

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 130/1985 (Klaus FUCHS (II) v. Secretary General)

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman, and
Mr Raul VENTURA and
Sir Donald TEBBIT, Members,

assisted by:

Mr Michele de SALVIA, Secretary, and
Ms Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged his appeal on 18 November 1985, and it was entered in the Board's register the same day under the number 130/1985.
2. The supplementary pleadings were communicated to the Secretary General of the Council of Europe on 6 December 1985.
3. In a letter on 6 December 1985, the Chairman asked the Secretary General to submit his observations on the appeal by 30 January 1986.
4. On 27 January 1986, the Secretary General's representative asked for an extension of time until 14 February 1986, and in a letter on 29 January 1986 the Chairman granted this request.
5. The Secretary General's observations were received on 13 February 1986 and were forwarded to the appellant for a reply by 2 April 1986.
6. The appellant's reply was received on 25 March 1986.
7. By letter of 13 May 1986, the parties were informed that the hearing had been set down for 9 June 1986.
8. The public hearing took place on 9 June 1986 and was attended by Mr Fuchs and Mr Harremoës, Director of Legal Affairs, representing the Secretary General, assisted by Mr Buquicchio, Head of Central Section in the Directorate of Legal Affairs, Ms Tubach-Ortiz,

Principal Administrative Officer in Establishment Division, and Mr Lamponi, Administrative Officer in the Private Office of the Secretary General.

In accordance with a decision it had taken on 29 May 1986, the Board heard evidence from Mr J Smyth, Director of Social and Economic Affairs, and Mrs C Hodgens, Head of Establishment Division.

9. On 11 June 1986, in pursuance of decisions it had taken on 9 and 10 June 1986, the Board heard evidence in private from Mr S Hunt, Director of Administration and Finance, Ms C Hodgens, Head of Establishment Division, Ms Paulus-Lévy and Ms Wiederkehr.

THE FACTS

The facts as set out by the parties may be summarised as follows:

10. Mr Klaus FUCHS entered the Council of Europe's service on 1 September 1975. He currently occupies an A3 post in the Social Division.

11. On 7 May 1985, by decision No. 1327, the Secretary General transferred A4 post No. 51.25 in the Social Division to the Health Division, under the number 54.24.

By the same decision, the A2/A3 post No. 54.22 in the Health Division was transferred to the Social Division, under the number 51.213.

12. On 17 May 1985, the Secretary General published vacancy notice No. 30/85 in respect of the A4 post number 54.24 of Principal Administrative Officer in the Health Division of the Directorate of Social and Economic Affairs. Nine members of staff applied for the post, including the appellant.

13. The Promotions Panel met on 28 June 1985 to consider these applications. At the end of its discussion it decided to recommend the appointment of Ms Massarelli-Boltho to the vacant post.

14. By order No. 3528 of 18 July 1985, the Secretary General appointed Ms Massarelli-Boltho to the post of Principal Administrative Officer in the Health Division.

15. On 22 July 1985, the appellant submitted an administrative complaint to the Secretary General, in which he sought to have set aside the decision whereby Ms Massarelli-Boltho was promoted.

16. The Secretary General rejected this complaint on 20 September 1985.

17. On 18 November 1985, the appellant lodged his appeal.

SUBMISSIONS OF THE PARTIES

18. The appellant is seeking to have set aside order No. 3528, whereby Ms Massarelli-Boltho was appointed to the A4 post in the Health Division.

The **appellant's** submissions may be summarised as follows.

19. The appellant considered that order No. 3528 contravened the rules governing the procedure for staff promotion, and in particular offended against the principle of equality.

20. He maintained that this principle was a general principle of law designed to ensure objective, impartial treatment and thus equality of opportunity for candidates at all stages of a competition, including the organisation of it and the assessment of professional abilities by the appropriate panel (ILOAT, judgment No. 107).

21. He stated that a breach of procedural rules could not be justified by arguing that the candidate selected was at all events the best.

He observed that such a line of reasoning, based entirely on the outcome, would disregard the obligation to comply with procedural rules in systems based on law.

22. He concluded that the order of appointment made by the Secretary General was unlawful if at any stage of the procedure a particular candidate was placed in a privileged position.

23. He added that this was particularly the case where a competition was organised for the sole purpose of appointing to the vacant post the candidate who was in the event successful (Court of Justice of the European Communities, Case 105/75, Giuffrida v. Council), as the very concept of a competition precluded selecting a particular member of staff at the outset.

24. He considered that, in the present case, the principle of equal opportunity for candidates was contravened, because it had been decided at the outset who would finally be appointed, and the procedure that was gone through served merely to give an appearance of compliance with a procedure according with legal rules and principles.

25. He pointed out that it was after a talk between Mr Smyth and Mr Adinolfi that the procedure which had already been set in motion to fill the A4 post in the Social Division was halted, the exchange of posts between the Social Division and the Health Division carried out and the competition organised to fill the A4 post in the Health Division.

26. He considered that this exchange of posts to the detriment of the Social Division did not reflect any criterion of the Council of Europe's general policy. He emphasised that nothing either in the statements made by the Secretary General or in the decisions of the Committee of Ministers warranted the conclusion that there had been a shift of priority between the health and social sectors; on the contrary, several of the Secretary General's statements to the Parliamentary Assembly and the Committee of Ministers suggested that important issues in the social sector would rank higher in future priorities.

27. The appellant claimed that these circumstances were discussed and criticised by the Promotions Panel.

28. He concluded that the exchange of posts could be explained only by the desire to settle an individual case, quite independently of any "programme of reorganisation", which he claimed to be non-existent.

29. He submitted that these were proceedings in which the Appeals Board inquired of its

own initiative into the facts of a case on the basis of the statements made and evidence offered by the parties and could, in particular, order production of any necessary documents and require any member of the Secretariat to attend and answer its questions, under oath if need be.

30. He considered that, given the confidential nature of matters concerning staff management, it had to suffice, in the interests of adequate legal protection for members of staff who brought appeals, for them to set out the information at their disposal. If such information was enough to suggest prima facie that the appellant's statements were well founded, it was for the defendant to prove the contrary.

The appellant accordingly considered that, in the present case, it was for the defendant to demonstrate that his allegations were false.

The **Secretary General's** submissions may be summarised as follows.

31. He observed that the appellant disputed neither the wording of the vacancy notice nor that the candidate chosen satisfied the requirements set out in it.

As regards the draft vacancy notice for the A4 post in the Social Division, the Secretary General pointed out that "it does not follow (...) that once a recruitment procedure has been initiated, the appointing authority is obliged to pursue it by filling the post which has become vacant" (Court of Justice of the European Communities, 24 June 1969, Fux v. Commission).

The Secretary General considered that, a fortiori, the appointing authority was under no obligation where a vacancy had not even been announced, the relevant notice having remained at the draft stage.

32. He also noted that the appellant had not adduced any evidence of a breach of the principle of equality in the present case.

33. He pointed out that it was for the appellant to present "compelling evidence that the administrative decision relating to the selection of the person who was to occupy the post sought by him was based upon prejudice" (UNAT, judgment No. 312, para. VII).

As to the shifting of the burden of proof, the Secretary General observed that the opposite principle was the norm and that in member States' legal systems, displacement of the burden of proof was expressly allowed, by way of exception, only in very special cases.

34. Lastly, he wished to point out that he had had all the proceedings reviewed and that no irregularities had been found.

As regards production of the minutes of the Promotions Panel, which was sought by the applicant, the Secretary General pointed out that by Article 9(1) of the Regulations on appointments, the "deliberations, reports, opinions and recommendations of the Appointments Board shall be confidential".

He stated that he was nonetheless ready to make these documents available to the Appeals Board if it so wished, in the confident expectation that it would take all necessary steps to preserve their confidentiality.

He noted lastly in this connection that the Administrative Tribunal of the International

Labour Organisation had ruled that “In accordance with a general principle, internal reports (...) should not be disclosed and, unless they are necessary to judicial redress, the Tribunal abstains from ordering the production of them” (ILOAT, judgment No. 440).

35. As regards decision No. 1327 on the exchange of posts, the Secretary General pointed out that it had been taken pursuant to the “Regulations on the Establishment Table” adopted by the Committee of Ministers on 20 September 1977 (Resolution (77) 24, as amended by Resolution (81) 6).

36. Article 1 (1) of these Regulations provides:

“The establishment table shall lay down the total number of permanent posts, the grade attaching to each and their distribution among the directorates, departments, division and sections which appear in the Secretariat’s organisation chart. It shall be approved annually by the Committee of Ministers when voting the budget.”

Article 2(3) of the same Regulations provides:

“The Secretary General may permanently transfer category A posts in grades A1, A2 or A3, or in grade A4 if they are not posts of head of section mentioned in the organisation chart, from one department to another. The Committee of Ministers shall be informed of such transfers and the posts transferred shall appear with the relevant comments and their new designation in the establishment table drawn up in connection with the next budget.”

37. The Secretary General noted that the exchange effected through decision No. 1327 was incorporated into the establishment table showing the distribution of permanent posts by directorate and department and was approved by the Committee of Ministers when the 1986 budget was adopted.

38. He also commented that the Regulations on the Establishment Table related to the internal organisation of the Secretariat’s departments, which was outside the scope of the Staff Regulations, and that the appellant’s objections to decision No. 1327 concerned a matter over which the Board theoretically had no jurisdiction.

39. In this connection, the Secretary General referred to established precedents in international law, such as the decision of the Court of Justice of the European Communities in Case 66/75: “a measure coming within the power of internal organisation of an institution can be actionable (...) only if it adversely affected the rights which the party concerned has” under the Staff Regulations. (See also European Court of Justice, Joined Cases 109/63 and 13/64, Case 16/67 and Case 124/78.)

40. He said that the appellant could not assert any right to have the Council of Europe’s organisation chart in general or one of its divisions in particular kept unchanged.

41. He noted furthermore that the exchange of posts had been carried out as part of a programme for reorganising the Directorate of Social and Economic Affairs, to which the Social Division and the Health Division belonged.

42. In conclusion, the Secretary General stated that he had effected the exchange in exercise of his prerogatives, that it met organisational needs within the department and had not adversely affected the appellant’s rights.

THE LAW

43. The appellant is appealing against the decision taken by the Secretary General on 18 July 1985 at the end of the procedure whereby Ms Massarelli-Boltho was appointed to the post of Principal Administrative Officer in the Health Division, Directorate of Social and Economic Affairs.

44. The appellant considers that the exchange of posts between the Social Division and the Health Division was designed to make it possible to appoint to the post of Principal Administrative Officer in the Health Division a candidate chosen beforehand.

He submits that the decision whereby this member of staff was appointed was accordingly unlawful.

45. The Secretary General claims that the decision to exchange the posts was taken in accordance with the "Regulations on the Establishment Table" adopted by the Committee of Ministers on 20 September 1977 (Resolution (77) 24, as amended by Resolution (81) 6) and in exercise of his prerogatives.

As regards the appointment to the post of Principal Administrative Officer, he points out that it took place after a competition, the procedure for which complied with the rules in force.

As to the subject-matter of the appeal

46. The Secretary General has a wide-ranging discretionary power in matters of staff management. In the exercise of this power he is in a position to know and assess the Organisation's operational needs.

That the controlling authority has this discretionary power is borne out by decisions of international administrative tribunals, which have recognised that the controlling authority has wide discretion to assess the facts of a situation, particularly as regards operational needs (ILOAT, Tarrab case, judgment No. 132, and Silow case, judgment No. 151), and to assess professional ability (UNAT, judgment No. 52 ; ESROAB, Decisions Nos. 8 and 10 ; ILOAT, judgment No. 405).

47. This discretionary power is subject to the rules in force in the organisation, however. It is exercised "without prejudice to the rights which staff members enjoy under their Staff Regulations" (CJEC, Case 61/70, G. Vistosi v. Commission of the European Communities, 16 June 1971, 1971 ECR 535 et seq). This is an essential rule which safeguards the rights and interests of the members of the organisation's administrative staff.

48. Although where a dispute has arisen the international adjudicating body cannot substitute its own judgment for that of the Administration, it nonetheless has a duty to ascertain whether the disputed decision was taken in accordance with the regulations and with the general principles of law which must prevail in the legal system of international organisations (ABCE 8/1972, G. Artzet v. Secretary General, Digest, p. 47).

As has been noted by the ILO Administrative tribunal, the discretionary authority of the Administration must always be exercised lawfully. This is why it is for the tribunal hearing an appeal against a decision taken following the exercise of discretionary authority to determine not only whether the decision has been taken by a competent authority and whether it is in

regular form but also whether the correct procedure has been followed. As regards the legality of the decision under the organisation's own rules, the tribunal must also determine whether the Administration's decision took account of relevant facts, whether clearly false conclusions have been drawn from the documents in the file and, finally, whether there has been a misuse of authority (ILOAT, Ballo case, judgment No. 191) (see also: ABCE 76/1981, Pagani v. Secretary General, Digest, p. 100 ; ABCE 100/1984, Van Lamoen v. Secretary General, Digest, p. 142 ; ABCE 101-113/1985, Stevens and Others v. Secretary General, Digest, p. 153 ; OECDAB, Decision No. 55 ; and ABCE 115-117/1985, Peukert, Muller-Rappard, Bartsch v. Secretary General).

As to the merits of the appeal

49. On 7 May 1985, by decision No. 1327, the Secretary General effected an exchange of posts between the Social Division and the Health Division.

A4 post No. 51.25 in the Social Division, which had fallen vacant following the promotion of its occupant, was transferred to the Health Division, under the number 54.24. A2/A3 post No. 54.22 in the Health Division was transferred to the Social Division, under the number 51.213.

50. This exchange was effected pursuant to Articles 1(1) and 2(3) of the "Regulations on the Establishment Table" adopted by the Committee of Ministers on 20 September 1977 (Resolution (77) 24, as amended by Resolution (81) 6).

51. It has not been disputed that the exchange was carried out in accordance with the procedure provided for in the regulations.

52. It is for the appropriate administrative authorities to assign the posts provided for in the organisation chart according to operational needs.

53. As has been noted by the Court of Justice of the European Communities, it is for each institution, which "controls its own detailed list of posts" and has "a wide discretion as regards its internal organisation" (CJEC, Case 14/79, R. Loebisch v. Council of the European Communities), to determine the internal organisation of its departments (CJEC, Case 5/70, M. Prella v. Commission of the European Communities). Thus, "the appointing authority may in the interest of the service transfer a post from one Directorate-General to another where it considers that such a post is more useful in the department to which it is allocated than in that from which it is removed" (CJEC, Case 61/70 ; G. Vistosi v. Commission of the European Communities).

54. The appellant submits that the A4 post No. 51.25 was deliberately transferred in order to make it possible to promote Ms Massarelli-Boltho to the post of Principal Administrative Officer in the Health Division. He considers that this procedure amounted to a breach of a principle of equality of opportunity for candidates in a competition. Such a breach would occur in particular where a competition was held solely with a view to appointing to the vacant post the candidate actually selected.

55. Where such allegations are made in an appeal, it is for the appellant to present compelling evidence that the administrative decision relating to the selection of the person who was to occupy the post sought by him was based upon prejudice (UNAT, judgment No. 312, Roberts v. Secretary General of the United Nations).

56. The Secretary General is entitled to transfer a post in the Organisation's interests, even if it means disappointing the expectations – however reasonable – of the staff in the departments concerned (UNAT, judgment No. 350, Raj v. Secretary General of the United Nations) ; the Organisation's interests cannot in any event justify a biased appointment.

57. The Board has considered all the material in the case and has taken evidence from the persons involved in the various stages of the exchange and promotion proceedings.

Scrutiny of the evidence the Board has gathered has not disclosed anything vulnerable to a charge of bias as regards the appellant or as regards the other candidates.

58. It appears moreover from the evidence that the appellant's application was considered impartially.

It follows that the disputed decision was not tainted with any unlawfulness.

For these reasons,

the Appeals Board

Declares the appeal unfounded;

Dismisses it; and

Orders that each party shall bear its own costs.

Given in public in Strasbourg on 10 November 1986, the French text of the decision being authoritative.

The Secretary of the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

W.J. GANSHOF VAN DER MEERSCH