

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 219/1996 (Giovanni PALMIERI (IV) v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,  
Mr Kåre HAUGE,  
Mr José da CRUZ RODRIGUES, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. Mr Giovanni PALMIERI lodged his appeal on 15 March 1996. On 21 March, it was registered under file No. 219/1996.
2. On 17 May 1996, the Secretary General submitted his observations on the appeal.
3. The appellant filed further observations on 11 June 1996.
4. The Chair decided there would be a single hearing to deal both with the present appeal and Appeal No. 217/1996 (Ary v. Secretary General).
5. The public hearing took place in Strasbourg on 22 October 1996. The appellant was represented by Professor D. RUZIÉ; and the Secretary General was represented by Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs, assisted by Mr P. GARRONE, Administrative Officer in the same directorate.

## THE FACTS

6. The appellant became a Council of Europe employee on 15 October 1976. He is a permanent staff member, on grade A4. When he lodged the present appeal, he held a post of Principal Administrative Officer in the Office of the Clerk of the Council of Europe Parliamentary Assembly.

7. On 6 January 1994, in Vacancy Notice No. 2/94, the Secretary General advertised for internal competition a post of Head of Division (grade A5) in the Clerk's Office. The appellant applied.

8. On 15 April 1994, the Secretary of the Transfers and Promotions Panel informed him that his application had been examined in accordance with the procedure laid down in the Regulations on Appointments and that, in the light of the recommendation which the panel had made after comparing and assessing the applications, the Secretary General had decided to appoint another staff member to the post.

9. On 27 April 1994, the appellant asked the Secretary of the Transfers and Promotions Panel whether the panel had drawn up a list, in order of merit, of applicants satisfying the requirements for the post.

10. On 4 May 1994, the Secretary replied that he was unable to provide him with information on the panel's deliberations as a whole or on any part of them on account of their confidentiality.

11. On 10 May 1994, the appellant lodged an administrative complaint alleging a procedural defect in that the provision of the Regulations on Appointments requiring that applicants be listed in order of merit had not been complied with.

12. On 26 May 1994, he withdrew the complaint and was informed, in a memorandum dated 9 June 1994 from the Director of Administration, that the Secretary General had noted the withdrawal.

13. On 23 November 1995, the Administrative Tribunal delivered its decision in Appeals Nos. 202-207/1995 (Palmieri, Grayson and others v. Secretary General). During the preparations for hearing these appeals, the Director of Legal Affairs gave the Tribunal information about the procedure for adopting the Transfers and Promotions Panel's records:

"In reply to an information request from the Tribunal, the Director of Legal Affairs stated in a letter dated 13 October 1995 that the established practice was that the record was drawn up by the panel's secretary and issued under the authority of its Chair. After the Chair had signed it, the record was submitted to the Secretary General and other panel members made whatever clarifications or amendments they considered necessary, on the understanding that if these were substantive the Chair and the Secretary General were informed of them. This, he said, had been the practice for a number of years and its purpose was to shorten the procedure for filling vacancies, the staff member promoted or

transferred being appointed as from the first day of the month following the panel's meeting" (paragraph 21 of the decision).

In its decision the Tribunal granted the appeals and set aside the challenged appointment.

14. On 24 November 1995, the appellant sent the Head of Human Resources a request for information, to which there was no reply.

15. On 20 December 1995, he submitted a further complaint to the Secretary General. He contended that, even if, in the present case, the Chair of the panel had signed the record, the established practice described by the Director of Legal Affairs made it impossible for all those who had taken part in the deliberations to sign the record. The appointment he was challenging was, he said, "contrary to Article 15, paragraph 5, of the Regulations on Appointments, as authoritatively interpreted by the Administrative Tribunal in the aforementioned decision" and requested the withdrawal of the decision to appoint the other staff member".

16. On 18 January 1996, the Secretary General replied that, by letter of 26 May 1994, the appellant had withdrawn the complaint submitted on 10 May 1994 and had accordingly exhausted the remedy prescribed in Article 59 of the Staff Regulations. The further complaint challenging that same decision was manifestly inadmissible.

17. In the light of that decision, the appellant referred the matter to the Administrative Tribunal.

## THE LAW

18. The appeal challenged the Secretary General's decision to appoint another staff member to the post advertised in Vacancy Notice No. 2/94 of 6 January 1994.

19. On the question of the appeal's admissibility, the appellant stated that it was only as a result of the Tribunal's decision of 23 November 1995 that he had discovered the practice the Secretary General had adopted. As there was neither publication nor notification of the preliminary documents for the challenged appointment, the time-limit for lodging a complaint ran from 23 November 1995.

In support of his arguments on admissibility *ratione temporis*, he relied on the Tribunal's case-law (decisions of the Appeals Board of the Council of Europe in Appeals Nos. 1/1967 and 3/1971), the practice of international organisations and the case-law of other international administrative tribunals (see A Pellet, *Les voies de recours ouvertes aux fonctionnaires internationaux*, 1988, p. 111) and the case-law of the Court of Justice of the European Communities (see, *inter alia*, *Jurisprudence en matière de fonction publique, janvier 1988-décembre 1993*, edited by the Research and Documentation Division of the CJEC, F-16.02.05, No. 9, p. 235).

20. On the substantive issues, he alleged that the appointment of the other person was illegal: when the Secretary General had taken his decision, the Transfers and Promotions Panel's record had not been final as it had not been signed by all the panel members.

21. In conclusion, he requested the Tribunal to set aside the challenged appointment.

22. The Secretary General maintained that the appeal was late and therefore inadmissible. The appellant had not met the time-limit in that the complaint from which the dispute arose had been filed on 20 December 1995 whereas the decision had been taken on 15 April 1994.

The Secretary General firstly contended that the appellant was wrong in maintaining that he had neither been notified nor had had any knowledge of the challenged decision: the decision had been notified to the appellant on 15 April 1994. Further, a complaint had been lodged in time and had been withdrawn.

Even assuming that within the meaning of Article 59, paragraph 2, final sub-paragraph, of the Staff Regulations there were exceptional circumstances for which allowance might be made – though that would clearly be contrary to legal certainty after more than a year and a half had elapsed – they could not be taken into consideration since a complaint had been submitted in time and the appellant had withdrawn it of his own accord. In the Secretary General's view, the success of another appeal did not constitute new development: the discovery of an irregularity in another administrative procedure might be regarded as a legal precedent but not as fresh evidence.

In addition, even if discovery of the panel's practice constituted fresh evidence allowing the period for lodging a complaint to be restarted, the complaint would still be late because the appellant had discovered the practice not (as he alleged) on 23 November 1995 (the date of delivery of the decision in Appeals Nos. 202-207/1995), but on 16 October 1995, when the Director of Legal Affairs' letter to the Tribunal had been notified to him.

23. On the substance of the appeal, the Secretary General argued that the principle of legal certainty, the principle of legitimate expectation and the principle of proportionality all precluded calling in question the appointment on the ground of a mere procedural irregularity. To do so would be contrary both to the rights of the person appointed and the interests of the department concerned.

24. In his observations in reply to the Secretary General's, the appellant stated that in April 1994 he had known of the challenged appointment but that, from the information at his disposal, it had been impossible to know that the procedure laid down in the Staff Regulations and the Regulations on Appointments had not been followed. In April 1994, therefore, he had not had any "existing" interest, within the meaning of Article 59, paragraph 1, of the Staff Regulations, in lodging a complaint on the matter. It was not until 23 November 1995 that he had learnt of the alleged irregularity; thus, he had fully complied with the time-limit laid down in Article 59, paragraph 2, sub-paragraph b, of the Staff Regulations.

On the substantive issues, he pointed out that, in Appeals Nos. 202-207/1995, the Tribunal had neither applied nor interpreted the principles of legal certainty, legitimate expectation, proportionality or appointees' acquired rights in the manner the Secretary General proposed. There was only one difference between the present case and those in Appeals Nos. 202-207/1995: the length of time which had elapsed between the challenged appointment and

the Tribunal's decision. None of those principles applied any differently in the present case.

24. The Tribunal notes, on the basis of his arguments, that, in maintaining that his appeal is admissible, the appellant relies on Article 59, paragraph 2, final sub-paragraph. Paragraph 2 of Article 59 reads:

“The complaint must be made in writing and lodged via the Head of the Human Resources Division:

- a. within thirty days from the date of publication or notification of the act concerned; or
- b. if the act has not been published or notified, within thirty days from the date on which the person concerned learned thereof; or
- c. within thirty days from the date of the implicit decision rejecting the request as mentioned in paragraph 1.

The Head of the Human Resources Division shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.”

The Tribunal must therefore establish whether the present case is an exceptional one and whether there are “duly justified reasons” for treating as admissible a complaint which, as the appellant's submissions acknowledged, was lodged well after the expiry of the thirty-day period, which ran from 15 April 1994 (see paragraph 8 above).

25. The Secretary General objected that the appellant's administrative complaint would in any case have been out of time since, he maintained, the appellant had learnt of the practice at issue on 16 October 1996 (the date on which he had been sent a copy of the Director of Legal Affairs' letter – see paragraph 22, sub-paragraph 4, above) and the complaint had been lodged on 20 December 1995.

The appellant, for his part, stated that he had never received the documents allegedly sent to him on 16 October 1996 and that he had not learnt of the practice until the Tribunal's decision of 23 November 1995.

26. The Tribunal, while not questioning the appellant's good faith, does not consider it necessary to determine that question, since the appeal must in any case be ruled inadmissible.

28. In the Tribunal's view, its decision in Appeals Nos. 202-207/1995 cannot, on its own, be regarded as providing grounds for allowing an appeal to be lodged after the time-limit. The appellant himself in fact acknowledged this in so far as he requested that his appeal be ruled admissible on account of a well-established matter in which his trust had been abused, and not

simply on the basis of the Tribunal's finding in the aforementioned appeals.

However the Tribunal holds that, although discovery of the Administration practice brought to light in Appeals Nos. 202-207/1995 constituted fresh evidence of which the appellant was unaware when he filed his first complaint, it none the less was not an exceptional occurrence such as the provision which the appellant wants applied would require.

He therefore cannot validly rely on the final sub-paragraph of Article 59, paragraph 2.

28. Certainly the appellant argued that, on account of the confidentiality of the proceedings, it was possible for him to be aware of the existence of the document which he alleged to have been irregularly drafted, yet not of its content. He likewise pointed out that the Secretary of the Transfers and Promotions Panel had informed him that his application had been examined in accordance with the procedure laid down in the Regulations on Appointments.

29. The Tribunal holds, however, that it cannot be inferred from this that we are dealing here with an exceptional matter. It notes that the administrative complaints and appeals which gave rise to its decision of 23 November 1995 did not challenge the Secretary General's impugned decision on the grounds of the manner in which the Transfers and Promotions Panel's record had been drafted. That irregularity came to light during the proceedings subsequent to the Tribunal's being asked to set aside the Secretary General's decision on other grounds.

30. The appeal must therefore be ruled inadmissible.

For these reasons, the Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 2 December 1996, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C RUSSO

## Appendix

### CHAIR'S ORDER OF 25 JANUARY 1996 in the case of PALMIERI v. Secretary General

#### THE FACTS

1. The complainant, Mr Giovanni PALMIERI, is an A4 Council of Europe official in the Office of the Clerk of the Council of Europe Parliamentary Assembly.
2. On 27 April 1995, under Article 60 of the Staff Regulations, he appealed to the Administrative Tribunal, challenging the appointment of Mr A, an A4 official in the Directorate of Legal Affairs, to an A5 Head of Division post in the Clerk's Office which had been advertised on 14 October 1994 in Vacancy Notice No. 140/94 and for which he himself had likewise applied.

In a decision dated 23 November 1995, the Tribunal annulled the appointment.

3. On 24 November 1995, Mr Palmieri submitted a request to the Secretary General that he be reinstated immediately in the post which he had held at the time of the annulled decision. At that time, Mr Palmieri stated, he had been Head of the Environment, Regional Planning and Local Authorities Section in the Clerk's Office and he had continued to perform the duties attaching to that post until 27 February 1995, the date on which they had passed to Mr A as a result of the promotion now annulled.
4. On 6 and 13 December 1995, Mr Palmieri submitted two complaints to the Secretary General under Article 59, paragraph 1, of the Staff Regulations.

In his first complaint, he asked the Secretary General to annul the Clerk's decision to put Mr C in temporary charge, following the Tribunal's decision, of the Committee on the Environment, Regional Planning and Local Authorities and the Committee on Agriculture and Rural Development. The Clerk's decision, he said, allegedly gave effect to the Tribunal's decision of 23 November 1995 but in actual fact was clearly contrary to the principle of *res judicata*. In addition, he maintained, it contravened the general legal principle of *restitutio in integrum*. He accordingly asked to be reinstated in the post.

In his second complaint, Mr Palmieri asked the Secretary General to rescind his decision, further to the Tribunal's decision of 23 November 1995, reconvening the Transfers and Promotions Panel and instructing the Head of the Department to reconduct the interviews he had given the applicants for the post. The Secretary General's decision, he contended, was contrary to the letter and intention of the Tribunal's decision.

5. In a memorandum dated 10 January 1996 lodged with the Registry on the same day, Mr Palmieri applied to the Chair of the Administrative Tribunal for a stay of execution of the procedure for filling Vacancy Notice No. 140/94 in the Clerk's Office.

6. On 10 January 1996, the Chair of the Administrative Tribunal invited the Secretary General to submit any comments he had on the request.

7. On 11 January, the appellant lodged additional information with the Registry (concerning the dismissal of his second complaint) and this was communicated to the Secretary General the same day.

8. The Secretary General submitted his observations by letter of 15 January 1996. They were communicated to the complainant on 16 January. The complainant submitted observations in reply on 19 January 1996.

## 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 complainant requests a stay of the procedure for filling Vacancy Notice No. 140/94 in the Clerk’s Office. He contends that if the procedure goes ahead it is liable to cause grave prejudice difficult to redress, for the following reasons.

After stating that at the time of the competition advertised in October 1994 (see paragraph 2 above), he was performing duties (as Head of the Environment, Regional Planning and Local Authorities Section) which were virtually identical with those attaching to the post which now requires to be filled, he argues that his circumstances will not be at all the same as in autumn 1994 and that this may do him serious harm. He contends that, in acting as he has done, the Secretary General has deprived him of professional experience – from 23 November 1995 to the Transfers and Promotions Panel’s meeting – which might have a vital bearing on the panel’s consideration of his application for the post and that if the *restitutio in integrum* issue is not resolved before the panel meets, the situation is liable to be prejudicial to his application: experience of the duties attaching to the post together with favourable reports from his superiors on his performance as Head of the Environment, Regional Planning and Local Authorities Section are assets of which he would have been unfairly deprived.

Lastly, he contends that the prejudice would be difficult to redress in that the only possible redress would be through the disputes procedure.

11. The Secretary General maintains that it is not possible for execution of the challenged decision to cause grave prejudice difficult to redress.

He points out that if the decision were itself annulled, on the grounds which the complainant puts forward, it would result in cancellation of the procedure for filling the post and of any new appointment to which the procedure gave rise. Equally, the Secretary General argues, the complainant himself admits that redress through the disputes procedure is possible even though he alleges that it would be difficult. That, however, is no reason to stay execution



of a challenged measure, for stay of execution would then cease to be an exceptional measure and would be granted whenever there was a complaint liable to give rise to a dispute before the Tribunal.

Lastly, the Secretary General regards as wholly gratuitous the complainant's supposition that he harbors a bias against his application which might adversely influence the panel and he regards it as no basis for granting a stay of execution.

The Secretary General concludes by requesting that no stay be granted.

12. In his observations in reply to the Secretary General's, Mr Palmieri first of all underlines the differences between his stay-of-execution request and those with which the Chair has already dealt, and goes on to reiterate that if no decision to reinstate him in his post is taken before the procedure goes any further, he would be faced with the legal impossibility of obtaining redress in the event of further reorganization by the competent Assembly bodies. On the basis of a synopsis produced in the Clerk's Office, he states that the problems inherent in the Assembly's structure are under constant review by the Clerk's Office. Maintaining that the prejudice suffered in the procedure currently under way might prove irreparable, he maintains that irreparable harm might similarly be done in the wider context of his career in the Organization.

The Secretary General's refusal of *restitutio in integrum* would, he argues, have serious effects on the meeting of the Transfers and Promotions Panel and only some of them would be readily measurable whereas others would be more difficult to identify accurately.

He lastly draws attention to various principles and guidelines laid down in stay-of-execution orders.

12. Firstly, the Chair notes that the complainant has lodged his stay-of-execution request in connection with the complaints of 6 and 13 December 1995 and that his reason for doing so is the prejudice he may suffer if the Transfers and Promotions Panel considers his candidature without there having been *restitutio in integrum*. It is only in his observations in reply to the Secretary General's that the complainant also raises the possibility of prejudice in the wider context of his career in the Organization.

Secondly, the Chair notes that the complainant refers to the prejudice he might suffer, on the one hand, if the procedure for filling Vacancy Notice No. 140/94 goes ahead and, on the other, in that if it were decided to reinstate him in his duties as Head of the Environment, Regional Planning and Local Authorities Section after the Clerk's Office had been further reorganised, the prejudice would be irreparable.

Be that as it may, the stay-of-execution request seeks a suspension of the procedure for filling the post in question.

The Chair does not consider the grounds put forward sufficient to demonstrate that the complainant risks "grave prejudice difficult to redress".

With regard to the procedure for filling Vacancy Notice No. 140/94, and as the Secretary General acknowledges in his observations, if the decision challenged were itself annulled for the reasons the complainant puts forward, it would result in cancellation of the procedure for filling the post and of any further appointment arising from it.

As to the impossibility of the complainant's adding to his experience as Head of the Environment, Regional Planning and Local Authorities Section on account of possible reorganization of the Clerk's Office, the Chair observes that, even though the stay-of-execution request seeks only to have the procedure for filling Vacancy Notice No. 140/94 suspended, it is not certain, whatever the consequences for the complainant, that there will be a reorganization of the Clerk's Office or, if there is, that the reorganization will affect the complainant himself or the Head of Section post the duties attaching to which he was performing.

13. The Chair further notes that, in the present dispute, allowing the promotion procedure to go ahead is not in itself, and in the absence of specific evidence, such as to cause the complainant "grave prejudice difficult to redress" within the meaning of Article 59, paragraph 7, of the Staff Regulations.

14. The Chair points out that it is his duty to show restraint in the exercise of the exceptional powers conferred on him by Article 59, paragraph 7, of the Staff Regulations (see Order of the Chair of 31 July 1990, paragraph 12, *Zaegel v. Secretary General*). In addition, there can be no question at this stage of going into arguments put forward by complainants in their administrative complaints.

15. It follows that the request for a stay of execution is unfounded.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 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,**

Decide

– to reject the appellant's application for a stay of execution.

Done and ordered in Strasbourg on 25 January 1996.

The Registrar of the  
Administrative Tribunal

S. SANSOTTA

The Chair of the  
Administrative Tribunal

C RUSSO