

<b>Decision of the Appeals Board of 26 June 1992</b>
<b>Appeal No. 168/1991 (ORLANDINI v. Secretary General)</b>

The Appeals Board, composed of:

Mr Carlo RUSSO, Chairman,  
Sir Donald TEBBIT, member and,  
Mr Kåre HAUGE, substitute member,

assisted by:

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

has delivered the following decision after due deliberation.

## **PROCEEDINGS**

1. The appellant lodged his appeal on 18 July 1991, and it was entered in the Board's register under file No. 168/1991 on the same day.
2. The Secretary General's observations were submitted to the Board on 29 November 1991.
3. The appellant's reply was dated 7 January 1992. In this reply, the appellant requested the Board to call as a witness Mrs G. PODESTA LE POITTEVIN, Head of the Central Division of the DECS at the material time. On 3 February 1992, the Board decided to grant this request.
4. The public hearing took place in the Court Room of the European Court of Human Rights, Strasbourg, on 28 February 1992. The appellant, Mr G. ORLANDINI, was assisted by Professor D. RUZIE; the Secretary General was represented by Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs, assisted by Mr P. DEWAGUET, Administrative Officer in the same Directorate. The aforementioned witness was heard.

## **THE FACTS**

5. The appellant entered the Council of Europe's service in 1985. He currently holds a grade A3 permanent post to which he was appointed on 1 April 1990.
6. On 12 September 1990, the appellant, who at the material time was working in the Central Division of the Directorate of Education, Culture and Sport (DECS), applied for the grade A4 post (No. 111.21) of Secretary to the Council for Cultural Co-operation (CDCC),

which had fallen vacant and been thrown open to internal competition by Vacancy Notice No. 46/90 of 10 August 1990.

7. On 23 November 1990 the Transfers and Promotions Panel submitted its recommendation to the Secretary General, pursuant to Article 14, para. 3, of the Regulations on Appointments.

8. Believing that there were serious doubts about the validity of the aforementioned recommendation, the Secretary General decided to consult the Bureau of the Appointments Board on the matter. On 22 January 1991 the Bureau concluded that the Panel should re-examine the applications and interview all the individual candidates in order to ensure the regularity of the procedure.

9. At the request of the Secretary General, the Panel held a second meeting. On 13 February 1991, after re-examining the applications and interviewing the candidates, the Panel recommended the Secretary General to appoint Mrs G. BATTAINI-DRAGONI.

10. The Secretary General, after personally interviewing both the appellant and Mrs G. Battaini-Dragoni, decided to appoint the latter to the post in question. The appellant was informed of this decision by a memorandum dated 27 March 1991.

11. On 15 May 1991, the appellant lodged an administrative complaint against the aforementioned decision. This complaint was rejected by the Director of Administration on 5 July 1991.

## **THE LAW**

12. The appellant is appealing against the Secretary General's decision to appoint Mrs Battaini-Dragoni to a post of Principal Administrative Officer (grade A4) in the Directorate of Education, Culture and Sport (DECS), advertised in Vacancy Notice No. 46/90 of 10 August 1990.

13. Having been informed of this decision by a memorandum dated 27 March 1991, the appellant considered it to be unlawful. He claims that this unlawfulness results from the fact that the disputed decision contains a procedural defect, that it violates the relevant statutory and administrative provisions as well as the general principles of law, and that the decision constitutes a misuse of authority on the part of the Secretary General.

14. The appellant claims that, in the first place, the disputed decision contains a serious procedural defect in that the Secretary General arbitrarily called in question a recommendation made in full knowledge of the facts on 23 November 1990. He further maintains that there is no administrative rule authorising the Secretary General to act in this manner by convening a further meeting of the Panel.

15. In this respect, he argues that the reason invoked by the Secretary General to justify such

a procedure, namely the existence of “a real risk of a sufficiently serious irregularity” resulting from “approaches” attributed to the appellant and his immediate superior, does not stand up to serious scrutiny. He adds that, far from constituting pressure designed to influence the members of the Panel, the approaches were simply aimed at better informing them of the duties attaching to the vacant post since the vacancy notice did not reflect the true nature of the post. The information given by both the Head of Division, who was the appellant’s hierarchical superior, and the appellant himself was intended to make up for the “glaring omissions” in the vacancy notice. Indeed, the aforementioned Head of Division, acting with the Organisation’s interests in mind, had had to intervene before the notice was published in an attempt to ensure that it reflected the changes that had taken place within the Division. As for the approaches made by the appellant, who was at the time filling the post in question on an acting basis to the satisfaction of his hierarchical superiors, they were intended to give the Panel members further information so that they could take their decision in full knowledge of the facts.

16. In the second place, the appellant maintains that the disputed decision violates the statutory and administrative provisions as well as the general principles of law. He claims that, contrary to the provisions of Article 12, para. 2, of the Staff Regulations, the Secretary General did not take account of the “qualifications and experience” of the appellant as compared to those of Mrs Battaini-Dragoni. He further maintains that, as a result, the Secretary General drew manifestly erroneous conclusions from the file and did not have regard to all the elements it contained.

17. According to the appellant, the Secretary General cannot refer to the selected candidate’s superior merit compared with his own “as there is no such superiority”. Such assessment of the candidates’ merits ought, he claims, to have taken account of the actual conditions relating to the duties to be performed, and he adds that it is in this context that the approaches made by the Head of Division concerned and himself should be seen. These approaches were intended simply to describe the exact content of the various duties, which had been described too vaguely in the vacancy notice.

It is further claimed that the Secretary General did not take account of the experience acquired by the appellant, who had performed duties “identical” to those specified in the vacancy notice.

18. In the third place, the appellant maintains that the Secretary General, in taking the disputed decision, committed a misuse of authority in that she attempted to favour a woman by adding a condition that was not included in the vacancy notice.

He refers in this context to a series of concordant indications resulting from various statements expressing a desire to promote women in the Organisation’s Secretariat at all costs.

19. The Secretary General maintains that the appeal is unfounded as the appellant has failed to show any infringement, to his detriment, of the provisions of the Staff Regulations and consequently cannot validly claim to have suffered any damage or loss of any kind.

20. As regards the appellant’s first submission, the Secretary General is of the opinion that

no procedural defects can be detected in this case as the procedure followed was in all respects consistent with the regulations in force.

21. The Secretary General maintains that the second meeting of the Transfers and Promotions Panel was convened as a result of the serious doubts that had arisen concerning the validity of the Panel's first decision in view of the repeated approaches made to several Panel members by the appellant himself and the Head of Division, who was at the time his immediate hierarchical superior. The Secretary General believes that these interventions were made not in the Organisation's interests but in the strictly personal interests of the appellant.

Furthermore, the decision to convene a second meeting of the Panel was taken after the Bureau of the Appointments Board had given its unanimous approval.

22. The Secretary General believes that such interventions are in all cases unacceptable. As they seek to influence the Panel members' judgment, they are such as to undermine the Panel members' independence and thus constitute unfair behaviour on the part of the candidate concerned. An appointment based on the Panel's first recommendation would therefore in this instance have infringed the principle of equality of treatment of candidates in a competitive procedure, given that the other candidates had not made the same approaches as the appellant.

The Secretary General therefore considers she was justified in believing, in the light of the aforementioned facts, that erroneous information on the nature of the vacant post had been supplied to certain Panel members and that this had prevented the Panel from conducting a comparative assessment of the candidates' merits and making objective, impartial and fully informed recommendations on the candidate most suitable for promotion.

23. As regards the alleged unlawfulness resulting from the violation of the statutory and administrative provisions and the general principles of law, the Secretary General, while not intending to cast doubt on the quality of the work performed by the appellant within the CDCC Secretariat, maintains that the merits of the candidate selected were greater than those of the other candidates. The Secretary General believes that Mrs Battaini-Dragoni possesses more varied experience and qualifications, the nature of which is more in keeping with the areas of activity covered by the post in question and indicated in the vacancy notice.

Furthermore, the wording of the notice reflected the new guidelines laid down by the Committee of Ministers as part of the reform of Council of Europe structures in the field of education and culture.

In this respect, the Secretary General wishes to underline that the administrative authority alone has responsibility for defining the duties and qualifications required for individual posts in accordance with any guidelines laid down by the Committee of Ministers and after conducting the necessary prior consultations.

24. As regards the alleged misuse of authority, the Secretary General maintains that Mrs Battaini-Dragoni was appointed to the post in question by reason of the fact that her merits were judged to be superior to those of the other candidates. The fact that she is a woman was taken

into account neither when the Panel adopted its recommendation of 13 February 1991 nor when the contested decision was taken.

25. The Board notes that, although the present dispute includes certain specific elements relating to the features of the procedure followed, it may be treated as a dispute regarding promotion.

In this respect, the following principles, in particular, emerge from the Board's case law.

26. The Secretary General's wide discretionary power in matters of staff management results from the fact that, being vested with authority to make appointments (Article 36c of the Statute of the Council of Europe and Article 11 of the Staff Regulations) and holding primary responsibility for the organisation of the Secretariat, she is best qualified to know and assess the needs of the Organisation. She accordingly enjoys a wide measure of discretion to assess factual matters pertaining to appointments, in particular with regard to the needs of each department of the Secretariat, as well as to assess the professional ability of staff members.

Nevertheless, the Board has consistently held in the past that that this discretionary power must always be exercised lawfully. All decisions must be taken in accordance with the relevant forms and procedures stipulated by the regulations in force. Furthermore, the administrative authority must take account of all the essential facts and avoid drawing erroneous conclusions from the documents in the file or misusing its authority.

27. As regards the particular facts of the present case, the Board notes that the parties have discussed at length the nature of the duties listed in the vacancy notice as well as the advantage there might have been for the Organisation in supplementing the said notice, which the appellant maintains did not reflect the true nature of the post.

28. The Board believes that this is the matter on which the clearest differences of opinion exist between the parties, especially as they concern the very scope of the Secretary General's authority in respect of the management of the Secretariat. It is therefore necessary to clarify at the outset the weight that can be attributed to this or that other aspect of the arguments advanced in this respect.

29. In the case of vacant posts, the Board notes that, when the internal competition procedure is followed, the Regulations on Appointments stipulate that "the vacant post shall be suitably notified within the Secretariat" (Article 7, para. 3) and that such notification "shall describe the duties attaching to the vacant post, and state the conditions for eligibility, the qualifications required of the candidates and the time-limit for the submission of applications." (Article 7, para. 4).

It is necessary for vacancy notices published within the Secretariat to have been verified by the Bureau of the Appointments Board (Article 11, para. 3, of the aforementioned Regulations), following consultation with a staff member duly appointed by the Staff Committee (Article 11, para. 4).

Consequently, all vacancy notices must be worded in accordance with the duties and qualifications chosen by the responsible administrative authority with whom a final decision in the matter lies, ie the Secretary General in the present instance.

30. In the circumstances, it is in the Board's opinion unacceptable for a member of the Secretariat staff, responsible for the department to which the vacant post would belong, by making direct approaches outside the scope of his administrative duties, to call into question the final choice of the Secretary General concerning the tasks and qualifications required for the post, on the pretext of an alleged failure of the vacancy notice to conform with the interests of the Organisation.

31. With regard to the appellant's first ground of appeal based on unlawfulness resulting from the procedural defect affecting the disputed decision, the Board notes that the procedure followed in this case consisted of two successive meetings of the Transfers and Promotions Panel.

It should be pointed out in this respect that under the system currently in force in the Council of Europe, and leaving aside situations different from the present case (for example those referred to in Articles 25, 26 and 27 of the Regulations on Appointments), in matters of promotion the Secretary General must initially obtain the opinion of the aforementioned Panel which then submits a recommendation. Thus, on 23 November 1990, an initial recommendation was sent to the Secretary General. Believing that the approaches which had taken place had constituted an interference with the exercise of the power of appointment and accordingly affected the regularity of this recommendation, the Secretary General felt obliged to obtain the opinion of the Bureau of the Appointments Board. Following such opinion, a second meeting of the Panel was convened, which submitted a new recommendation after interviewing all the candidates.

32. The Board does not see in what respect the procedure followed in this case can have given rise to a procedural defect. In its view there is nothing in the relevant administrative provisions to prevent the Secretary General from deciding, according to the particular circumstances of each case and using the power vested in her in matters concerning appointments, to order a subsequent procedure, provided nonetheless that the minimum requirements laid down by the regulations have been observed, which was the case here.

It would moreover have been open to the Secretary General, without infringing such regulations, to appoint the candidate who in her view had the greatest merit, without any other formality than to obtain a single recommendation of the Transfers and Promotions Panel. Accordingly there can be no finding of unlawfulness in this respect.

33. As regards the second ground of appeal based on breach of the statutory and administrative provisions and general principles of law, the Board notes that the appellant criticises the Secretary General for not having taken account of the objective elements in the file and in particular the experience which he had acquired in performing the duties attaching to the vacant post.

34. The Appeals Board has examined all the elements of the case. It has taken note in particular of the Panel's minutes of 23 November 1990, the official report of the Bureau of the Appointments Board's meeting on 22 January 1991 and the minutes of the Panel's meeting on 13 February 1991. Owing to the confidential nature of these documents, the Board has examined them in the absence of the parties, but with the appellant's agreement.

It follows from these documents, and in particular the minutes of 13 February 1991, that the Panel carried out a thorough examination of the candidates' respective qualifications in the light of the requirements of the vacant post. The Board notes that the appointment of the chosen candidate was in fact recommended by a majority of the Panel.

The Board also notes that before reaching her decision the Secretary General made a point of personally interviewing the two candidates who had obtained the most votes, namely Mrs Battaini-Dragoni and the appellant.

35. In the circumstances the Board is of the opinion that no unlawfulness can be detected in this case.

First, the disputed decision is clearly based upon the objective elements relating to the candidates' respective qualifications having regard to the exact tasks which they would have had to perform in the vacant post, elements which were mentioned in the Panel's deliberations and in the written and oral observations submitted to the Board.

Secondly, with regard more particularly to the conclusions which could be drawn from these elements and the comparative assessment of the candidates' merit carried out by the Secretary General, the measure of discretion which she has in matters of appointment by promotion was not exceeded.

36. Lastly, as regards the third ground of appeal that the Secretary General misused her authority by appointing the chosen candidate on the grounds that she was a woman, the Board is of the opinion that such an allegation must be rejected since it is not based upon any evidence.

For these reasons,

the Appeals Board:

Declares the appeal unfounded,

Rejects it; and

Decides that each party shall bear its own costs.

Delivered in Strasbourg, on 26 June 1992, the French text of the decision being authentic.

The Secretary of the  
Appeals Board

M. de SALVIA

The Chairman of the  
Appeals Board

C. RUSSO