

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

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 132/1986 (Danielle COIN v. Secretary General)

The Appeals Board, consisting of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,
Mr Raul VENTURA,
Sir Donald TEBBIT, Members

assisted by:

Mr Michele de SALVIA, Secretary and
Ms Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged her appeal on 7 August 1986. It was entered in the Appeals Board's register on the same day under N° 132/1986.
2. On 8 August 1986, the appeal was forwarded to the Secretary General of the Council of Europe.
3. On 29 August 1986, the Chairman of the Board invited the Secretary General to submit observations by 13 October 1986.
4. His observations were forwarded to the appellant on 15 October 1986 with a request that she reply by 28 November 1986.
5. On 27 November 1986, the appellant submitted her reply.
6. In a letter dated 29 January 1987, the hearing was fixed for 4 pm on 16 February 1987.
7. The public hearing took place in the presence of Ms D. Coin, represented by Mr P. Marchessou, Barrister practising in Strasbourg, and Mr E. Harremoes, Director of Legal Affairs, representing the Secretary General, assisted by Mr G. Buquicchio, Head of the Central Section of the Directorate of Legal Affairs, Mr R. Brillat, Administrative Officer in the Directorate of Legal Affairs, and Ms G. Tubach-Ortiz, Principal Administrative Officer in Establishment Division.

THE FACTS

The facts as set out by the parties may be summarised as follows.

8. Ms Danielle COIN took up her appointment in the Council of Europe on 1 January 1974. She at present holds a B5 post in the Committee of Ministers secretariat.
9. Vacancy notice N° 39/85 was issued on 5 July 1985. It announced that an internal competition would be held for the post (N° 40.29) of administrative officer (grade A2/A3) in the secretariat of the Committee of Ministers (Directorate of Political Affairs). The notice specified that the competitive examination was open solely to permanent staff in grades B4, B5 and B6 with at least 10 years' service, including at least four years in those grades. The appellant applied for the post on 30 July 1985.
10. The written tests took place on 18 November 1985 and the panel interviewed the five short-listed candidates on 21 January 1986.
11. On 14 March 1986, the appellant learned that, by decision No. 3601, the Secretary General had appointed Mr J.P. Titz to the post (N° 40.29) of administrative officer in the secretariat of the Committee of Ministers, with effect from 1 April 1986.
12. On 27 March 1986, the appellant submitted an administrative complaint to the Secretary General requesting that Mr J.P. Titz's appointment be annulled.
13. On 1 April 1986, the Secretary General forwarded the administrative complaint to the Advisory Committee on Disputes.
14. On 5 June 1986, the Advisory Committee on Disputes submitted its opinion (No. 2/1986), concluding that the procedure followed was not in keeping with the Regulations on Appointments and that the appointment was irregular.
15. Her administrative complaint having been implicitly rejected, the appellant lodged an appeal on 7 August 1986.

SUBMISSIONS OF THE PARTIES

16. The appellant requests that the appointment of Mr J.P. Titz to the post of administrative officer in the Committee of Ministers secretariat (Directorate of Political Affairs) be annulled on the grounds that it has no legal basis.

The **appellant's** arguments may be summarised as follows.

17. She contends that there was a breach of the principle of equality since the rules governing the selection of candidates, as laid down in the Staff Regulations, were not observed.

As to the failure to comply with Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board

18. The appellant points out that the memorandum which the Head of Establishment Division sent to all the applicants on 30 July 1985 stated that, in accordance with Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board, the Director or Head of the department in which the post was to be filled would interview the candidates in order to give

them the opportunity to obtain further information about the duties involved and to enable the Director or Head of department to assess the candidates' qualifications with more precision.

19. She points out that, as the interview did not take place, this provision was not complied with.

As to the failure to comply with Article 14, paragraph 4, of the Regulations on Appointments

20. The appellant states that there was a breach of Article 14, paragraph 4, of the Regulations on Appointments, which states that the Panel must set the subjects of the papers and appoint the examiners.

She claims that in the case in issue the Panel was denied this responsibility, which was given to the administration.

As to the failure to comply with Article 23, paragraph 2, of the Regulations on Appointments

21. The appellant states that there was a breach of Article 23, paragraph 2, of the Regulations on Appointments.

This provision reads as follows:

“Staff in grades B4, B5 or B6 may apply for an A2/A3 post if, by decision of the Secretary General under Article 6, the post is, as an exceptional measure, to be filled by internal competitive examination. In addition to the requirements of Article 3 of these regulations, such staff members must have completed at least ten years' service, of which at least four in those grades.”

22. The appellant claims that the candidate actually appointed, Mr J.P. Titz, who was taken on as a permanent grade B5 member of staff on 1 December 1984, did not fulfil the two length of service conditions.

23. She concludes that the Promotions Panel failed to comply with the Staff Regulations, since it should have decided that Mr J.P. Titz did not fulfil the conditions laid down in Article 23, paragraph 2 of the Regulations on Appointments, and that there is therefore no legal basis for his appointment.

As to the failure to comply with Articles 2, 3, 5 and 6 (2) of the Regulations on the assessment of staff after confirmation in post.

24. The appellant contends that Articles 2, 3, 5 and 6 (2) of the Regulations of the assessment of staff after confirmation in post were not complied with.

25. She contends that she was never given an assessment report by her immediate superior as provided for in Article 2 (1) of the Regulations of the assessment of staff after confirmation in post, and that the Promotions Panel was not therefore able to assess her skills at their true worth.

26. Lastly, she states that she has been performing duties corresponding to those of a grade A2 post for several years.

She considers that she was penalised all the more in that the Promotions Panel ranked her second.

The **Secretary General's** arguments may be summarised as follows.

As to the breach of Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board

27. The Secretary General does not dispute the fact that the Head of the department in which the post was to be filled did not officially interview the appellant prior to the Panel's meeting.

28. He points out, however, that Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board, to which the appellant refers, applies to promotions, and that promotion is defined in Article 2 of the Regulations on Appointments as "the appointment of a staff member to a post carrying a higher grade".

29. He contends that the procedure provided for in Article 23, paragraph 2, is not, strictly speaking, a promotion, since it results in a change in category of employment and not just a change of grade.

30. He states that when grade B members of staff obtain grade A posts as a result of a mixed competitive examination held for the purposes of recruitment and open mainly to candidates from outside the organisation, the procedure in question is, strictly speaking, a recruitment procedure and the provisions of Article 19, paragraph 4, do not therefore apply.

He argues that it would be unrealistic, in such circumstances, for the Head of department to be required to interview all the candidates, since there are sometimes a very large number of candidates. Moreover, to interview only some of them would be discriminatory.

31. He doubts whether there is any objective justification for treating members of staff moving from grade B to grade A differently depending on whether the procedure used is open to outside candidates or not.

32. He considers that the principles of non-discrimination and fairness justify the failure to comply with the rule that candidates should be interviewed before the meeting of the Panel in the case of procedures whereby grade B staff obtain grade A posts.

He also points out that the proceedings necessarily entail written tests and an interview with the Panel.

33. Lastly, he adds that the appellant has been working in the secretariat of the Committee of Ministers for several years and that she was therefore familiar with the duties pertaining to the post and personally knew the Director and Head of the department in which the post was to be filled.

He therefore concludes that an interview would not have produced any new information likely to affect the appellant's chances in the competition.

34. He points out that the appointed candidate was not interviewed by the Director or Head of department either, and that there was therefore no discrimination.

35. The Secretary General considers that one should not be unduly pedantic and points out that "a procedural irregularity should entail the annulment of an administrative decision only when the said irregularity significantly affects the matters at issue" (NATO Appeals Board, decision 99 of 2.2.79).

As to the failure to comply with Article 14, paragraph 4, of the Regulations on Appointments

36. The Secretary General states that at its meeting on 20 September 1985 the Bureau of the Appointments Board decided on the number and nature of the test papers. The Director of Administration and Finance, who was Chairman of the Panel, then decided on the exact wording of the subjects and appointed the examiners, in accordance with Article 17, paragraph 2, of the Rules of Procedure of the Appointments Board, which reads as follows:

“The Director of Administration and Finance, whether or not he acts as chairman, shall:

- approve the question papers prepared by the Secretariat for written examinations, following a decision by the Panel on the number and kind of subjects and after the department to which the appointment is to be made has been consulted. The questions must be selected in such a way as to guarantee that candidates are treated equally;
- select examiners from the persons approved by the Panel.”

37. The Secretary General considers this practice to be in keeping with the letter and spirit of Article 14, paragraph 4, of the Regulations on Appointments.

As to the failure to comply with Article 23, paragraph 2, of the Regulations on Appointments”

38. The Secretary General considers it appropriate to describe the appointed candidate’s career at the Council of Europe.

From 1 January 1975 to 1 December 1984, he performed the duties of programme adviser in the Directorate of Education, Culture and Sport. On 1 December 1984, he was appointed to a permanent post of Principal Administrative Assistant (grade B5) in the External Relations Division of the Directorate of Political Affairs.

39. The Secretary General considers that the appointed candidate had been working continuously for the Council of Europe for more than 10 years at the time of the competition on the grounds that his length of service should include the periods during which he had temporary contracts.

40. He considers that the requirement of four years’ service in grades B4, B5 or B6 was more than fulfilled since, as programme adviser, the appointed candidate was on the same footing as a grade A member of staff, as is apparent from rule 4, paragraphs 4 and 5, of the rules applying to the various categories of temporary staff, adopted in October 1974.

41. In the Secretary General’s view, it would be unfair to interpret Article 3, paragraph 2 of the Regulations on Appointments in such a way as to penalise the selected candidate for having been a (level A) programme adviser rather than a (level B) programme assistant.

42. Moreover, he considers that the solution adopted was in keeping with Article 12, paragraph 1, of the Staff Regulations which states that:

“Recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity.”

He points out, in this connection, that the selected candidate performed distinctly better

than the other candidates in the written and oral tests.

As to the failure to comply with Articles 2, 3, 5 and 6 (2) of the Regulations on assessment of staff after confirmation in post

43. The Secretary General acknowledges that the enforcement of these regulations has given rise to problems and, in particular, to wide discrepancy between departments.

Until the situation has been remedied, Panels cannot take account of assessment reports, since to do so would be tantamount to unequal treatment of candidates who have been assessed and those who have not.

44. He considers that, despite the lack of assessment reports, the Panel had at its disposal all the information needed to assess the candidates objectively.

45. He also emphasizes that the fact that no assessment reports were communicated to the Panel ensured that all the candidates were placed on an equal footing.

THE LAW

46. The appellant appealed against the decision to appoint Mr Titz to the post (N° 40.29) of administrative officer in the secretariat in the Committee of Ministers, taken by the Secretary General on 14 March 1986.

She requests that this decision be annulled.

47. The Secretary General contends that the procedure was not irregular.

48. It is apparent from the facts of the case that Council of Europe staff were informed by vacancy notice N° 39/85 that an internal competitive examination open solely to permanent grade B4, B5 and B6 members of staff was being held to fill the post of administrative officer (N° 40.29, grade A2/A3) in the Committee of Ministers secretariat (Directorate of Political Affairs).

49. The appellant and seven other members of staff applied.

50. In order to fill post 40.29, the Secretary General decided to throw it open to internal competition among existing staff, in accordance with Article 6, paragraph 1, and Article 23, paragraph 2, of the Regulations on Appointments.

51. Article 23, paragraph 2, reads as follows:

“Staff in grades B4, B5 or B6 may apply for an A2/A3 post if, by decision of the Secretary General under Article 6, the post is, as an exceptional measure, to be filled by internal competitive examination. In addition to the requirements of Article 3 of these regulations, such staff members must have completed at least ten years’ service, of which at least four in those grades.”

52. The appellant lists four grounds of appeal concerning the regularity of the procedure and the lawfulness of the appointment of the selected candidate.

53. The appellant contests the admissibility of Mr Titz’s application for post 40.29 on the grounds that he did not fulfil the requirements of Article 23, paragraph 2, of the

above-mentioned Regulations or those of the vacancy notice. In other words, she claims that the Promotions Panel was wrong to accept his application.

54. With regard to this ground of appeal, the Board observes that, unlike the external recruitment procedure, the internal competition procedure whereby staff in grades B4, B5 and B6 may apply for grade A posts by taking a competitive examination is subject to specific conditions: the condition of ten years' service *and* the condition of at least four years in those grades.

55. As the procedure in question was an exceptional one, in that the external recruitment procedure (which enables any member of staff - and therefore category B staff to apply for category A post) did not take place, the procedure referred to in Article 23, paragraph 2, applies solely to grade B staff fulfilling specific requirements. It is therefore important that this provision of the Regulations should be fully complied with.

56. The Board would point out that the formalities and procedures provided for in the regulations are designed to safeguard the principle of certainty of the law inherent in the system of the Council of Europe and, therefore, the interests of both the organisation and its staff (ABCE, Appeals Nos 115, 116 and 117/1985, Peukert, Müller-Rappard and Bartsch v. Secretary General, paragraph 117). No other interpretation would be consistent with either the aim or the object of Article 23, paragraph 2, of the Regulations on Appointments.

57. In this case, Mr Titz, who was appointed a permanent grade B5 member of staff on 1 December 1984, did not, at 5 July 1985, fulfil the requirement of four years' service in grade B5 laid down in Article 23, paragraph 2, of the Regulations on Appointments and in the vacancy notice. His application should not, therefore, have been accepted.

58. The procedure which followed and the appointment of Mr Titz were therefore irregular.

59. The Board therefore has no need to examine any of the other grounds of appeal put forward by the appellant against the decision at issue.

60. At the hearing on 16 February 1987, the Appeals Board was informed that Mr Titz had been transferred to another post with the same grade and that post N° 40.29 was advertised in vacancy notice (N° 8/87) on the same day (16 February 1987) with a view to it being filled by a transfer procedure open solely to permanent staff in grades A2 and A3.

61. The Board would remind the Secretary General that, while an appeal is pending, he is required to refrain from "taking any further measure in respect of the appellant which, in the event of the appeal being upheld, would render unfeasible the redress sought" (Article 60, paragraph 5, of the Staff Regulations).

For these reasons,

The Appeals Board,

Declares the appeal founded,

Annuls decision N° 3601 of 14 March 1986, whereby the Secretary General appointed Mr Titz to post 40.29 in the Directorate of Political Affairs,

Decides that the Council of Europe shall reimburse the appellant's costs, up to a maximum of 4,000 French Francs.

Given in public in Strasbourg on 17 February 1987 the French text of the decision being authoritative.

The Secretary of the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

W.J. GANSHOF VAN DER MEERSCH