

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeals Nos. 202-207/1995 (PALMIERI and GRAYSON and others v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Alan H GREY,
Mr Hans G KNITEL, judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Palmieri lodged his appeal on 27 April 1995. It was registered on 3 May 1995 under file number 202/1995.
2. On 12 May 1995 MM Grayson, Hartland, La Porta, Perin and Plate lodged their appeals, which were registered on 15 May 1995 under file No 203 to 207/1995.
3. On 19 June 1995 the Secretary General submitted his observations in Appeal No. 202/1995 together with those on Appeals Nos. 203-207/1995. Appended to them was the record of the Transfers and Promotions Panel meeting concerning the appointment at issue.
4. The appellants submitted their memorials in reply on 4 July 1995 (Appeal No. 202/1995) and 20 July 1995 (Appeals Nos. 203-207/1995).
5. On 9 January 1995 Mr Palmieri applied to the Chair of the Administrative Tribunal for a

stay of execution of Mr A.'s appointment to the post of head of division in the Office of the Clerk of the Council of Europe Parliamentary Assembly (hereinafter the Clerk's Office). On 16 January 1995 MM Grayson, Hartland, La Porta, Perin and Plate jointly did likewise. In an order dated 1 February 1995 the Chair of the Administrative Tribunal refused the applications.

6. On 28 September 1995 the Tribunal decided to hold one hearing on all six appeals.

7. The public hearing took place in Strasbourg, in the courtroom of the European Court of Human Rights, on 24 October 1995. Mr PALMIERI was represented by Professor D RUZIE; the other appellants were represented by Ms M NADAL, a member of the Strasbourg Bar. The Secretary General was represented by Mr G BUQUICCHIO, Head of the Legal Advice and Treaty Office Division, Directorate of Legal Affairs, who was assisted by Mr R LAMPONI, Principal Administrative Officer in the same directorate.

THE FACTS

8. Mr Palmieri is Italian and began service with the Council of Europe in 1976.

Mr Grayson is British and began service with the Council of Europe on 15 November 1973.

Mr Hartland is British and began service with the Council of Europe on 1 December 1971.

Mr La Porta is Italian and began service with the Council of Europe on 1 October 1965.

Mr Perin is Turkish and began service with the Council of Europe on 1 July 1971.

Mr Plate is Dutch and began service with the Council of Europe on 1 November 1965 on a temporary contract, becoming a permanent staff member on 1 February 1966.

Each holds an A4 post of principal administrative officer in the Office of the Clerk.

9. On 14 October 1994 the Secretary General published Vacancy Notice 140/1994 advertising a post of head of division (grade A5) in the Clerk's Office. The appellants all applied.

10. On 9 November 1994 the Bureau of the Parliamentary Assembly approved the setting up of a new committee responsible for environment, local-authority and agriculture matters. This resulted in reorganization of the Clerk's office, as part of which it was decided that the person appointed to the post would head a new division comprising in particular the secretariat of the new committee.

11. The applicants for the post were informed of this decision in the interviews - provided for in Rule 19 (4) of the Rules of Procedure of the Appointments Board - which they had with the Deputy Clerk. The interviews took place on 18, 21 and 22 November 1994.

12. The Transfers and Promotions Panel met on 28 November 1994 to consider the applications. Having scrutinized them, it decided to recommend that Mr A. be appointed to the vacant post. On 2 December the secretary to the panel drew up the record of the meeting.
13. The record was submitted to the Secretary General on 14 December 1994. That same day the Secretary General appointed Mr A. Head of Division, grade A5, in the Clerk's Office, with retroactive effect from 1 December 1994.
14. The appellants were informed of Mr A.'s appointment on 19 December 1994.
15. The Chair of the Transfers and Promotions Panel signed the record on 21 December 1994. The other members of the panel amended and signed it later.
16. On 9 January 1995 Mr Palmieri, and on 16 January 1995 the other appellants, lodged complaints with the Secretary General in which they sought to have Mr A.'s appointment annulled.
17. The complaints were referred to the Advisory Committee on Disputes, by the Secretary General in Mr Palmieri's case and by the appellants themselves in the other cases. On 3 March 1995 the committee delivered two opinions (Nos. 1/1995 and 2/1995) in which it held that the complaints were unfounded.
18. The Secretary General dismissed the complaints on 21 March 1995, stating that he "accepted the reasons set out" in the committee's opinions.
19. On 17 August 1995 the Director of Legal Affairs sent the Tribunal a revised version of the record of the Transfers and Promotions Panel's meeting. He said that a copy had already been sent to the Advisory Committee on Disputes in July 1995.
20. In a memorandum dated 6 September 1995 the assistant secretary to the Advisory Committee on Disputes informed the Head of Human Resources that "the members of the committee as constituted at the relevant time did not regard the amendments to the record as affecting Opinions Nos. 1/1995 and 2/1995 but had asked him to inform the Head of Human Resources of "their surprise that the record had apparently been amended after submission to the committee and contained no indication of the date on which the amendments had been made". They had also requested that these observations be brought to the attention of the Administrative Tribunal.
21. 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.

He further informed the Tribunal that in the present case the panel had met on 28 November 1994, that as a result of clerical error the record had been sent to the Secretary General on 14 December 1994 before being signed by the Chair, but that the error was not of any practical significance as the Chair had signed it on 21 December without making any substantive changes to it. It had then been submitted to the rest of the panel, who had each signed it in turn.

The Director of Legal affairs also stated that in January 1995 the Secretary General had provided the record to the Advisory Committee on Disputes, complete with the signatures which had been obtained at that point. The record with all the signatures had been provided to the committee in July 1995.

The Secretary General, he said, wished to assure the Tribunal that his assessment of Mr A.'s merits, which had led him to appoint Mr A. to the post, was in no way altered.

The Secretary General, he lastly stated, wished to inform the Tribunal that in future the record would be signed by the Chair after all the other participants had signed it, and only then would be submitted to the Secretary General for decision.

THE LAW

22. The appellants request the annulment of Mr A.'s appointment to the post of head of division in the Office of the Clerk (grade A5) and put forward various arguments.

The Secretary General maintains that the appeals are unfounded.

23. Under Rule 14 of its Rules of Procedure the Administrative Tribunal orders the joinder of the six appeals as being closely connected.

24. Mr Palmieri firstly asserts that the Secretary General's decision dismissing his complaint did not give any reasons. He further contends that the procedure was defective in that the applicants were not ranked in order of merit. He likewise maintains that the administration did not take into account all the relevant evidence in the file, from which, in addition, conclusions were wrongly drawn, more particularly in that the applicant appointed did not meet all the requirements laid down in the vacancy notice.

25. MM Grayson, Hartland, La Porta, Perin and Plate argue that the procedure was defective in that a new selection criterion was added after publication of the vacancy notice. They also object to the composition of the panel and argue that the applicant selected did not meet some of the requirements laid down in the vacancy notice.

26. At the hearing, in the light of the information in the Director of Legal Affairs' letter of 13 October 1995, the appellants also raised the issue of procedural soundness.

27. The Secretary General maintains that by stating his acceptance of the opinion delivered by

the Advisory Committee on Disputes he amply met the requirement to give reasons for his dismissal of the administrative complaint and he contends that the procedure was lawful. He maintains that the complaint that a new selection criterion was added after publication of the vacancy notice is late and in any case unfounded. He also disputes that in appointing Mr A. he arbitrarily exercised his discretionary powers and he says that he took into account all the information in the file.

On procedural matters he confirmed at the hearing that the record of the panel's meeting had been unsigned when sent to him on 14 December 1994 and that amendments had been made to it subsequently, but reiterated that the subsequent signatures and amendments had made no difference to the outcome. The irregularity, he maintained, was a purely formal one and did not invalidate Mr A.'s appointment. He confirmed the assurance given in the letter dated 13 October 1995 that in future the record would be submitted to him after signature by all the Panel members.

28. The Tribunal considers that in view of the Director of Legal Affairs' letter of 13 October 1995 (see paragraph 21 above) it must first rule on the lawfulness of the procedure.

29. It holds that there is no reason to doubt the Secretary General's statement that the corrections made to the record in no way alter his assessment of Mr A.'s merits. It finds no evidence in the file that warrants drawing any different conclusion.

30. It points out, however, that Article 14, para. 5, second sub-paragraph, of the Regulations on Appointments reads:

"A record of the Panel's proceedings, including in particular its recommendation, shall be submitted to the Secretary General. The record shall be signed by all persons who have participated in the deliberations."

31. In the present case it notes that the record submitted to the Secretary General on 14 December 1994 and which formed the basis of his appointment decision not only was not signed by all the persons who had participated in the deliberations but - contrary to the practice the Secretary General had introduced - was not even signed by the Chair of the panel.

32. The Chair did not sign the record until 21 December 1994 and it was only thereafter that the other panel members signed and amended it. Their signatures and amendments were effected after the decision to appoint Mr A. (taken on 14 December 1994) and indeed, in some cases, even after the appellants had lodged their administrative complaints (on 9 and 16 January 1995) and after the case had been referred to the Advisory Committee on Disputes. When the Secretary General took the decision to appoint Mr A., therefore, the record of the Transfers and Promotions Panel meeting was not final and was not legally a record within the meaning of Article 14, para. 5 of the Regulations on Appointments. The rules laid down in that provision were accordingly not complied with.

33. The Tribunal therefore cannot but find the procedure null and void as from the Secretary General's appointment decision dated 14 December 1994, which it hereby sets aside.

34. It accordingly does not consider it necessary to examine the other grounds of appeal against the decision.

For these reasons the Administrative Tribunal:

Orders the joinder of Appeals Nos. 202-207/1995,

Declares the appeals founded,

Annuls the Secretary General's decision to appoint Mr A. to the Head of Division post in the Office of the Clerk and,

Orders that the Council of Europe pay 10 000 FF to Mr Palmieri and 10 000 FF to the other appellants collectively in costs and expenses.

Delivered in public at Strasbourg on 23 November 1995, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO

CHAIR'S ORDER OF 1 FEBRUARY 1995
in the cases of PALMIERI and GRAYSON and others v. Secretary General

THE FACTS

1. The six applicants are MM G. PALMIERI, C. GRAYSON, J. HARTLAND, R. LA PORTA, B. PERIN and A. PLATE. They are all Council of Europe grade A4 officials assigned to the Office of the Clerk of the Parliamentary Assembly of the Council of Europe.

2. The applicants applied for the post of Head of Division in the Office of the Clerk of the Assembly (grade A5), advertised on 14 October 1994 in vacancy notice no 140/94. On 19 December 1994 they were informed that the Secretary General had decided to appoint Mr A., a grade A4 official working in the Council of Europe's Directorate of Legal Affairs.

3. On 9 January 1995, Mr Palmieri submitted a complaint to the Secretary General, in accordance with article 59 para 1 of the Staff Regulations. The other five applicants submitted a similar joint complaint on 16 January.

In his complaint, Mr Palmieri asked the Secretary General to annul the decision to appoint Mr A. He also expressed serious reservations regarding the Transfers and Promotions Panel's compliance with the provisions of article 14 para 5, first sub-paragraph, of the Regulations on Appointments, which read "where a number of applicants satisfy the conditions, they shall be listed in order of merit". He therefore asked the Secretary General to: a) inform him whether the Panel had performed this task; b) establish whether the Panel had listed "all" the applicants satisfying the conditions in order of merit and, if it had not done so, annul the contested decision; and c) establish whether he was one of the applicants satisfying the conditions and, if this was not the case, annul the decision.

4. In their complaint, the other five applicants asked the Secretary General to annul his decision to appoint Mr A. and resume the appointment procedure. They claimed that the successful applicant did not have all the necessary qualifications; in addition, in the course of the procedure, the Secretary General had introduced a new element (appointment to a Division yet to be established) which was not referred to in the vacancy notice, thus deviating from the appointment procedure; finally, they argued that the person conducting the interview provided for in article 19 para 4 of Secretary General's Rule no 620 of 29 November 1982 establishing the rules of procedure of the Appointments Board had exceeded his responsibilities in requiring the applicants to undertake tests for which they could not have been prepared.

5. In memoranda dated 16 and 17 January 1995 respectively, received in the Registry on 17 January, Mr Palmieri and the other five applicants submitted two applications to the Chair of the Administrative Tribunal for a stay of execution of the contested decision.

6. On 18 January 1995, the Chair of the Administrative Tribunal invited the Secretary General to submit any comments he might wish to make on the two applications for a stay of execution.

7. The Secretary General presented his observations in a letter of 23 January 1995. These observations were communicated to the applicants on 24 January. The applicants presented their observations in reply on 27 January 1995.

On 31 January 1995 the Secretary General submitted comments on Mr Palmieri's observations and the latter has today presented his comments in reply.

THE LAW

8. Since the two requests for a stay of execution have the same object, it is appropriate to consider them jointly.

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 execution of the decision is likely to cause "grave prejudice difficult to redress".

10. The applicants are applying for a stay of execution of the contested decision.

Mr Palmieri considers that the following two circumstances could lead to a grave prejudice difficult to redress: a) the appointment of another permanent official to the A4 grade post in the Directorate of Legal Affairs formerly occupied by Mr A., for which a competition was announced on 12 January 1995 (vacancy notice no 7/95) and b) Mr A.'s acquisition, during his period in post in the Office of the Clerk of the Assembly, of at least part of the experience he currently lacks.

The other applicants refer to the arguments in their administrative complaint to support their claim that the contested appointment is likely to cause them grave prejudice difficult to redress. They also request a stay of execution of the appointment procedure to which vacancy notice no 7/95 relates. They consider that pressing ahead with the procedure could aggravate the situation and cause further prejudice.

11. The Secretary General considers that implementation of the contested decision cannot cause grave prejudice difficult to redress in this case.

The annulment of the procedure to fill the A5 post in the Office of the Clerk of the Assembly would also result in the annulment of Mr A.'s appointment and the holding of a new competition. The applicants would thus retain all their prospects. In this connection, the Secretary General sees no objection to stating, as Mr Palmieri has requested, that should the contested decision be annulled, any experience acquired as a result of an earlier, illegal, procedure would be disregarded.

The Secretary General also considers that the filling of the post left vacant by Mr A. is not liable to create rights and situations that cannot be easily reversed or to cause the applicants grave prejudice difficult to redress. He notes that, in accordance with his practice in similar cases, if Mr A.'s appointment were to be annulled he would be appointed to another vacant or a supernumerary post.

In conclusion, the Secretary General asks for the stay of execution not to be granted.

12. In his observations in reply, Mr Palmieri notes that the Secretary General has responded satisfactorily to the question concerning experience acquired as a result of an earlier, illegal, procedure but not to that concerning Mr A.'s posting should his promotion be annulled.

The other applicants firstly dispute the Secretary General's assertion that filling the post left vacant by Mr A. in the Directorate of Legal Affairs is not liable to establish rights and situations that cannot be easily reversed; in particular, it would be rash to predict that he could fulfil his undertaking to appoint Mr A. to another post within a period that was not prejudicial to the applicants for the A5 post in the Office of the Clerk. Secondly, they consider that the conditions in which the procedure for filling the post left vacant by Mr A. was set in motion could also prejudice their situation.

13. The Chair notes firstly that the applicants Grayson, Hartland, La Porta, Perin and Plate are also asking for a stay of execution of the procedure for filling the post left vacant by Mr A. in the Directorate of Legal Affairs, on the grounds that pressing ahead with the procedure would be liable to aggravate the situation and cause further prejudice.

The Chair observes that the administrative complaint presented by these applicants applies only to Mr A.'s appointment to the post of head of division. Under the provisions of article 59 para 7 of the Staff Regulations, applicants can request a stay of execution only in relation to the act complained of. The admissibility of this part of the application for a stay of execution is therefore open to question. However, the Chair does not consider it necessary to rule on this matter since the examination of the remainder of this application for a stay of execution and of Mr Palmieri's application must take account of the potential consequences of the filling of Mr A.'s post on the applicants' case, in order to establish whether there is a "grave prejudice difficult to redress".

14. Regarding the stay of execution of Mr A.'s appointment, the Chair notes the Secretary General's statement that should the contested decision be annulled, any experience acquired as a result of an earlier, illegal, procedure would be disregarded. This undertaking will be fulfilled in the event and in the context of any contentious proceedings (cf. Chair's Order of 22 October 1990 para 14, in the case of Hartland, Massie and Tessari v. Secretary General).

15. The Chair also notes that Mr A.'s appointment, following a promotion procedure, does not in itself, and in the absence of special circumstances, give rise to the applicants' suffering a "grave prejudice difficult to redress", within the meaning of Article 59, para. 7 of the Staff Regulations.

16. The Secretary General has stated that the filling of the post left vacant by Mr A. is not liable to create rights and situations that cannot be easily reversed. The applicants dispute this assertion.

As Mr Palmieri has noted, in an earlier application for a stay of execution the Secretary General decided to postpone, temporarily, the advertising of the vacated post (order of 17 July 1986 para 9, in the case Bartsch v. Secretary General). However, the Chair notes that the Secretary

General has ranging wide discretionary power in matters of staff management and in exercising this power he is qualified to know and assess the operational need of the Organization. If the Secretary General does not consider such a decision appropriate in the present cases, the consequences will have to be taken into account if he is required to implement a decision to annul the contested appointment, since his action cannot be allowed to delay or impede the implementation of the Tribunal's decision.

17. The Chair points out that it his duty to show restraint in the exercise of the exceptional power which he exercises under Article 59, para. 7 of the Staff Regulations (see Chair's Order of 31 July 1990, para. 12, in the case of Zaegel v. Secretary General). Moreover, there can be no question at this stage of a detailed assessment of the applicants' submissions in the context of their administrative complaints.

18. It follows from the foregoing that in this case the applications for a stay of execution are unfounded.

On these grounds,

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

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- to reject the applicants' requests for a stay of execution.

Done and ordered in Savona on 1 February 1995.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO