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| Decision of the Appeals Board of 27 September 1990 |
| Appeal No. 160/1990 (Staff Committee v. Secretary General) |

The Appeals Board, consisting of:

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

assisted by

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

has delivered the following decision after due deliberation.

PROCEDURE

1. The Staff Committee, represented by its Vice-President, Ms A. Nollinger, lodged its appeal on 19 April 1990. This appeal was registered in the register of the Appeals Board under No. 160/1990.
2. On 18 May 1990, the Secretary General submitted her observations.
3. On 8 June 1990, the Staff Committee submitted its observations in reply.
4. On 19 June 1990, the Appeals Board considering that Mr V. Berger had a sufficient interest in the case, accepted his application, under Article 10 of the Statute of the Appeals Board, to intervene orally in the case in support of the appellant.
5. On 19 June 1990, following the approval of all the parties concerned in appeals Nos. 158 (Cagnolati-Staveris), 159 (Ronconi), 160 (the Staff Committee) and 161 (Newman), the Board decided that these cases should be heard together.
6. On 19 June 1990, the public hearing of cases Nos. 158 to 161 took place at the Council of Europe. The Staff Committee and the other appellants were represented by Professor D. Ruzié. Mr E. Harremoes, Director of Legal Affairs, represented the Secretary General and was assisted by Mr R. Lamponi, administrative officer in the Directorate of Legal Affairs. Ms A. Nollinger, Vice Chairman of the Staff Committee, for the Staff Committee and Mr Newman, the appellant in case No. 161, were also present. Mr Berger was present as intervener.
7. On 19 June 1990, after the oral procedure, the Appeals Board decided to examine the present case first and to join cases Nos. 158, 159 and 161 and to examine them subsequently together.

THE FACTS

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

9. Ms Cagnolati-Staveris, Mr Ronconi and Mr Newman, administrative officers, grade A3, were candidates among others in an internal competition, open only to permanent staff, for post No. 111.21 of principal administrative officer (grade A4) in the Directorate of Education, Culture and Sport. The vacancy notice No. 55/89 for this post was dated 7 July 1989.

10. On 28 September 1989, the Transfers and Promotions Panel made recommendations to the Secretary General concerning the candidates for post No. 111.21 and placed Mr Therond, administrative officer, grade A3 in the Directorate of Environment and Local Authorities, in first and Mr Blair, administrative officer, grade A3 in the Directorate of Environment and Local Authorities, in second position.

11. The Secretary General, by Order AP No. 4069 of 9 October 1989, promoted Mr Therond, with effect from 1 November 1989, to post No. 111.21, grade A4 in the Directorate of Education, Culture and Sport.

12. Following a decision of the Committee of Ministers at its 431st meeting (November 1989), the former post of Mr Therond in the Directorate of Environment and Local Authorities was upgraded to the grade of A4.

13. The Secretary General transferred Mr Therond to his former upgraded post which had remained vacant and, on 22 January 1990, post No. 111.21 again became vacant.

14. The Secretary General promoted Mr Blair to post No. 111.21 from 1 February 1990 by Order No. 4101, dated 29 January 1990.

15. On 9 February 1990 the Staff Committee lodged a complaint under paragraph 6 (c) of Article 59 of the Staff Regulations.

16. On 9 February 1990, Ms Cagnolati-Staveris, Mr Ronconi and Mr Newman, under Paragraph 7 of Article 59, requested the Chairman of the Appeals Board to grant a stay of execution of the decision to appoint Mr Blair.

17. By letter dated 14 February 1990, the Secretary General informed the Chairman of the Board that she had decided to suspend all the effects of the decision until the completion of the appeals procedure.

18. By Order AP No. 4127 of 19 February 1990, the Secretary General suspended the effect of Order No. 4101 until the completion of the appeals procedure.

19. On 20 February 1990, the Secretary General rejected the complaint of the Staff Committee.

20. The Chairman of the Appeals Board, in his Order dated 23 February 1990, decided that it was not necessary to take any further steps concerning the application for a stay of execution of the decision to appoint Mr Blair.

21. On 23 June 1990, Mr Blair was promoted to a post in grade A4 in the Directorate of Environment and Local Authorities with effect from 1 July 1990.

SUBMISSIONS BY THE PARTIES

The Staff Committee

22. The Staff Committee is seeking the annulment of the decision of 29 January 1990 whereby the Secretary General promoted Mr Blair to post No. 111.21 from 1 February 1990.

23. The submissions of the Staff Committee may be summarised as follows:

24. The Staff Committee submitted that it was entitled to bring an appeal on the basis of paragraph 6 (c) of Article 59 of the Staff Regulations as it related “to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations”. The Staff Committee claimed that the procedure used to appoint Mr Blair failed to comply with the Staff Regulations and the regulations on appointments and prevented the Staff Committee from giving its views on the appointment as provided in the different rules.

25. The Staff Committee submitted that the Secretary General had failed to comply with the rules relating to appointments and, in particular, had failed to comply with the following texts:

- i. Article 21, paragraph 2 of the Staff Regulations which provide that the “Secretary General shall decide on promotions in accordance with the conditions laid down by the regulations on appointments.”
- ii. Article 6, paragraph 1 of the regulations on appointments sets out all the different procedures available when filling posts. This paragraph provides that in the case of a vacant post and without prejudice to the provisions relating to transfers, appointments to certain grades (A6 and A7) and to certain posts (in the Court of Human Rights, the European Youth Foundation, the European Pharmacopoeia Commission, the Private Office of the Secretary General), the Secretary General shall decide whether the post in question should be filled through recourse to the external recruitment procedure or by means of internal competition among existing staff.
- iii. Article 7 of the regulations on appointments, which requires all vacancies, subject to certain exceptions, to be advertised. This article provides that, except for transfers, certain cases of external recruitment procedures which make use of reserve lists, certain posts (in the European Court of Human Rights and in the Private Office of the Secretary General) and subject to the provisions concerning appointments to certain grades (A6 and A7), all vacancies shall be advertised in accordance with the provisions of this article. In particular, paragraph 3 of this article provides that “if the internal competition procedure is followed the vacant post shall be suitably notified within the Secretariat.”
- iv. Article 9 paragraphs 1 and 2 of the regulations on appointments requires the Appointments Board to be consulted in all cases of appointments with a few exceptions not relevant in the present case.
- v. The failure to consult the Board in connection with the nomination of Mr Blair had also excluded a staff member appointed by the Staff Committee from being consulted by the Board as required by Article 11 paragraph 4 of the regulations.

- vi. Articles 14, 16 and 22 of the regulations, which would have required an examination by the Transfers and Promotions Panel in the procedure which resulted in the appointment of Mr Blair. The failure to observe these requirements had prevented the two staff members of the panel appointed by the Staff Committee from expressing their opinions.

26. The Staff Committee considered that the fact that the Transfers and Promotions Panel had, on 28 September 1989, placed Mr Blair in second position after Mr Therond was not a sufficient ground for promoting Mr Blair after the transfer of Mr Therond as:

- paragraph 3 of Article 15 of the regulations on appointments, which provides for reserve lists, only applied to applicants having passed a competitive examination conducted as part of the external recruitment procedure; the fact that in one recent case a member of staff, with the consent of the Staff Committee, had been promoted on the basis of a reserve list, which did not comply with the conditions provided by this Article, could not affect the application of the Article to other cases; the fact that no observations were made by the Staff Committee could in no way remove any illegality;
- the failure to comply with the regulations and hold a second competition had prevented the previous candidates from applying and referring to additional experience gained during the intervening time of three months and had also prevented Mr Berger and other members of the staff, who were not candidates on the first occasion, from having the possibility to apply for the post in question on the second occasion. The administration had simply taken away from the appellants a chance of a further examination, not necessarily by the same panel.

27. The Staff Committee maintained that the failure to respect the regulations was contrary to a general principle of law of the international civil service according to which the administration may not take away from a member of the staff certain rights - in this case the right to be a candidate.

The Secretary General

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

29. The Secretary General did not contest that the Staff Committee was entitled to bring an appeal on the basis of paragraph 6 (c) of Article 59 of the Staff Regulations.

30. As regards the claim by the Staff Committee that the Secretary General had failed to comply with the rules relating to appointments, the Secretary General submitted that it was not appropriate to interpret these texts literally and rigidly as it was necessary to ensure the efficient and flexible management of the Secretariat.

31. By taking into account the recommendations of 28 September 1989 of the Transfers and Promotions Panel the Secretary General claimed that she had applied the provisions of the regulations on appointments in a way which was fully adapted to the circumstances of the case and was sensible, reasonable, realistic and dynamic. In addition, on a previous occasion a member of the staff had been promoted, after consulting the Staff Committee, on the basis of a reserve list established one month previously even though the relevant provisions (paragraph 3 of Article 15 of the regulations on appointments) did not provide for such a reserve list. This

proved that the appointment of Mr. Blair was based on a previous case which was mainly similar.

32. The Secretary General maintained that, having regard to the short time which had elapsed since the meeting of the Panel, it would not have been appropriate to hold another competition for the post as the results would not have been different. Furthermore the post was an important one which had already been vacant for a relatively long time and a new competition would have taken at least two months. Consequently the situation was urgent.

33. The Secretary General rejected the assertion that she had misused her power by transferring Mr Therond and promoting Mr Blair. The upgrading of Mr Therond's post in the Directorate of Environment had taken place after he had been promoted to the post in the Directorate of Education, Culture and Sport. He had later been transferred back to his former post because of his experience in the field of the environment.

34. The Secretary General also denied the allegation by the Staff Committee that the failure in the present case to respect the regulations literally was contrary to a general principle of law according to which the right to be a candidate may not be taken away from a member of the staff.

35. The Secretary General also denied that Ms Cagnolati-Staveris, Mr Ronconi and Mr Newman had been deprived of their right to be candidates because, before appointing Mr Blair, she had taken account, of the recommendations of the Transfer and Promotions Panel which had examined their applications in a comparative and detailed manner. The additional experience which they had gained since the meeting of the Panel would not have been sufficient to have affected the result.

36. As regards possible applications from recently appointed A3 staff, the Secretary General considered that any such candidates would have had insufficient experience to be appointed to the A4 post in question.

37. In the case of Mr Berger, who already held an A4 post, the Secretary General pointed out that he had not been a candidate for post N° 111.21. However, the Secretary General would be delighted to transfer Mr Berger if the post soon became vacant.

38. In addition, the Secretary General submitted that she had not prevented the Staff Committee from giving its views on the appointment of Mr Blair. She claimed that the Staff Committee had participated in all the procedures provided by the Staff Regulations and by the regulations on appointments when the competition was held for the post following vacancy notice No. 55/89 dated 7 July 1989.

THE LAW

39. The appellant appealed against the Secretary General's decision of 29 January 1990 appointing Mr Blair to a grade A4 post in the Directorate of Education, Culture and Sport (Order No 4101), which it considered vitiated by illegality. The appellant also requested the reimbursement of the procedural costs.

40. The Secretary General submitted that the appeal is ill-founded in that the appellant has established no breach of the provisions of the Staff Regulations or of the regulations on appointments and therefore cannot validly claim to have suffered any interference with its

powers under the aforesaid Staff Regulations.

41. The appellant's submission, consisting of various separate claims and complaints, is essentially that the Secretary General, by the decision in dispute, infringed the rights secured to the Staff Committee under the Staff Regulations and the regulations on appointments. The Appeals Board will consider the appeal in the light of this claim.

The Board is accordingly required to consider whether and to what extent the decision actually affected the powers of the Staff Committee under the Staff Regulations (see Article 59 paragraph 6 (c) of the Staff Regulations).

42. In this connection, it is important to establish at the outset the nature of the "powers" which, having regard to the circumstances of the case, are given to the Staff Committee by the current regulations.

43. The Board notes firstly that according to Article 8 paragraph 1 of the Staff Regulations, "the Staff Committee shall represent the general interests of the staff." With regard to promotion in particular, Article 21 paragraph 2 of these Regulations states that "the Secretary General shall decide on promotions in accordance with the conditions laid down by the regulations on appointments." By virtue of the reference thus made to the regulations on appointments, the "powers" mentioned in Article 59 paragraph 6 (c) of the Staff Regulations must be construed as also including those given by the regulations on appointments.

44. The applicable procedure on appointments is laid down in Articles 6 and 7 of the aforesaid Regulations.

Article 6 paragraph 1, provides, without prejudice to situations unconnected with the case in point, that "in the case of a vacant post ... the Secretary General shall decide ... whether the post in question should be ... thrown open to internal competition among existing staff."

Article 7 paragraph 1 further provides, without prejudice to situations unconnected with the case in point, that "... all vacancies shall be advertised in accordance with the provisions of this article."

45. As to the bodies required to take part in the appointment procedure, Article 11 paragraph 4 of the regulations on appointments provides that the Bureau of the Appointments Board, which constitutes the Secretary General's advisory body on appointments, "shall consult a staff member duly appointed by the Staff Committee before formulating its opinions or taking decisions." As to the promotion procedure in particular, Article 14 paragraph 1 provides that the Transfers and Promotions Panel, responsible for any competitive examination or selection based on qualifications that is conducted as part of the internal competition procedure, shall comprise "two staff members appointed by the Staff Committee."

46. The Board notes at the outset that the Secretary General did not contest the Staff Committee's capacity or claim to act in the present case, and therefore takes it for granted that no question arises in that connection.

The Board adds for its own part that, as the present case concerns specific provisions of the Staff Regulations and the regulations on appointments directed at a statutory body of the Council of Europe, ie the Staff Committee, the "powers" referred to in Article 59 paragraph 6 (c) of the Staff Regulations in fact amount to substantive rights whose infringement can give rise to an appeal procedure by the Staff Committee.

47. As to the facts of the case, it has been established that the decision in dispute was not taken as the outcome of a fresh internal competition procedure after the grade A4 post in the Directorate of Education, Culture and Sport, which had been filled subsequent to an initial competition procedure, again fell vacant on 22 January 1990 through the transfer of the incumbent.

48. Regard was therefore had to the internal competition procedure relating to vacancy notice no. 55/89 and concerning the same A4 post in the Directorate of Education, Culture and Sport when the Secretary General made her choice in promoting Mr Blair, who had been ranked second by the Transfers and Promotions Panel in its recommendations of 28 September 1989.

49. The Secretary General acknowledged that she intentionally refrained from opening a further competition procedure, considering that there would have been no material and objective justification for a fresh competition only three months after the first.

50. Secretary General deemed her duty to ensure not only that the rules in force in the Organisation are meticulously applied but also that their implementation was fully in keeping with the requirements arising from the need to achieve optimum efficiency in the Council of Europe Secretariat.

51. Accordingly, the Secretary General considered that in this instance the application of the regulations on appointments was fully suited to the actual circumstances of the case in point. She further considered that during the first competition procedure the Staff Committee fully availed itself of the powers given to it by the Staff Regulations and the regulations on appointments and was thus in no way entitled to complain of interference with its powers.

52. The Board recalls that where the Secretary General's powers regarding appointments and promotions are concerned, the following principles emerge from its case law.

53. While it is true that in matters of staff management the Secretary General has wide discretionary power and is thus competent to ascertain and assess the service needs of the Organisation, the exercise of that power is nevertheless subject to the rules in force. In this connection the Administration must ensure, in the interests of proper staff management, that it complies with the regulations in force, in particular as it must comply with the principle whereby an authority is bound by the rules which it has laid down as long as it has not repealed or amended them (see decision of 14 February 1986, appeals Nos 115, 116, 117/1985, paragraph 100).

54. Consequently, when a vacant post is to be filled, a procedure respecting the letter and spirit of the statutory provisions and regulations has the advantage of preventing any misuse of powers and is, moreover, of a nature to ensure the transparency which is necessary in such matters (see aforementioned decision, paragraph 117). The formalities and procedures laid down in the Staff Regulations are designed to ensure the observance of the principle of legal certainty inherent in the Council of Europe system (see decision of 17 February 1989, appeal No. 153/1988, paragraph 30).

55. The Board notes that the above-mentioned rules on appointments and promotions specifically secure to the Staff Committee rights which it is bound to uphold as part of the public policy function entrusted to it by the Staff Regulations, namely to represent the general interests of the staff.

56. In this case, it must be noted that the procedure applicable to a vacant post was not followed. Consequently the Staff Committee did not have the possibility to exercise its rights and thereby carry out its statutory duties, which are expressly recognised by the rules in force without any reservation.

57. As regards the reason given by the Secretary General to justify the procedure which was followed, the importance of which is appreciated by the Board, the Board holds the view that considerations of expediency or efficiency may not however justify such a breach which takes away the effective exercise of the Staff Committee's rights recognised under the Staff Regulations and the regulations on appointments.

58. As regards the submission that the Staff Committee, by participating in the first competition procedure relating to vacancy notice No 55/89, exercised its rights under the regulations, the Board considers that this submission is not relevant to the present appeal as there is no regulation which provides, in the case of an internal competition procedure to fill a post, for the preparation of a reserve list which would be valid for later competitions.

59. As a result of the above matters, the Board considers that it does not have to examine the other issues raised by the appellant concerning the contested decision.

For these reasons,

The Appeals Board

Declares the appeal founded ;

Annuls order No 4101 of 29 January 1990 ;

Decides that the Council of Europe shall refund the appellant its costs up to the sum of four thousand French francs,

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 the public hearing in Strasbourg on 27 September 1990

E. DIEZ