

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF

## ADMINISTRATIVE TRIBUNAL

Appeal No. 490/2011  
(Olivia CONRAD v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christo ROZAKIS, Chair,  
Mr Angelo CLARIZIA,  
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,  
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. The appellant, Ms Olivia Conrad, lodged her appeal on 8 July 2011. It was registered the same day under No. 490/2011.
2. On 10 August 2011 the appellant filed further pleadings.
3. On 22 September 2011 the Secretary General lodged his observations. The appellant submitted observations in reply on 24 November 2011.
4. The public hearing of this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 8 December 2011. The appellant was represented by Ms Carine Cohen-Solal of the Strasbourg Bar, and the Secretary General by Ms B. O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice, assisted by Ms Christina Olsen, from the same department.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

5. A permanent staff member, the appellant began her career at the Council of Europe on 1 April 1997 as a communications officer in the Public Relations Division of the Directorate of Communication. She went on to hold various posts in the field of communication: after working as an external communications officer from 1 April 1997 to 30 June 1999, she was appointed publications assistant. Since 1 October 1999, she has been employed as a communications officer in the Directorate of Communication where she holds the grade B4.

6. She applied for the post of Adviser to the Commissioner for Human Rights on communication, Grade A1/A2, advertised in vacancy notice e64/2011, by e-mailing her application to the Directorate of Human Resources (hereafter “DHR”) on 11 April 2011. In support of her application, she stated as follows:

“My professional competencies & managerial skills : 14 years in the field of journalism, editorial work, strategic communication & project management of programmes & organisation of events & campaigns ; developing & producing information & communication material (in print form & on line) ; planning, designing, editing & producing campaign packs (death penalty, trafficking in human beings, domestic violence), & a wide range of information & promotional material, including on major Human Rights issues ... My vision on international affairs: great awareness of the international political, economic, social & cultural context;

My professional skills: developing professional & specialised networks; identifying new promotional opportunities for new target groups & multipliers in member states & liaising with information offices & other partners; data base management. ...”

7. The same day, the appellant received an auto-generated e-mail from DHR, informing her that her application would be considered by the Appointments Board:

“We confirm receipt of your application and we thank you for it.

The Appointments Board will examine carefully your qualifications and experience with regard to the requirements of this post, as set out in the Vacancy Notice. Please note that you will be informed in due course of the outcome of your application. Depending on the type of competition this may take several weeks after the closing date.

In order to find out the status of ongoing competitions after the closing date, you may consult the relevant page on our website for further information: (...)”

8. In an auto-generated e-mail dated 13 April 2011, the appellant was informed by DHR that her application had not been shortlisted by the Appointments Board. The message read as follows:

“It is with regret that I inform you that the Appointments Board of the Council of Europe has decided not to shortlist you along with other candidates whose qualifications most closely match those set out in the vacancy notice. (...)”

9. On 15 April 2011, the appellant contested this decision by lodging an administrative complaint, on the ground that her application had been rejected following an irregular procedure. She submitted that the Appointments Board never met on the dates indicated by DHR to consider her application. As an elected member of the Staff Committee, the appellant was aware that meetings of the Appointments Board were brought to the attention of the Chair of the Staff Committee and that no member of the Staff Committee had been invited to attend a meeting of the said Board on 12 or 13 April 2011.

10. In his reply dated 11 May 2011, the Secretary General rejected the appellant's administrative complaint, stating firstly that it was inadmissible under Article 59, paragraph 2, of the Staff Regulations and, secondly, that DHR had simply made a drafting error and that the Appointments Board was not competent in such matters.

11. The appellant therefore lodged the present appeal on 8 July 2011, on the ground that she had been excluded from the recruitment procedure in a totally irregular fashion, claiming compensation for the damage suffered.

## II. APPLICABLE LAW

### *Staff Regulations*

12. Article 59, as amended by Committee of Ministers Resolution CM/Res(2010)9 of 7 July 2010, reads as follows:

“ (...)

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression “administrative act” shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

(...)

8. The complaints procedure set up by this article shall be open on the same conditions mutatis mutandis:

(...)

d. to staff members and candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.”

### *Appendix II to the Staff Regulations: Regulations on Appointments*

13. Article 8 reads as follows:

“Applications shall be admissible only if they comply with the conditions set out in the vacancy notice.”

14. Article 13 “Functions of the Board with regard to recruitment” states:

“The Board shall be responsible for any competitive examination that is conducted as part of the external recruitment procedure.

The Board shall:

- draw up a list of applicants invited to compete;
- where written tests or examinations have been held, assess the results of such tests and examinations; only those applicants who have obtained satisfactory results shall be interviewed;
- interview the applicants and assess their overall results; the results of those candidates who are not interviewed following the decision taken by the Chair in accordance with Article 15 paragraph 5, are submitted to the members of the Board for their information.

2. At the end of the recruitment procedure, whether it be through competitive examination under Article 15 or selection based on qualifications under Article 16, the Board, after having listed the applicants in order of merit, shall submit a recommendation to the Secretary General.”

15. Article 16 “Selection based on qualifications” states, *inter alia*:

“1. When selection is based on qualifications, the applicant’s qualifications shall be examined, and short-listed candidates shall be interviewed by a representative or representatives of the administrative entity where the post or position is to be filled and by the Director of Human Resources or his/her representative(s). The administrative entity concerned may also decide to organise, with the agreement of the Director of Human Resources and the cooperation of his/her Directorate, job-related tests with short-listed candidates. At the end of the procedure, the Board shall submit a recommendation to the Secretary General on the basis of the relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in the order of merit.”

***Rule No. 1258 of 8 September 2006 laying down procedures for the implementation of the Regulations on Appointments***

16. According to Article 3 “Secretariat of the Appointments Board”:

“The Secretariat of the Appointments Board shall be provided by the Directorate of Human Resources.”

17. Article 7 “Recruitment”, states:

“The list of candidates to be invited to take part in a recruitment procedure shall be drawn up by the Board’s Secretary, in the case of recruitment to fill a post or position in a specific Major Administrative Entity, in consultation with this Entity, on the basis of the qualification requirements set out in the vacancy notice and any instructions given by the Board. The list of candidates will be brought to the notice of the members of the Board who, within a period of at least five working days, may consult in the Secretariat the files of the candidates and make observations. Any difficulties which may arise over the composition of the list shall be discussed by the Board at a meeting if any member so requests. If, within the period indicated by the Board’s Secretary when circulating the list, no Board member has expressed an objection or asked for a meeting to be convened, the list of candidates drawn up by the Board’s Secretary shall be deemed to have been approved.”

**THE LAW**

**I. SUBMISSIONS OF THE PARTIES**

**A. On the admissibility of the appeal**

18. The Secretary General contends that, since the competition in question is an external recruitment procedure, the Staff Regulations do not entitle the appellant to lodge a complaint against the decision to reject her application. Such complaints may be lodged only by candidates invited to sit the competition where they wish to complain about an irregularity in the examination procedure. That was not the case with the appellant.

19. With regard to the applicability of Article 6 of the European Convention on Human Rights, mentioned by the appellant, the Secretary General takes the view that the Administrative Tribunal is not competent in such matters. Furthermore, the amendment to Article 59 of the Staff Regulations has a legitimate aim, namely to ensure that the recruitment process runs smoothly.

20. The Secretary General concludes from this that the exclusion of any issue relating to an external recruitment procedure from the acts against which staff may lodge an administrative complaint is a justified restriction of the right of access to a court for which there are legitimate grounds. The Secretary General submits that such a restriction is

proportionate, as applicants who have been allowed to sit a competitive recruitment examination have the opportunity to lodge an administrative complaint, provided the complaint relates to an irregularity in the examination procedure.

21. The appellant maintains that the recruitment procedure begins with the submission of an application. Even at this stage of the procedure, there are rules governing the eligibility and selection of candidates. She makes the point that the decision informing candidates that they have not been shortlisted constitutes a decision adversely affecting them, which effectively prevents them from participating in a recruitment procedure with a view to developing their career. In her view, the said decision was taken following an irregular “preliminary selection procedure”.

22. The appellant argues that the shortlisting of candidates must be carried out in keeping with the eligibility requirements set out in the vacancy notice, according to precise rules. In the present case, the fact that she was not able to contest DHR’s decision to exclude her from the recruitment procedure effectively removed all control over the selection procedure. It is because this procedure was not observed that she has an interest entitling her to contest DHR’s decision of 13 April 2011. Article 59, paragraph 2, of the Staff Regulations basically prohibits Council of Europe staff who have not been shortlisted from applying to the Administrative Tribunal. She refers here to Article 6, paragraph 1, of the European Convention on Human Rights which guarantees the right of access to a court.

23. In other words, the right of access to a court has been expressly removed from the Staff Regulations with respect to any challenge relating to external recruitment procedures that might be made by non-shortlisted candidates. In the appellant’s view, such a prohibition allows the Secretary General to take certain irregular or even arbitrary decisions with impunity, without having to answer either to his staff or to the Administrative Tribunal. The said provision, furthermore, is not compatible with existing international instruments or with the general legal principles designed to ensure the existence of an appeals procedure.

## **B. The merits of the appeal**

24. The appellant contends that it was clear from DHR’s e-mails that it was the Appointments Board which drew up the shortlist of candidates. Referring to the Secretary General’s reply of 11 May 2011, she expresses surprise that DHR should have committed the same error twice, at several days’ interval. Also, while the previous e-mail was generated “automatically”, on submission of the application via the Internet, the same cannot be said for the e-mail dated 13 April 2011, which was written by a DHR staff member.

25. The appellant maintains that she was surprised to learn that it was the Appointments Board which drew up the shortlist of candidates, and that such practice is contrary to the current rules, which do not give DHR any authority to take such action, and indeed contrary to the case-law of the Tribunal (see *Jean-Marc Libs v. Secretary General*, No. 463/2010). Further proof of DHR’s lack of authority to act can be found in Article 16, paragraph 1, of the Regulations on Appointments and in Article 1, paragraph 2, of Rule No. 1258.

26. The Secretary General states that, under Article 16 of the Regulations on Appointments, the Appointments Board is not responsible for the preliminary selection of candidates. Although the two e-mails in question mentioned the Board’s involvement in this

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stage of the process, this was a clerical error on the part of DHR, the said e-mails being generated automatically. Such an error is, the Secretary General admits, regrettable. He maintains that an initial shortlist is drawn up by DHR, which receives the application forms from the candidates and examines each form one at a time, checking to see whether candidates meet the requirements set out in the vacancy notice. If they do, their names are placed on list A. If they clearly fail to meet one or more of the requirements, they are placed on list B. If there is the slightest doubt about whether a candidate meets all the requirements, their name is placed on list C. DHR provides logistical support, assistance and expertise to the department concerned, which makes the final decision about which candidates to invite to sit the competition. This fact was clearly mentioned in the reply to the appellant's administrative complaint.

27. In the present case, DHR took the view that the appellant's application did not meet the following preliminary selection criteria: "a minimum of six years of experience in the field of journalism, editorial work and strategic communication; professional experience in developing long-term communication strategies, including training of staff", "proven network of contacts with media professionals in Western Balkans, Central, Eastern and Northern Europe". DHR maintains that this decision does not exceed the discretionary power of the Appointments Board, is not vitiated by any irregularity and is fully in keeping with international administrative case-law (see *Zimmermann v. Secretary General*, No. 226/1996; *Palmieri v. Secretary General*, Nos. 216/1996, 218/1996 and 221/96). Such decisions, in fact, are subject to only limited review (see *Zimmermann v. Secretary General*, mentioned above). At the same time, the role of an Administrative Tribunal is not to judge candidates on their merits, but rather to leave it to the authority in charge of selection to decide for itself (see *Barahona v. Pan American Health Organization*, ILOAT judgment of 29 January 1991).

28. Once the preliminary selection has been made, DHR sends – as it did in this case – all the application forms to the relevant department, which then decides either to examine all the forms, or to examine only some of them, or to examine only the applications submitted by the candidates on list A. It then decides either to shortlist only the candidates whose names appear on list A, or to also shortlist candidates who are not on list A, or not to shortlist certain candidates from list A if, in its opinion, they do not meet the requirements set out in the vacancy notice. The department then compiles the final list, takes the decision regarding preliminary selection and sends the final decision to DHR. DHR sees to it that the unsuccessful candidates are notified and invites the shortlisted candidates to attend an interview or sit tests.

## II. THE TRIBUNAL'S ASSESSMENT

29. The Tribunal notes that the Secretary General's objection of inadmissibility is closely related to the merits of the case. It therefore finds it appropriate to join it to the merits.

30. The Tribunal confirms the rule that an international organisation, such as the Council of Europe, is free to recruit the candidate whose professional abilities and personal qualities most closely match the requirements of the post to be filled. Recruitment procedures must be conducted in a fair, clear and transparent manner, however. Candidates must be expressly informed from the outset about the assessment and recruitment methods and techniques used. In addition, the staff involved in the recruitment procedure, whose task is to make an initial assessment of candidates' competencies, must show that they are capable of achieving the goal, namely to assess and recruit an individual for the post in question.

31. The need for fairness, clarity and transparency must be respected from the time applications are submitted. It appears from the Secretary General's submissions that all the applications are gathered together by DHR, which checks them against the criteria set out in the vacancy notice. According to the Secretary General, the examination lasts only a few minutes. If a candidate meets the requirements set out in the vacancy notice, their name is placed on list A, if that is patently not the case, they are placed on list B and where there is the slightest doubt in this respect, they are placed on list C (see paragraph 26 above). All the applications are then sent to the relevant department which may choose either to examine all the forms, or to examine only some of them or to examine only the applications of the candidates on list A. It then decides either to shortlist only the candidates who appear on list A, or to also include candidates who are not on list A, or not to shortlist certain candidates from list A if, in its opinion, they do not meet the requirements stated in the vacancy notice (see paragraph 28 above).

32. In the present case, DHR rejected the appellant's application on the ground that she did not meet two of the requirements and her application was placed on list B (see paragraphs 8 and 27 above). DHR's decision informing her that she had not been shortlisted constitutes a decision adversely affecting her. She submits that the said decision was taken following an irregular "preliminary selection procedure".

33. The Tribunal does not have the power to assess the competencies of candidates responding to a vacancy notice, its role being to ascertain whether the recruitment procedure was conducted in a fair, clear and transparent manner. It observes that the appellant's application was not rejected for procedural reasons or on specific grounds that require no further assessment, such as nationality, possession of a university degree or number of years of professional experience in a particular field. The reason why DHR did not shortlist her was that she did not have "a minimum of six years of experience in the field of journalism, editorial work and strategic communication; professional experience in developing long-term communication strategies, including training of staff", and did not have a "proven network of contacts with media professionals in Western Balkans, Central, Eastern and Northern Europe".

34. The Tribunal considers that a more detailed assessment was needed to determine whether the appellant met the requirements. It further observes that the appellant did in fact state in her application: "My professional competencies & managerial skills: 14 years in the field of journalism, editorial work, strategic communication & project management of programmes ... ; ... My professional skills: developing professional & specialised networks; identifying new promotional opportunities for new target groups & multipliers in member states & liaising with information offices & other partners; ... ". DHR's conclusion that she did not meet these requirements appears doubtful to say the least, therefore.

35. The Tribunal considers that the role of DHR in any recruitment procedure is essentially an organisational and logistical one, something which is undoubtedly vital. Certainly, the Secretary General, who holds the authority to make appointments, has a discretionary power whose scope may be somewhat reduced at the stage when applications are examined (see *Palmieri v. Secretary General*, mentioned above). This power, however, must not be exercised in such a way as to render the recruitment procedure unfair. In view of the subjective nature of the criteria used to eliminate the appellant at the preliminary selection stage, the Tribunal holds that DHR was not competent to make a proper assessment of the said criteria.

36. Although all the applications were later sent to the relevant department, the Tribunal is not convinced that the examination carried out by this department is sufficient to remedy any errors that might have occurred during the preliminary selection procedure (see paragraph 34 above).

37. In these circumstances, without it being necessary to rule on whether Article 16 of the Staff Regulations and Article 7 of Rule No. 1258 have been infringed, the Tribunal finds that the appellant's application was not rejected following a transparent, clear and fair procedure.

38. For these reasons, the Tribunal declares the appeal founded and annuls the decision complained of.

### III. CLAIM FOR DAMAGES AND COSTS

39. The appellant asks the Tribunal to award her the sum of 5 000 euros in damages plus 4 000 euros in costs.

40. The Secretary General argues that the appellant did not suffer any non-pecuniary damage and, with regard to the costs, asks the Tribunal to dismiss the relevant claim.

41. With regard to non-pecuniary damage, the Tribunal finds that the appellant did in fact suffer clear non-pecuniary damage. It decides that the Secretary General shall pay to the appellant the full sum claimed (Article 60, paragraph 2, of the Staff Regulations).

42. On the subject of costs, the Tribunal notes that the appellant was assisted by counsel. It finds it reasonable that the Secretary General should reimburse the sum requested for that purpose (Article 11, paragraph 2, of the Staff Regulations).

For these reasons,

The Administrative Tribunal

Declares the appeal founded;

Annuls the decision complained of;

States that the Secretary General must pay the sum of 5 000 euros in damages and reimburse the sum of 4 000 euros by way of costs.

Adopted by the Tribunal in Strasbourg on 16 April 2012 and delivered in writing pursuant to Article 35, paragraph 1, of the Rules of Procedure of the Tribunal, on 20 April 2012, the French text being authentic.

The Registrar of the  
Administrative Tribunal

S. SANSOTTA

The Chair of the  
Administrative Tribunal

C. ROZAKIS