

Decision of the Appeals Board of 27 March 1990
Appeal No. 157/1989 (CUNHA v. Secretary General)

The Appeals Board, composed of:

Mr Gunnar LAGERGREN, Chairman,
Sir Donald TEBBIT and
Mr Emanuel DIEZ, members,

assisted by:

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

has delivered, the following decision after due deliberation.

PROCEDURE

1. The appellant brought his appeal on 29 September 1989. The appeal was entered on the same date in the Appeals Board register under number 157/1989.
2. The Secretary General's observations were submitted on 8 November 1989.
3. On 8 December 1989 the appellant forwarded his reply.
4. The public hearing took place at the Council of Europe on 29 January 1990 in the presence of the appellant, Mr Cunha, and Mr E. Harremoes, Director of Legal Affairs, representing the Secretary General, assisted by Mr P. Dewaguet, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

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

5. Mr Candido Cunha took up his duties at the Council of Europe on 1 November 1977. He currently holds a Grade A3 post in the Directorate of Legal Affairs.
6. On 22 December 1988 the Secretary General published vacancy notice 128/88 relating to Grade A4 post no. 70.211 in the Directorate of Human Rights, for which the appellant applied.
7. On 14 March 1989 the Head of Establishment Division informed the appellant that the Secretary General had selected another candidate.
8. On 22 March 1989, in a memorandum addressed to the Secretary General, the appellant requested information concerning the deliberations of the Transfers and Promotions Panel.

9. In a note dated 23 March 1989, the Head of Establishment Division rejected the appellant's request on grounds of the confidentiality rule.
10. On 30 March 1989, the appellant submitted a memorandum to the Secretary General requesting that certain measures be taken regarding his personal file.
11. On 20 April 1989 the Head of Establishment Division informed Mr Cunha that his requests had been refused.
12. On 10 May 1989 the appellant lodged three administrative complaints with the Secretary General:
 - a. against the decision of 14 March 1989 not to appoint him to the desired post;
 - b. against the decision of 23 March 1989 refusing to grant the appellant access to certain information;
 - c. against the decision of 20 April 1989 refusing the appellant's requests regarding his personal file.
13. At the Secretary General's request, these three complaints were submitted on 17 May 1989 to the Advisory Committee on Disputes.
14. On 6 July 1989 the Advisory Committee on Disputes submitted an opinion concerning the three complaints in which it considered:
 - a. that there was no indication that any irregularities had occurred in the procedure concerning the appointment of another candidate;
 - b. that the administration was justified in invoking the confidentiality rule with respect to the Panel's deliberations, but that Mr Cunha could have been informed of the type documents made available to the Panel;
 - c. that the provisions of the Staff Regulations do not require that documents relating to the deliberations of the Appointments Board be included in a member of staff's personal file;
that the principle of equality for all members of staff had led the administration to refrain from including assessment marks in staff files, because the marking procedure had not been carried out under similar conditions in all departments;
that there was no reason to believe that another (second) file concerning Mr Cunha might have been compiled at any time;
that the administration is required, in accordance with Article 4 of Rule 475, to register, number and file in sequence all the items included in a personal file.
15. On 31 July 1989 the Secretary General rejected the three administrative complaints.
16. Mr Cunha lodged his appeal on 29 September 1989.

SUBMISSIONS OF THE PARTIES

The appellant's submissions may be summarised as follows:

i. Decision to appoint a candidate other than the appellant:

17. The appellant submitted that the appointment to post no. 70.211 of a candidate less senior than himself both in the grade concerned and in length of service in the organisation was contrary to Article 22 paragraph 2 of the Regulations on Appointments.

18. He claimed that the only justification for this could be that the candidate appointed had achieved a higher score than himself in assessment of their respective merits. However, no test or examination had been held.

19. The appellant therefore maintained that merit was assessed exclusively on the basis of documentary evidence, namely candidates' personal administrative file, curriculum vitae and job application.

20. He alleges that, at all events, the file on which the decision was based was inadequate to enable his merit to be properly assessed.

21. No item had been added to his personal file since 1979, neither the assessments required in accordance with Article 22 of the Staff Regulations, nor any mention of Panel deliberations, although he had already applied unsuccessfully for promotion on six occasions.

22. The absence of assessments, for which he himself was in no way to blame, had been prejudicial to his interests.

23. The appellant felt that it was not normal for him to have worked in the organisation for 12 years without having received any real promotion.

24. This state of affairs might be explained by considerations of nationality underlying the Secretary General's decisions whether or not to promote a particular candidate.

25. The appellant therefore concluded that there was a procedural defect, that the assessment of his merits had been arbitrary, or at any rate inadequate, and that this justified the cancellation of the decision.

ii. Refusal to communicate to the appellant the information he had requested:

26. The appellant had requested information on three matters:

a. With regard to the recommendation of the Transfers and Promotions Panel on conclusion of the procedure to fill the post under consideration, had he been regarded as having satisfied the conditions required (Article 14, paragraph 5 of the regulations on appointments)?

b. What was the position of his name in the order of merit which the Panel had had to draw up in respect of candidates having satisfied the requirements?

c. What elements for assessing the candidates were available to the members of the Panel to enable them to decide what recommendations to submit to the Secretary General?

27. While acknowledging that, according to Article 9, paragraph 1 of the regulations on appointments, the deliberations, reports, opinions and recommendations of the Appointments Board shall be confidential, the appellant considered that this was not absolute.

28. In this connection, he quoted numerous examples of case law and both national and international texts which indicate that there is a fundamental right of access for citizens to administrative documents concerning them.

29. The appellant maintained that the confidential nature of certain documents no doubt prohibited their publication or the divulging of their contents, but it did not prevent them from being communicated to the persons concerned in cases where a relationship of psychological or moral confidence existed, as in the present case.

30. The rule that the Panel's deliberations should remain confidential, which serves to protect the rights of the other candidates and the independence of Panel members, had not been called in question by the requests submitted by the appellant who was himself bound by the rule stated in Article 9 of the Regulations on Appointments.

31. The appellant also invoked a number of legal principles, such as respect for the rights of the defense, in support of his argument that the Secretary General's refusal to communicate the information to him was totally unjustified.

32. Lastly, noting that the Secretary General had revealed in the presence of the Appeals Board that all the candidates were not of equal merit, the appellant concluded that the rule that the Panel's deliberations should remain confidential was therefore not absolute.

iii. The keeping of the personal administrative file:

33. The appellant put forward several criticisms regarding the manner in which the administration managed his personal file, alleging that it was negligently kept and incomplete.

34. The appellant expressed surprise that his file contained no items subsequent to 1979 and that the documents in the file were neither signed, numbered nor filed in sequence as specified in the texts.

35. The appellant pointed out that he had applied for promotion six times and that his file contained no information concerning his abilities, whereas such data should have been available as a result of the Panel's deliberations.

The submissions of the Secretary General may be summarised as follows:

i. Decision to appoint a candidate other than the appellant:

36. The Secretary General held that Article 22 paragraph 2 of the regulations on appointments had not been violated since the condition of equal merit was not met in the case under consideration. The candidate appointed was considered to be best fitted for the post because of his thorough knowledge of the Convention on the Prevention of Torture on which he had worked for 18 months. The Secretary General's decision to appoint the latter to the post created under the convention was therefore taken in the best interests of the department concerned and was a perfectly natural one.

37. The Secretary General formally denied that any considerations of nationality influenced her decision.

38. The documents made available to the Panel were the appellant's personal file, his application for the post and his curriculum vitae which had been sent for approval to the

appellant who could have made any changes which he considered desirable.

39. The Secretary General's representative agreed that the file did not contain any assessments, but that this state of affairs did not prejudice the appellant since the assessment system was no longer applied in the organisation or at least was applied differently in the various Council departments.

40. The Panel had made a fair assessment of the appellant's merits and the Secretary General's decision was in no way arbitrary since there were no grounds for believing that it had been based on any preconceived idea.

ii. Refusal to provide the appellant with the information he had requested:

41. The Secretary General maintained that the questions asked were covered by the confidentiality rule applying to the panel deliberations, in accordance with the principles stated in Article 9, paragraph 1 of the Regulations on Appointments.

42. This rule, established to protect the interests of the other candidates (since a comparative assessment is made of merits) and to preserve the independence of panel members, was an unequivocal rule which admitted no exception.

43. Furthermore, the fact of having revealed to the Appeals Board that the appellant's capabilities were regarded as inferior to those of the candidate appointed was justified in the interests of the proper administration of justice, since it would enable the Board to take a decision with full knowledge of the facts.

iii. The keeping of the personal administrative file:

44. The Secretary General noted that the appellant did not mention any specific document which he considered should have appeared in his file after 1979.

45. Contrary to what was alleged by the appellant, the documents contained in his file were signed and numbered in accordance with Article 4 of Rule 475.

46. As pointed out in the Opinion submitted by the Advisory Committee on Disputes neither Article 46 of the Staff Regulations, nor Rule 475 required the administration to draw up a list of the documents contained in the personal files of staff. Panel deliberations on former promotion procedures should under no circumstances appear in the file owing to their confidential character.

47. Accordingly, the personal administrative file of the appellant complied with the regulations.

THE LAW

48. The appellant lodged his appeal against three decisions taken by the Secretary General:

a. the decision of 14 March 1989 informing him that another candidate had been appointed to the A4 grade post for which he had applied;

b. the decision of 23 March 1989 rejecting his request for certain information;

c. the decision of 20 April 1989 refusing to comply with his requests concerning his personal file.

49. The Secretary General considered with regard to the three complaints that:

- the decision whereby a candidate other than the appellant was appointed was justified and perfectly lawful;
- the refusal to communicate certain information to the appellant was justified by the rule of confidentiality governing the Panel's deliberations;
- the requests by the appellant concerning his file were unfounded.

50. The Secretary General has a wide ranging discretionary power in matters of staff management. Within the scope of that power she is qualified to know and assess the operational needs of the organisation. The existence of the discretionary power of the authority is borne out by the case-law of international administrative tribunals. This case-law recognises that the authority has a wide measure of discretion to assess the needs of the organisation (see the latest decision in this matter Bartsch and Peukert of 30 March 1987, paragraph 51 with references).

51. This discretionary power is, however, subject to the rules in force in the organisation. It is exercised "without prejudice to the rights which servants enjoy under their staff regulations" (ECCJ, case 61/70, G. Vistosi v. Commission of the European Communities, 16 June 1971 ECR, p. 535 et seq.). This is an essential rule which safeguards the rights and interests of the persons who form the administrative staff of the organisation.

52. Clearly, in the event of a dispute the international tribunal cannot substitute its own judgment for that of the administration. Nevertheless, it has a duty to ascertain whether the disputed decision was taken in accordance with the regulations and with general principles of law, to which the legal systems of international organisations are subject (ABCE 8/1972, G. Artzet v. Secretary General, Digest, p. 47).

Even the wide discretionary power of the administrative authority must always be exercised lawfully. This is why it is for the tribunal hearing an appeal against an administrative decision taken in the exercise of that discretionary power to determine not only whether that decision has been taken by a competent authority and whether it is in due form, but also whether the correct procedure has been followed. The tribunal must also determine, with regard to the legality of the decision under the organisation's own rule, whether the administration's decision took account of all the relevant facts, whether the wrong conclusions have been drawn from the documents in the file, or finally, whether there has been misuse of power (decision Bartsch and Peukert supra).

a. Decision to appoint another candidate

53. The appeal concerns primarily the decision by the Secretary General to appoint another candidate, after receiving the opinion of the Panel following an internal competition procedure in which the appellant had taken part.

54. In contesting the aforementioned decision, the appellant pointed out that he was senior, both in grade and in length of service with the organisation, to the candidate appointed and that, in cases of equal merit, it is the candidate with the longest service who should have been appointed, in accordance with Article 22, paragraph 2 of the Regulations on Appointments.

55. The Secretary General, on the other hand, maintained that, in the case under consideration, the merits of the appellant were judged to be inferior to those of the appointed candidate, whose thorough knowledge of the Convention on the Prevention of Torture gave him an advantage which secured his appointment, which was in the interests of efficiency.

56. The appellant further maintained that a valid assessment of his merits could not have been made owing to the inadequacy of the documents concerning him which were submitted to the Panel. As evidence of this, he pointed to the fact that he had undergone no tests during the promotion procedure under consideration.

57. In this connection, he noted that his personal file contained no assessment or any other document dated later than 1979, nor any mention of the deliberations concerning the six former applications for promotion in which he had unsuccessfully taken part.

In addition, he claimed that it is not normal that he should have served for twelve years as a member of staff of the Council of Europe without ever having been granted any real promotion.

58. The Appeals Board has examined all the elements of the case. At the request of the appellant who decided against consulting the minutes of the Panel meeting of 23 February 1988 owing to the confidential character of the Panel's deliberations, the Board requested the Secretary General to produce this document which it examined in the absence of the parties.

59. The relevant minutes show that the Panel made a conscientious examination of the respective qualifications of the candidates with respect to the requirements of the post to be filled and that, in effect, the merits of the chosen candidate were considered superior to those of the other candidates.

60. As regards the procedure for assessing merit, the Panel was under no obligation to organise tests, a procedure which is optional and which the Panel decided to forego.

61. The absence of an assessment report does not appear to have put the appellant at a disadvantage, since no other candidate had a document of that kind in support of his application.

62. The Secretary General's representative stated during the hearing that the assessment system of the Council of Europe has fallen into disuse. Again, the Board cannot but express surprise at this failure to comply with the Regulations on the assessment of staff after confirmation in post (see Bohner decision of 1 December 1988, para. 39). It reiterates the principle according to which an authority is bound by the rules which it has adopted until it has rescinded or modified them.

63. The Board notes however that the Secretary General intends to collaborate with the Staff Committee in finding a solution to this problem. The Board attaches very special importance to this matter because, although the Administration may well possess a thorough knowledge of the qualities and aptitudes of each member of the organisation's staff, which is often the case in an organisation as modest in size as the Council of Europe, the lack of an effective assessment system is likely to create a serious handicap in applying and monitoring an appointments system equitably. The Board trusts that this situation will be remedied as soon as possible.

64. Regarding the appellant's contention that considerations of nationality or prejudice influenced the Secretary General's decision, this is based on pure speculation unsupported by any evidence produced by the appellant, and is contradicted by the scrupulous examination carried out by the Panel.

65. In its desire to prevent the occurrence of unnecessary disputes, the Board can only deplore the extreme brevity of the communication of 14 March 1989 by which the appellant was notified that another candidate had been appointed to the post for which he had applied, and its failure to spell out the reasons for the decision taken by the Secretary General (see Bohner decision of 1 December 1988, paragraphs 27-30).

Had the said notification explained that the successful candidate possessed the experience required for the post under consideration, this might have been instrumental in reassuring the unsuccessful candidates.

66. In the light of all the foregoing considerations and despite the remarks just made, the Board considers that the disputed decision was based on objective factors and, as such, was justified.

67. Consequently, there are no grounds for considering this decision to be unlawful.

b. Refusal to communicate certain information to the applicant

68. The appellant considered secondly that the refusal to communicate to him the information which he requested was unlawful insofar as there exist certain general principles of law and statutory provisions in several Council of Europe member states which grant individuals in general, and civil servants in particular, access to information held by the public authorities.

69. The Secretary General justified the refusal by referring to the rule of confidentiality governing the panel's deliberations, in accordance with Article 9 paragraph 1 of the regulations on appointments.

70. The Board would point out that, although the various national legislations, case-law rulings and international texts indicate that there is a fundamental right of access by citizens to administrative documents concerning them, this right is not an absolute one. Exceptions to it are made in cases where it would be likely to harm legitimate interests. Recommendation R (81) 19 of the Committee of Ministers, quoted by the appellant in support of his request, confirms (Article 5) that there are exceptions to the right of access.

The appellant also referred to Article 10 of the European Convention on Human Rights. In a case relating to freedom to receive information kept in a secret police register, the European Court of Human Rights interpreted the above-mentioned provision in the following terms:

“The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual” (Eur. Court HR, Leander judgment of 26 March 1987, Series A, No. 116, paragraph 74).

71. As regards the present case, account should be taken of the nature and purpose of the desired information in order to determine the scope of the principle of confidentiality embodied in Article 9 paragraph 1 of the regulations on appointments. It cannot be denied that the information requested by the appellant is confidential in character, as moreover specified in

paragraph 1 of Article 9 of the relevant regulations (the Panel forming part of the Appointments Board). The Panel's deliberations are classified as confidential in order to protect the rights of the other candidates (since a comparative assessment of merit is carried out) and to preserve the independence of the Panel members. These aims constitute a legitimate exception to the principle of free access by staff to the administrative documents concerned.

72. It is true that there are cases where, although the confidentiality principle applies, certain items of information considered to be separable from the elements covered by the secrecy rule may be communicated by reason of their accessory nature. In the present case, however, the appellant cannot benefit from this since the information he unsuccessfully requested form an integral part of the Panel's deliberations and as such are confidential.

73. Furthermore, insofar as the appellant considers that the fact of having been denied possession of the requested data put him at a disadvantage in presenting his appeal, the Board considers that this was not the case because, as mentioned above, it was able to examine the Panel's minutes and satisfy itself that no irregularities had occurred in applying the prescribed procedure.

74. In the matter under consideration, therefore, nothing unlawful has been established.

c. The keeping of the personal administrative file:

75. Thirdly, the appellant complained that, contrary to what is prescribed in the regulations, his file did not contain a numbered list of the contents and that these were neither numbered nor signed.

76. The Secretary General maintained that the personal administrative file of the appellant was kept in accordance with the regulations in force.

77. Having examined the appellant's personal file, the Board has found it to have been kept in accordance with the regulations prescribed in the Secretary General's Rule 475 relating to personal administrative files.

78. Nothing illegal has been found to have occurred in this connection.

For these reasons, the Appeals Board

Declares the appeal to be unfounded;

Dismisses it, and

Orders that each party shall bear its own costs.

Delivered in Strasbourg, the French text of the decision being authentic.

The Secretary of the
Appeals Board

The Chairman of the
Appeals Board

M. de SALVIA

G. LAGERGREN

Read by Mr. Emmanuel DIEZ at a public hearing on 27 March 1990

E. DIEZ