

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
12 December 1996

Case T-130/95

X

v

Commission of the European Communities

(Officials – Promotion – Consideration of the candidates' comparative merits –
Staff report – Drawn up late – Action for annulment and damages)

Full text in French II - 1609

Application for: annulment of the decision of the Commission not to
promote the applicant to Grade A 4 and for damages.

Decision: Application dismissed.

Abstract of the Judgment

The applicant, an official in Grade A 5, refused to sign the draft staff report for the period from 1 July 1991 to 30 June 1993 which his head of unit had sent to him by

memorandum of 21 February 1994. On 6 May 1994, the applicant signed a statement carrying over his staff report for 1989 to 1991, which the Directorate-General for Personnel and Administration (DG IX) sent back on 20 June 1994 marked 'not in order (description of duties missing)'. On 20 January 1995, DG IX registered as 'in order' the statement of carryover accompanied by an annex describing the duties carried out by him during the report period 1991 to 1993.

The Promotions Committee, in accordance with the opinion of the joint working party, turned down the applicant's internal appeal against the list of officials in DG V put forward for promotion to A 4, in which his name did not appear. His subsequent complaint against the Commission's implied decision not to promote him to A 4, as contained in its decision to promote to that grade the officials adjudged by the Promotions Committee to be most deserving of promotion, was also rejected.

The claim for annulment

Admissibility

The Court rejects the objection of inadmissibility raised by the Commission that the claim for annulment is directed against the list of promoted officials which merely confirms the decision not to include the applicant on the list of officials most deserving of promotion. The promotion procedure at issue is a complex administrative operation composed of a series of very closely-linked acts. The applicant is therefore entitled to seek annulment of the decision concluding the promotion operation, that is to say, in this case, the list of promoted officials (paragraphs 28 and 29).

See: C-448/93 P *Commission v Noonan* [1995] ECR I-2321, para. 17

Substance

The first limb of the first plea, concerning the absence of the staff report for 1991 to 1993 during the promotion procedure

– Admissibility

The Court finds that the applicant's assertion, included for the first time in his reply, that his staff report for 1991 to 1993 did not reach DG V until 20 January 1995 does not in any way constitute a new plea, contrary to the Commission's submissions, but amounts to an argument developed in support of the first limb of the plea (paragraph 33).

– Merits

The staff report is an indispensable criterion of assessment whenever an official's career is taken into consideration by the administration. A promotion procedure is flawed when the appointing authority has not been able, contrary to Article 45 of the Staff Regulations, to consider the comparative merits of the candidates for promotion because there has been a substantial delay on the part of the administration in drawing up the staff reports of one or more of them. However, the fact that the personal file of one candidate is irregular and incomplete is not a sufficient ground for annulling the promotion decisions unless it is established that this might have had a decisive impact on the promotion procedure. In particular, the appointing authority may seek other means of remedying the absence of a staff report. In exceptional circumstances the absence of a staff report may be compensated for by the existence of other information on the official's merits (paragraphs 45 to 48).

See: 86/77 *Ditterich v Commission* [1978] ECR 1855, paras 18 and 19; 7/86 *Vincent v Parliament* [1987] ECR 2473; C-68/91 P *Moritz v Commission* [1992] ECR I-6849, para. 18:

T-25/92 *Vela Palacios v ESC* [1993] ECR II-201, para. 45; T-557/93 *Rasmussen v Commission* [1995] ECR-SC II-603, paras 30 and 31

As the draft report for 1991 to 1993 sent to the applicant in February 1994 was drawn up by an official who lacked the necessary authority and the statement carrying over the report for 1989 to 1991 did not include the description of the duties carried out by the applicant during the report period of 1991 to 1993, DG V did not have the final staff report on the applicant when it drew up the list of its officials put forward for promotion to A 4 (paragraphs 50, 51 and 52).

However, DG V could legitimately take into consideration the analytical assessment, which has not been challenged, contained in the applicant's staff report for 1989 to 1991 and deemed to be reproduced in identical terms in the report as carried over. It appears that, even if the carried-over report had been available to DG V at the appropriate time, it would inevitably have omitted the applicant's name from the list of officials put forward for promotion, because of the gap between the marks awarded to him in his staff report for 1989 to 1991 and those of the officials put forward by DG V. Furthermore, the duties which DG V gave to the applicant did not change significantly from the time that he joined that directorate-general. Finally, while the majority of the officials put forward by DG V for promotion to A 4 were younger than the applicant, it is the assessment of the merits of officials which constitutes the decisive criterion for the purposes of promotion and the appointing authority may take the age of candidates into account only as a subsidiary matter (paragraphs 53 to 59).

See: 293/87 *Vainker v Parliament* [1989] ECR 23, paras 16 and 17

Accordingly, although the final staff report on the applicant was not available to the competent Commission departments during the promotion procedure at issue, this cannot have had a decisive impact on that procedure (paragraph 63).

The second limb of the first plea, alleging that the consideration of the candidates' comparative merits was unlawful in that it was restricted to officials in DG V

A preliminary examination of the applications of officials eligible for promotion, within the directorate-general of the Commission to which each of them is attached, is not capable of preventing a properly formed consideration of their comparative merits, as referred to in Article 45 of the Staff Regulations; on the contrary, it reflects the principle of sound administration (paragraphs 67 and 68).

See: T-76/92 *Tsirimokos v Parliament* [1993] ECR II-1281, para. 16; *Rasmussen v Commission*, cited above, para. 21

The third limb of the first plea, alleging that the method of awarding priority points was unlawful

Since the applicant could not have been among those whose names could be put forward by DG V for promotion to A 4, he has no interest in raising this limb of the plea inasmuch as he himself states that he does not dispute the power of directors-general to draw up lists in order of priority of the officials put forward for promotion within their directorate-general. Furthermore, the method of assessment criticized is compatible with Article 45 of the Staff Regulations (paragraphs 72, 73 and 74).

See: *62/75 De Wind v Commission* [1976] ECR 1167; *T-53/91 Mergen v Commission* [1992] ECR II-2041, para. 36; *Rasmussen v Commission*, cited above, para. 20

The second plea, alleging that Article 26 of the Staff Regulations was infringed

Since the applicant has not disputed, in the course of the proceedings, the inherent validity of the analytical assessment relating to him, this plea, based on the failure to send to him his carried-over staff report for 1989 to 1991 for him to check and comment on, is irrelevant for the purposes of this case (paragraph 78).

The claim for damages

Contrary to the requirements laid down by Article 44(1)(c) of the Rules of Procedure, the applicant has neither indicated the pleas in law on which he intended to rely in support of his claims, in particular the event giving rise to the harm, nor quantified, even approximately, the amount of the non-material harm suffered (paragraphs 84 and 85).

See: *C-322/91 TAO/AFI v Commission* [1992] ECR I-6373, paras 13 and 14; *T-112/94 Moat v Commission* [1995] ECR-SC II-135, para. 38

Moreover, since the applicant was not justified in asserting that his chances of promotion were affected, he cannot claim that he is entitled to compensation for the non-material harm allegedly suffered as a result (paragraph 86).

Costs

The Court orders the Commission to pay the entire costs, since it may have caused the applicant to bring this action in that the draft staff report on him was drawn up by an official who lacked the necessary authority and the entire promotion procedure at issue took place without the final staff report on him being available in the prescribed form (paragraph 89).

See: *Vincent v Parliament*, cited above, para. 28

Operative part:

The application is dismissed.

The Commission is ordered to pay its own costs and those of the applicant.