

Case T-187/98

Pascual Juan Cubero Vermurie
v
Commission of the European Communities

(Officials – Promotions – Mobility – Admissibility)

Full text in French II - 885

Application for: Annulment of the decision of 6 April 1998 not to promote the applicant to Grade A 5 during the 1998 promotions procedure and compensation for material and non-material damage caused to the him as a result of his non-promotion.

Held: The application is dismissed. The parties are to bear their own costs.

Summary

*1. Officials – Actions – Act adversely affecting an official – Definition – Official not included on list drawn up by Promotion Committee – Promotion outside career bracket – Preparatory act – Exclusion – Act open to challenge in an action for annulment of the promotion decision
(Staff Regulations, Art. 90(2))*

*2. Officials – Actions – Prior administrative complaint – Requirement that subject-matter and grounds be the same – Pleas not appearing in the complaint, but closely linked to it – Admissible – Plea not raised, even implicitly, in the pre-litigation procedure – Inadmissible
(Staff Regulations, Arts 90 and 91)*

*3. Officials – Promotion – Consideration of the comparative merits – Discretion of the administration – Limits
(Staff Regulations, Art. 45)*

*4. Officials – Promotion – Consideration of the comparative merits – Application of rules on mobility contained in the Commission's promotions guide – Conditions
(Staff Regulations, Art. 45)*

1. Although the fact that an official's name does not appear on the list drawn up by the Promotion Committee may have some influence on the promotion decision, that is not a final decision of the administration. Furthermore, as regards promotions outside the career bracket, the list of officials most deserving of promotion is also in the nature of a preparatory act which does not produce any definitive effect and is therefore not an act adversely affecting an official within the meaning of Article 90(2) of the Staff Regulations.

It follows that the regularity of the list drawn up by the appointing authority of the officials most deserving of promotion, like other preparatory acts in the course of the administrative procedure, may only be called into question indirectly in an action for annulment of the final decision concluding the promotion procedure.

(see paras 30-31)

See: T-82/89 *Marcato v Commission* [1990] ECR II-735, para. 43; Case T-506/93 *Moat v Commission* [1995] ECR-SC I-A-43 and II-147, para. 24

2. The rule that there should be harmony between a complaint, within the meaning of Article 90(2) of the Staff Regulations, and the action which follows requires that, for a plea before the Community judicature to be admissible, it must have already been raised in the pre-litigation procedure, enabling the appointing authority to know in sufficient detail the criticisms made by the person concerned of the contested decision. Whilst claims for relief before the Community judicature may contain only the same heads of claim, based on similar matters, as those raised in the complaint, those heads of claim may nevertheless be further developed before the Community judicature by the presentation of pleas in law and arguments which, whilst not necessarily appearing in the complaint, are closely linked to it. Moreover, since the pre-litigation procedure is informal in character and since those concerned may act without the assistance of a lawyer at that stage, the administration must not interpret the complaints restrictively but should, on the contrary, consider them with an open mind.

That is not the case where a complaint not only does not mention the plea in law raised before the Community judicature but does not contain any information from which the defendant institution could have inferred, even by endeavouring to interpret the complaint with an open mind, that the applicant intended to rely on that plea.

(see paras 35-37)

See: T-4/96 *S v Court of Justice* [1997] ECR II-1125, paras 98 and 99

3. The discretion allowed to the administration to evaluate the merits to be taken into consideration in connection with a promotion procedure pursuant to Article 45 of the Staff Regulations is circumscribed by the need to undertake a comparative consideration of candidatures with care and impartiality, in the interests of the service and in accordance with the principle of equal treatment. In practice, consideration of the comparative merits of candidatures must be undertaken on a basis of equality, using comparable sources of information.

(see para. 58)

See: T-76/92 *Tsirimokos v Parliament* [1993] ECR II-1281, paras 20 and 21; T-157/98 *Oliveira v Parliament* [1999] ECR-SC I-A-163 and II-851, para. 35

4. The objective pursued by the rules on mobility, contained in the Commission's promotions guide, is to ensure that mobility does not impair the career progress of those officials subject thereto. The awarding of priority points based on the number of officials eligible for promotion in the directorate general concerned could penalise an official who has been reassigned to a directorate general containing a different number of eligible officials. Accordingly, in order not to render purposeless the consideration of the comparative merits of all the eligible officials put forward by the Promotion Committee to the appointing authority, the latter cannot restrict itself to a strict application of the abovementioned rules on mobility. It is thus for the Community institution to examine the circumstances of the official subject to such

mobility in order to ensure that he or she has not been penalised. Such examination proves even more necessary where the official concerned has not received any priority points whilst in his home directorate general and that, pursuant to Rule (a) on mobility which provides that, where an official is put forward for mobility without having any priority points, such proposal for mobility is binding only on the home directorate general, where there are no acquired rights, the appointing authority is not required to award him any.

(see paras 67-69)