

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
9 April 2003

Case T-134/02

Miguel Tejada Fernández
v
Commission of the European Communities

(Officials – Promotion – Consideration of comparative merits –
Action for annulment)

Full text in French II - 609

Application for: annulment of the decision of the Commission not to promote the applicant to Grade B 2 in the 2001 promotions procedure.

Held: The decision of the Commission not to promote the applicant to Grade B 2 in the 2001 promotions procedure is annulled. The Commission is ordered to pay the costs.

Summary

*1. Officials – Actions – Act adversely affecting the applicant – Decision rejecting a complaint – Pure and simple rejection – Confirmation of act adversely affecting the applicant – Action inadmissible
(Staff Regulations, Art. 91(1))*

*2. Officials – Actions – Act adversely affecting an official – Refusal to propose an official for promotion – Preparatory measure – Inadmissible
(Staff Regulations, Arts 90(2) and 91)*

*3. Officials – Promotion – Candidates suitable for promotion – Right to promotion – None
(Staff Regulations, Art. 45(1))*

*4. Officials – Promotion – Discretion of the administration – Judicial review – Limits
(Staff Regulations, Art. 45)*

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

*6. Officials – Promotion – Criteria – Merits – Taking into consideration of seniority and age – Subsidiary nature
(Staff Regulations, Art. 45)*

1. Every decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged. It is only when this decision upholds all or part of the complaint of the person concerned that it will, in appropriate circumstances, constitute by itself a decision against which an action can be brought.

(see para. 16)

See: 371/87 *Progoulis v Commission* [1988] ECR 3081, para. 17; T-196/95 *H v Commission* [1997] ECR-SC I-A-133 and II-403, para. 40

2. A refusal to propose an official for promotion is, as a rule, merely a preparatory measure and as such may not be the subject of an action for annulment. However, such a refusal may nevertheless be disputed in the course of an appeal against the final decision taken at the end of the promotions procedure.

(see para. 18)

See: 3/66 *Alfieri v Parliament* [1966] ECR 437, 446; 78/87 and 220/87 *Santarelli v Commission* [1988] ECR 2699

3. The Staff Regulations do not confer a right to promotion even for officials who meet all the conditions for promotion.

(see para. 40)

See: T-3/92 *Latham v Commission* [1994] ECR-SC I-A-23 and II-83, para. 50; T-262/94 *Baiwir v Commission* [1996] ECR-SC I-A-257 and II-739, para. 67

4. The appointing authority has a wide discretion in assessing the merits to be taken into consideration in a decision on promotion under Article 45 of the Staff Regulations, and review by the Community judicature is confined to determining whether, having regard to the various considerations which have influenced the administration in making its assessment, it has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Court cannot therefore substitute its assessment of the qualifications and merits of the candidates for that of the appointing authority.

(see paras 41, 58)

See: *Baiwir v Commission*, cited above, para. 66; T-221/96 *Manzo-Tafaro v Commission* [1998] ECR-SC I-A-115 and II-307, para. 16; T-187/98 *Cubero Vermurie v Commission* [2000] ECR-SC I-A-195 and II-885, para. 58

5. 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. 41)

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

6. In a promotion procedure, the appointing authority is required to make its choice on the basis of a consideration of the comparative merits of the candidates eligible for promotion and of the reports on them. To that end, it has power under the Staff Regulations to undertake such consideration according to the procedure or method which it considers to be the most appropriate. The assessment of the merits of the officials eligible for promotion is therefore the decisive factor for all promotions, while the appointing authority may take candidates' age and seniority in grade or service into consideration only as a secondary factor. Only where the merits of the officials eligible for promotion are equal may those additional criteria come into play and even constitute a decisive factor in that authority's choice.

(see para 42)

See: *62/75 de Wind v Commission* [1976] ECR 1167, para 17; *T-557/93 Rasmussen v Commission* [1995] ECR-SC I-A-195 and II-603, para 20; *T-280/94 Lopes v Court of Justice* [1996] ECR-SC I-A-77 and II-239, para 138; *Manzo-Tafaro v Commission*, cited above, para 18; *Cubero Vermurie v Commission*, cited above, para 59; *T-163/01 Pérez Escanilla v Commission* [2002] ECR-SC I-A-131 and II-717, para 29