

interpretation of that notice and admit to the oral test candidates who have not attained in the written tests the pass mark required by the notice of competition, since to do so would be to alter substantively the conditions of the competition.

2. In view of the independence of Selection Boards in competitions, the administration has no authority to amend or annul their decisions. If it considers that a Selection Board has illegally prevented certain candidates from sitting a test, its role is to take formal note of that situation by means of a reasoned decision and recommend the whole procedure by publishing a new notice of competition. Under no circumstances has it the power to respond

to a complaint by admitting the complainant to that test.

3. Ambiguity in a notice of competition concerning the marks required in the written tests for admission to the oral test cannot invalidate the decision of the Selection Board concerning such admission, reached on the basis of a correct interpretation of that notice, where there is no evidence to suggest that, in the absence of such ambiguity, the candidates would have performed better in the written tests. A procedural irregularity cannot invalidate an act unless it is established that, without it, the result of the decision might have been different.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
3 March 1993 *

In Case T-44/92,

Claudia Delloye, Stavros Karafillakis, Antonio Loddo, Carla Rinaldin and Mariangela Tavola, respectively a member of the temporary staff and officials of the Commission of the European Communities, residing in Belgium, represented by G. Vandersanden of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62 Avenue Guillaume,

applicants,

v

* Language of the case: French.

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision, communicated to the applicants on 9 July 1991, by which the Selection Board in Open Competition EUR/B/21 refused to admit them to the oral test in that competition,

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: H. Jung,

having regard to the written procedure and further to the hearing on 20 January 1993,

gives the following

Judgment

Facts and procedure

1 The applicants, respectively a member of the temporary staff and officials of the Commission, submitted applications in Open Competition EUR/B/21 based on tests to constitute a reserve list for the recruitment of administrative assistants. They passed the eliminatory tests and were admitted to the single essay paper (test (d)) on which admission to the oral test depended.

- 2 The Commission informed the applicants by letter of 9 August 1991 that they had not obtained a total of 24 marks in test (d) of the competition and that the Selection Board had consequently been unable to admit them to the oral test. At their request the applicants were informed of the marks awarded to them in test (d). Mrs Delloye had obtained 21.75 marks, Mr Karafillakis 23.50 marks, Mr Loddo 21.50 marks, Mrs Rinaldin 22.50 marks and Mr Tavola 23.25 marks.
- 3 Notice of Open Competition EUR/B/21 explained how the written tests were to be marked, the conditions for admission to the oral test and the conditions for inclusion on the list of suitable candidates as follows:

'V. NATURE OF WRITTEN TESTS — TIME ALLOWED — MARKING

...

3. Marking

Eliminatory tests

— (a) out of 20 (pass mark: 10)

— (b) out of 10 (pass mark: 5)

— (c) out of 10 (pass mark: 5)

Other written test

— (d) out of 40 (pass mark: 20)

Tests (a), (b) and (c) will be marked first. Test (d) will be marked only in the case of candidates who obtain pass marks in tests (a), (b) and (c).

VI. ADMISSION TO ORAL TEST — NATURE OF TEST — MARKING

1. Admission to oral test

Candidates who obtain at least 24 marks in written test (d) will be admitted to the oral test.

Each candidate will be informed by letter whether or not he/she has been admitted to the oral test.

...

3. Marking

The oral test will be marked out of 60 (pass mark: 30).

VII. LIST OF SUITABLE CANDIDATES

Candidates who obtain an aggregate of at least 60 marks for the written test (d) and the oral test, with a pass mark in each test, will be placed on the list of suitable candidates.'

- 4 On 31 October 1991 the applicants submitted a complaint against the decision of 9 August 1991. This complaint did not elicit a clear response from the Commission. It is apparent from the documents on the file that on 9 April 1992 the Director-General for Personnel and Administration, Mr De Koster, informed two of the applicants, Mr Karafillakis and Mrs Tavola, that, 'given the ambiguities in the notice of competition at issue (he had) asked the Selection Board to reconsider (their) position in a positive spirit'. By letters of 21 May 1992 Mr Koster informed the applicants that the Selection Board stood by its decision not to admit them to the oral test in the competition. He added that his staff, in collaboration with the Legal Service, were considering the implications of this stance.
- 5 Consequently, by application lodged at the Court Registry on 27 May 1992, the applicants sought the annulment of the decision of 9 August 1991. The written procedure followed the normal course. 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 20 January 1993.

Forms of order sought

- 6 The applicants claim that the Court should:
- annul the Commission's decision of 9 August 1991 denying the applicants the right to take part in the oral test in Competition EUR/B/21;
 - order the Commission to pay all the costs.

The defendant contends that the Court should:

- dismiss the application as unfounded;

— make an order as to costs in accordance with the law.

Substance

- 7 The applicants put forward two pleas in law, the first alleging that the decision contains a manifest error of reasoning and the second alleging breach of the duty to have regard to the interests of officials.

The plea alleging that the decision contains a manifest error of reasoning

Arguments of the parties

- 8 In their first plea, the applicants argue that, in refusing to admit them to the oral test on the grounds that they had not obtained a total of 24 marks in the essay paper (d) as required by paragraph VI.1 of the Notice of Competition EUR/B/21, the Selection Board was relying on a misinterpretation of that notice which contradicted its wording.
- 9 The applicants rely in particular on the fact that paragraph V.3 of the notice of competition concerning the marking of the written tests expressly stated that the pass mark in test (d) was 20 out of 40. The applicants argue that this provision should have been read in conjunction with the first subparagraph of paragraph VII of the notice of competition, according to which ‘candidates who obtain an aggregate of at least 60 marks for the written test (d) and the oral test, with a pass mark in each test, will be placed on the list of suitable candidates’. They infer from this that, given the structuring of the conditions for admission to the oral test and for inclusion on the list of suitable candidates, which constituted a subsequent stage in the selection procedure, it followed logically that it was sufficient to achieve the ‘pass mark’ of 20 in test (d) to be admitted to the oral test.
- 10 Accordingly, the applicants argue, to require a mark of at least 24 out of 40 in the essay paper (d) for admission to the oral test represented a ‘material error’ in

paragraph VI.1 of the notice of competition, which could not be relied upon against them since it contradicted the provisions of paragraphs V and VII. This material error was hardly surprising, they alleged, as the notice of competition at issue contained other blatant inaccuracies. The applicants point out in particular that the description of one of the eliminatory tests intended, according to paragraph V.1(a) of the notice of competition, 'à évaluer les connaissances spécifiques dans le domaine juridique' (to assess the candidate's specialized knowledge of law) did not tally with the nature of the duties in the fields of accounting, public finance, insurance, auditing and statistics described in paragraph I.1 of the notice of competition. Moreover, paragraph VIII of the notice of competition referred in error to a reserve of 'administrateurs' (administrators) for 'la carrière 5/4 de la catégorie B' (the career bracket covering grades 5 and 4 of category B).

- 11 In support of their argument, the applicants also point out that the notice of competition should have been interpreted literally as it was the only firm point of reference for the candidates, particularly since it was an open competition which external candidates were also eligible to enter. Accordingly, the defendant's reported practice of admitting to the oral test only those candidates who had obtained at least 60% of the marks in the written tests could not be relied upon against the applicants. At the hearing, moreover, the applicants disputed the contention that this was the usual practice.
- 12 For its part, the defendant maintains that the contested decision is based on the correct application of the conditions for admission to the oral test set out in the notice of competition at issue. It argues that, in line with the usual practice in open competitions based on tests and organized by the Commission, paragraph VI.1 of the notice of competition, which is the only relevant paragraph in this connection, set out clearly and explicitly that a total of 24 marks were required in the essay paper (d) for admission to the oral test.

Findings of the Court

- 13 As to the first plea alleging a manifest error of reasoning, the Court finds that, in refusing to admit the applicants to the oral test on the ground that they had not

obtained a total of 24 marks in the essay paper (d), the Selection Board correctly applied the conditions for admission to that test, which are set out clearly and precisely in paragraph VI.1 of the notice of competition.

- 14 Paragraph VI.1 of that notice specifically covered the conditions for admission to that test in that it expressly required, under the heading 'Admission to oral test', a minimum of 24 marks out of 40 in test (d) for admission to the oral. It could not therefore be rendered ineffective by the reference in paragraph V.3 of the notice of competition to a 'pass mark' of 20 for test (d). The latter provision, under the heading 'Marking' (of the written tests), preceded logically the heading concerning the conditions for admission to the oral test. It was therefore in no way intended to set out the conditions governing admission to the oral test.
- 15 This analysis does not conflict with the interpretation of the above provisions in conjunction with paragraph VII of the notice of competition. Under that provision the Selection Board is to place on the list of suitable candidates those 'who obtain an aggregate of at least 60 marks for the written test (d) and the oral test, with a pass mark in each test'. Paragraph VII of the notice of competition, governing the final stage of the selection procedure, was intended to apply exclusively to candidates who had already been admitted to all the tests in the competition, which means that they must already have satisfied the criterion for admission to the oral test. As the competition was structured, therefore, paragraph VII could not logically have referred to the conditions for admission to the oral test which were specifically set out in paragraph VI.1 of the notice of competition.

As the notice of competition only made provision for one written test, (d), the requirement of a 'pass mark' of 20 in paragraph V.3 was in practice wholly immaterial as far as the marks obtained in test (d) were concerned. This, in the event mistaken, reference to a 'pass mark' of 20 could be explained, according to the Commission, by the fact that the notice of competition at issue was based on the system used in competitions in which several written tests determine admission to

the oral test. This was demonstrated, in particular, by the use of the plural in the phrase 'les épreuves écrites (d)' in paragraph VII. In those circumstances, the Court finds that the words mistakenly included in paragraph V.3 should be disregarded in order to arrive at a correct interpretation of the notice. Consequently the reference to a 'pass mark' in paragraph VII related in practice only to the marks obtained in the oral test.

- 16 It follows that the first plea in law is unfounded.

The plea alleging breach of the duty to have regard to the interests of officials

Arguments of the parties

- 17 In their second plea the applicants point out that the duty to have regard to the interests of officials deriving from Article 24 of the Staff Regulations implies that when a public authority takes a decision concerning the position of an official, it should take into consideration not only the interests of the service but also those of the official concerned (judgment of the Court of First Instance in Case T-133/89 *Burban v Parliament* [1990] ECR II-245, paragraph 27).
- 18 The applicants consider that in this case the refusal to admit them to the oral test represented a breach of the duty to have regard to the interests of officials in that it did not take account of their good faith. They point out that they were entitled to interpret the wording of the notice of competition to mean that achievement of the 'pass mark' of 20 in test (d) automatically entailed admission to the oral test. They argue that the wording of the notice of competition could, at the very least, give rise to serious confusion, as the defendant itself had admitted in its aforementioned note of 9 April 1992 to Mr Karafillakis and Mrs Tavola.
- 19 The applicants concede that the Selection Board in the competition was bound by the provisions of the notice of competition in their entirety, including paragraph VI.1 of that notice which required a total of 24 marks in the essay paper (d) for admission to the oral test. They maintain that it was therefore incumbent upon the Commission, which was responsible for drafting the notice of competition at issue,

to give the applicants the benefit of the doubt and admit them to the oral test, by rectifying that ambiguous condition following their complaint.

- 20 For its part, the defendant takes the view that there was no breach of the duty to have regard to the interests of officials in this case. It argues that, in view of the independence of Selection Boards in competitions, it was bound, in this case, by the decision of the Selection Board not to admit the applicants to the oral test. It points out further that it is only where it finds that every stage of the competition has been invalidated by the allegedly illegal decision of the Selection Board that the appointing authority is under a duty to take formal note of that situation by means of a reasoned decision. It is then obliged to repeat the whole competition procedure after publishing a new notice of competition and, if necessary, appointing a new Selection Board.

Findings of the Court

- 21 As to the second plea, the Court finds in the first place that, even on the assumption that there were ambiguities in the notice of competition, neither the Selection Board in the competition nor the Commission had the authority to admit the applicants to the oral test following their complaint.
- 22 So far as concerns the Selection Board, suffice it to note that, while the appointing authority has a wide discretion when deciding on the conditions for a competition, the Selection Board is bound by the wording of the notice of competition as published (see the judgments of the Court in Case 67/81 *Ruske v Commission* [1982] ECR 661, paragraph 9, and in Case 289/81 *Mavridis v Parliament* [1983] ECR 1731, paragraph 21).

In this case, however, even if the ambiguity alleged by the applicants is conceded, the fact remains that it did not prevent the notice of competition from being interpreted correctly. Accordingly, the Selection Board could not have admitted the applicants to the oral test without amending the conditions set out in the notice of competition. If, for the benefit of candidates who had been awarded a mark of 20 or more in the essay paper (d), the Selection Board had waived the more restrictive

condition set out in paragraph VI.1 of the notice of competition requiring a total of at least 24 marks, it would have substantially altered the conditions of the competition.

- 23 Nor, the Court points out, did the Commission have any authority to admit the applicants to the oral test following their complaint. As the Court has consistently held, on the basis of the principle that Selection Boards in competitions are independent, the administration has no power to amend or revoke their decisions (see, in particular, the judgments of the Court of Justice in Case 44/71 *Marcato v Commission* [1972] ECR 427, paragraph 5, and in Case 321/85 *Schwiering v Court of Auditors* [1986] ECR 3199, paragraph 11). If the Commission had considered that the decision of the Selection Board refusing to admit the applicants to the oral test was invalidated by an irregularity in that they were allegedly misled by the supposedly ambiguous wording of the notice of competition, the defendant institution's only option would have been to take formal note of that situation by means of a reasoned decision and recommence the whole competition procedure by publishing a new notice of competition free from ambiguity (see the judgment of the Court in *Schwiering v Court of Auditors*, cited above, paragraph 13). In this case, at no time during the administrative or judicial procedure did the applicants request the annulment of the notice of competition itself. They merely seek the annulment of the decision excluding them from the oral test in the competition.
- 24 The Court points out in the second place that, even if the applicants had genuinely been misled by the allegedly ambiguous wording of the notice of competition, it is a matter of principle that a procedural irregularity can invalidate an act only if it is established that in the absence of that irregularity the decision might have been substantively different (see, for example, the judgments of the Court of Justice in Case 150/84 *Bernardi v Parliament* [1986] ECR 1375, paragraph 28, and in Joined Cases 181/86 to 184/86 *Del Plato v Commission* [1987] ECR 4991, paragraph 36).

It is clear that, in this case, the ambiguity in the notice of competition alleged by the applicants was not such as to affect the quality of the written paper (d) or, consequently, their results and their exclusion from the oral test. To argue otherwise, it would be necessary to establish that the applicants had pitched their performance

so as to achieve a mark of just over 20 and thus meet the condition which, in their view, governed admission to the oral test. There is no evidence to suggest that the applicants acted in this way and they themselves do not claim to have done so. Accordingly, the ambiguity in the notice of competition relied upon by the applicants in support of their claim for annulment of the decision of the Selection Board refusing to admit them to the oral test had no effect on that decision and cannot therefore invalidate it.

- 25 It follows from all the foregoing considerations that the second plea is unfounded. This application must therefore be dismissed.

Costs

- 26 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 in proceedings between the Communities and their servants the institutions are to bear their own costs.
- 27 Moreover, under the second subparagraph of Article 87(3) of those Rules, the Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.
- 28 The Court finds that the defendant has admitted that the notice of competition contained a number of mistakes, in particular the reference to a 'pass mark' of 20 for the single written test (d). Moreover, in his note of 9 April 1992 to two of the applicants, the Director-General for Personnel and Administration expressly acknowledged the 'ambiguities in the notice of competition' and informed the applicants that he had 'asked the Selection Board to reconsider (their) position in a positive spirit'.

29 The defendant's attitude thus led the applicants to believe that their claim to be admitted to the oral test on the basis of the alleged ambiguities in the notice of competition was well founded and to institute legal proceedings. In the circumstances, it is equitable to order the Commission to bear the applicants' costs, in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application.
2. Orders the Commission to bear the costs.

Bellamy

Saggio

Briët

Delivered in open court in Luxembourg on 3 March 1993.

H. Jung

C. W. Bellamy

Registrar

President