

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

### Appeal No. 181/1994 (DIEBOLD v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chairman,  
Mr Kåre HAUGE,  
Mr Alan GREY, Judges

assisted by:

Mr Sergio SANSOTTA, Registrar, and  
Mrs Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. Mr Robert DIEBOLD lodged his appeal on 2 June 1994. On the same day the appeal was registered under no. 181/1994.
2. The appellant filed a supplementary memorial on 27 June 1994.
3. On 29 July 1994 the Secretary General submitted his observations on the appeal. The appellant lodged additional observations on 29 September 1994.
4. In a letter of 4 October 1994 the appellant requested that evidence be heard from the Director of Social and Economic Affairs, Mr Guthrie, as to his standard of work. On 13 October 1994 the Secretary General submitted his observations. The appellant lodged a rejoinder dated 24 October 1994. In an order of 27 October 1994 the Tribunal, under Article 9 para. 5 of its Statute and Article 5 para. 1 of its Rules of Procedure, decided not to accede to the request.
5. The public hearing took place in the courtroom of the European Court of Human Rights in Strasbourg on 28 October 1994. The appellant was represented by a member of the Strasbourg bar, Ms M L LANG; the Secretary General was represented by the Director of Legal Affairs, Mr E HARREMOES, assisted by Mr P DILLON-MALLONE, an administrative

officer in Central Section, Directorate of Legal Affairs.

## **THE FACTS**

6. The appellant entered the Council of Europe's employment on 1 April 1981. He is a permanent grade C2 staff member and holds a post of usher providing administrative assistance in the Directorate of Social and Economic Affairs.

7. On 12 October 1992, by Vacancy Notice 190/93, the Secretary General threw open to internal competition five grade C3 usher posts in Central Section, Directorate of Administration. The appellant and 11 other staff members applied for the posts.

8. The Transfers and Promotions Panel met on 18 November 1993 (302nd meeting) to consider the applications and after deliberating decided to recommend the appointment of five of the other candidates.

9. On 2 December 1993 the appellant was informed that, in the light of the Transfers and Promotions Panel's recommendations, made after a comparison of the applications for the post, the Secretary General had decided to appoint the applicants whose name the panel had forwarded.

10. On 14 January 1994 the appellant lodged an administrative complaint against the rejection of his application.

11. In Opinion 2/1994 dated 31 March 1994 the Advisory Committee on Disputes expressed the view that the complaint was unjustified. After examining, among other things, the record of the panel's deliberations, the committee held that there had not been any procedural defect and that the panel did not appear to have drawn any incorrect or arbitrary conclusions. In particular it held that not consulting the administrator liaison officer in the appellant's case or in the cases of the other applicants had not invalidated the procedure. However it said that it would be helpful to the appellant in his further career if he were told in what precise ways his performance could be improved.

12. On 7 April 1994 the Director of Administration rejected the administrative complaint.

## **THE LAW**

13. The appeal challenges the Secretary General's decision to appoint other applicants to the posts advertised in Vacancy Notice 190/93 of 12 October 1993.

14. The appellant submits that he had all the qualifications for promotion to grade C3 and that the duties described in Vacancy Notice 190/93 matched those he was already carrying out. He alleges that, in rejecting his application, the panel and the Secretary General were manifestly incorrect in their assessment of the facts in that they did not take into account all the relevant evidence and that, in part at least, they drew incorrect conclusions from the documents in the file. He says that during an interview which took place on 22 December 1993 the Head of Central Section, Directorate of Administration, told him that his application had been rejected because his working hours were different from those of the usher in charge of the

sector concerned and because his work was poor.

15. The appellant further alleges that the procedure was flawed in that the panel did not ascertain whether the Central Section (Directorate of Administration) official present on the panel had consulted the administrator liaison officer in the Directorate of Social and Economic Affairs, as required by Article 2 para. 5 of the Regulations governing the Internal and Security Service.

16. In addition the appellant alleges that the panel did not apply strictly the seniority criterion, as laid down in Article 2 para. 2 of the Regulations on Appointments, in the case of three of the applicants appointed.

17. Lastly he considers that the notice he received that his application had been rejected did not give an adequate statement of reasons.

18. The Secretary General contends that the appeal is unfounded in that the appellant has not established that there was any breach affecting him of the Staff Regulations, the Rules of Procedure of the Appointments Board or any other relevant regulations and therefore cannot legitimately claim to have suffered any prejudice.

19. The Secretary General submits that there was no misassessment of the facts. Contrary to the appellant's suppositions, the panel at no point took into account that his working hours were different from those of the current head of sector, and his application was not rejected on account of any misevaluation of his qualifications, merits or performance. On the contrary, the panel exercised due care in considering the qualifications of all the applicants in the light of the requirements laid down in Vacancy Notice 190/93 and took full account of the experience, ability, personal qualities and performance of each them. In exercising its powers of assessment on the basis of an adequately ascertained set of facts and after giving overall consideration to each application, the panel decided to recommend the five candidates who were ultimately appointed to the posts.

20. With regard to the alleged breach of Article 2 para. 5 of the Regulations governing the Internal and Security Service the Secretary General observes that the provision in question is part of an enabling instrument which does not create any obligation to seek the views of administrator liaison officers in promotion or transfer procedure. He states that the role of such officers is purely to liaise between user services and the Internal and Security Service. Lastly there was no inequality of treatment to the appellant's detriment since there was no consultation with liaison officers on any of the candidates.

21. On the alleged breach of Article 22 para. 2 of the Regulations on Appointments the Secretary General points out that the seniority criterion applies only where there is equal merit.

22. As regards the appellant's complaint that he was not adequately informed of the reasons for the rejection of his application, the Secretary General points out that the panel's appraisal of the applicants' merits involved comparing them and, being integral to the panel's deliberations, is confidential. The requirements to protect other candidates' rights and panel members' independence create, he argues, a legitimate exception to the duty to give detailed reasons for such a decision of the Transfers and Promotions Panel.

23. The dispute concerns an internal competition to fill five posts by promotion.

24. The Administrative Tribunal points out that, in matters of staff management, the Secretary General, being vested with authority to make appointments (Article 36 (c) of the Statute of the Council of Europe and Article 11 of the Staff Regulations), has discretionary powers. By virtue of these powers he is qualified to ascertain and assess the Organisation's departmental needs and the staff's professional abilities. However, these discretionary powers must always be lawfully exercised. While, in the event of a dispute, the Tribunal is not allowed to replace the Administration's assessment by its own, it must satisfy itself that the decision complained of complied with the Organisation's regulations and with general legal principles, to which the legal systems of international organisations are subject. In dealing with an appeal against an administrative decision taken under discretionary powers, the Tribunal must consider not only whether the decision was taken by a competent body and meets the formal requirements but also whether the correct procedure was followed and from the standpoint of the Organisations's own rules, whether the administrative authority took into account all the relevant facts, whether any incorrect conclusions were drawn from the file and whether there was any misuse of powers (See ABCE 147-148/1986, Bartsch and Peukert v. Secretary General, decision of 30 March 1987, paras. 51 to 53; ATCE 171/1993, Amat v. Secretary General, decision of 21 April 1994).

25. The Administrative Tribunal has considered all the evidence and documentary evidence submitted by the parties, including the record, which the Secretary General has produced, of the Transfers and Promotions Panel meeting on 18 November 1993. The Tribunal has examined the record without disclosing its contents to the appellant, who left it to the Tribunal to do whatever was necessary to preserve its confidentiality.

26. From the record it is clear that the Transfers and Promotions Panel conscientiously examined all the applicants' qualifications in the light of the requirements laid down in the vacancy notice, including the abilities, experience, personal qualities and performance of all the applicants.

27. In the matter of not consulting the relevant administrator liaison officer, the Tribunal notes that the purpose of the Regulations governing the Internal and Security Service, which came into force on 1 November 1990, is to clarify the manner in which the Internal and Security Service is organised and to lay down the main instructions which each member of the service must apply and be guided by at all times.

28. Article 2 para. 5 of the regulations lays down the duties of the administrator liaison officers, who are appointed by the Director of Administration on recommendations from the relevant directors and heads of department. They are responsible for relations between the relevant operational sector and the Internal and Security Service and for providing an assessment of an usher's performance. They thus liaise between user services and the Internal and Security Service.

29. As, however, the regulations do not lay down an actual assessment system for purposes of making a fair appraisal in appointments matters, they do not place any obligation on the Transfers and Promotions Panel or the Secretary General to consider the administrator liaison officers' views.

30. In addition, the Tribunal would point out that there is nothing in the evidence it has examined to suggest that the panel's deliberations were based on matters which were irrelevant

to the case or that the panel's recommendations resulted from an arbitrary assessment of the various criteria.

31. The Tribunal notes that the appellant in no way criticises the professional qualities and abilities of the candidates appointed, whose merits the panel in fact considered to be greater than the appellant's.

32. The Tribunal accordingly holds that the panel's, and subsequently the Secretary General's, decision not to apply the seniority criterion in the applicant's case did not infringe Article 22 para. 2 of the Regulations on Appointments.

33. It follows that the appellant's anxieties as to the proper assessment of his qualifications (anxieties which appear to have received support in inappropriate fashion during an interview with his superior on 22 December 1993) are groundless.

34. The Tribunal further observes that the reasons given in the memorandum of 2 December 1993 informing the appellant of the Secretary General's decision to appoint other candidates to the posts included an explanation that the appointments had been made in the light of the panel's recommendations, which followed an assessment and comparison of the candidatures.

35. The Tribunal points out that the requirement to give sufficient reasons for an administrative decision helps to ensure the necessary transparency in matters of staff management (ABCE 151/1988, *Bohner v. Secretary General*, decision of 1 December 1988, para. 28).

36. However, as regards the nature and scope of information to be disclosed to staff, regard must be had to the rule, laid down in Article 9 para. 1 of the Staff Regulations, that the panel's deliberations are confidential (see *mutatis mutandis* ABCE 157/1989, *Cunha v. Secretary General*, decision of 27 March 1990, paras. 68 to 71).

37. The confidentiality rule is designed to protect not only panel members' independence but also the rights of other candidates since assessment of merit necessitates comparing the candidates.

38. The memorandum dated 2 December 1993 met the requirement to give adequate reasons for appointments after comparative assessment of candidatures.

39. Consequently no illegality is to be found.

For these reasons the Administrative Tribunal:

Declares the appeal unfounded;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 12 December 1994, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

The Chairman of the  
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Read by Mr Kåre HAUGE  
at a public hearing on 12 December 1994

K. HAUGE

**ORDER OF 27 OCTOBER 1994**

**Appeal N° 181/94 - DIEBOLD v. Secretary General**

1. By letter of 4 October 1994 Mr Marchessou, the applicant's representative, requested

that Mr Guthrie, Director of the DASE, be heard as a witness. In the request, the witness is identified as the only person to make an objective assessment of the work performed by the appellant.

2. On 13 October 1994 the Secretary General submitted observations. The Secretary General contended that evidence from Mr Guthrie did not appear relevant to the case, considering the inability of the witness to give an opinion on the question, as examined by the Transfers and Promotions Panel, of the applicants' comparative merits. The Secretary General added that the witness had been acquainted with the appellant's work for a period of only nineteen months, whereas the appellant's merits were to be assessed on the basis of his entire service record. In his reply of 24 October 1994 the appellant stressed that it was important for this witness to be heard.

3. Having regard to Article 9 para. 5 of its Statute and Rule 25 para. 1 of its Rules of Procedure, the Administrative Tribunal decides not to grant the request that a witness be heard, on the grounds that the evidence in question would not assist the hearing.

4. The Deputy Registrar of the Administrative Tribunal is instructed to inform the parties orally of the foregoing.

Done in Strasbourg on 27 October 1994

The Deputy Secretary of the  
Appeals Board

C. WESTERDIEK

The Chairman of the  
Appeals Board

C. RUSSO