

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 151/1988 (Ulrich BOHNER (II) v. Secretary General)

The Appeals Board, consisting of:

Mr Gunnar LAGERGREN, Chairman
Sir Donald TEBBIT,
Mr Emmanuel DIEZ, members

assisted by:

Mr Michele de SALVIA, Secretary

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged his appeal on 6 April 1988. It was entered in the register of the Appeals Board on the same day under No. 151/1988 and sent to the Secretary General of the Council of Europe.
2. The observations of the Secretary General dated 30 May 1988 were communicated to the appellant.
3. The reply of the appellant dated 4 July 1988 was communicated to the Secretary General.
4. The public hearing took place in the Court room of the European Court of Human Rights, Strasbourg, on 23 September 1988.
5. The hearing was attended by the appellant, assisted by his legal representative Mr P. MARCHESSOU, of the Strasbourg Bar, and Mr. E. HARREMOES, Director of Legal Affairs, representing the Secretary General, assisted by Mr. G. BUQUICCHIO, Head of the Central Section and Mr. R. BRILLAT, Administrative Officer in the Directorate of Legal Affairs, and Mrs. G. TUBACH, Principal Administrative Officer in the Directorate of Administration and Finance.
6. The appellant commenced employment with the Council of Europe in 1972 and is a permanent member of the staff in grade A 4 in the Directorate of Environment and Local Authorities.

7. On 25 June 1987, Vacancy Notice No. 46/87 informed permanent staff members in grade A 4 that they could apply for a transfer to the post of Principal Administrative Officer (grade A 4) in the Office of the Clerk of the Assembly. One of the qualifications listed in the Vacancy Notice was “a wide range of interests, ensuring a high degree of versatility”.

8. On 9 July 1987, the appellant applied to be transferred to this post.

9. On 14 September 1987, the Director of Administration and Finance informed the appellant that the Secretary General considered that he did not fulfill the requirement in the vacancy notice relating to “a high degree of versatility” and, consequently, the Secretary General had decided not to appoint him to the vacant post.

10. On 12 November 1987, Mr BOHNER lodged an administrative complaint against this decision.

11. The Secretary General referred this complaint to the advisory committee on disputes which, in its opinion dated 14 January 1988, rejected the complaint.

SUBMISSIONS BY THE PARTIES

The appellant’s claims may be summarised as follows:

12. Mr BOHNER submitted that he had already complied with the condition contained in the vacancy notice as a high degree of versatility had also been required for the A 4 post to which he had been appointed in 1986.

13. Furthermore, the appellant pointed out that both before and after 1986, his work required a high degree of versatility.

14. The appellant also claimed that the Secretary General had not followed the usual procedure for a transfer as:

a. his application for a transfer had not been examined by a panel. Mr BOHNER submitted that a panel would offer certain guarantees and that the views of a panel were necessary, as the Secretary General could not personally know all his staff;

b. an assessment report had not been made concerning his work. Such reports were required by the regulations on the assessment of staff after confirmation in post;

c. the reasons given by the Secretary General for refusing to transfer the appellant to the post amounted to a negative assessment;

d. the appellant was not informed during his interview with the Head of the Department of the vacant post that he did not have a high degree of versatility;

e. grounds should have been given for rejecting the application of the appellant; the sole ground based on a lack of “a high degree of versatility” was quite incorrect.

The Secretary General's claims may be summarised as follows:

15. The Secretary General submitted that, as regards the requirement of a high degree of versatility, the degree of versatility required could vary from post to post according to the nature of the work. Account should also be taken of the other requirements in the vacancy notice.

16. Furthermore, the Secretary General stressed that he had a wide ranging discretionary power in matters of staff management and within the scope of that power he was qualified to know and assess the operational needs of the Organisation (decision of the Appeals Board of 30 March 1987, Appeals Nos 147 and 148/1986).

17. The Secretary General gave the following indications concerning the procedure which had been followed when examining the appellant's request for a transfer:

a. Under the Regulations on appointments and the decision of the Appeals Board of 14 February 1986 concerning Appeals Nos. 115, 116 and 117/1985, the Promotions Panel was not competent to examine requests by staff to be transferred. There was no other competent panel to deal with such requests. The reduced size of the Council of Europe enabled the Secretary General to exercise his powers in full knowledge of the qualifications of the staff;

b. The Secretary General recognised that the application of the said Regulations in the Council of Europe had given rise to difficulties and in particular to considerable reticence on the part of certain staff and services, as well as to a wide disparity between the services. To take account of assessment reports in appointment procedures would amount to treating unequally those candidates who had been assessed and those who had not been assessed and for this reason would prejudice some of them. The Secretary General had all the necessary elements to make an objective examination of candidates and the absence of an assessment report had not adversely affected the appellant;

c. The decision not to transfer Mr BOHNER to the post did not amount to a negative assessment of Mr BOHNER, as assessment reports were only made on the work of staff in their actual posts; furthermore, the Secretary General was required to give the reasons for his decision;

d. The appellant was not informed during his interview that he did not have a high degree of versatility as it would be contrary to the letter and the spirit of the texts taken into consideration by the administration for these interviews to discourage a candidate.

THE LAW

18. The appellant's appeal is directed against the decision taken on 14 September 1987 by the Secretary General not to assign the appellant to post No. 46/87 which was vacant in the Office of the Clerk of the Parliamentary Assembly. He seeks the annulment of this decision.

19. The Secretary General submitted that he used lawfully and fairly the power which is his in matters of staff management and that the appeal should be rejected as being manifestly unfounded.

20. The Board notes, in the first place, that the disputed decision concerns a transfer procedure governed, at the time of the events, by the provisions of Article 5 (1) and (2) of the Regulations on Appointments as interpreted by the Appeals Board in its decision of 14 February 1986 in Appeals No. 115, 116 and 117/1985 (Peukert, Muller-Rappard and Bartsch v. Secretary General).

These provisions are as follows:

“(1) Any staff member may inform the Secretary General that he wishes to be assigned to another post in the same grade. His request shall be considered when a vacancy arises or when an exchange is contemplated”.

“(2) Before filling a vacant post, the Secretary General shall first consider whether this should be done by way of transfer...”

21. Having examined the request for transfer made by the appellant, the Secretary General decided not to fill the post in question by transferring the appellant.

22. The Board observes that the Secretary General has a wide discretionary power in matters of staff management.

23. While it is true that in the event of a dispute concerning a decision taken in such a case, the administrative judge cannot substitute his own judgment for that of the Administration, he has however the duty to ascertain if the discretionary authority has been exercised lawfully. This is why it is for the court hearing an appeal to determine not only whether the decision has been taken by a competent authority and whether it is in regular form, but also whether the correct procedure has been followed. The court must also determine whether the administrative authority's decision took account of all the essential facts, whether manifestly wrong conclusions have been drawn from the documents in the file, or finally, whether there has been a misuse of authority (see the decision mentioned above ABCE 115-117/1985, paragraph 99).

24. The appellant challenged the disputed decision on two main grounds.

25. His first submission was that the reasons given in the disputed decision were incorrect and that, therefore, there was a misuse of power. He claims, in this respect, that the Secretary General had been wrong to consider that he did not comply with the requirement indicated in the vacancy notice “a wide range of interests, ensuring a high degree of versatility”.

According to the appellant the reason given to refuse his application was false. In fact, he complied with this requirement especially as there had been an identical requirement for the post of the same grade to which he had been appointed, eighteen months previously.

26. The Secretary General submitted, in this respect, that far from having the absolute character indicated by the appellant, the said condition should be looked at in comparison with other matters and the extent of this requirement could vary from one post to another, according to the nature of the work required. In this particular case, the appellant had been considered to be not “sufficiently versatile” for the post indicated in Vacancy Notice No.46/87. Therefore, the appraisal which he carried out took account of the abilities of the member of staff and whether they were sufficient to meet the needs of the service.

27. The Board observes at once that the note of 14 September 1987, informing the appellant that his request had been rejected, is extremely brief and does not clearly spell out the reasons for the decision of the Secretary General.

28. The requirement to give sufficient reasons for an administrative act of this nature helps to ensure, in matters of staff management, the necessary transparency of such acts (Eur. Court HR, judgment of 30 November 1987, Series A No. 127-B and joint concurring opinion of Judges LAGERGREN, PETTITI and MACDONALD pages 35-36 and 43).

29. In this respect, the written observations and the statements made during the hearing by the representative of the Secretary General show that the grounds for the decision have been based on the special nature of the tasks attached to the post to be filled compared with those carried out up to that time by the appellant. In reply to a question during the hearing, the representative of the Secretary General indicated that, while the post occupied by the appellant included tasks based on a particular activity of the Council of Europe in the field of environment and regional planning, the vacant post in the Office of the Clerk of the Assembly included tasks which could concern all questions relating to the field of work of the Council of Europe.

30. In the light of all these statements, it appears that the contested decision is based on objective criteria.

31. In addition, as regards the power of appointment of the Secretary General, he has a wide measure of judgment to evaluate in a given case the abilities of staff members in relation to the needs of the service.

32. Consequently, although it would have wished that the reasons given to it in the framework of the disputed procedure had been given to the appellant during the transfer procedure, the Board concludes that no misuse of authority has been proved.

33. In his second submission the appellant pointed out that the transfer procedure did not comply with the general principles of law of the civil service.

34. First, he criticises the Secretary General for having taken alone the decision concerning his request for a transfer, without a prior examination of this request by a panel as required in the case of a promotion.

35. The Board notes that at the time of the events, in the case of an application for a transfer, the rules in force did not provide for the intervention of a panel.

36. Therefore, the fact that in the present case the Secretary General had taken a decision without a prior opinion of a panel did not infringe the rights which the appellant could legitimately claim to be entitled.

37. Secondly, the appellant complained that the failure to comply with the Regulations on the assessment of staff has adversely affected him.

38. As stated by the representative of the Secretary General during the hearing "it is well known. that the system of assessment provided by the Staff Regulations is inoperative in the Council of Europe".

39. The Board is surprised by this state of affairs. It observes that there is a principle according to which an authority is bound by the rules which it has adopted until it has rescinded or modified them. The Board notes, however, that the Establishment Division is at present examining the means to remedy the situation and facilitate the functioning of the system.

40. In any event, the Board notes that the appellant did not claim that there had been any inequality in the treatment of the four candidates for a transfer. Consequently, the Board does not see how the absence of an assessment in the case of all the candidates could have affected him adversely.

41. In addition, this case does not imply in that there was any negative assessment of the appellant merely because his request for a transfer was not accepted. The Board notes in this respect that at no time had the merits of the appellant been doubted.

42. Finally, with regard to the conditions in which the interview with the Director or the Head of Service took place, the file does not show any element which could give rise to doubts concerning the compliance of the interview with the rules in force.

43. Consequently, the disputed decision discloses no illegality.

For these reasons,

the Appeals Board:

1. Declares the Appeal unfounded;
2. Dismisses it;
3. Orders that each party shall bear its own costs.

Delivered in Strasbourg, the French text being authentic.

The Secretary of the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

G. LAGERGREN

Read in public on 1 December 1988 by Mr. Emmanuel DIEZ

E. DIEZ