

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
5 March 2003

Case T-24/01

Claire Staelen
v
European Parliament

(Officials – Open competition – Eliminating tests – Power of the selection board to change the minimum number of points required in the Notice of Competition – Tests of a comparative nature – Admissibility)

Full text in French II - 423

Application for: as a principal claim, the annulment of the decision of the selection board in Competition EUR/A/151/98 refusing to allow the applicant to take part in the tests subsequent to Test VII.A.(d) of that competition and, in the alternative, a claim for compensation for the non-material damage allegedly suffered.

Held: The decision of the selection board in Competition EUR/A/151/98 refusing to allow the applicant to take part in the tests subsequent to Test VII.A.(d) of that competition is annulled. The Parliament is ordered to bear its own costs and to pay the applicant's costs, including those relating to the application for interim measures.

Summary

1. Officials – Actions – Act adversely affecting an official – Decision of a selection board to reduce the minimum number of points required in the Notice of Competition for the eliminating tests – Inadmissibility (Staff Regulations, Art. 90(2))

2. Officials – Competition based on qualifications and tests – Pass requirements – Definition in notice of competition – Reduction by the selection board of the minimum number of points required in the Notice of Competition for the eliminating tests – Procedural irregularity likely to distort the final outcome of the competition (Staff Regulations, Annex III, Art. 1(1)(e))

1. The only acts or decisions that are capable of forming the subject-matter of an action for annulment are those which produce binding legal consequences that are likely to affect the applicant's interests by significantly changing his legal situation. In the case of acts or decisions that involve several stages, especially in the course of an internal procedure such as a competition, the only measures which constitute acts that can be challenged are those which definitively establish the position of the institution at the end of that procedure. Intermediate measures whose purpose is to prepare the final decision, however, do not adversely affect an official within the meaning of Article 90(2) of the Staff Regulations and may only be challenged incidentally in the course of an action brought against acts which may be annulled.

A decision of a selection board in a competition to reduce the minimum number of points required in the Notice of Competition in order to pass the eliminating tests does not constitute an act that can be challenged and may only be challenged by a candidate incidentally in the course of an action brought against an act adversely affecting him.

(see paras 32-34)

See: T-6/93 *Pérez Jiménez v Commission* [1994] ECR-SC I-A-155 and II-497, paras 34 and 35; T-208/00 *Barleycorn Mongolue and Boixader Rivas v Council and Parliament* [2001] ECR-SC I-A-103 and II-479, para. 34

2. Although the appointing authority enjoys a wide discretion to determine the conditions governing a competition, the selection board is bound by the text of the notice of competition as published. The notice of competition forms both the legal basis and the basis of assessment for the selection board.

Although the selection board determines the level of difficulty of a competition by defining, under the wide discretion which it enjoys, the rules for and detailed contents of the tests referred to in the Notice of Competition, the pass marks for the tests are set out by the appointing authority in the Notice of Competition in accordance with Annex III, Article 1(1)(e) of the Staff Regulations, which states that the notice must specify, among other things, where the competition is on the basis of tests, what kind they will be and how they will be marked. Therefore, a decision of the selection board to change the pass marks for the tests renders the competition procedure flawed.

It is true that a procedural irregularity can invalidate an act only if it is established that in the absence of that irregularity the act might have been substantively different, but a reduction in the pass marks by a selection board in a competition, which has the direct effect of significantly increasing the number of candidates taking part in the subsequent comparative tests, is necessarily likely to invalidate the conduct of those tests.

Tests of a comparative nature are, by definition, tests in which each candidate's performance is assessed in relation to that of the other candidates, so that the number of candidates admitted to the tests is likely to affect the selection board's assessments of the candidates. Those assessments reflect a value judgment of a candidate's performance compared with that of the other candidates. The higher the number of candidates in that type of tests, the greater the demands made of them by the selection board. That conclusion might be open to question only if the defendant institution could prove that each candidate had been marked in such a way as to eliminate any comparison with the other candidates, since if an irregularity occurs during the course of a competition, it is for the defendant institution to prove that it did not affect the final outcome of the competition.

(see paras 47, 51-54, 57-58)

See: 67/81 *Ruske v Commission* [1982] ECR 661, para. 9; 150/84 *Bernardi v Parliament* [1986] ECR 1375, para. 28; 181/86 to 184/86 *Del Plato and Others v Commission* [1987] ECR 4991, para. 36; T-35/89 *Albani and Others v Commission* [1990] ECR II-395, paras 43 to 45; T-153/95 *Kaps v Court of Justice* [1996] ECR-SC I-A-233 and II-663, para. 37; T-80/96 *Fernandes Leite Mateus v Council* [1997] ECR-SC I-A-87 and II-259, para. 27; T-200/97 *Jiménez v OHIM* [1999] ECR-SC I-A-19 and II-73, para. 55