

guarantee an official's right to a fair hearing and thus enable the administration to reach a decision in full knowledge of the facts.

That is not the case, however, where such opinions also contain, in addition to the assessments involved in the comparative consideration of candidatures, references

to a candidate's ability, efficiency and conduct not previously included in his personal file. However, even if it constitutes an infringement of Article 26 of the Staff Regulations, a failure to notify such assessments to the official so that he may make any comments thereon cannot vitiate decisions rejecting his candidature and appointing another candidate unless they had a decisive influence on the appointing authority's choice.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
30 November 1993 ^{*}

In Case T-76/92,

Jean-Panayotis Tsirimokos, an official of the European Parliament, residing at Luxembourg, represented by Jean-Noël Louis and Thierry Demasure, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson, 1 Rue Glesener,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, assisted by Christian Pennera and Jannis Pantalis, of its Legal Service, acting as Agents, with an address for service at the Secretariat of the European Parliament,

defendant,

^{*} Language of the case: French.

APPLICATION for the annulment of the European Parliament's decision rejecting the applicant's candidature for the post of head of the Greek translation division, declared vacant on 8 July 1991, and of its decision appointing another candidate to that post,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: C. W. Bellamy, President, A. Saggio and C. P. Briët, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 15 July 1993,

gives the following

Judgment

Facts and procedure

- 1 The applicant, Mr Jean-Panayotis Tsirimokos, who has been on the staff of the European Parliament since 6 July 1983, is a reviser in Grade LA 4. He was first attached to the Greek Translation Division, which at that time, like the rest of translation, came under the Directorate-General for Sessional and General Services (DG I). In 1984/85, following a reorganization, the translation services were brought within the Directorate-General for Translation and General Services (DG VII). Mr Tsirimokos was posted in 1986 to the 'Report of Proceedings' Division in the 'Sittings' Directorate, which had remained with DG I after the reorganization.
- 2 By Vacancy Notice No 6776 of 8 July 1991, the appointing authority opened the procedure for filling the post of Head of the Greek Translation Division, initially

by promotion or transfer. Seven candidatures, including the applicant's, were declared admissible for promotion to the post.

3 The candidatures were examined by Mr Wilson, Director of Translation ('the Director'), who interviewed five of the seven candidates, including Mr Tsirimokos. He spoke with the other two candidates, who were on annual leave, by telephone. Following that comparative consideration, the Director sent an opinion to Ms De Enterria, Director General for Translation and General Services ('the Director General'), in which, it appears from the Parliament's observations, he analysed the respective merits of the seven candidates in relation to the qualifications required in the vacancy notice and suggested that one of those candidates, Mr K., should be appointed to the vacant post. The Director General interviewed four of the seven candidates (Mr D., Mr K., Mr M. and Mr P.). The applicant was not invited to such an interview. The Director General then submitted an opinion to the Director General for Personnel, Budget and Finance giving the conclusions she had reached from her examination of the candidatures and suggesting, as the Parliament states in its observations, that the candidate proposed by the Director should be appointed to the vacant post. A file containing the Director General's opinion and a list of the assessments contained in all the candidates' periodical reports was sent to the Secretary General of the Parliament, who submitted a proposal to the President of the Parliament, the appointing authority, recommending the appointment of the same candidate. The abovementioned file was sent with that proposal. By decision of 5 November 1991, the President promoted Mr K. to the post of Head of the Greek Translation Division. On 27 November 1991, the applicant received a standard form notifying him of the rejection of his candidature and, on 27 January 1992, staff at the Parliament were informed of the decision appointing Mr K. to the post through the noticeboard.

4 On 25 February 1992, the applicant lodged a complaint against those two decisions rejecting his candidature and appointing Mr K. His complaint was rejected by decision of the President of the Parliament of 25 June 1992.

5 By application lodged at the Registry of the Court of First Instance on 24 September 1992, the applicant sought the annulment of the decisions rejecting his

candidature and appointing Mr K. to the post of Head of the Greek Translation Division. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. The hearing took place on 15 July 1993.

Forms of order sought

6 The applicant claims that the Court should:

- annul the appointment of Mr K. to the post of Head of the Greek Translation Division;
- annul the decision rejecting his candidature;
- order the defendant to pay the costs.

The defendant contends that the Court should:

- rule the action unfounded;
- rule on costs in accordance with the applicable provisions.

Substance

7 The applicant puts forward two pleas in law. His first plea alleges an infringement of Article 45(1) of the Staff Regulations, under which promotion 'shall be exclusively by selection ... after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. In his second plea, he submits that the assessment of his merits made, as for all the candidates, by the Director General was not communicated to him, contrary both to his right to a fair hearing

and to Article 26 of the Staff Regulations, the first paragraph of which provides that the personal file on an official is to contain '(a) all documents concerning his administrative status and all reports relating to his ability, his efficiency and his conduct' and '(b) any comments made by the official on such documents'.

Absence of proper comparative consideration of the candidatures

Arguments of the parties

8 The first plea comprises two parts. First, the applicant claims that the appointing authority did not personally carry out the comparative consideration of candidatures required by Article 45(1) of the Staff Regulations. Secondly, unlike other candidates, he did not have an interview with the Director General, in breach of the principle of equal treatment in relation to the right of officials to be heard.

9 In this plea, the applicant points out, first, that it has been held that when the appointing authority enjoys a broad discretion, as in cases of promotion, 'respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance' and that 'those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision' (Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469 and Case T-52/90 *Volger v Parliament* [1992] ECR II-121).

10 The applicant considers that, pursuant to those principles and to the first subparagraph of Article 45(1) of the Staff Regulations, the appointing authority was under a duty both to undertake the comparative consideration of candidatures personally and to ensure that all the candidates could be heard by the Director General.

- 11 With more particular regard to the first part of the plea, relating to the effective comparative consideration of his candidature by the appointing authority, the applicant stresses that the President of the Parliament considered the candidatures on the sole basis of the Director General's memorandum and the Secretary General's proposal made on the basis of a file containing only 'a summary of the various periodical reports and the detailed analysis contained in the Director General's memorandum'. The President therefore did not consult the candidates' personal files and consider personally, as appointing authority, their comparative merits and the reports on them, contrary to Article 45 of the Staff Regulations.
- 12 As regards the second part of the plea, the applicant claims that the fact that, unlike other candidates, he was not heard by the Director General prevented him from defending his candidature under the same conditions as those candidates, contrary to the principle of equal treatment for officials in relation to their right to be heard. That irregularity vitiated the opinion submitted by the Director General to the Secretary General, the Secretary General's proposal to the President and thus the final outcome of the promotion procedure in issue. In support of his argument, the applicant states, on the basis of Case T-25/90 *Schönherr v Economic and Social Committee* [1992] ECR II-63, that 'the appointing authority was obliged to take those opinions and that proposal into account, even if it decided not to follow them'.
- 13 The Parliament contends that both parts of the first plea are unfounded. With regard to the first part, alleging that there was no effective consideration of the candidates' comparative merits by the appointing authority, it states that the President had been given all the information necessary to enable him to make such a comparison following the Secretary General's proposal for the appointment. In particular, he had at his disposal the list of the seven candidates, a summary of the assessments in their periodical reports, the detailed report of the Director General, the most senior official in charge of the service in which the post was to be filled, and the opinion of the Director General for Personnel, Budget and Finance. The Parliament therefore considers that the President personally undertook a consideration of the candidates' comparative merits.

- 14 As for the second part of the plea, alleging a failure to hear certain candidates before the choice was made, the Parliament submits that the procedure followed was in full conformity with the principles set out in *Volger*, cited above. That judgment merely states that the administration is bound by the procedure which it has defined for itself. In the context of the comparative consideration of candidatures laid down in Article 45 of the Staff Regulations, the administration is not obliged to hear all the candidates unless it has decided to do so. The Parliament considers that equal treatment was fully ensured in the present case, since all the candidates were heard by the Director. The fact that certain candidates were subsequently given a further hearing by the Director General does not run counter to the principle of equal treatment.

Findings of the Court

- 15 Under the first subparagraph of Article 45(1) of the Staff Regulations: ‘Promotion shall be by decision of the appointing authority. It ... shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.’
- 16 It is thus clear from that provision that in a promotion procedure or, by analogy, transfer procedure, the appointing authority must make its choice on the basis of a comparative consideration of the periodical reports and merits of the various candidates eligible for promotion. It is settled law that for that purpose it has the power under the Staff Regulations to undertake that consideration in the manner it considers most appropriate (see in particular Case 62/75 *De Wind v Commission* [1992] ECR 1167, paragraph 17, and Case T-53/91 *Mergen v Commission* [1992] ECR II-2041, paragraph 30).
- 17 When undertaking that consideration, therefore, the appointing authority must have at its disposal all the information necessary to assess the merits of each candidate. It is assisted by the administrative services at the various hierarchical levels, in accordance with the principles inherent in the operation of any hierarchical

administrative structure, embodied in the first paragraph of Article 21 of the Staff Regulations, under which 'an official, whatever his rank, shall assist and tender advice to his superiors; he shall be responsible for the performance of the duties assigned to him'.

- 18 In the present case, therefore, the appointing authority cannot be criticized for not having assembled all the information necessary for assessment itself through a personal comparative consideration of the candidates' periodical reports and personal files, as the applicant claims in the first part of the present plea. It is clear from the documents in this case that the appointing authority had at its disposal all the information necessary for assessment, obtained, *inter alia*, from a serious examination of the candidatures at each stage in the promotion procedure, on the basis of a detailed comparison of the periodical reports and the merits of the various candidates. In particular, the fact that both the Director, who interviewed all the candidates, and the Director General were consulted shows that the appointing authority took care to obtain all the relevant information from those in charge of the service in which the post was to be filled, in order to be able to reach a decision in full knowledge of the facts. It was therefore properly able to make its choice on the basis of the Secretary General's proposal, to which were attached the detailed opinion of the Director General and a summary of the assessments in the periodical reports of all the candidates.
- 19 The appointing authority must therefore be held to have undertaken a comparative consideration of the candidatures, including that of the applicant, in accordance with Article 45(1) of the Staff Regulations. The first part of the first plea in law must therefore be dismissed.
- 20 With regard to the second part of this plea, alleging breach of the principle of equal treatment in connection with the right to be heard, it must first be borne in mind that, in the context of its recognized discretion as to the method to be used in the comparative consideration of candidatures, both the appointing authority itself and

the various hierarchical authorities consulted in the course of the promotion or transfer procedure in question must consider at each stage in the examination of the candidatures whether it is necessary to obtain further information or form further assessments through interviews with all the candidates or only with some of them, in order to be able to reach a decision in full knowledge of the facts. That discretion was recognized by the Court of Justice in Case 111/83 *Picciolo v Parliament* [1984] ECR 2323, paragraphs 10 to 13, in the context of a recruitment or transfer procedure, and the administration must, *a fortiori*, be allowed such a discretion in a promotion or transfer procedure where, as in the present case, the candidates are already in the service of, and known to, the institution concerned. In principle, candidates cannot, therefore, claim an automatic right to an interview. It is only where the appointing authority has specifically decided to make its choice following, *inter alia*, interviews held with all the various candidates by a senior official in the service where the post is vacant must it ensure that each candidate has such an interview during the course of the procedure in question, so that it can be effectively in a position to examine each candidature on the basis of all the factors on which it intended to base its choice, as is clear from the judgment in *Volger*, paragraphs 27 and 29.

21 However, the discretion thus allowed to the administration is circumscribed by the need to undertake a comparative consideration of candidatures with care and impartiality, in the interest of the service and in accordance with the principle of equal treatment for officials, expressed in general terms in Article 5(3) of the Staff Regulations: 'Identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service'. In practice, consideration of the comparative merits of candidates must therefore be undertaken on a basis of equality, using comparable sources of information, as the Court of Justice held in Case 97/63 *De Pascale v Commission* [1964] ECR 515, at p. 527.

22 In the present case, therefore, it must therefore be determined whether, in the light of those principles, the examination of the applicant's candidature was vitiated, as he contends, by the fact that, unlike four of the six other eligible candidates, including the candidate finally promoted, he did not have an interview with the Director General. It must thus first be established whether the appointing authority

intended each candidate to have an interview with the Director General, as part of the procedure which it had defined for the comparative consideration of the candidatures. If not, it must still be determined whether the applicant's candidature was examined by the Director General in a non-discriminatory manner, that is to say on the basis of information and assessment criteria comparable to those on which she based her assessment of the four candidates whom she interviewed.

- 23 First, as to whether the procedure laid down by the appointing authority for examining the candidatures was properly followed in the applicant's case, there is nothing in the documents before the Court to warrant an assumption that the appointing authority intended to base its assessment of the comparative merits of the candidates in particular on interviews held with each of them by the Director General. In that regard, the facts here differ from those in *Volger*, on which the applicant relies. In the present instance, it is clear from the decision of the President of the Parliament of 25 June 1992 rejecting the complaint that the appointing authority took the contested decisions in accordance with the procedure which it intended to follow, that is to say following a proposal submitted by the Secretary General after consulting the officials in charge of the service in which the post was to be filled, namely the Director of Translation and the Director General of Translation and General Services. In that same decision, the appointing authority specifically stresses that the Director heard all the candidates in the course of the procedure in question. So, quite conversely, it is clear that the absence of any reference, in the reply to the complaint, to an interview with the Director General confirms that the appointing authority had not intended all those concerned to be interviewed by her. It was therefore for the Director General alone to decide whether it would be useful to interview any particular candidate in order to obtain further information for assessment.

- 24 Secondly, therefore, it must be established whether the applicant's candidature was examined by the Director General on the basis of information comparable to that which she had on the candidates whom she did interview, such as Mr K., the candidate finally promoted. It is clear from the documents before the Court that she was able to base her assessment on the opinion expressed by the Director after interviews with all the candidates, including the applicant, and on a comparative examination of their periodical reports or personal files, which were available to

her. On the basis of that evidence, she could use her discretion to judge whether it was necessary to interview certain candidates in order to obtain fuller information or, as the Parliament expresses it in the defence, to 'refine the assessment meticulously drawn up ... by the Director'. The Director General was thus entitled, without overstepping the bounds of her discretion, to consider that she had sufficient information concerning the applicant.

- 25 In making her assessment, the Director General was normally justified in basing her view in particular on the Director's opinion as regards the candidature of the applicant, who was on the staff of his directorate and for whom he was the appeal assessor. The Director General cannot in any event be criticized for having taken that — non-binding — opinion into account and having undertaken her comparative consideration of the candidatures on that basis.
- 26 The argument underlying the applicant's contention that an interview with the Director General would have enabled him not only to support his candidature but also to put right certain decisive points which, he claims, were incorrectly presented in the Director's opinion and reiterated by the Director General in her own opinion overlaps with the second plea, alleging infringement of the right to a fair hearing and of Article 26 of the Staff Regulations, and will therefore be examined together with that second plea.
- 27 Consequently, the appointing authority did not infringe the principle of equal treatment of officials in relation to the right to be heard by not ensuring that the applicant, like other candidates, had an interview with the Director General.
- 28 Both parts of the first plea in law must therefore be dismissed as unfounded.

Infringement of the right to a fair hearing and of Article 26 of the Staff Regulations

Arguments of the parties

29 In his second plea, put forward in the reply, the applicant states that it was on reading the defence that he first learned of the Director General's memorandum containing assessments of each candidate's qualifications with regard to the requirements of the post to be filled. He points out that the Director General noted in her opinion that he had not exercised any managerial responsibilities in the course of his career, a point of particular importance in this case. The applicant therefore maintains that the administration infringed the right to a fair hearing and Article 26 of the Staff Regulations by failing to communicate that opinion to him and to include it in his file, without even having given him an opportunity to meet the Director General in an interview. At the hearing, the applicant specified that, contrary to what was stated by the Director in his opinion, he had acquired managerial experience prior to entering the service, as was shown by a series of certificates included in his personal file. He claims that that error could have been put right if he had been heard by the Director General. It was therefore only in the absence of such a hearing that the Director General's opinion should have been communicated to him, in so far as the assessments in that opinion were not based on his periodical reports, in order to enable him to comment on it, in accordance with Article 26 of the Staff Regulations. It is for the administration to demonstrate that such an omission had no decisive influence on the choice made by the appointing authority.

30 The Parliament maintains that those opinions are preparatory documents, internal to the promotion procedure. Their scope is confined to the procedure in question and the assessments which they contain do not, therefore, fall within Article 26 of the Staff Regulations. Those assessments form an inseparable whole and are not to be communicated to the persons concerned, in order to maintain the confidentiality necessary in the interests both of the proper functioning of the service and of the candidates.

31 In addition, at the hearing, the Parliament submitted that, unlike the situation in Case 21/70 *Rittweger v Commission* [1971] ECR 7, the abovementioned memoranda did not have any decisive and direct influence on the contested decisions, which were based essentially on a comparative examination of the periodical reports.

Findings of the Court

- 32 Article 26 of the Staff Regulations provides that an official's personal file must contain '(a) ... all reports relating to his ability, efficiency and conduct' and '(b) any comments by the official on such documents'. Furthermore, 'the documents referred to in (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed'. Under Article 43 of the Staff Regulations, the periodical report on the ability, efficiency and conduct in the service of each official is to be communicated to the official, who is 'entitled to make any comments thereon which he considers relevant'.
- 33 It is settled law that the purpose of those provisions is to guarantee an official's right to a fair hearing by ensuring that decisions taken by the appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file. Consequently, a decision based on such matters is contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of a procedure vitiated by illegality (see *Rittweger*, cited above, paragraphs 29 to 41, Case 88/71 *Brasseur v Parliament* [1972] ECR 499, paragraphs 9, 10 and 11, Case 233/85 *Bonino v Commission* [1987] ECR 739, paragraph 11, and Case T-82/89 *Marcato v Commission* [1990] ECR II-735, paragraph 78).
- 34 Those provisions therefore do not in principle cover opinions of hierarchical superiors consulted in the course of a promotion or transfer procedure. Such opinions are not to be notified to the candidates concerned, since they contain only a comparative assessment of their qualifications and merits, based on factual considerations mentioned in their personal file or notified to them, so that those concerned have thus already had an opportunity to make any comments. The scope of those opinions is therefore confined to the appointment procedure in question. They reflect the discretion which the administration enjoys in the matter and do not fall under the rules laid down in Article 26 of the Staff Regulations, which seek to guarantee an official's right to a fair hearing and thus enable the administration to reach a decision in full knowledge of the facts.

35 That is not the case, however, where such opinions also contain, in addition to the assessments involved in the comparative consideration of candidatures, references to a candidate's ability, efficiency and conduct not previously included in his personal file. Where that is the case, Article 26 of the Staff Regulations requires the administration to include that information in the official's personal file, as the Court of Justice held in *Bonino*, paragraph 12. However, it has consistently been held that a failure to notify such assessments to the official so that he may make any comments thereon cannot vitiate decisions rejecting his candidature and appointing another candidate unless they 'had a decisive influence on the choice made by the appointing authority' (see *Rittweger*, paragraph 35, and *Brasseur*, paragraph 18). It is for the administration to demonstrate that such failure had no decisive influence on the choice made by the appointing authority.

36 In the light of those principles, it must first be held that in the present case, contrary to what the applicant alleges, the result of the assessment of his abilities in relation to the specific requirements of the post for which he was applying was not in any event to be communicated to him or included in his personal file. Nor did the applicant have a right to be heard by the Director General in order to defend his candidature at the stage of the comparative examination, which falls within the administration's discretion and thus cannot be adversarial in nature. Such rules are not affected by the circumstance, to which the applicant refers, that the comparative assessments in issue were not based on his periodical reports. As is explicitly stated in Article 45(1) of the Staff Regulations itself, the comparative consideration relates not merely to the periodical reports but also to the merits of the various candidates for promotion. As this Court has held in Case T-11/92 *Schlob v Council* [1992] ECR II-203, paragraph 52, the appraisal of those merits is based on numerous factors which are not necessarily recorded in the candidates' personal files.

37 With more particular regard to the applicant's argument that, pursuant to his right to a fair hearing and to Article 26 of the Staff Regulations, he should either have received notification of the Director General's opinion noting his lack of managerial experience or have been heard beforehand by the Director General so that he could challenge that assertion, the Court notes, first of all, that it was open to him to submit with his candidature any information which he considered useful as regards, *inter alia*, the experience which he had acquired before joining the

Parliament's staff, even if certificates concerning that experience had been included in his personal file, as he stated at the hearing. However, it must be borne in mind that such experience could not be as decisive, in the context of his career as an official, as the experience which he had acquired with the Communities or, specifically, his superiors' assessments of the way in which he performed his duties.

38 It need only be noted, therefore, that the reference in the opinion in question to the applicant's lack of managerial experience must be understood as relating more particularly to his responsibilities during his career as an official. In that regard, the opinion was not inconsistent with his periodical reports and thus did not have to be placed on his personal file pursuant to Article 26 of the Staff Regulations.

39 Furthermore, the mention of lack of managerial experience had in any event no decisive influence on the contested decision in the present case. An examination of the documents before the Court and in particular of the periodical reports shows that a comparison between the respective assessments of the applicant and the candidate promoted in their periodical reports is enough to justify the administration's preference for the latter at each stage of the procedure in question. It is explicitly clear from the decision of 25 June 1992 rejecting the complaint that the appointing authority's choice was based essentially on a comparative examination of the periodical reports. In that decision, the appointing authority stated that the Director and then the Director General had carried out a detailed, thorough and comparative analysis of those reports, and indicated that it had appeared at that point that, irrespective of the merits and personal knowledge of the applicant, his periodical report was not as good as that of several other candidates who more adequately met the conditions and qualifications required by Vacancy Notice No 6776. In the defence, it was stated that the mark given to the promoted candidate in his periodical report for the reference period 1989-1991 was in raw terms five and in adjusted figures nine points higher than that of the applicant. Given a difference of that extent, it does not appear that the matters contested by the applicant, to which the opinions of the Director and the Director General refer with regard to his managerial experience, can have had any decisive influence on the appointing authority's choice.

- 40 The fact that they were not communicated to the applicant and placed on his personal file cannot, therefore, in any event vitiate the legality of the contested decisions.
- 41 It follows from all of the foregoing that the second plea, alleging infringement of the right to a fair hearing and of Article 26 of the Staff Regulations must be dismissed.

Costs

- 42 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the parties to bear their own costs.**

Bellamy

Saggio

Briët

Delivered in open court in Luxembourg on 30 November 1993.

H. Jung

C. W. Bellamy

Registrar

President