

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 210/1995 (Alfred SIXTO v. Secretary General)

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. Mr Alfred SIXTO lodged his appeal on 7 August 1995. The appeal was registered on 8 August under No. 210/1995.
2. On 28 September 1995, the Secretary General submitted his observations concerning the appeal. The appellant filed further observations on 30 October 1995.
3. In a letter received on 12 September 1995, Mr F., the staff member whose promotion is challenged by the appellant, requested permission to intervene in the proceedings concerned, in pursuance of Article 10 of the Statute of the Tribunal.

The Tribunal having granted Mr F. permission, on 16 November 1995, to submit written observations by a deadline of 8 December 1995, the Chair, in an order of 21 November 1995, stated which documents from the file were to be communicated to Mr F.

When these were deposited, Mr F. requested permission to intervene in the oral proceedings; on 26 January 1996, the Tribunal decided not to grant permission.

4. The public hearing took place in Strasbourg on 20 February 1996. The appellant was represented by Professor D. RUZIÉ; the Secretary General was represented by Mr R LAMPONI, Principal Administrative Officer in the Legal Affairs Division, and by Mr P. GARRONE, Administrative Officer in the same directorate.

THE FACTS

5. The appellant has worked for the Council of Europe since 1 January 1984 and was appointed to the permanent staff on 1 November 1985. Up to 31 October 1992, he was assigned to the Conference (now Congress) of Local and Regional Authorities of Europe - Directorate of Environment and Local Authorities. He at present holds a post of Administrative Officer (grade A3) in the Office of the Clerk of the Parliamentary Assembly of the Council of Europe.

6. On 12 December 1994, the Secretary General opened to internal competition, through Vacancy Notice No. 153/94, a post of Principal Administrative Officer (grade A4) in the Territorial Authorities, Transfrontier Co-operation and Regional Planning Division - Directorate of Environment and Local Authorities. The appellant applied for the post.

7. The Transfers and Promotions Panel met on 24 February 1995 (320th meeting) to examine the applications, and, after due deliberation, decided to recommend that Mr F. be appointed.

8. Having learned by chance that Mr F. had been appointed to the post concerned, Mr Sixto made a request on 24 April 1995 to be officially informed of this. He received that information on 26 April 1995.

9. On 19 May 1995 the appellant submitted a complaint about the rejection of his application. The complaint reached the Human Resources Division on 23 May.

10. On 22 June 1995 the Secretary General rejected the complaint.

THE LAW

11. The appellant appealed against the Secretary General's decision to appoint Mr F. to the post declared vacant in Vacancy Notice No. 153/94, of 12 December 1994.

12. The appellant considers that there was a failure to apply the Staff Regulations and that the general principles of law were violated.

13. In respect of the first argument, he maintains that there was a violation of Article 14, para. 5 of the Regulations on Appointments, the second sentence of which specifies that: "Where a number of applicants satisfy the conditions, they shall be listed in order of merit". Being unaware

of the record of the Panel meeting, the appellant, on the basis of the practice adopted until relatively recently, believes that, in his specific case, the Panel certainly continued to make no distinction between the applicants who satisfied the conditions and those who did not. He also believes that the Panel did not list all the applicants in order of merit and placed together all the applicants receiving no votes during the single ballot.

The appellant further takes the view that this provision was also violated in so far as, in any case, Mr F. ought not to have been listed, since he did not satisfy the conditions set out in the Vacancy Notice.

During the oral proceedings, the appellant stated that he would not press the point if the Tribunal had evidence, having inspected the record of the Panel meeting, that a differentiated list had been drawn up.

14. Where the second argument is concerned, the appellant takes the view that the Secretary General did not take account of all the relevant information in the case-file, and that erroneous conclusions were drawn from the documents in the file. These two series of defects led the Secretary General to appoint an applicant who did not meet certain conditions required by the Vacancy Notice.

According to the appellant, Mr F. did not satisfy the conditions for the admissibility of his application, not having “appropriate professional experience” or a “very good knowledge of the problems relating to local and regional co-operation”. The evidence adduced for this was the duties performed by Mr F. at the Council of Europe and, in respect of his previous experience, his curriculum vitae.

15. The appellant considers that he himself, thanks to his career within the Organisation, has a perfect knowledge of the problems connected with local and regional co-operation, always having been responsible for matters relating to local and regional authorities.

Thus the appointment of Mr F. is not based on any objective information which would prevent the Secretary General’s discretionary power in this matter from becoming arbitrary power.

Finally, basing his view on the case law of the Court of First Instance of the European Communities (judgment of 30 January 1992, Case T-25/90 *Schönherr v ESC* ECR II-63, and judgment of 22 March 1995, Case T-586/93 *Kotzonis v ESC*, not yet published), the appellant believes that the Secretary General has not produced evidence, in the form of objective information capable of being verified by the courts, that his assertion that the case-file concerning the Vacancy Notice enabled him to compare the applicants’ merits can be regarded as sufficient to show that, in the case in point, he considered the applicants’ comparative merits.

16. In conclusion, the appellant asks the Administrative Tribunal to declare Mr F.’s appointment void and ask the Secretary General to take note that, in the event of a new competition procedure being held, no account would be taken of any experience acquired by Mr F. in a post held by him following a previous procedure tainted by illegality.

17. The Secretary General argues that the appeal is unfounded.

In response to the appellant's first argument, he reaffirms that, in accordance with established practice, the order of merit of applicants is determined by the number of votes cast when the Panel takes its vote. In the present case, the record of the deliberations specifies the appellant's position on the list of applicants. Thus Article 14, para. 5 of the Regulations was complied with.

In respect of the complaint that Mr F. should not have been listed - because he did not satisfy the conditions set out in the Vacancy Notice - the Secretary General takes the view that this has to be examined in the light of the second argument.

18. Where the second argument is concerned, the Secretary General first points out that the qualifications set out in the Vacancy Notice are not of an objective nature, but, on the contrary, form part of the qualifications leaving scope for the exercise of discretion by the administrative authority. Furthermore, the Panel is required to appraise the merits of all applicants in the light of all the requirements imposed on post holders, since it is these as a whole which indicate the ideal profile of the post holder and make it possible to assess applicants most fairly in the light of this ideal profile.

19. On the subject of the qualifications which the appellant alleges that Mr F. does not possess, the Secretary General considers that the requirement for appropriate professional experience is a perfect example of a criterion which leaves him a very large measure of discretion. He refers on this point to the Tribunal's case law (ABCE No. 169/1992, Nilsson v. Secretary General, and No. 170/1992, Müller-Rappard v. Secretary General).

In the present case, the Vacancy Notice made no reference to professional experience in the field concerned, but only to appropriate professional experience.

Where the requirement for a very good knowledge of the problems relating to local and regional co-operation is concerned, the Secretary General takes the view that this requirement is similar to a requirement for an in-depth knowledge of the problems of international co-operation, and points out that the Tribunal has already considered that this requirement by its nature leaves scope for the exercise of discretion. On this point he refers to paragraph 22 of the aforementioned Müller-Rappard decision.

The Secretary General believes that the Panel carefully examined all the applicants' qualifications in the light of those required, and says that he himself certainly did not exercise the discretion he enjoys arbitrarily, for the successful candidate had the knowledge required by the Vacancy Notice.

20. The present dispute concerns an internal competition held in order to fill a post through promotion.

21. The Administrative Tribunal has examined all the information and documents submitted to it by the parties, including the record of the meeting of the Transfers and Promotions Panel of

24 February 1995, produced by the Secretary General.

22. Where the appellant's first argument is concerned, the first point which emerges from this document is that the Transfers and Promotions Panel did list in order of merit, following a vote, the staff members whom it felt it should recommend to the Secretary General. Thus there was no failure to apply Article 14, para. 5 of the Regulations on Appointments. As for the second point of this argument - namely the appellant's assertion that Mr F. should not have been listed since he did not have the requisite qualifications, this has to be examined, as stated by the Secretary General, in the context of the second argument.

23. As for the second argument, 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. Indeed, it is for the Tribunal to which an appeal against an administrative decision taken under discretionary powers is made, to examine, not only whether the decision was taken by a competent body and meets the formal requirements but also whether the procedure was correctly 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 whether there was any misuse of powers (ABCE No. 147-148/1986, decision in the case of Bartsch and Peukert v. the Secretary General, of 30 March 1987, paras 51-53; ATCE No. 171/1993, decision in the case of Amat v. the Secretary General, of 21 April 1994).

24. The Tribunal first notes that the parties differ on the nature of the qualifications on which the present dispute centres. In the appellant's view, these are objective in nature, whereas the Secretary General's view is that they are matters to be appraised subjectively.

25. The Tribunal considers it necessary to specify that, where the appraisal of subjective qualifications is concerned, the exercise of discretionary power by the authority responsible for their appraisal could not be as extensive as the Secretary General seems to indicate, claiming in his memorial of 28 September a "very large scope for appreciation" in the appraisal of appropriate professional experience.

However, the Tribunal does not consider it necessary in this case to settle the question of whether the disputed qualifications are of an objective or a subjective nature.

26. In practice, it emerges from an examination of the record of the meeting of the Panel that the Panel did conduct a conscientious examination of the respective qualifications of all the applicants, in the light of the requirements set out in the Vacancy Notice, including those for appropriate professional experience and for a very good knowledge of the problems relating to

local and regional co-operation.

27. Although the appellant disputes that Mr F. has the requisite qualifications, the Panel reached the opposite conclusion. In so doing, it did not go beyond the limits inherent in such an appraisal.

In the Tribunal's view, this finding could not be different, even supposing that the disputed qualifications were of an objective nature.

28. Furthermore, the Tribunal emphasises that nothing in the information at its disposal is likely to give the impression that the Panel's deliberations were based on circumstances not relevant to the instant case, or that its recommendation was the result of an arbitrary appraisal of all the criteria.

29. The Tribunal finds that the Panel deemed Mr F.'s merits to be greater than those of the appellant. For its part, it has found no information likely to prove that the disputed decision was based upon manifestly erroneous conclusions. As it is not for the Tribunal to substitute its own appraisal of the applicants' qualifications and merits for that of the Secretary General, the Tribunal concludes that the Secretary General's decision to appoint Mr F. does not seem at all arbitrary.

30. It follows that the complaint that there has been a failure to apply Article 14, para. 5 of the Regulations on Appointments (see paragraph 22 above) must also be rejected.

31. Consequently no illegality is to be found.

For these reasons, the Administrative Tribunal:

Declares the appeal unfounded;

Rejects it;

Decides that each party shall bear its own costs.

Delivered in Strasbourg, on 26 April 1996, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO

Read out by Mr Kåre HAUGE
in the public hearing of 26 April 1996

K. HAUGE

CHAIR'S ORDER of 21 November 1995
in the case of appeal SIXTO v. Secretary General

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having regard to appeal No 210/1995 - Sixto v. Secretary General;

Having regard to the application from Mr Roberto FASINO to intervene in the proceedings and inspect the documents, submitted to the Administrative Tribunal on 12 September 1995, to enable him to present his observations in support of those of the Secretary General;

Having regard to Article 10 of the Statute of the Administrative Tribunal and Rule 39.3 of its Rules of Procedure;

Considering that on 16 November 1995, the Tribunal, finding that Mr Fasino had a sufficient interest in the result of the case, agreed to his intervention application and granted him until the 8 December 1995 to submit his observations, which should only concern the matter of his qualifications;

DECIDE

- that a copy of the application referred to above and of the supplementary memorial shall be communicated to Mr Fasino;

- that the Secretary General's written observations and a copy of the applicant's observations in reply shall also be communicated to him;

- that these documents are communicated to Mr Fasino with the proviso that, in the interests of the parties in dispute, he respects, with regard to all third parties, the general principle of the right to the confidentiality of the proceedings during the stage preceding the public hearing, to which the parties are entitled [see, *mutatis mutandis*, Eur. Court of H.R., Lawless Case (preliminary objections and questions of procedure), 14 November 1960, Series A No 1, page 14].

Done and ordered in Strasbourg on 21 November 1995, the order being notified to the parties to the dispute and Mr Fasino.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO