

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 194/1994 (FERNANDEZ-GALIANO (II) 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 Eladio FERNANDEZ-GALIANO lodged his appeal on 26 October 1994. It was registered the same day under file No 194/1994.
2. The appellant filed a supplementary memorial on 14 November 1994.
3. On 14 December 1994 the Secretary General submitted his observations concerning the appeal. The appellant filed observations in reply on 12 January 1995.
4. On 22 June 1994 the appellant applied to the Chairman of the Administrative Tribunal for the stay of execution of an external recruitment procedure (see paragraph 10 below). On 7 July 1994 the Chairman granted the stay.
5. The appellant handled his own case; the Secretary General was represented by Mr G. BUQUICCHIO, Head of the Legal Advice and Treaty Office Division, Directorate of Legal Affairs. The parties agreed to waive oral proceedings.

THE FACTS

6. The appellant is a grade A3 permanent Council of Europe staff member. He holds a post of Administrative Officer in the Directorate of Environment and Local Authorities.

On 3 May 1994 he applied for the grade A4 post of Executive Director of the European Centre for Global Interdependence and Solidarity, Lisbon, under an internal competition procedure open solely to permanent Council of Europe staff and advertised in Vacancy Notice No 64/94 of 25 April 1994. The Centre comes under the Council of Europe Directorate of Political Affairs.

The post had previously been advertised under an internal recruitment procedure in which no applications had been forthcoming and subsequently under an external recruitment procedure withdrawn on 10 January 1994.

7. The Transfers and Promotions Panel met on 3 June 1994 (309th meeting) to consider the two applications lodged under the second internal procedure.

8. In a memorandum dated 10 June 1994 the Secretary of the Transfers and Promotions Panel informed the appellant that the panel had rejected his application after considering it and taking into account all the evidence it had been able to assemble, on the ground that he did not have all the qualifications laid down in the Vacancy Notice. The memorandum further stated that the Secretary General, acting on the panel's recommendation, had decided to fill the post by an external recruitment procedure.

9. On 21 June 1994 the appellant lodged an administrative complaint challenging the rejection of his application. He pointed out that neither the Transfers and Promotions Panel nor the Secretary General had specified the required qualifications which he apparently lacked. In refusing to appoint him the Secretary General had, he said, omitted to deliver a reasoned decision. He further maintained that an unreasoned decision of that kind could be regarded as arbitrary, not being based on any specific evidence that could be discussed or substantiated.

He requested that the internal recruitment procedure be restarted and that the post not be filled by an external recruitment procedure.

10. On 22 June 1994 an external recruitment procedure to fill the vacant post was set in motion (Vacancy Notice No 64/94).

11. In Opinion 6/1994 dated 13 September 1994 the Advisory Committee on Disputes expressed the view that the complaint was unfounded.

It said that the memorandum from the Secretary of the Transfers and Promotions Panel struck the required balance between observance of the appellant's rights and compliance with the confidentiality rule laid down in Article 9 para. 1 of the Regulations on Appointments.

Secondarily, in its view the appellant's allegation that the Secretary General's decision based on the Transfers and Promotions Panel's recommendation was arbitrary had required that it examine the substance of the decision. It had come to the conclusion that the decision was not arbitrary.

In conclusion it expressed the view that, as there was no staff assessment system, the Secretary General might give unsuccessful candidates for posts more detailed reasons for the rejection of their applications so that, in the interests of their future careers, they would know in what area or areas improvement was needed.

12. On 21 September 1994 the Secretary General rejected the complaint.

THE LAW

13. The appellant challenges the Secretary General's decision of 10 June 1994 to reject his application for the post of Executive Director of the European Centre for Global Interdependence and Solidarity, Lisbon, as advertised in Vacancy Notice No 64/94 of 25 April 1994.

He asks the Administrative Tribunal to annul the decision and return the procedure to the stage preceding the Transfers and Promotions Panel's meeting.

14. In challenging the rejection of his application the appellant submits that no reasons were given for the decision of 10 June 1994.

15. He notes that the decision states the panel's view that he did not have all the qualifications laid down in the Vacancy Notice but he contends that, as it does not specify which are the qualifications he does not have, it is quite impossible for him to know why the panel and the Secretary General rejected his application.

He argues that the requirement to give reasons for administrative and judicial decisions is intended to avert arbitrary decisions and enable the individual to challenge the lawfulness or foundedness of decisions. He further argues that failure to give reasons makes access to a tribunal meaningless and therefore contravenes Article 6 of the European Convention on Human Rights.

16. The appellant accepts that, like many other rights, the right to be given reasons for administrative decisions is not absolute and that there are grounds on which it may legitimately be restricted.

However, he has the following observations concerning the two legitimate grounds of restriction (the rights of other applicants and the confidentiality – to protect its members' independence – of the panel's deliberations) which the Advisory Committee on Disputes took into account in the present case.

On the first ground of restriction he observes that, as no other internal applicant was appointed (the application from the other staff member was rejected on exactly the same grounds

as his own), giving reasons for the rejection of his application could in no way have harmed anyone else.

With regard to the second ground of restriction he expresses the view that although protecting the confidentiality of the panel's discussions is a legitimate concern, not giving reasons for a decision interferes with a fundamental right of the individual. He states that what he is interested in knowing is not the details of the panel's deliberations (that is, the views expressed by individual members of the panel) but the qualifications which, in the panel's view, he does not possess. Neither therefore, he contends, is the confidentiality rule an acceptable explanation for his not being given reasons for the decision.

17. In conclusion he maintains that no justification can be derived from Administrative Tribunal case-law for not giving reasons regardless of circumstances.

18. The Secretary General maintains that the memorandum of 10 June 1994 clearly and unambiguously informed the appellant that the panel had decided that he did not meet all the criteria laid down in the Vacancy Notice. The question, he submits, is therefore not whether there was a failure to give reasons but whether this summary of the detailed reasons was legally sufficient, in the circumstances of the case as a whole, to enable the appellant to challenge the foundedness of the decision and thus defend himself against possible arbitrariness. The Secretary General points out that the appellant does not in fact challenge the foundedness of the decision.

On the question as to what form a detailed statement of reasons should take and how detailed it should be to meet the requirement, the Secretary General notes that neither from practice nor principle can any requirement be inferred to state each individual reason for accepting or rejecting the appellant's qualifications in respect of the individual criteria laid down in the Vacancy Notice. Relying on the case-law of the European Court of Human Rights as evidence that this is the position as far as judicial decisions are concerned, the Secretary General expresses the view that it applies even more so to administrative decisions and that overall regard must be had to the particular circumstances of the case and more especially to what is at stake.

19. He submits that, in view of the discretionary power which he enjoys in promotion matters, the balance that has to be struck between informing applicants of the reasons for his decisions and satisfying the requirements of administrative efficiency and confidentiality does not require a detailed statement of reasons.

20. The present dispute concerns a promotion matter.

21. 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 Organisation'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 (ABCE No 147-148/1986, Bartsch and Peukert v. Secretary General, decision of 30 March 1987, paras. 51 to 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).

The present case concerns a staff member whose application for a post was refused because he did not meet all the requirements laid down in the Vacancy Notice. The Tribunal recently determined a case which raised the same issue (ATCE No 186/1994, Bouillon v. Secretary General, decision of 24 February 1995).

However, the present case is different from the latter in that the appellant does not claim to have all the qualifications and skills necessary for promotion (*ibidem* para. 20). He complains merely that the wording used to inform him of the rejection of his application was clearly a vague administrative formula which tells applicants nothing about the reasons for the rejection of their applications, making it impossible for them to challenge possibly arbitrary decisions on grounds other than that – on which he himself has appealed – of failure to give reasons.

22. The Tribunal has considered all the documentary and other evidence submitted by the parties, including the record of the Transfers and Promotions Panel's meeting on 3 June 1994, which the Secretary General has produced at the Tribunal's request.

23. The Tribunal observes that the memorandum of 10 June 1994 informing the appellant of the refusal of his application for the post stated merely that the Transfers and Promotions Panel had decided that he did not have all the qualifications laid down in the Vacancy Notice.

24. 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 (see ABCE No 151/1988, Bohner v. Secretary General, decision of 1 December 1988, para. 28). As regards the nature and scope of the information to be disclosed to staff, the rule in Article 9 para. 1 of the Regulations on Appointments that the panel's deliberations are confidential must of course be taken into account. Its purpose is to protect not only the independence of the panel members but also the rights of other candidates where an appointment is made after a comparison of their respective merits (see ATCE No 181/1994, Diebold v. Secretary General, paras. 35 to 37).

25. The Tribunal observes that the present case concerns the rejection of an application for a post on the ground that the appellant did not meet all the qualifications laid down in the Vacancy Notice. The question of protecting the rights of the other candidate did not arise. In addition, the requirement to protect panel members' independence did not justify withholding further details, in particular details of the qualifications deemed to be lacking.

In this connection the Tribunal points out that it has already had occasion to criticise the lack of a proper staff-assessment system, a deficiency which makes it even more difficult to

achieve transparency in promotion matters (see ATCE No 186/1994, Bouillon v. Secretary General, decision, para. 32).

26. The proceeding is therefore unlawful.

27. Having reached that conclusion and in the absence of any specific complaint from the appellant, the Tribunal does not think it necessary to consider whether the Secretary General's decision to reject the appellant's application was substantively justified.

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 Executive Director of the European Centre for Global Interdependence and Solidarity, advertised for internal competition in Vacancy Notice No 64/94 dated 25 April 1994.

Delivered in Strasbourg on 5 April 1995, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chairman of the
Administrative Tribunal

S. SANSOTTA

C RUSSO

Read out by Mr Alan Grey
in the public hearing of 5 April 1995

A. GREY

CHAIRMAN' S ORDER OF 7 JULY 1994
in the case FERNANDEZ-GALIANO v. Secretary General

THE FACTS

1. The complainant is a permanent (grade A3) staff member of the Council of Europe assigned to the Directorate of Environment and Local Authorities.
2. On 3 May 1994 the complainant applied for the (grade A4) post of Executive Director of the European Centre for Global Interdependence and Solidarity, located in Lisbon (Vacancy Notice No 64/94 of 25 April 1994).
3. On 10 June 1994 he was informed that the Transfers and Promotions Panel, taking account of all the information which it had been able to collect as a basis for its appraisal, had considered that he did not have all the qualifications required laid down in the Vacancy Notice. The complainant was also told that the Secretary General had taken up the Panel' s recommendation that the post be filled through external recruitment.
4. On 21 June 1994 the complainant, under Article 59 para. 1 of the Staff Regulations, submitted a complaint about the above-mentioned decision to the Secretary General. He requested him to reopen the appointment procedure and not to open the post to external recruitment until the Administrative Tribunal had reached a decision on the subject.
5. In a memorandum dated 22 June 1994 the complainant applied to the Chairman of the Administrative Tribunal for a stay of execution of the Secretary General' s decision.
6. On 23 June 1994 the Chairman of the Administrative Tribunal invited the Secretary General to submit any comments he had about the application for a stay of execution.
7. The Secretary General submitted his observations in a letter of 29 June 1994. They were forwarded to the complainant on 30 June. The latter submitted his observations in reply on 4 July 1994.

THE LAW

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

9. The complainant affirms that neither the Transfers and Promotions Panel nor the Secretary General stated which qualifications he probably lacked. The Secretary General had failed to give grounds for his decision. The said decision was therefore arbitrary. On this point he referred to the case law of the Appeals Board/Administrative Tribunal (ABCE No 115-117/1985, Peukert, Müller-Rappard and Bartsch v. Secretary General, para. 102).

He gives as grounds for the present application for a stay of execution the fact that the filling of the post through external recruitment would cause him grave prejudice difficult to redress.

10. The Secretary General points out that any permanent staff may take part in external recruitment procedures (Article 7 para. 2 b of the Regulations on Appointments); the complainant would thus still have every chance at the end of the internal transfer/promotion procedure. As a result, the opening of the external recruitment procedure would not in itself entail the risk of grave prejudice difficult to redress.

On the other hand, in the Secretary General's opinion, suspension of the external recruitment procedure would definitely be prejudicial to the Council of Europe. In practice, since the Centre's headquarters is located in Lisbon, and thus a long way from the organisation's central structures, it would be unthinkable to leave unfilled the post of Executive Director, the holder of which is responsible for managing the Centre's programme of activities, throughout the period of the contentious proceedings.

Lastly, the Secretary General notes that, should the contentious proceedings lead to a ruling in favour of the complainant, appropriate compensation would of course be offered to him.

11. In his observations in reply to those of the Secretary General, the complainant notes that the assertion that he may take part in an external recruitment procedure is an argument likely to render the existence of the internal transfer/promotion procedure meaningless.

He further disputes that he would still have every chance. Lastly, referring to the compensation which he might receive if he won his case following the recruitment of another person from outside the Council, the complainant points out that he is demanding that the recruitment procedure be equitable and "transparent" and that the reasons for the appointment be given, and says that he cannot see how the Secretary General could compensate him for the absence of these guarantees.

Finally, while acknowledging that it would be desirable for the post to be filled as soon as possible, he says that there is no urgency, as the post of Executive Director has always been filled on the basis of temporary contracts since the Centre started to function and the post was created.

12. The Chairman points out from the outset that there could be no question at this stage of analysing the parties' arguments about the merits of the complaint submitted.

13. However, he notes that an external recruitment procedure would be likely to give rise to rights and situations which it would be difficult to remedy, and which would therefore be likely to cause the complainant grave prejudice difficult to redress, within the meaning of Article 59 para. 7 of the Staff Regulations (cf. Chairman's Order of 22 February 1988, paras. 9 and 10, in the case of Jeannin v. Secretary General).

14. The Chairman notes that the Secretary General has stated that "appropriate compensation" would of course be offered to the complainant should the contentious proceedings lead to a ruling in his favour. However, the Secretary General gives no details concerning the nature of such compensation.

The Chairman therefore notes that the Secretary General has not given sufficient information to eliminate the fear that the complainant might suffer grave prejudice. He further notes that, in so far as the Secretary General might envisage application of Article 60 para. 7 of the Staff Regulations, the prejudice suffered by the complainant would then, as the Secretary General even admits, be such as to be difficult to redress. Thus the complainant would not be protected from the negative effects which application of Article 59 para. 7 is intended to avoid.

15. It follows from the above considerations that the application for a stay of execution is well-founded where it relates to a stay of execution of 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 of the Tribunal,

Having regard to the urgency of the matter,

I, CHAIRMAN OF THE ADMINISTRATIVE TRIBUNAL,

- grant the requested stay of execution in so far as it concerns the external recruitment procedure for the post of Executive Director of the European Centre for Global Interdependence and Solidarity;

- decide that the stay of execution shall lapse if the complainant does not exercise his right of appeal before the Administrative Tribunal within the time limit stipulated in Article 60 para. 3 of the Staff Regulations, should his complaint be rejected;

- decide that the stay of execution shall expire on the day the Administrative Tribunal delivers its decision.

Done and ordered in Savona, on 7 July 1994.

The Registrar of the

The Chairman of the

Administrative Tribunal

S. SANSOTTA

Administrative Tribunal

C RUSSO