

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 320/2003 (Jane SPIEGEL v. Secretary General)

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,
Mr José da CRUZ RODRIGUES,
Mr Angelo CLARIZIA, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Marialena TSIRLI, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms Jane Spiegel lodged her appeal on 13 October 2003. It was registered on the same day under No. 320/2003.
2. On 2 December 2003, the appellant's representative, Professor M. Piquemal, submitted a supplementary memorial.
3. On 1 March 2004, the Secretary General submitted observations on the appeal. He was represented by Mr P. Titun, Administrative Officer in the Legal Advice Department of Directorate General I – Legal Affairs.
4. The appellant submitted a memorial in reply on 9 April 2004.
5. On 23 January 2004, the Chair of the Tribunal authorised the Staff Committee to intervene in the proceedings under Article 10 of the Staff Regulations.

On 12 May 2004, the Staff Committee submitted its observations.

6. As the Parties had stated that they were willing to waive oral proceedings, the Tribunal decided there was no need to hold a hearing.

7. At the Tribunal's request, the Secretary General submitted documents concerning the proceedings before the recruitment panel and provided information about them. Having regard to Article 9, paragraph 1, of the Regulations on Appointments and in accordance with current practice, the Tribunal did not pass these documents on to the appellant.

THE FACTS

8. When she lodged the appeal, the appellant was a long-term temporary staff member of French and Italian nationality.

She had been recruited on 11 February 2002 after an external recruitment procedure held to fill two long-term temporary posts of Scientific Administrative Officer and assigned to a grade A2 post in the European Directorate for the Quality of Medicines (Vacancy Notice No. 68/2001).

9. On 23 January 2003, the Council of Europe published a vacancy notice (No. 04/2003) for an external recruitment procedure for grade A1/A2/A3 Scientific Administrative Officers – whose number was not specified – in the European Directorate for the Quality of Medicines. The vacancy notice provided for four recruitment profiles (A to D) according to the duties to be performed. The vacancy notice specifically stated that “[t]he successful candidates [would] be appointed on an initial two-year contract ... constituting a probationary period” and that “[p]rovided the staff members' work [was] considered satisfactory, they [would] be offered an indefinite or a fixed term contract”. It was also specified that, on the basis of the competitive examination, a reserve list of successful candidates might be drawn up “for other similar vacant posts in the Organisation” and that this list would be valid for two years and its validity might be extended.

10. After the written tests on 28 April 2003, the appellant was invited to an interview with the Recruitment Panel, which took place on 22 May. Ms A., Director of the European Directorate for the Quality of Medicines, and Ms P., Unit Head in the same Directorate and the appellant's hierarchical superior, were members of the Panel. They had both already marked the appellant's written tests.

11. On 3 July 2003, the appellant was informed that her candidature had been unsuccessful.

According to the documents at the Tribunal's disposal, it would appear that, at the close of its deliberations, the Panel suggested that the Secretary General put a number of people on a reserve list but did not suggest recruiting specific people.

12. On 15 July 2003, Ms A. sent the appellant an e-mail reading as follows:

“As discussed, I confirm the terms of your contract, which will end on 1 February 2004. We have appreciated your experience and motivation in the biological domain, which were valuable at a time when there was a large influx of files concerning TSE.”

13. On 23 July 2003, the appellant lodged an administrative complaint reading as follows:

“Having worked as a Scientific Administrative Officer in the EDQM since February 2002 (after passing Competitive Examination 68/2001 for the recruitment of two Scientific Administrative Officers on long-term renewable temporary contracts), I would ask you to reconsider the decision taken on your behalf not to declare me successful in the external competitive examination for the recruitment of Scientific Administrative Officers to the EDQM (4/2003), on the grounds that the competitive examination did not meet the requirements of an impartial competition whereby the merits of all the candidates are assessed on an equal footing.

First of all, the competitive examination did not meet the anonymity requirement that is the rule at the Council of Europe (Article 15. 1 of the Regulations on Appointments).

The written tests were handwritten. At least one of the examiners, Ms [P.], was familiar with the handwriting of the internal candidates from the Certification Unit of which she is the head. It seems to me that a competitive examination organised in this way cannot be held against me when it comes to assessing my ability to occupy the Scientific Administrative Officer post in question.

It should also be noted that two of the persons who marked the written tests (Ms [A.] and Ms [P.]) were members of the Panel when I was called for an interview, as a result of which my candidature was not accepted (cf in this connection the comment by the Administrative Tribunal in paragraph 36 of its decision of 28 March 2003 (Appeal 294/2002, Marchenkov v. Secretary General)). Overall, it would appear that the organisation of the competitive examination was not fully in keeping with the provisions of the Staff Regulations, as is borne out by that decision.

Furthermore, the appraisal procedure provided for in the Staff Regulations was not respected, since the initial objective-setting stage did not take place until February 2003 (one year after I took up my post), and it was not planned to ascertain whether the objectives had been achieved until a year later (February 2004).

I would therefore ask you to ensure that the result is not used against me to avoid renewing my long-term temporary contract when it expires (February 2004). I was informed that it was normal practice for such a contract to be renewed (provided, of course, that I gave satisfaction in my work). If my contract is not renewed, I will be thrown on to the labour market in a particularly vulnerable position as I am 53 years old.”

14. On 18 August 2003, the Director General of Administration and Logistics, on the Secretary General’s instructions, dismissed the administrative complaint as follows:

“Your complaint is, essentially, unfounded, as you were successful in the written examination and were admitted to the interview stage of the recruitment procedure.

The Secretary General acknowledges the fact that two members of the Recruitment Panel were correctors of the written examination papers, a practice criticised by the Administrative Tribunal in its decision in Appeal N° 294/2000 (Marchenkov vs. Secretary General). Nevertheless, although the practice was criticised, the Administrative Tribunal did not rule out this possibility. Therefore, while the Administration has instructions to avoid this situation whenever possible, it is difficult in exceptional situations when the posts to be filled are of a highly specialised technical nature, as is the case of posts of Scientific Administrator in the EDQM, which leaves little choice in terms of examiners and/or suitably qualified recruitment panel members.

As regards your complaint regarding the evaluation procedure, I would inform you that the only evaluation provided to the Recruitment Panel concerned an evaluation for the year 2002 and that this evaluation was, at the time, the standard evaluation applied to temporary staff

members. Clearly, your evaluation at the beginning of 2004 will evaluate the results compared to the objectives set at the beginning of 2003.

I note that your request is that the results of the competition are not held against you when the time comes to consider the renewal of your long-term temporary contract. I am also aware that, when you were hired on this contract it was, in part, because of your specialised skills which enabled you to deal with the increasing number of questions relating to Bovine Spongiform Encephalopathy (BSE). However, in the meantime this activity has been considerably reduced, and no longer justifies the employment of a staff member working full time on these questions. As a result, it will be necessary for you to develop other skills which are not necessarily in your primary field of expertise.

In these circumstances the Secretary General has instructed the Directorate of Human Resources to collaborate with the EDQM in order to make every effort to help you acquire the necessary skills and, should the financing be available, to examine all possibilities of a renewal of your long-term temporary contract."

15. In a memorandum dated 12 November 2003, the Directorate of Human Resources informed the appellant that her long-term temporary contract would not be extended.

THE LAW

16. The appellant lodged the present appeal against the Secretary General's decision not to appoint her to one of the posts of Scientific Administrative Officer thrown open to competition by Vacancy Notice No. 04/2003 and against "other decisions stemming from the above-mentioned decision that were likely to affect her adversely". She asked the Tribunal to set aside all these decisions and award her € 3,800 in costs.

17. The Secretary General contends that the appeal is inadmissible on two counts and, in the alternative, requests that it be rejected as ill-founded.

A. Partial inadmissibility of the appeal

18. The Secretary General first contends that the appellant raised three complaints (paragraphs 27-31 below) for the first time in the supplementary memorial she submitted to the Tribunal. The complaints in question concern the procedure for the appointment of examiners (violation of Article 12, paragraph 5, second indent of the Regulations on Appointments), an alleged statement by the Director of the European Directorate for the Quality of Medicines during the Promotions Panel to the effect that she did not wish to renew the appellant's long-term temporary contract, and, lastly, the setting aside of the decision not to appoint the appellant (Vacancy Notice No. 04/2003).

Relying on the decision of 27 March 2002 in the Lobit-Jacquín case (Administrative Tribunal of the Council of Europe, Appeal No. 284/2001, paragraph 21 b) of the decision), the Secretary General contends that the appellant did not, at the administrative complaint stage, in accordance with the conditions laid down in Article 59 of the Staff Regulations, raise the complaints she is raising with the Tribunal.

19. The Secretary General goes on to contend that the appellant cannot claim to be a victim – and hence prove an interest in availing herself of Article 59, paragraph 1, of the Staff Regulations – on the grounds that her hierarchical superior (Ms P.) marked the written tests (paragraph 10 above). Assuming that, as the appellant argues, Ms P. recognised her handwriting, which has in no way been proved, it cannot be alleged that this had an adverse effect, since the appellant passed the written tests.

20. With regard to the second objection, the appellant notes that the Tribunal dismissed a similar objection in its decision of 28 March 2003 in the Marchenkov case, which concerned a dispute over promotion and the workings of the Transfers and Promotions Panel (Administrative Tribunal of the Council of Europe, Appeal No. 294/2002). Moreover, legal opinion, the Tribunal's case-law and Community case-law allow new arguments and indeed new complaints to be put forward in an appeal.

21. She goes on to point out that she lodged her administrative complaint in order to have the decision not to “declare her successful in the external recruitment competitive examination” reviewed.

22. As regards her not being a victim, the appellant stresses that it is the competitive examination as a whole that adversely affected her. The written tests definitely affected the final decision, for the marks in the written tests are taken into account in the overall mark.

23. With regard to the first two aspects of the first objection, the Tribunal notes that in her complaint of 23 July 2003 (see paragraph 13 above) the appellant did not merely ask for assurances as to her future as a long-term temporary staff member but also contested the outcome of the recruitment procedure. In particular, she said that, in her view, the competitive examination was not consistent with an impartial competition allowing the merits of all the candidates to be assessed on an equal footing. She added that, overall, it appeared that the organisation of the competitive examination did not fully comply with the provisions of the Staff Regulations, as is borne out by the Marchenkov decision. The Tribunal takes the view that these elements are sufficient for the appellant to be considered to have complied with the conditions laid down in Article 59 of the Staff Regulations.

24. As for the third aspect of the first objection, the Tribunal notes that it mainly concerns the *petitum* of the appeal. In her administrative complaint, the appellant had already asked the Secretary General to “review the decision taken on [his] behalf not to declare [her] successful in the competitive examination”.

25. With regard to the second objection, the Tribunal accepts that the appellant may have been adversely affected by the written stage even if she passed the tests, for, as she argues, the fact that the results of the written tests are taken into account in the final mark means that the marks in the written tests may influence the final mark, and this is a matter to be considered in the examination of the merits of the complaint.

26. In conclusion, the Secretary General's arguments that the appeal is inadmissible are ill-founded.

B. Merits of the appeal

27. The appellant puts forward four grounds for her appeal: a) violation of Article 15, paragraph 1, of the Regulations on Appointments, b) violation of Article 12, paragraph 5, second indent, of the Regulations of Appointments and Rule No. 620 of 29 November 1982, c) violation of the administrative practice whereby the same person may not mark the written tests and be a member of the Panel, and d) violation of Article 12, paragraphs 5 and 6, of the Regulations on Appointments.

28. The appellant first contends that Ms P. – who was her hierarchical superior and also marked the written tests in the recruitment procedure – was in a position to recognise her handwriting and that of the other candidates working in the same unit. Accordingly, Article 15, paragraph 1, of the Regulations on Appointments was disregarded. This provision reads as follows:

“Competitive examinations shall include written papers and an interview conducted by the appropriate panel. The written papers shall be eliminatory, manuscripts must be anonymous, and must be marked by two examiners.”

The appellant points out that the Secretary General did not answer this complaint directly in his decision dismissing the administrative complaint. She adds that, in response to another complaint, he stated that “while the Administration has instructions to avoid this situation whenever possible, it is difficult in exceptional situations when the posts to be filled are of a highly specialised technical nature, as is the case of posts of Scientific Administrator in the EDQM, which leaves little choice in terms of examiners and/or suitably qualified recruitment panel members” (see paragraph 14 above).

According to the appellant, the Secretary General could have avoided this violation, since Article 12 of the Regulations on Appointments allows him, if he “sees fit, in view of the nature of the vacant post, [to] invite one or two persons from outside the Council to sit on the Panel in an advisory capacity”. Moreover, this procedure was applied in a previous instance (Vacancy Notice No. 66/2003).

29. The appellant goes on to express serious misgivings about the lawfulness of the appointment of the examiners. She points out that, under Article 12, paragraph 5, second indent, of the Regulations on Appointments, “[t]he Panel shall [...] appoint the examiners [...]”, while Article 9, paragraph 2, of Rule N° 620 of 29 November 1982 establishing the Rules of Procedure of the Appointments Board states:

“In accordance with the powers delegated to him by the Panel so that the proceedings shall remain confidential, the Chairman shall:

[...]

- select examiners from the persons approved by the Panel.”

The appellant believes these rules and regulations may not have been properly and strictly observed in the instant case. She asks the Tribunal to ascertain whether, in

the instant case, the requirements concerning express delegation by the Panel and the compilation by the latter of a list of examiners were observed.

30. The appellant also claims that there was a violation of administrative practice, whereby it is forbidden to act as both examiner and member of the Panel. She points out that the Tribunal ruled on the matter on 28 March 2003 in the Marchenkov appeal (Administrative Tribunal of the Council of Europe, Appeal No. 294/2002) and that in the instant case, the written tests took place after that date.

31. Lastly, the appellant asks the Tribunal to ascertain whether the Panel considered the question of the renewal of her long-term temporary contract. She contests that, if so, the Panel acted *ultra vires* and there is a violation of Article 12, paragraphs 5 and 6, of the Regulations on Appointments, which read as follows:

“5. The Recruitment Panel I shall be responsible for any competitive examination or selection based on qualifications that is conducted as part of the external recruitment procedure when the post to be filled is in category A or L or of grade B4, B5 or B6, even where the applicants include staff members already in post. The Panel shall:

- draw up a list of applicants invited to compete;
- decide whether tests or examinations are to be held, make arrangements for their organisation, set the subjects of the papers, and appoint the examiners;
- assess the results of such tests and examinations;
- interview the applicants; where written tests or examinations have been held, only those applicants who have obtained satisfactory results shall be interviewed.

6. At the end of the procedure, the Panel, after having listed the applicants in order of merit, shall submit a recommendation to the Secretary General.”

32. For his part, the Secretary General is of the opinion that the appellant was not adversely affected, since there is no proof that Ms P. recognised her handwriting. Moreover, even assuming that she did recognise the handwriting, this would have had no adverse consequences, since this was after the interview with the Panel that the appellant’s candidature was rejected, and not on the basis of her written results. Furthermore, the papers were marked by two examiners.

33. With regard to the second complaint, the Secretary General contends that the procedure for the appointment of the examiners was observed in the instant case and that there is nothing to prove the contrary. The Secretary General does not, however, provide the Tribunal with any evidence in support of his assertions, which concern a confidential stage of the recruitment procedure.

34. As regards the third complaint, the Secretary General contends that acting as both examiner and member of the Panel is not contrary to any regulation or indeed to any administrative practice. In its Marchenkov decision, the Tribunal did not rule that the fact that the same person had performed both duties constituted grounds for annulling a competitive examination procedure, but merely said that “it [was] highly desirable that an examiner should not also be a panel member”. While the Tribunal addressed a recommendation to the Secretary General, it did not issue a formal prohibition. The Secretary General stresses that, in the instant case, the post in question was a scientific one. It was for that reason that members of the European

Directorate for the Quality of Medicines, who were perfectly familiar with the type of post on offer, were called on to mark the tests. He agrees that he could have called on outside examiners, but states that he was in no way bound to do so and that he did not consider it necessary in the instant case.

35. The Secretary General claims that there is no reason to prevent a head of department who is a member of the Panel from giving the latter factual information about the contractual situation of a temporary staff member and the likelihood of her temporary contract being renewed.

36. In conclusion, the Secretary General asks the Tribunal to declare these complaints ill-founded.

37. In her observations in reply, the appellant reiterates her conclusions.

38. Before ruling, the Tribunal examined a set of Panel minutes and some information about the assessment of the written tests of the appellant and the other candidates. The Secretary General provided this material under the usual conditions of confidentiality.

39. With regard to the first complaint, the Tribunal agrees with the Secretary General that there is no proof that Ms P. recognised the appellant's handwriting, still less that the appellant was adversely affected.

40. With regard to the second complaint, the Tribunal notes first of all that the Secretary General has provided no proof in support of his assertion that the procedure, which – it is worth recalling – was confidential, was in keeping with the regulations.

The Tribunal has no need, however, to ask for such proof *ex officio*, for the procedure must be annulled for the reasons set out below.

41. As for the third complaint, the Tribunal observes that, in support of his argument that the practice he followed was lawful, the Secretary General referred to the content of the above-mentioned Marchenkov decision, in which, after ascertaining the existence of an irregularity necessitating a declaration to the effect that the procedure was null and void, the Tribunal made the following statements concerning the appellant's other complaints, one of which was identical to that with which it is dealing today:

“34. Having reached that conclusion, the Tribunal does not require to consider the appellant's other grounds of appeal.

35. It nonetheless considers it advisable to draw the Secretary General's attention to the following point.

36. As regards a panel member's also acting as an examiner, the Tribunal takes the view that where a panel is not itself responsible for the marking of tests, it is highly desirable that an examiner should not also be a panel member. Separation of those functions is particularly important as staff, in principle, are not told the names of the examiners because of the present confidentiality rule governing the procedure (see Article 9(1) of the Regulations on Appointments).”

42. It is clear from this excerpt that the Tribunal was delivering an *obiter dictum*. It wished to draw the Secretary General's attention to the problems caused in practice in this respect without officially ruling that there had been a breach of the regulations, for the requirements of the examination of Mr Marchenkov's appeal did not call for such a ruling. If the Tribunal proceeded in this way, it was not because it considered the procedure, unfortunate though it might be, to be in keeping with the regulations – in which case it would have said so clearly in order to dispel any suspicion of unlawfulness in respect of a practice frequently followed – but because the Tribunal considered that it was contrary to the rules and practice applicable in this respect.

43. The Secretary General has not, during the investigation of the present appeal, submitted any arguments prompting the Tribunal to change its mind. The Tribunal considers that this procedure poses a problem in so far as certain members – in this case two members – of the Panel have overlapping remits. This means that, when it comes to the final assessment of the candidates, these Panel members, unlike the other Panel members, supervise the assessment of the written tests and are at the same time subject to supervision of their own assessment. From the administrative point of view, there must not be an imbalance of this kind within the Panel. Furthermore, it is clear from the wording of the statutory texts (see paragraph 31 above) that the examiners may not be chosen from among the Panel members, even if they are on the list in question. Lastly, the Tribunal considers that there is a problem of impartiality when it comes to awarding final marks, after the interview, to all the candidates if a member of the Panel has already marked the written tests of those candidates.

Consequently, in the light of the Marchenkov decision and on the basis of the circumstances of the present procedure, the Tribunal concludes that the appellant's complaint is well-founded. It considers it worth adding that, in the instant case, two examiners, and not just one, were also members of the Panel. Moreover, the fact that the post was a scientific one did not make it imperative to call on people from the same Directorate for, as the Secretary General acknowledges, he could have organised the procedure differently (see paragraph 34 above).

44. Lastly, with regard to the fourth complaint, the Tribunal agrees with the Secretary General that the fact of providing the Panel with factual information is not such as to make the procedure irregular.

45. As for the consequences of the finding of unlawfulness in the instant case, the Tribunal annuls the competitive examination procedure for Profile C as from the stage when the examiners were chosen, which must therefore be repeated, for it is incumbent on the Organisation to observe the rules that it has itself laid down.

46. The appellant, who made use of the services of a lawyer, has requested € 3,800 in costs. The Tribunal considers it reasonable that the Council of Europe should refund € 2,000 (Article 11, paragraph 2, of the Tribunal's Statute).

For these reasons,

the Administrative Tribunal:

Dismisses the Secretary General's objections of partial inadmissibility;

Declares the appeal founded;

Annuls the contested procedure as from the stage when the examiners were chosen;

Decides that the Council of Europe shall reimburse the appellant's costs in the sum of € 2,000.

Delivered in Strasbourg on 8 October 2004, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

K. HERNDL