

# CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

## COMMISSION DE RECOURS APPEALS BOARD

**Appeal No. 51/1979 (Christine MEUNIER v. Secretary General)**

The Appeals Board, sitting in private in Strasbourg, on 30 April 1980, under the chairmanship of DELVAUX and in the presence of:

Mr H KITSCHENBERG, Deputy Chairman, and  
Mr S CANTONO DI CEVA

assisted by:

Mr A. PLATE, Secretary, and  
Miss D COIN, Substitute Secretary,

Having deliberated.

### PROCEDURE

The appellant, represented by Maître NADAL, Barrister at Strasbourg, and assisted by Professor G. LYON-CAEN of the Paris Law Faculty, lodged her appeal on 26 November 1979. The appeal was registered the same day under file No 51/1979.

On 13 December 1979, she lodged further notice of appeal and a memorial. She pointed out on that occasion that post 51-26, the subject of her appeal, was the subject of two further notices of competitive examination.

On 17 December 1979, the appellant wrote to the Chairman of the Appeals Board asking him to invite the Secretary General to await the decision of the Appeals Board before going ahead with the recruitment procedure, or, failing such an undertaking by the Secretary General, to order measures to maintain the status quo.

By letter of 9 January 1980, the Secretary General informed the appellant that he would delay filling the vacancy in question until 30 April 1980.

The Secretary General of the Council of Europe, represented by Mr HARREMOES, Director of Legal Affairs, presented his observations on 12 February 1980. The appellant replied to the Secretary General's memorandum on 31 March 1980. The same day, she wrote to the Chairman of the Appeals Board, again asking him to take measures to maintain the status quo.

On 8 April 1980, she sent the Chairman a list of witnesses whom she asked the Board to hear, and the points on which she wanted their evidence.

The public hearing was held on 28 April 1980 at the Council of Europe in the presence of the appellant, assisted by Maître NADAL, and of Mr HARREMOES, representing the Secretary General, assisted by Mrs C. APPRILL. The Board heard the evidence of Mr Wilson, principal administrator in the Establishment Division. In addition, it had also obtained the minutes of the meetings of the Recruitment Panel on 26 and 30 July 1979. In view of the confidential nature of that document, the remainder of the hearing was held in camera.

Having deliberated in private, the Board delivered the present decision.

## **THE FACTS**

The facts submitted by the parties, which are undisputed, may be summarised as follows:

Miss Christine Meunier, a French national, who was born at Villeurbanne on 4 March 1946, was first appointed to the Council of Europe Secretariat in 1969. She is at present serving in grade B4 in the Directorate of Economic and Social Affairs. On 17 May 1979, the appellant submitted her application for post 51-26 at grade A2/A3, which was vacant in the same Directorate. She was authorised to sit the competitive examination by a letter of 8 June 1979 signed by Mr Wilson on behalf of the Head of the Establishment Division. She sat the written tests on 27 June 1979.

She was informed orally on 22 August 1979 that the competitive examination was cancelled, but that she had nevertheless obtained a good result.

This information was confirmed in writing on 18 September 1979. The appellant, having asked whether that letter constituted an individual decision within the meaning of Article 32, was told that it did not.

On 11 October 1979, the appellant asked the Secretary General to change his decision. A letter from the Deputy Secretary General informed her on 14 November 1979 that the cancellation of the competitive examination did not constitute an individual decision and that therefore there was no reason to change the decision.

It is against this refusal that the appellant lodged her appeal.

## **SUBMISSIONS OF THE PARTIES**

A. The **appellant's submissions** may be summarised as follows:

### **As to the jurisdiction of the Appeals Board and admissibility**

On the question of whether the "cancellation" of the competitive examination constitutes an individual decision within the meaning of Article 32 of the Staff Regulations, the appellant refers firstly to French administrative law which distinguishes between decisions concerning the organisation of the civil service and an individual decision concerning the

career of a civil servant (see Vedel, *Droit administratif*, 184). Now, once the appellant had sat the competitive examination, any decision, no matter how it is qualified, is an individual decision so far as the appellant is concerned. The appellant refers to Council of Europe regulations. From Article 2 of the Statute of the Appeals Board which lays down that an individual decision is one “concerning which the official alleges non-observance of the conditions of employment” and from Article 32 of the Staff Regulations according to which an official may allege “non-observance of the Staff Regulations, the administrative rules or the conditions of employment...”, the appellant infers that an individual decision is one which adversely affects an official’s right.

Now her right to promotion is an integral part of her rights, and the withdrawal of the notice announcing the competitive examination deprived her of that right.

The appellant points out furthermore that she alone of the candidates had passed the written tests.

It is therefore clearly an individual decision to her detriment that the appellant is submitting to the Appeals Board.

### **As to the merits**

The question is whether the decision to cancel the competitive examination is valid.

If, as the appellant was given to understand, the notice of competitive examination gave rise to misunderstandings, it is wrong to make the appellant suffer the consequences of the administration’s mistakes. It should then be considered whether, once the competitive examination had been regularly announced and was in progress, the Secretary General was entitled to refuse to make an appointment. The answer is yes if no candidate satisfies the conditions or meets the required standard in the tests. But this is not the case.

The appellant was authorised to compete, which means therefore that she satisfied the conditions. And she was informed that she had reached the necessary standard in the tests, even though it was not necessary to tell her that her marks were the best. She was even promised a sort of second-chance examination. It is therefore a right in the process of being acquired that was withdrawn.

Now the withdrawal of an act in administrative law is possible in only two cases: if it does not create any rights or if it is illegal.

In this instance, the Recruitment Panel, by recommending the withdrawal of the competition, exceeded its powers as defined in the regulations.

The real reason for the withdrawal may be inferred by comparing the notice of competitive examination of 5 April and that of 29 September: in fact, a Spanish candidate was wanted.

On the question of whether it is possible to restrict a competition to one nationality: Article 10 of the Staff Regulations lays down that “no post may be reserved for nationals of any specific member state”.

It is, however, accepted in international law that in order to ensure a fair geographical distribution, the nationality of candidates may be taken into consideration and that, in cases of equal merit, preference be given to a candidate of a particular nationality. Furthermore, Article 6 of the Regulations on Appointments provides that “in the case of beginning of career posts in category A the Secretary General may hold a competitive examination confined to one or more of the member states which are under-represented in the Secretariat”. But even so such a restriction must appear on the notice of competitive examination. Now this was not done in the notice of 5 April, but was in the notice of 29 September.

The nationality argument cannot therefore validly be used against the appellant after the tests had already taken place.

Now, although this reason was not stated explicitly, on the one hand it may be deduced from the second notice of competition, and on the other, the Head of the Establishment Division expressly pointed it out to the appellant.

On the argument that the appellant did not have the highest ability, efficiency and integrity, the appellant refers to the witnesses.

**B** The **Secretary General’s submission** may be summarised as follows:

**As to the jurisdiction of the Appeals Board and to admissibility**

The Secretary General argues the inadmissibility of the appeal on the grounds that the decision cancelling the competitive examination is not an individual decision. A notice announcing or cancelling a competitive examination is not an individual decision. The Secretary General refers to the *Traité de contentieux administratif* by J.-M. Aubry and R. Drago, which classifies, among acts of a general nature, a ministerial decision cancelling a competitive examination. It is stated that the decision referred to in the judgment in question was made after the candidates had submitted their applications. The cancellation of a competitive examination may be freely decided by the administration since the announcement of a competitive examination does not establish any right.

In the present case, it is a question of rescinding, and since an individual decision cannot be rescinded, we are not talking about an individual decision.

On the argument based on Article 2 of the Statute of the Appeals Board and on Article 32 of the Staff Regulations, the Secretary General draws the Appeals Board’s attention to its decision No 5/1971 (Pugsley) which lays down three conditions for an appeal to be admissible:

- The decision shall be of an individual nature;
- It shall be applicable to the staff members;
- The appellant shall allege the non-observance of the Staff Regulations, the administrative rules or the conditions of employment.

If the third condition was in itself sufficient to determine the nature of a decision the first condition would be unnecessary.

In reality, the two notions are not identical. Furthermore, the Regulations on Appointments confer no rights on officials and as far as the “right to promotion” is concerned, it cannot be argued that all officials are entitled to that right.

As to the right to compete, it exists neither in the civil service, nor in the texts, nor in law.

Lastly, the Secretary General considers the appellant’s submissions invalid since assessment of the desirability of completing a procedure is the exclusive responsibility of the administrative authority. He adds that the Board is not empowered to issue instructions to the administration.

### **As to the merits**

On the argument based on an error in law:

The announcement of a competitive examination does not establish a right and can therefore be cancelled. The Secretary General also points out that such a decision is within his discretionary powers.

The Secretary General’s power to interrupt a competitive examination follows from his power to initiate this procedure.

On the argument of discrimination based on nationality:

The Secretary General alleges the need to ensure a fair geographical distribution such as to enable him at the close of the competitive examination to give preference to a candidate of Spanish nationality.

The Secretary General did not restrict the competitive examination to one nationality precisely in order to throw it widely open.

The reference in the notice of competitive examination that the recruitment of a Spaniard was envisaged implied that, in the case of equal ability, preference would be given to a Spanish national.

The appellant brings no evidence to support her allegation which is, moreover, contradicted by the fact that a competitive examination was also opened to Italian nationals by the notice of 1 October 1979.

Lastly, the Secretary General took his decision on the advice of the Recruitment Panel and because he considered that the competitive examination would not enable him effectively to recruit an official “of the highest ability, efficiency and integrity”.

### **CONCLUSIONS OF THE PARTIES**

The appellant requests the Appeals Board:

- To order that the recruitment procedure follow its course and that she be admitted to the oral examination.

The Secretary General requests the Appeals Board:

- Principally to declare the appeal inadmissible;
- Alternately to declare it ill-founded and to reject it.

## **THE LAW**

### **Jurisdiction**

Under Article 32 of the Staff Regulations, a staff member may apply to the Secretary General, on the grounds of non-observance of the Staff Regulations, the administrative rules or the conditions of employment, for the withdrawal or amendment of an individual decision applicable to him;

It is true that the contested decision is not directed expressly at the appellant; nevertheless, since she sat in the first tests in the competitive examination in question, the decision concerns her directly and therefore constitutes an individual decision applicable to her;

Moreover, with regard to the decision the appellant alleges non-observance by the Secretary General of various provisions of the Staff Regulations, administrative rules and conditions of employment;

It follows that the Board has jurisdiction to hear the appeal.

### **Admissibility**

Since the appellant has observed all the formalities laid down in Article 3 of the Statute of the Appeals Board, her appeal is likewise admissible.

### **As to the merits**

The appellant points out that the decision complained of infringed the procedures for the appointment of officials, seeing that such a decision is not provided for in the Regulations or, Appointments;

The Secretary General, for his part, submits that he was free to cancel the competitive examination, since the announcement of a competitive examination is not an administrative act which creates right's and since no text obliges him to give reasons for such a decision which, by its nature, is discretionary;

The Board considers that the Secretary General has the discretionary power to cancel a competitive examination, but that that discretionary power is not absolute, since the cancellation of the decision was calculated to injure the legitimate interests of the appellant

who, having taken the written tests, had an interest to the completion of the examination procedure;

It has been widely accepted for a long time that the discretionary nature of an administrative act does not exempt it from judicial control, especially when legitimate interests are at stake;

In cancelling the competitive examination, the Secretary General was therefore under an obligation to give reasons for his decision so that the appellant might, if need be, contest the grounds on which it was based;

Those grounds were not revealed. In fact, neither the statement by the representative of the Head of the Establishment Division to the appellant on 22 August 1979, nor the contents of the letter from the Head of the Establishment Division himself dated 18 September following can be considered as presenting sufficiently valid grounds. The minutes of the Recruitment Panel's meetings on 26 and 30 July 1979, which were presented confidentially during the hearing, constitute merely advice to the Secretary General whilst the real grounds for the latter's action are still unknown;

In these circumstances, the cancellation of the competitive examination decided by the Secretary General constitutes an abuse of power. It must therefore be annulled. The Board, therefore, allows the appeal;

The Board considers that, in accordance with Article 6, paragraph 4 of its Statute, there are grounds for ordering part of the costs incurred by the appellant to be reimbursed.

Now, therefore, the Appeals Board:

1. Declares that it has jurisdiction to hear the appeal;
2. Declares the appeal admissible;
3. Allows the appeal and, consequently, annuls the Secretary General's decision of 18 September 1979;
4. Fixes at 15,000 FF the compensation provided for in Article 6, paragraph 2 of its Statute;
5. Decides that the expenses incurred and duly justified by the appellant shall be reimbursed by the Council of Europe up to an amount not exceeding 5,000 French francs.

Done in French at Strasbourg, on 30 April 1980.

The Chairman of the  
Appeals Board

H. DELVAUX

The Secretary to the  
Appeals Board

A. PLATE