

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 251/1999 (Marc BAECHEL v. Secretary General)

The Administrative Tribunal, composed of:

Mr Nicolas VALTICOS, Deputy 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 Marc BAECHEL submitted his appeal on 17 March 1999. On 18 March 1999, the appeal was registered under N° 251/1999.
2. On 14 April 1999, Mr J.-P. CUNY, representing the appellant, submitted a supplementary memorial. On 18 May 1999, the Secretary General submitted observations concerning the appeal. The appellant submitted observations in reply on 16 June 1999.
3. The public hearing took place in the Human Rights Building, Strasbourg, on 30 September 1999. The appellant was represented by Mr J.-P. CUNY; and the Secretary General by Mr R. LAMPONI, Head of the Legal Adviser's Department in the Directorate of Legal Affairs, assisted by Mr P. TITIUN, Administrative Officer in the same directorate.

THE FACTS

4. The appellant, who has a master's degree in information technology as applied to management and a higher technical education diploma in information technology, was recruited on 1 November 1987 as a permanent staff member at grade B4. He works as a

programmer/analyst in the Computer and Telecommunications Service (CTS). On 1 June 1993, he was promoted to grade B5.

5. Following Vacancy Notice n° 71/97, dated 15 July 1997, for the post of Administrative Officer – Specialist in Information Technology (Grade A2/A3) in the Registry of the European Court of Human Rights, the appellant sat a competitive examination organised as part of an external recruitment procedure and was placed on a reserve list drawn up in keeping with Article 15 of the Regulations on Appointments.

The Vacancy Notice listed the following duties and requisite qualifications:

“Duties (Post n° 71.22):

Under the authority of the Registrar, the post-holder will be responsible for the development, implementation and maintenance of the information system of the Registry of the European Court of Human Rights, in collaboration with the Computer and Telecommunications Service (CTS). The principal duties of the post-holder will be:

Management:

- developing short- and medium-term information system strategies with users and reviewing of needs periodically;
- ensuring the most efficient use of computer tools compatible with the Council of Europe’s standards and information infrastructure.

Design of the information system:

- analysis of needs and evaluation of solutions in relation to the Court's information, data collection and data dissemination systems;
- participation in the choice of consultants and sub-contractors;
- management and monitoring of the life-cycle of systems;
- co-ordinating the management of projects and drawing up and validating specifications;
- co-ordinating the integration of the Court’s information system with that of the Secretariat of the European Commission of Human Rights and the Council of Europe’s global system.

Technical co-ordination:

- optimising purchases within the framework of the Council of Europe's procedures;
- co-ordinating installation of such infrastructures as are managed by the CTS;
- resolving minor technical problems;
- liaison with CTS and/or suppliers as regards technical repairs and maintenance;
- facilitating the installation and renewal of computer software.

Training:

- establishing necessary training programmes in liaison with CTS and/or suppliers;
- training of users.

Qualifications, professional experience, knowledge, skills and language proficiency:

- good university degree preferably in computer studies or in a relevant field;
- good knowledge of information technology and the development of databases;
- appropriate professional experience in the field of information, data collection and data dissemination systems;
- knowledge of management systems desirable;
- very good knowledge of one of the two official languages (French and English) and good knowledge of the other; knowledge of other European languages desirable.

Other qualifications:

- sense of responsibility and initiative;
- ability to work in a team;
- organising skills and method."

6. The selection tests for the post comprised an information system assessment study with a view to the merger of two establishments and a technical questionnaire.

7. The letter from the Human Resources Division dated 24 February 1998, informing the appellant that he was being put on a reserve list, contained the following passage:

“Consequently, we shall not fail to contact you if a comparable post falls vacant during the validity of the reserve list. However, inclusion on a reserve list does not constitute a right to an offer of employment.”

8. On 26 October 1998, Vacancy Notice n° 62/98 announced a post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly of the Council of Europe, to be filled by competitive examination in an external recruitment procedure. The duties attached to the vacant post and the requisite qualifications were stated in the following terms:

“Duties (Post n° 30.211 – PIMS n° 84):

Under the authority of the Clerk of the Assembly and in co-operation with the Director responsible for Information and Information Technologies and the relevant departments of member States’ national parliaments, the duties of the successful candidate will be as follows:

Management:

- assisting the Clerk and administrators responsible in defining and regularly assessing the strategies adopted for disseminating information about the work of the Assembly and its committees.

Information system design:

- publicising the Assembly's activities on the Internet;
- organising the Assembly's information system so that it may be accessed by both the general public and specialist parliamentary sectors;
- setting up and managing relational databases on the activities of the Parliamentary Assembly (parliamentary documents and procedures, meeting schedules, directories);
- enlivening the site with graphics and suitable information headings in the official languages (French and English) and, where possible, the working languages (German, Italian, Russian).

Technical system design:

- designing and maintaining the Assembly website in co-operation with the partners (IT services, libraries and information centres);
- training users in the technologies used to disseminate information via the Internet.

Qualifications, professional experience, knowledge, skills and language proficiency:

- good university degree and/or professional experience in developing and managing a website from a communication angle;
- knowledge and experience of the technology applied to the Internet, particularly as regards the creation and maintenance of a dynamic website in a Windows NT environment;
- familiarity with HTML and with CGI and ISAPI;
- knowledge of graphics applications and technology (Photoshop), and relational database management (Microsoft SQL and Access);
- preferably experience of interparliamentary services and activities;
- very good knowledge of one of the two official languages and good knowledge of the other; preferably knowledge of one of the Assembly's working languages (German, Italian and Russian).

Other qualifications:

- sense of responsibility and initiative;
- discretion in dealing with interparliamentary political bodies;
- team spirit;
- sense of organisation and method."

9. On 2 November 1998, the appellant sent a note to the Director of Administration reminding him that he was on a reserve list following the competitive examination organised for the post of specialist in information technology at the European Court of Human Rights. He considered that "the duties and qualifications required for the two posts" were "very similar". Arguing that his profile matched that described in the vacancy notice, he expressed surprise at not having been contacted by the Administration before the external recruitment procedure had been set in motion. In conclusion, he asked the Director of Administration "to give his

candidature for the post all the attention it deserved” and “to reconsider the need to organise a competitive examination”.

10. In a memorandum dated 26 November 1998, the Director of Administration replied that it was not possible to offer him the post in question and that the specific nature of the post made a recruitment procedure necessary. He gave the following reasons:

“It is true that in certain respects there are similarities between the aforesaid vacancy notice and the one which gave rise to the competitive examination subsequent to which you were placed on a reserve list (Vacancy Notice n° 71/97). There are substantial differences between the two, however, both in the duties involved and in the qualifications required.

In particular, the post announced in Vacancy Notice n° 71/97 was a post of specialist in information technology in the Registry of the European Court of Human Rights, with emphasis on the technical skills required for the design, maintenance and development of the information processing tools used in the Court Registry. The post in the Office of the Clerk of the Assembly also demands extensive knowledge of information technology, but the emphasis in this post is on communication and the dissemination of information on the Assembly’s activities. It is a job for a communication specialist rather than a specialist in information technology. This is made clear both in the duties and in the qualifications required: the vacancy notice calls for experience in developing and managing a website from a communication angle.”

11. On 17 December 1998, the appellant lodged an administrative complaint with the Secretary General, under Article 59 of the Staff Regulations.

12. On 18 January 1999, the Director of Administration, acting on behalf of the Secretary General, informed the appellant that his complaint had been rejected. The following reasons were given:

“I should like to point out, first of all, that it is for the Secretary General to decide which appointment procedure to use. When he decides to fill the post by external recruitment and there is a reserve list for the post concerned, the Secretary General appoints a suitable candidate named on the reserve list.

In this case, the Secretary General decided that there was no suitable candidate on the reserve list.

In view of the department’s requirements and the particular nature of the vacant post, the Secretary General wished to have a wide choice of candidates selected on the basis of the specific nature of the post.

It should be noted in this respect that the duties of the Administrative Officer to be recruited to the Office of the Clerk of the Assembly differ considerably from those of the post for which you were placed on a reserve list. While it is true that both job descriptions contain an ‘information system design’ component, in the European Court of Human Rights, this involved the design and technical implementation of a data processing system to manage the

Court's activities as a whole, following the merger of the former institutions. Disseminating information outside the Organisation was just one aspect of this overall task, approached from the angle of the technologies and applications to be used rather than primarily from the communication policy angle. This is made quite clear in Vacancy Notice n° 71/97 concerning the post of specialist in information technology. Vacancy Notice n° 62/98, on the other hand, stresses communication with the outside world, naturally leaving ample scope for the use of WEB technologies. Communicating with the general public and organising the site are central here, whereas they were absent from or merely incidental to the other post."

13. Following his candidature for the post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly, the Human Resources Department informed the appellant by letter dated 15 February 1999 that as one of the 24 candidates short-listed on the strength of their qualifications, he was invited to take part in the following stage of the recruitment procedure, namely the written examination (essay on the new information technologies in the form of a question or a statement for comment; drafting of a succinct newspaper article for both the general public and specialists, based on documentary information provided; and practical case study involving website architecture design). He was also informed that those candidates who obtained the best results in these tests would be invited to undergo a second series of tests using computers. The appellant did not do well enough in the first part of the selection procedure to qualify for the second series of tests.

THE LAW

14. The appellant challenged the Secretary General's decision, communicated to him by the Director of Administration on 28 November 1998, not to appoint him to the post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly, thrown open to external recruitment by Vacancy Notice n° 62/98. He asked the Tribunal to annul the decision and award him the sum of 20 000 French francs to reimburse the cost of this appeal.

15. The appellant holds that the Secretary General overstepped his discretionary power in matters of staff management, violating Article 15, paragraph 3, of the Regulations on Appointments to his detriment. He considers that before opening an external recruitment procedure to fill the post in the Office of the Clerk of the Parliamentary Assembly (Vacancy Notice n° 62/98) the Secretary General was under an obligation to appoint a suitable candidate from a valid reserve list, namely the reserve list drawn up following the competitive examination for post n° 72.20 in the European Court of Human Rights.

16. As for the Secretary General's statement that there was no suitable candidate on a reserve list, the appellant points out that his candidature for the post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly was declared admissible. To attribute to the adjective "suitable" a meaning other than that inherent in the adjective "admissible" would be giving the Secretary General an additional measure of discretion that rendered any obligation incumbent on him ineffectual. Furthermore, candidates on a reserve list would no longer have any guarantee of being appointed in the event that the condition laid down in Article 15, paragraph 3, were to materialise and a post corresponding to their qualifications were to become vacant. Before burdening the Organisation with the cost of a new external recruitment

procedure, the Secretary General should consider staff already on valid reserve lists and recruit a candidate who meets the requirements set out in the vacancy notice. It is in the interest of persons on reserve lists that this should be the procedure; the fact that they have taken and passed an examination should “lead to a situation which, albeit uncertain, is not arbitrary”.

17. The appellant maintains that whatever differences may exist between the posts in the Office of the Clerk of the Parliamentary Assembly and in the Registry of the European Court of Human Rights, they did not render his candidature for the A2/A3 post in the Office of the Clerk of the Parliamentary Assembly inadmissible. In the event of a competitive examination, a candidature is “admissible” within the meaning of the statutory and regulatory texts when it fulfils all the conditions of admissibility stipulated in the vacancy notice. Where there is no vacancy notice and no candidature as such, when it is simply a question of assessing how well a candidate’s qualifications match the needs of the vacant post, the regulations specifically use the adjective “suitable” (“*approprié*” in French). Now, the meanings of this adjective and the adjective “admissible” are perfectly identical, namely that the candidate’s qualifications match those required for the vacant post.

On this basis, the appellant considers himself to be a “suitable” candidate, in conformity with Article 15 para. 3 of the Regulations on Appointments, for the simple and adequate reason that his candidature was considered “admissible” by the Secretary General in the context of the external recruitment procedure organised in order to fill this vacant post in the Office of the Clerk of the Parliamentary Assembly.

18. In the alternative, the appellant disputes the purported scale of the differences between the qualifications required in the two vacancy notices, which he considers are the standard qualifications for work in information technology. There is no apparent reason why the post in the Office of the Clerk of the Assembly should require more experience of communication than that in the Registry of the European Court of Human Rights. Furthermore, in the course of his work he has actually acquired experience of parliamentary services and activities.

19. The Secretary General asks the Tribunal to declare the appeal unfounded and to dismiss it accordingly.

He maintains that he took all the facts of the case into account and did not draw any clearly unreasonable conclusions. He simply used his discretionary power and in no way overstepped his authority to appreciate the facts.

20. The Secretary General holds that under Article 6 of the Regulations on Appointments he is empowered to decide which recruitment procedure to use. He further considers that nothing in these regulations obliges him to appoint a candidate from a reserve list and that, even if such an obligation did exist, it would only apply if there were a suitable candidate. In his view, the possibility of drawing up reserve lists following competitive examinations is a matter of convenience, a means of saving time and money by making it unnecessary to organise a competitive examination every time a post becomes vacant. If he chooses to set a new external recruitment procedure in motion he assumes responsibility for his decision *vis-à-vis* the Committee of Ministers, the Council

of Europe organ to which he is also answerable for the smooth functioning of the Secretariat.

21. In this particular case, the Secretary General points out that the letter informing the appellant that he was being placed on a reserve list also informed him that this did not constitute a right to an offer of employment. Furthermore, in the specific case of the post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly, the appellant was informed that there was no suitable candidate on a reserve list.

22. According to the Secretary General, the skills required for the post of Administrative Officer in the Registry of the European Court of Human Rights and the duties involved are linked solely to information technology.

23. For the post in the Office of the Clerk of the Parliamentary Assembly, the Secretary General agrees that knowledge of information technology is also necessary, and this was why the appellant had also been short-listed along with 24 other candidates. However, this knowledge alone could by no means be considered sufficient, and this made it impossible to consider him a suitable candidate within the meaning of Article 15, paragraph 3, of the Regulations on Appointments solely because he was on the reserve list drawn up following the competitive examination for a specialist in information technology at the European Court of Human Rights. Unlike this post, the post in the Office of the Clerk of the Parliamentary Assembly requires the Administrative Officer recruited to use information technology to disseminate information about the Assembly's activities. Accordingly, emphasis had been placed on communication with the outside world and, more particularly, the design of a website for the Assembly. This same emphasis is also found in the qualifications and professional experience required for the post in the Office of the Clerk of the Assembly, namely "professional experience in developing and managing a website from a communication angle" (see paragraph 8 above).

24. This emphasis in the vacancy notice on communication outside the Organisation was also reflected in the type of tests the candidates were invited to take.

25. In short, the Secretary General holds that the job description and the nature of the selection tests clearly reflect a new need in the Organisation, the need to recruit a person capable of using his or her information technology skills in the field of communication, in particular by setting up a website. The Secretary General points out that, being aware of this need, he had been unable to assume outright that the appellant possessed the requisite skills. His acknowledged proficiency in information technology, however, entitled him to take the examination in order to demonstrate that he was also skilled in the art of disseminating information.

26. The Administrative Tribunal notes that this case concerns the Secretary General's decision not to appoint the appellant, who was on a reserve list following an external recruitment procedure to fill a post of specialist in Information Technology in the Registry of the European Court of Human Rights, to a post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly not filled by internal competition. Considering that the appellant

was not a “suitable” candidate within the meaning of Article 15, paragraph 3, of the Regulations on Appointments, the Secretary General chose to use the external recruitment procedure.

27. The Administrative Tribunal recalls that in general, according to its case-law, 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. Where a decision is challenged, an international court naturally cannot substitute its judgment for that of the Administration. However, it must ascertain whether the decision challenged was taken in compliance with the Organisation’s regulations and the general principles of law, to which the legal systems of international organisations are subject. It must consider not only whether the decision was taken by a competent authority and whether it is legal in form, but also whether the correct procedure was followed and whether, from the standpoint of the Organisation’s own rules, the administrative authority’s decision took account of all the relevant facts, any conclusions were wrongly drawn from the evidence in the file, and there was any misuse of power (ABCE, N° 147-148/1986, Bartsch and Peukert v. Secretary General, Decision of 30 March 1987, paragraphs 51-53; and, most recently, ATCE, N° 250/1999, Schmitt v. Secretary General, Decision of 9 June 1999, paragraph 25).

28. With regard to the choice of appointment procedure, Article 6 of the Regulations on Appointments reads:

“1. In the case of a vacant post (...), the Secretary General shall decide, having regard to the provisions of Article 12 of the Staff Regulations, whether the post in question should be filled through recourse to the external recruitment procedure or thrown open to internal competition among existing staff (...).”

29. Article 15 of the Regulations on Appointments concerns competitive examinations. Paragraph 3 reads:

“When the number of applicants having passed a competitive examination conducted as part of the external recruitment procedure exceeds the number of vacant posts thrown open to competition, a reserve list shall be drawn up and notified to the applicants concerned. A reserve list shall be valid for two years, but the Secretary General may, on the recommendation of the Recruitment Panel, extend its validity for periods of one year at a time. In the event of a vacancy not being filled by way of internal competition, the Secretary General shall appoint a suitable candidate named in the reserve list (...).”

30. It is only natural that the Council of Europe’s internal administrative regulations should be interpreted in the light of the rules of interpretation laid down in the Vienna Convention of 23 May 1969 on the Law of Treaties, the general rule of interpretation established in Article 31, paragraph 1, of which provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (see ATCE, N° 226/96, Zimmermann v. Secretary General, Decision of 24 April 1997, paragraph 24).

31. In this context, the Tribunal recalls that Article 12, paragraph 1, of the Staff Regulations clearly defines the aim of recruitment, which should be to ensure the employment of staff of the highest ability, efficiency and integrity (see ATCE, N° 247/1998, *Rattanasamay v. Secretary General*, Decision of 9 June 1999, paragraph 46). The point of the provisions of the Regulations on Appointments is to help to achieve this aim.

32. The Tribunal believes that while the primary consideration in recruitment is to secure people of the highest level, candidates should also be treated with due regard for their legitimate interests as recognised in the Organisation's regulations.

33. In the opinion of the Tribunal, the purpose of Article 15, paragraph 3, of the Regulations on Appointments is to make recruitment easier for the Organisation by enabling it to fill a vacant post with a suitable candidate from an earlier recruitment procedure. Considering the variety of posts in the Council of Europe, the parties agree that this solution should be used only for comparable posts. This was also made clear in the letter informing the appellant that he was being placed on a reserve list (paragraph 7 above).

34. The Tribunal considers that a candidate placed on a reserve list after passing a written examination organised as part of an external recruitment procedure certainly has no unconditional right to an offer of employment. However, the candidate must expect to be appointed if a comparable post falls vacant during the validity of the list. Article 15, paragraph 3, of the Regulations on Appointments cannot be considered not to have any binding force in the event of a vacancy not filled by internal competition. Otherwise, the scope of this provision would be unclear and the usefulness of the reserve lists would be compromised.

35. In respect of the eligibility of candidates on reserve lists for vacant posts, the Tribunal notes that under Article 15, paragraph 3, of the Regulations on Appointments the candidate must be "suitable". This term should be interpreted in such a way as to facilitate appointment to a vacant post. It must be determined whether the candidate on the reserve list is capable of filling the particular post, namely whether he or she meets the essential requirements of the post. Opting for an external recruitment procedure in order to have a wide choice of candidates in the hope of finding someone with better qualifications would be misusing Article 15, paragraph 3, of the Regulations on Appointments.

36. In this case, according to Vacancy Notice n° 62/98, the duties of the Administrative officer appointed to the Office of the Clerk of the Parliamentary Assembly (post n° 30.211) include information dissemination management, information and technical system design and training (paragraph 8 above). By comparison, the information technology specialist in the Registry of the European Court of Human Rights (post n° 71.22) is responsible, in the terms of Vacancy Notice n° 71/97, for the development, implementation and maintenance of the information system of the Registry of the Court, including management, information system design, technical co-ordination and training (paragraph 5 above).

37. The Tribunal has taken note of the arguments of the Secretary General stressing the differences between the two vacancy notices in terms of the duties involved, the qualifications required and the tests set in the two recruitment procedures. The Tribunal accepts that the job

description for the post of Administrative Officer in the Office of the Clerk of the Assembly was so worded with a view to recruiting a person capable of using his or her information technology skills in the communication field (paragraph 23) and that this aspect of the duties had been emphasised. Furthermore, the written tests in the selection procedure for this post were more important, especially those involving drafting.

38. Nevertheless, having analysed the various duties and qualifications required, the Tribunal arrives at the conclusion that the similarities between these two posts in the information technology field are sufficient for it to consider that the post in the Registry of the Court, for which the appellant passed the examination, and the vacancy in the Office of the Clerk of the Assembly are comparable. Accordingly, the appellant must be considered a “suitable candidate” for the latter post.

39. The fact that the candidate was short-listed to take the first set of tests in the ensuing external recruitment procedure confirms this opinion. Differing from the Secretary General’s statement concerning the provisional appraisal of a candidate’s qualifications when his or her admissibility is considered, the Tribunal points out that under Article 8, paragraph 1, of the Regulations on Appointments, “applications shall be admissible only if they comply with the conditions set out in the vacancy notice”. This means that a candidate who does not meet the minimum requirements set out in the vacancy notice is not entitled to take part in the selection procedure. In the opinion of the Tribunal, nothing in the case-file or in the pleadings of the parties indicates that the decision to accept the appellant’s candidature was out of order.

40. In short, the Secretary General was bound to appoint the appellant, who was on the reserve list, instead of resorting to an external recruitment procedure.

41. Therefore, the decision of the Secretary General not to appoint the appellant to the vacant post of Administrative Officer in the Office of the Clerk of the Assembly was unlawful.

42. The appellant, having used the services of a lawyer, claims 20 000 French francs in costs and expenses. The Tribunal considers that claim reasonable within the meaning of Article 11, paragraph 2, of the Statute of the Administrative Tribunal.

For these reasons,

The Administrative Tribunal:

Declares the appeal founded;

Sets aside the Secretary General’s decision not to appoint the appellant to the vacant post of Administrative Officer in the Office of the Clerk of the Parliamentary Assembly (post No. 30.211);

Orders that the Council of Europe reimburse the appellant 20 000 French francs (twenty thousand French francs) in costs and expenses.

Delivered at Strasbourg on 22 October 1999, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

N. VALTICOS