

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 186/1994 (Pascale BOUILLON v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

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

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms Pascale BOUILLON lodged her appeal on 6 June 1994. On 7 June 1994 the appeal was registered under file No. 186/1994.
2. The appellant filed a supplementary memorial on 8 June 1994.
3. On 1 August 1994 the Secretary General submitted his observations concerning the appeal. The appellant filed observations in reply on 28 September 1994.
4. On 22 June 1994 the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the external recruitment procedure (see paragraphs 12 and 15 below). On 7 July 1994 the Chair granted a stay of execution of the procedure.
5. In letters of 28 September and 13 October 1994 Mr Marchessou, representing the appellant, requested that a witness gives evidence concerning the selection tests held on 28 June 1994. On 28 October 1994 the Secretary General submitted his observations. The appellant replied on 16 November 1994. In an order dated 17 November 1994 the Tribunal, having regard to Article 9 para. 5 of its Statute and Article 25 para. 1 of its Rules of Procedure, decided to refuse the request.

6. The public hearing took place in the courtroom of the European Court of Human Rights in Strasbourg on 24 November 1994. The appellant was represented by Ms M L LANG, a member of the Strasbourg Bar and the Secretary General was represented by Mr E HARREMOES, Director of Legal Affairs, assisted by Mr C GIAKOUMOPOULOS, Principal Administrative Office in the Directorate of Legal Affairs.

THE FACTS

7. The appellant has been a permanent member of the Council of Europe staff since 1 February 1987 and has held a grade C4 post of storekeeper in the secretariat of the European Pharmacopoeia Commission since 1 July 1990.

8. In Vacancy Notice No. 215/93 dated 25 November 1993 a grade C5 post of laboratory technician in the same service (post Ph. 73) was advertised for internal competition. The notice stated the various duties which the person appointed would have to carry out under the Director responsible for the European Pharmacopoeia, more immediately, the head of the laboratory. The qualifications laid down in the notice were education of a standard equivalent to an intermediate level of general secondary education, preferably beyond, and/or established professional experience as a laboratory technician; very good knowledge of one of the two official languages (French/English) and good knowledge of the other; a sense of organisation and teamwork, order, method, initiative and discretion; and computer literacy. The appellant applied for the post.

9. The Transfers and Promotions Panel met on 20 January 1994 (304th meeting) to consider the two applications for the post.

10. In a memorandum dated 28 January 1994 the Secretary to the Transfers and Promotions Panel informed the appellant that her application had been rejected: after considering her application the panel, taking into account all the evidence it had been able to gather, had decided that she did not have all the qualifications laid down in the Vacancy Notice. The memorandum further stated that the Secretary General, on the panel's recommendation, would be filling the post by external recruitment.

11. On 10 February 1994 the appellant lodged an administrative complaint against the rejection of her application, requesting that her application be reconsidered and that the external recruitment procedure be stayed so as not to prejudice the outcome of her complaint.

12. On 23 February 1994 external recruitment procedure to fill the vacant post was set in motion (Vacancy Notice No. 215/93).

13. In Opinion 3/1994 dated 6 April 1994 the Advisory Committee on Disputes held that the complaint was unfounded. It expressed the view that there had not been any procedural defect in the matter and said it was clear from the record of the panel's deliberations that the panel had exercised due care in appraising the applicants' qualifications in the light of all the requirements laid down in Vacancy Notice No 215/93 and had not drawn any wrong or arbitrary conclusions from the file. The committee did say, however, that where, as in

the present case, the Transfers and Promotions Panel was dealing with candidates for posts of whom it could not readily arrive at an informed view because they worked in an outlying department or because of the technicality of the matter, a staff assessment system such as was provided for in Appendix III to the Staff Regulations was severely missed. As such a system had still not been introduced, it would be helpful to the appellant to be given a clearer statement of the reasons for the rejection of her application.

14. On 11 April 1994 the Secretary General rejected the administrative complaint.

15. In a letter of 2 June 1994 the appellant was informed that her further application, under the external recruitment procedure, for the aforementioned grade C5 post had been rejected after consideration of her file. It was decided that selection tests for shortlisted candidates would be held on 28 June 1994. In early July 1994, after the written tests, four of the five applicants were informed that their applications had failed.

THE LAW

16. The appellant challenges the Secretary General's decision dated 28 January 1994 to reject her application for the grade C5 post of laboratory technician in the secretariat of the European Pharmacopoeia Commission, advertised in Vacancy Notice No. 215/93 of 25 November 1993.

17. The appellant sees the rejection of her application as part of a campaign of humiliation and harassment.

18. She states that, during reorganisation of the European Pharmacopoeia Commission secretariat, a purchasing and reception service was set up in July 1993 and new procedures were introduced. As a result she was assigned additional responsibilities and found herself no longer able to cope with all her work. Nothing came of her request to be relieved of some of her workload and on 4 October 1993 she lodged an administrative complaint. She contends that her new job, profile dated 2 December 1993, arbitrarily deprived her of nearly all her previous duties.

19. In this connection she likewise mentions audits during the second half of 1993 to check that the new procedures were being implemented and working properly and a meeting to assess the introduction of the procedures. The report of the first audit, conducted in her absence in September 1993, concluded that the new procedures were not being properly implemented and a memorandum to her dated 28 September 1993, criticised her apparent refusal to help implement departmental guidelines. The finding of the second audit, conducted in her presence at the end of October 1993, was that there had been a marked improvement in implementation of the procedures and in a memorandum dated 16 November 1993 the Director of the Pharmacopoeia thanked her for her efforts. When the evaluation meeting was held on 26 November 1993 the appellant was on leave and she considers that this deprived her of the opportunity to express her views about her work and to make suggestions and requests.

20. The appellant believes she had all the qualifications and skills necessary for promotion to grade C5 laboratory technician and infers that the Transfers and Promotions Panel's rejection of her application was quite simply unreasonable.

21. In addition she alleges that the reasons she was given for the rejection of her application were incorrect or, at the very least, inadequate.

22. Lastly she points out that for the external recruitment procedure the qualifications were altered: education of a standard equivalent to an intermediate level of general secondary education and established professional experience as a laboratory technician or pharmacy assistant were now both required. She regards this alteration as a clear misuse of authority with the object of ensuring that the other candidate in the internal competition was promoted to the post.

23. She further points out that, despite the principle laid down in Article 59 para. 7 of the Staff Regulations, the selection tests went ahead as scheduled on 28 June 1994 and that four of the five candidates were informed that they had not been appointed.

24. The Secretary General maintains that the appeal is unfounded in that the appellant has not established any breach of the Staff Regulations, the Rules of Procedure of the Appointments Board or any other regulations relevant to the case and therefore has no legitimate claim to have suffered any prejudice whether pecuniary or non-pecuniary.

25. He argues that neither the Transfers and Promotions Panel's competence nor the procedure used are open to criticism. In addition the panel exercised due care in assessing the applicants' qualifications in the light of the various requirements laid down in Vacancy Notice No. 215/93. In taking their decisions the panel in the first instance and subsequently the Secretary General had regard to all the essential considerations and did not draw manifestly incorrect conclusions from the file. The Secretary General takes the view that the matters which the appellant adduces as background to the rejection of her application are of no relevance. In any case, he suggests, the occurrences to which she refers are indicative only of the difficulties she had in performing her duties, of some of which she was relieved at her own request, and show too that the decision to reject her application was neither arbitrary nor incorrect.

26. As regards the alleged failure to give adequate reasons, the Secretary General points out that the panel's assessment of the appellant's merits formed an integral part of its deliberations and is thus confidential. Where candidates' abilities are explicitly discussed during the selection process a candidate who is refused promotion is not entitled to receive detailed reasons. The requirement to protect the other candidates' rights and the panel members' independence creates, he argues, a legitimate exception to the obligation to give detailed reasons for decisions of the Transfers and Promotions Panel. The appellant's legitimate interests were fully protected in that the Tribunal can examine the record of the panel's deliberations and satisfy itself that there was no procedural irregularity.

27. The Secretary General goes on to argue that the part of the appeal concerned with the external recruitment procedure is inadmissible since the appellant's objections to Vacancy Notice No. 215/93 of 23 February 1994 have never been set forth in an administrative

complaint, as required by Article 59 of the Staff Regulations. Further, where he decides, in using external recruitment procedure, to ask for more qualifications than he would have asked for in an internal competition, that cannot be described as unreasonable or regarded as exceeding his discretion in appointment matters. He submits that the appellant's allegation that the procedure used was designed to ensure the promotion of another candidate is not supported by the slightest evidence.

28. The present case is a dispute concerning promotion.

29. The Administrative Tribunal points out that in staff management matters the Secretary General, who holds the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), has wide ranging discretionary powers under which he is qualified to ascertain and assess the Organization's operational needs and the staff's professional abilities. However those discretionary powers must always be lawfully exercised. In the event of a dispute, of course, it is not possible for the international tribunal to substitute its appraisal for that of the Administration's. It nevertheless has a duty to verify whether the disputed decision was taken in accordance with the Organization's regulations and with general principles of law, to which the legal systems of international organizations are subject. 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 Organisation's own rules, whether the administrative authority's appraisal took into account all the relevant facts, whether any incorrect conclusions were drawn from the file and lastly whether there was any misuse of powers (ABCE No. 147-148/1986, Bartsch and Peukert v. Secretary General, decision of 30 March 1987, paras. 51-53; ATCE No. 171/1993, Amat v. Secretary General, decision of 21 April 1994, para. 20; No. 181/1994, Diebold v. Secretary General, decision of 12 December 1994, para. 24).

30. The Tribunal has considered all the evidence and documents submitted by the parties, including the record of the Transfers and Promotions Panel's meeting on 20 January 1994, which the Secretary General produced at the Tribunal's request.

31. From the record it can be seen that the panel considered the appellant's qualifications for the particular vacancy. It notes, however, that neither the panel, in deciding not to recommend the appellant's appointment, nor the Secretary General, in acting on that recommendation, provided an adequate appraisal which had regard to the criteria set forth above (see paragraph 29).

32. In this connection the Tribunal points out that in previous decisions it has criticised the lack of an effective assessment system as liable to create a serious handicap in equitably operating and monitoring an appointments system (ABCE No. 157/1989, Cunha v. Secretary General, decision of 27 March 1990, para. 63; No. 169/1992, Nilsson decision of 25 September 1992, para. 24). Despite the urgency of the matter, it has yet to be remedied.

33. The Tribunal would point out that the lack of an assessment system is particularly evident in the present case, where the application was rejected because it was felt that the applicant did not have all the qualifications laid down in the Vacancy Notice and not after a comparison of the various applications for the post. Such a decision requires that the Transfers and Promotions

Panel adopt a more transparent approach allowing a detailed appraisal of all the relevant facts. Relevant considerations of professional ability cannot be thoroughly examined if there is no assessment report with the comments, if any, of the staff member concerned.

34. Considerations of transparency likewise require that some thought be given to the memorandum dated 28 January 1994 in which the appellant was informed of the rejection of her application for the post. The memorandum contained only the short statement that the Transfers and Promotions Panel, having regard to all the evidence it had been able to assemble, had decided she did not have all the qualifications laid down in the Vacancy Notice.

35. The Tribunal points out that giving adequate reasons for an administrative measure is a requirement which helps to ensure the necessary transparency in matters of staff management (ABCE No. 151/1988, *Bohner v. Secretary General*, decision of 1 December 1988, para. 28). As regards the nature and extent of the information to be disclosed to staff, regard must be had to the confidentiality rule concerning the panel's deliberations as laid down in Article 9 para. 1 of the Regulations on Appointments. The purpose of the confidentiality rule is to preserve panel members' independence and protect the rights of the other candidates where an appointment is made after comparison of the candidates' merits (see ATCE No. 181/1994, *Diebold v. Secretary General*, loc. cit., paras. 35-37).

36. The Tribunal observes that in the present case the application was rejected on the ground that the appellant did not have all the qualifications laid down in the Vacancy Notice. The requirement to protect the rights of the other candidate therefore did not arise. Equally the requirement to protect the panel members' independence did not justify withholding further details, particularly information about the qualification or qualifications that were lacking.

37. The decision to reject the appellant's application for the grade C5 post of laboratory technician as advertised in Vacancy Notice No. 215/93 of 25 November 1993 was therefore unlawful.

38. In view of this finding the Tribunal does not consider it necessary to examine the other grounds of appeal.

39. The appellant, having used the services of a lawyer, claims 10,000 French francs in costs and expenses. The Tribunal considers that claim reasonable within the meaning of Article 11 para. 2 of the Statute of the Administrative Tribunal.

For these reasons,

The Administrative Tribunal:

Declares the appeal founded;

Annuls the Secretary General's decision to reject the appellant's application for the post of laboratory technician as advertised for internal competition in Vacancy Notice No 215/93 dated 25 November 1993;

Orders that the Council of Europe reimburse the appellant 10,000 (ten thousand) French francs in costs and expenses.

Done and decided at Strasbourg on 24 February 1995, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Appendix 1

Chair's order

CHAIR'S ORDER OF 7 JULY 1994 in the case BOUILLON v. Secretary General

THE FACTS

1. The applicant, a permanent staff member (grade C4) in the Secretariat of the European Pharmacopoeia Commission, applied for the vacant post of laboratory technician (grade C5) in the same department, advertised on 25 November 1993 in Vacancy Notice No. 215/93.

2. In a memorandum of 28 January 1994 she was informed that, in accordance with the recommendation of the Transfers and Promotions Panel, the Secretary General had rejected her application on the grounds that she did not fulfil all the qualifications listed in the Vacancy Notice. The Secretary General subsequently decided to fill this post through an external recruitment procedure (Vacancy Notice No. 215/93 of 23 February 1994).

3. On 10 February 1994, in accordance with Article 59 para. 1 of the Staff Regulations, the applicant submitted a complaint to the Secretary General against the above decision. In it, she asked for the Transfers and Promotions Panel to reconsider her application and, in addition, for the external recruitment procedure for the post in question to be suspended, in order not to prejudice the outcome of her complaint.

In its opinion No. 3/1994, dated 6 April 1994, the Advisory Committee on Disputes found that the complaint was ill-founded.

On 11 April 1994, the Secretary General rejected the complaint.

4. In a letter of 2 June 1994, the applicant was informed that, following an examination of her file, her new application under the external recruitment procedure for the above-mentioned grade C5 post had been rejected. Selection tests for the short-listed applicants were scheduled for the 28 June 1994.

5. On 9 June 1994, the applicant lodged an appeal, No. 186/94, against the Secretary General's decision to reject her administrative complaint.

6. In a letter dated 22 June 1994, the applicant applied to the Chair of the Administrative Tribunal for a stay of execution of the selection tests provided for in Vacancy Notice No. 215/93 as part of the external recruitment procedure.

7. On 24 June 1994, the Chair of the Administrative Tribunal invited the Secretary General to submit his observations on the application for a stay of execution.

8. The Secretary General submitted his observations in a letter of 29 June 1994, which was received on 1 July 1994. These observations were communicated to the applicant on the same day. The applicant presented her reply on 5 July 1994.

THE LAW

9. Under Article 59 para. 7 of the Staff Regulations, an application for a stay of execution of an administrative act may be made if such execution is likely to cause "grave prejudice difficult to redress".

10. The reason given for the present application for a stay of execution is that the appointment of one of the candidates in the external recruitment procedure for the above-mentioned C5 post would cause the applicant prejudice which would be difficult to redress, reinstatement being in this case unlikely. The applicant argues that the rejection of her application for the post advertised in Vacancy Notice No. 215/93 was illegal, and that the alterations made to the job description and the qualifications required for the post in the context of the external recruitment procedure violated the fundamental principle of equality between the candidates.

11. The Secretary General states that the application for a stay of execution is inadmissible since it relates to the external recruitment procedure which was not, itself, the subject of an administrative complaint, a condition of admissibility of any application for a stay of execution.

12. Furthermore, the Secretary General states that, should the contentious proceedings lead to a ruling in favour of the complainant, the contested decision would be annulled and appropriate compensation would be paid. The Secretary General therefore concludes that there would not be any grave prejudice difficult to redress within the meaning of Article 59 para. 7 of the Staff Regulations.

13. The Secretary General also refers to precedents according to which interpreting the provisions of Article 59 para. 7 of the Staff Regulations as permitting any appointment to a vacant post to be immediately called into question merely because unsuccessful candidates allege illegality would be such as to jeopardise proper departmental functioning, which clearly cannot have been the intention of the authors of the Staff Regulations when they drafted the aforesaid provision (Chair's Order of 22 October 1990, para. 13, in the case of Hartland, Massie and Tessari v. the Secretary General; Chair's Order of 6 December 1990, para. 11, in the case of Tortroteau v. the Secretary General). He maintains that if the grade C5 post in the Secretariat of the European Pharmacopoeia Commission were to remain vacant for a long period, this would be likely to jeopardise the proper functioning of that department.

14. Finally, the Secretary General argues that the appeal's likelihood of success should be taken into account. In this case, the applicant's submissions would not appear to reveal any procedural irregularities or arbitrary decisions.

15. The Chair of the Administrative Tribunal notes that the applicant contests the rejection of her application for the C5 post advertised in Vacancy Notice No. 215/93 of 25 November 1993 and that this decision was the subject of an administrative complaint submitted by the applicant, which also referred to the procedure for filling this post by external recruitment. Since her application for a stay of execution, which concerns the continuation of the external recruitment procedure, falls within the context of the internal competition procedure initiated in November 1993, it cannot be considered inadmissible.

16. With regard to the merits of the application for a stay of execution, the Chair considers that the carrying of an external recruitment procedure is likely to create rights and situations that are difficult to reverse and might therefore cause the applicant prejudice difficult to redress within the meaning of Article 59 para. 7 of the Staff Regulations (see Chair's Order of 22 February 1988, paras. 9-10, in the case of Jeannin v. the Secretary General; Chair's Order of 26 October 1993, para. 15, in the case of Feriozzi-Kleijssen v. the Secretary General).

17. With regard to the Secretary General's statement that if the appeal proceedings were to end in the annulment of the contested decision, appropriate compensation would be paid to the applicant, the Chair notes that the Secretary General gives no details concerning possible forms of redress.

18. In the light of the particular circumstances of the case, the Chair concludes that the Secretary General's submissions do not allow the possibility that the applicant might suffer grave prejudice to be ruled out and that, since the Secretary General might envisage the application of Article 60 para. 7 of the Staff Regulations, it would then be difficult to redress the prejudice suffered by the applicant. As a result, the applicant would not be shielded from the negative consequences which the application of Article 59 para. 7 is intended to avert.

19. It follows that the application for a stay of execution is founded in so far as it concerns the external recruitment procedure.

For these reasons,

Ruling provisionally in accordance with Article 59 para. 7 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Rules of Procedure,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the requested stay of execution in so far as it concerns the external recruitment procedure for the grade C5 post of laboratory technician in the Secretariat of the European Pharmacopoeia Commission;

- decide that the stay of execution shall expire on the date on which the Administrative Tribunal hands down its decision.

Done and ordered in Savona, on 7 July 1994.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Appendix 2

Tribunal's Order

ORDER OF 17 NOVEMBER 1994

Appeal No. 186/1994 - BOUILLON v. Secretary General

1. The applicant, a permanent C4 member of staff in the Secretariat of the European Pharmacopoeia Commission, has appealed against the Secretary General's decision of 28 January 1994 to reject her application for the vacant C5 grade post of laboratory technician in the same department, advertised on 25 November 1993 in Vacancy Notice No. 215/93. The Secretary General subsequently decided to fill this post through the external recruitment procedure.
2. On 22 June 1994, the applicant applied to the Chair of the Administrative Tribunal for a stay of execution of the external recruitment procedure, in the light of the selection tests scheduled for 28 June 1994. On 7 July 1994, the Chair granted a stay of execution.
3. By letters of 28 September and 13 October 1994, the applicant's representative, Mr Marchessou, asked for Ms N Sandrin, who until the end of August 1994 had been a temporary employee in the Secretariat of the European Pharmacopoeia Commission, to be heard as a witness. The request stated that Ms Sandrin had sat the selection tests on 28 June 1994 and that her evidence would concern the conditions in which the tests took place.
4. The Secretary General submitted his observations on 28 October 1994. He maintained that, insofar as it related to the external recruitment procedure, the applicant's appeal was inadmissible. Moreover, since the applicant had not taken part in the examination in question, Ms Sandrin's evidence was not likely to cast further light on the case. He also stated that Ms Sandrin had failed the examination and that this therefore cast some doubt on the objectivity of her evidence.
5. In her reply of 16 November 1994, the applicant confirmed her request in its totality. She disputed the Secretary General's submission that part of the appeal was inadmissible. Regarding the relevance of Ms Sandrin's evidence, the applicant stated that the selection tests of 28 June 1994 had taken place in disregard of the principle in Article 59 para. 7 of the Staff Regulations. Ms Sandrin's evidence would demonstrate to the Tribunal that the tests had taken place, despite the request for a stay of execution, that the letters of rejection following the written tests had been sent to applicants after 7 July 1994, the date of the stay of execution of the external recruitment procedure, and that the tests were disconcertingly easy. Finally, the applicant completely rejected the argument that Ms Sandrin's evidence would not be objective.

6. 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.

7. The Deputy Registrar of the Administrative Tribunal is instructed to inform the parties orally of this decision.

Done in Strasbourg on 17 November 1994,

The Deputy Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

C. WESTERDIEK

C. RUSSO