 1976 to 1 July 1977 in fact prevented them from being promoted by interrupting their seniority although the leave was granted to them in the interests of the service.

19 In this connection it should be observed, on the one hand, that seniority is merely one of a number of criteria of assessment and can never take precedence over the merits of candidates and, on the other hand, that Article 40 (3) of the Staff Regulations states that during leave on personal grounds "an official shall not be entitled to advancement to a higher step or promotion in grade". Accordingly the appointing authority cannot be criticized for having regarded the applicants' seniority as interrupted during

the period of their leave. Furthermore there is nothing in the documents before the Court to show that seniority was a decisive factor in the appointments at issue.

20 Since the applicants have produced no other evidence that the appointing authority exceeded its discretion by giving its preference to other candidates in the matter of promotion, the second submission must also be rejected.

21 It follows that the submission of misuse of powers is unfounded and must also be rejected.

22 Consequently the application for annulment of the defendant's decision must be dismissed. As regards the request that the Court should order the Commission to appoint the two applicants, it is sufficient to state that in any event the Court has no jurisdiction to entertain such a request.

Costs

23 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure, the institutions are to bear their own costs incurred in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby

1. **Dismisses the application;**

2. Orders the parties to bear their own costs.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 14 July 1983.

J. A. Pompe
Deputy Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 19 MAY 1983 [1]

Mr President,
Members of the Court,

1. Introduction

In this case the Court is once again confronted with a number of questions relating to a promotion procedure. This time the case involves a vacancy notice for some seven posts of principal translator in Grade L/A 5-4 in the Danish translation division of the Commission. The applicants and the other persons named in the case have been working in that division since 1974 with differences of a few months. The candidatures submitted by the applicants were among those rejected by the Commission while those promoted to the above-mentioned vacant posts included Tilly Bye Rasmussen and Anker Rasmussen.

The applicants claim that the Court should annul the rejection, notified by the Commission by letter of 3 April 1981, of their candidatures for appointment as principal translators pursuant to the vacancy notice (COM/1134-1140/80). They further claim that the Court should order that they be appointed as principal translators, with seniority calculated from 1 March 1981, either by the permanent creation of two new posts of principal translator or by annulling the appointments of Tilly Bye Rasmussen and Anker Rasmussen. As there is no provision in Community law for making such an order the second claim must be regarded as inadmissible. I shall therefore confine my opinion to the first claim.

The applicants' principal submissions are substantially as follows:

1 — Translated from the Dutch.