CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COMMISSION DE RECOURS
APPEALS BOARD

Appeal No. 2/1969 (X. v. Secretary General)

The Appeals Board, sitting in private in Strasbourg, on 13 October 1971, under the presidency of Mr. G.H. van HERWAARDEN, Deputy Chairman, and in the presence of:

MM. S. CANTONO di CEVA and
H.J. von OERTZEN, Substitute Members

assisted by:

MM. K. ROGGE, Secretary and
T. GRUBER, Substitute Secretary

Having deliberated.

PROCEDURE

1. The appellant, represented by Mr Pierre SCHRECKENBERG, a barrister practicing in Strasbourg, lodged her appeal on 15 October 1969. The appeal was registered on the same day under file No. 2/1969.

The Secretary General, represented by Mr H. GOLSONG, Director of Legal Affairs, submitted his comments on 19 December 1969.

On 20 March 1970 the appellant submitted observations in reply, which the Secretary General answered on 22 May 1970.

2. By letters dated 2 June 1970, the Secretary informed the parties that the Chairman of the Board proposed to hold a hearing on 27 and 28 August 1970. The parties' representatives replied on 9 and 18 June 1970 respectively that they were willing to appear on the dates suggested.

However, by letter to the Board of 9 July 1970 the appellant stated that in her opinion the file was not yet complete and that in view of the court vacation it would not be convenient to hold the hearing before the month of October. At the same time, she asked that the respondent should produce certain documents.

On 20 July 1970 the Secretary informed the parties that the Chairman of the Board had decided to adjourn the hearing.

On 27 July 1970 the Secretary General sent the Board his comments in reply to the appellant's letter of 9 July 1970. The documents whose production the appellant had requested were appended.

3. By a letter to the Board of 18 November 1970 the appellant asked for the production of further documents by the Secretary General, in particular her medical file. The Secretary General commented on this request in his letter of 5 January 1971. By an Order dated 16 March 1971 the Deputy Chairman decided to submit to the Board the appellant's request for the production of her medical file.

On 28 May 1971 the Board's Secretary informed the parties that the hearing would be held on 28 and 29 June 1971. However, on 25 June 1971 the appellant's Counsel applied for a further adjournment for health reasons.

The Board, sitting in private on 28 June 1971, decided:

- to adjourn the hearing to 13 October 1971;
- that in principle this hearing should be in public;
- to request the parties to address it on all the questions raised by the present case;
- to inform the parties that, if it decided that the appellant's medical file should be put in evidence at the hearing, they would be entitled to comment on its contents;
- to request the parties to reply in the meantime to certain questions which it put to them.

The parties replied to these questions by letters dated respectively 4 and 13 August 1971.

4. The public hearing was held on 13 October 1971, the representatives appointed by the parties (see para. 1 above) being present.

During this hearing the Secretary General's representative placed the appellant's administrative file at the disposal of the Board. The appellant's representative was given the opportunity of consulting this file.

After having deliberated in private, the Board has given the present decision.

THE FACTS

The facts submitted by the parties, which are undisputed, may be summarised as follows:

5. Mrs X., born Y., is a French citizen, born in the Netherlands. She worked in the Secretariat of the Council of Europe from September 1965 to 31 August 1970. From September 1965 to September 1966 she was given various temporary appointments. On 27 September 1966 she was offered a permanent appointment of Grade B1, step 7, in the Directorate of Administration. She accepted this offer and took up her duties on

1 October 1966. On 1 November 1966 she was transferred to a post of grade B2, step 1, in the Directorate of Economic and Social Affairs.

6. On 1 December 1966, she underwent the medical examination customary on recruitment, which was conducted by Dr Knecht, medical adviser to the Secretariat of the Council of Europe.

In a note dated 31 January 1967, Mr. Messer, Head of the Establishment Division, referring to a conversation with the appellant on 25 January 1967, informed her that the medical adviser had not felt able to recommend her appointment to the permanent staff and had accordingly not furnished the medical certificate required for such an appointment under Art. 8 of the Council of Europe's Staff Regulations.

Art. 8 of the Staff Regulations provides: "No person shall be appointed a member of the staff unless a doctor chosen by the Secretary General furnishes a medical certificate certifying that he is suffering from no infirmity or illness likely to prevent him from fulfilling his duties".

In his note of 31 January 1967, the Head of the Establishment Division also informed the appellant that he found himself "obliged to limit the appointment /she had/ been offered to the period from 1 October 1966 to 31 December 1966". At the same time the appellant was offered a temporary monthly contract for the period from 1 to 31 January 1967 and was told that this appointment could be extended from month to month. In fact she was given temporary monthly contracts throughout 1967. From 1 January to 31 December 1968 she was employed as a member of the assimilated temporary staff.

7. On 11 January 1968, the appellant underwent a second medical examination by Dr Knecht, who again refused to furnish the medical certificate required under Art. 8 of the Staff Regulations.

On 26 September 1968, Professor Kammerer, Director of the Psychiatric Clinic of Strasbourg Civil Hospital, sent Dr Knecht the following letter concerning the appellant:

> "… Following our telephone conversation I take the liberty of giving you the following particulars.
>
> Mrs X., née Y., born on …, was under treatment in my department from 4 to 30 November 1964 for reactive depression following personal difficulties. At that time her mental balance caused some anxiety. But now that her position is clarified and she is in full-time employment this has considerably improved. To my knowledge she has not had to receive any further psychiatric treatment during the last four years and no sick leave has been necessary. In view of the considerable time which has now passed I consider that the prognosis has greatly improved and that she may be considered fit for permanent appointment.
>
> Yours etc...."

In a note dated 17 October 1968, Dr Knecht informed the Head of the Establishment Division that, having obtained additional information on the appellant, including a very authoritative opinion from one of her doctors, he was prepared to alter his decision on 11 January 1968 and considered that there were no longer sufficient medical reasons to refuse her a permanent contract.

The appellant was offered a permanent contract of grade B2 in the Directorate of Economic and Social Affairs with effect from 1 January 1969. She accepted it and worked in that Directorate until transferred to the Secretariat of the European Commission of Human Rights on 1 August 1969 at her own request.

8. Between October 1968 and March 1969 the appellant had talks with various officers of the Establishment Division and in particular Mr. Hunt, Deputy Director of Administration.

In March 1969, she sent Mr. Hunt a note in which she complained especially of the fact that the medical adviser had refused to furnish the required medical certificate until October 1968. She stated that she had learned from an official of the Establishment Division that this was, due to her having been mistaken by the medical adviser for someone else with a similar name. She requested that her case should be dealt with fairly.

By a note of 22 July 1969, Mr. Hunt informed the appellant that both he and the Director of Legal Affairs had had a conversation with the medical adviser, who had assured them that he had made no mistake as to identity and confirmed the correctness of the medical opinion he had given earlier. Mr. Hunt concluded that the decision not to offer the appellant a permanent contract in 1967 was based on reasons sound in law – namely the medical opinion – in connection with which no irregularity was apparent.

On 18 August 1969, the appellant applied to the Secretary General under Art 25 of the Staff Regulations for "the withdrawal or amendment of the decisions prejudicial to /her/ interests".

On behalf of the Secretary General, Mr Daussin, Director General of Administration and Finance, sent a letter to the appellant on 16 September 1969 in which he stated that the decision taken in 1967 was based on reasons sound in law in connection with which he could find no irregularity. He added that the appellant's allegations were completely unproven and that the Secretary General was in no way liable for the opinion of the medical adviser.

SUBMISSIONS AND APPLICATIONS OF THE PARTIES

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

9. Firstly she complains that the administration refused her a permanent contract in 1967 and 1968.

In her opinion its decisions were based on defective or mistaken medical opinions for which the Secretary General was liable.

Moreover, she considers that, at the least, she should have been given a permanent appointment as soon as the medical certificate was issued.

She maintains that the Staff Regulations, in particular Art. 8, the administrative regulations, especially Office Circular No. 271, and the conditions of appointment were thus not complied with or were improperly applied, and she makes the following particular comments.

10. According to the rules of administrative law the Secretary General is liable for the acts performed by his medical adviser in the exercise of his official and administrative duties (cf. the Secretary General's submissions on this point in para. 19).

As in other intergovernmental organisations the medical adviser is part of the Administration he is therefore an organ of the Administration of the Council of Europe.

Although in the Council of Europe the medical adviser is not employed full-time and has not the status of a civil servant the nature of his duties is thereby in no way different from that of the medical advisers of the other organisations. He works in one of the Council's offices, he is assisted by a nurse who is a member of the permanent staff and he reports to the Administration. He is appointed by the Secretary General.

The terms of the appointment cannot in any way affect the rule as to liability. Even if the contract between the Council of Europe and its medical adviser is a private law contract with an arbitration clause, the medical adviser is nevertheless part of the Administration.

He receives a fixed salary and is not paid on the basis of his attendances.

11. The appellant does not dispute that the transformation of the "contractual agreement" of September 1966 into a permanent contract in proper form is subject to the condition laid down in Art. 8 of the Staff Regulations.

However, she was "validly appointed" in September 1966. The exchange of letters shows that the two contracting parties were ad idem. The appellant took up her duties as a "permanent official" and was promoted with effect from 1 November 1966, receiving an increase in salary.

The contract was nevertheless subject to a condition precedent, and the Head of the Establishment Division therefore advised the appellant to await the result of the next medical examination (see para. 12 below). This advice would have been pointless if the Head of the Establishment Division had not considered that the contract was still in existence. Furthermore, temporary staff is not subject to medical examinations, and if the Administration had regarded the appellant merely as a member of the temporary staff there would have been no question of her "next medical examination".

12. The medical opinions were defective or mistaken.

After the first medical examination, neither the medical adviser nor the Head of the Establishment Division informed the appellant of the reasons why the medical certificate had not been given. The Head of the Establishment Division merely advised her to await the result of the next medical examination.

In May/June 1968, i.e. after her second medical examination, the appellant learned that the medical adviser still refused to give the certificate in question. Of her own accord, she went to see him on 12 September 1968 and asked him why he refused it. During their conversation the medical adviser referred to her "antecedents" and to "psychiatric treatment" and added "that there are some things one cannot say".

The appellant assumed that the medical adviser was referring to the fact that she had told him at her first examination in 1966 that she had consulted a specialist in 1964 as the result of exhaustion caused by serious family difficulties. At that time the specialist had advised her to take a week's rest and she had never consulted him since. Failing to understand how the medical adviser could base his refusal on so trivial an incident so long ago, she consulted her private doctor who said he found the whole thing incomprehensible and told her he would get in touch with the Council.

Shortly afterwards the appellant learned from Miss Kelly, the official in the Establishment Division responsible for recruitment, that according to information provided by the appellant's family doctor, the medical-adviser's repeated refusal to give the necessary medical certificate was due to his having mistaken her for a person with a similar name. Miss Kelly spoke to Mr. Vaineau, then acting Head of the Establishment-Division, who went to see the medical-adviser. If then transpired that there was no further objection to the appellant's being engaged on a permanent basis.

That an error prejudicial to her interests had been committed is shown by the fact that the medical certificate was finally issued without a further examination. The medical adviser's card shows that examinations took place on 25 September and 17 October 1968 but in fact the appellant was not examined on those dates.

The note sent by the appellant to Mr. Hunt in March 1969 led to a conversation in April 1969 during which Mr. Hunt is alleged to have stated that it was after an examination in September or October 1968 that the medical-adviser had abandoned his previous opinion and had certified that there was no longer any reason for not granting a permanent contract. At the end of the conversation Mr. Hunt is said to have stated that he would make further enquiries of the medical adviser.

A comparison of the medical adviser's cards with the register of medical examinations shows that the dates on the cards were not correct.

13. In his comments of 19 December 1969 the Secretary General referred to the note from the medical adviser to the Head of the Establishment Division dated 17 October1968.

In her observations of 20 March 1970 the appellant stated that she had previously been unaware of the existence of this note which had never been referred to by the Directorate of Administration; at the time the Administration had relied on a completely different reason, i.e. an examination which she was alleged to have undergone in September or October 1968 (see para. 12. above).

Against the argument advanced by the Secretary General, who states that it was the "additional information" mentioned in the note of 17 October 1968 which caused the medical adviser to change his opinion as soon.as the information was available to him, the-appellant maintains that the specialist who treated her in 1964 told her that he would have given a favorable opinion in 1966 had he been consulted.

14. The appellant therefore considers it to have been proved that:

- there was errors in the medical cards;
- these errors misled the Administration;

- the Administration subsequently tried to justify the actions of its medical adviser by referring to additional information which he had obtained and to the opinion of another doctor;
- these facts, were available in 1966;
- it was-only the action taken by her on 12 September 1968 (see para. 12 above) and the action of her family doctor which revealed the initial error.

15. As the appellant had already worked at the Council of Europe for more than 15 months when the medical adviser refused his certificate, she considers that the Secretary General could have ordered a thorough enquiry as to the grounds for refusal.

The facts which came to light in 1968 and 1969 show that, in 1966, there were no medical objections to the issue of the certificate. The same considerations apply to the second refusal to give the certificate in 1968.

16. Finally, the appellant puts forward the following argument:

Even after issue of the medical certificate the Secretary General by granting a permanent contract only as from 1 January 1969, failed to observe the conditions of appointment.

The restriction on the appellant's appointment mentioned in the note of 31 January 1967 should have been removed as soon as the certificate was given. This unjustified delay in granting a permanent contract caused the appellant additional damage.

17. The appellant accordingly makes the following applications:

She requests reinstatement with payment of the corresponding remuneration (including medical and pharmaceutical expenses, the increase in the amount required to redeem her pension rights, etc.) and such amount of compensation for the non-material damage suffered by her as the Board may think fit.

At the hearing before the Board the appellant withdrew her claim for medical and pharmaceutical expenses.

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

18. In the first place he points out that no-one has a right to a permanent appointment with the Council of Europe.

As a rule the Secretary General is not liable for the acts of the medical adviser.

Even if in the present case he were to be held liable for those acts it has not been proved that the medical adviser's opinions were defective or mistaken. `

The Secretary General is free to offer a permanent contract at the time he thinks fit.

The Secretary General makes the following particular points:

19. His liability for opinions given by the medical adviser on the appointment of staff is limited (see on this point the appellant's arguments in para. 10). An administrative decision taken on the basis of such an opinion cannot be set aside unless the Secretary General:

- knew or should *have* known at the time he appointed him, or at any subsequent time, that the medical adviser had not the professional competence necessary to perform the duties of his office; or

- knew or should have known that in the case in point the medical adviser's opinion on which he had based his own administrative decision was mistaken.

In the present case neither of these conditions has been met.

Relations between the Secretary General and the medical adviser are governed mainly by a letter from the Director of Administration dated 6 February 1958, which has been put in evidence in the proceedings before the Board, informing the medical adviser of the conditions of appointment proposed by the Secretary General. According to para. 3 of the letter, the medical adviser is to enjoy complete independence in the performance of his duties and is to be subject to the French code of professional etiquette.

The legal position of the medical adviser in relation to the Council of Europe is therefore not exactly the same as with the medical advisers of other organisations. In particular he is not a member of the Council's staff.

The Secretary General further refers on this point to Office Circular No. 271 of 1 October 1967 on the advisory health service.

20. The Secretary General points out that issue of the medical certificate mentioned in Art. 8 of the Staff Regulations is art essential condition for appointment to the permanent staff. In the appellant's case this condition was not fulfilled in 1966.

Contrary to the argument put forward by the appellant (see para. 11), at no time prior to 1 January 1969 did she enjoy the status of a permanent staff member. In other words, before that date there was never any permanent contract between the Secretary General and her. It follows for example that the Secretary General would not have been obliged to observe the one month's notice laid down in Art. 19 of the Staff Regulations for the six month's probationary period.

For the same reason, the note of 31 January 1967 cannot be considered as defective on account of its retroactive effect. It amounts to a statement by the Administration to the effect that the appellant was deemed to have completed, between 1 October and 31 December 1966, a period of service equivalent to a period served on the permanent staff.

21. It is true that the medical card certifying that on 25 September and 17 October 1968 "there were no longer any reasons against a permanent contract" relates to dates on which the appellant was not medically examined. However, the Secretary General disputes the cogency of the appellant's argument on this point (see para. 12) for the following reasons.

The medical adviser entered the first date (25 September 1968) on the card after a telephone conversation that day with Professor Kammerer of the Strasbourg Faculty of

Medicine, who was able to supply him with additional information on the appellant's pathological antecedents and the prognosis in her case. Professor Kammerer confirmed this information in a letter dated 26 September 1968, which explains the entry of 17 October 1968 on the medical card and the issue of the medical certificate on that date. The certificate states that it is based on an opinion supplied by one of the appellant's doctors, this being a reference to Professor Kammerer (see para. 7).

In a letter to Mr. Hunt on 23 May 1969, the medical adviser points out that the above-mentioned letter of 26 September 1968 confirmed the correctness of his previous decisions. He writes: "… Moreover, this letter from a very authoritative specialist confirms in black and white the correctness of my decision at the time of /the appellant's/ examination on appointment and would justify the decisions I then took were the case to come before a medical board …".

22. The appellant's statement that the specialist who treated her in 1964 would have given a favorable opinion at the time of her examination on appointment in 1966 had he been consulted (see para. 13 *in fine)* is not substantiated. Against it the Secretary General sets the statements of the medical adviser mentioned above (para. 21).

23. It is thus proved that there was no irregularity in the medical cards. The appellant's allegations (see para. 14) are unfounded and categorically denied by the Secretary General. The documents produced constitute sufficient evidence of these facts.

24. According to the appellant the Secretary General could have ordered a more detailed enquiry as to the grounds for refusal of the medical certificate (see para. 15).

However, her administrative file shows that when the Head of the Establishment Division received the medical opinion of 1 December 1966 to the effect that there were reasons for not giving her a permanent contract he did not merely act in accordance with the medical adviser's recommendations but got into touch with him to find out whether there were also medical objections to a two-year temporary contract. The medical adviser gave a categorical recommendation against this too.

Furthermore, the Head of the Establishment Division asked the medical adviser whether Art. 45 of the Pension Scheme Regulations might provide a solution. The medical adviser said he would not propose the application of this provision.

The Secretary General thus did not purely and simply note the medical adviser's opinion but looked into the possibility of offering the appellant either an extended temporary contract or a contract subject to Art. 45 of the Pension Scheme Regulations.

25. Finally, the Secretary General makes the following comments-in reply to the appellant's argument in para. 16:

Issue of the certificate required by Art. 8 of the Staff Regulations is an essential condition for appointment to the staff. On the other hand, the Secretary General is not obliged to appoint every person for whom such a certificate has been issued.

A member of the temporary staff has no right to a permanent appointment. The Secretary General decides at his own discretion, in accordance with the general interests of

the organisation as defined in particular in Art. 7 of the Staff Regulations, whether it is expedient to offer a permanent contract to a temporary staff member. This power necessarily implies that the Secretary General takes the decision to offer a-permanent contract as and when he thinks fit.

Since the Secretary General was entitled not to offer the appellant a permanent contract, she has no ground for complaining that such a contract was granted her with effect from 1 January 1969 only.

26. The Secretary General accordingly applies to the Board to reject Mrs X's appeal as ill-founded.

THE LAW

27. As regards **the period from 1 January 1967 to 17 October 1968**, the Board makes the following observations.

The nature of the appellant's appointment prior to 1 January 1967 is at issue between the parties. The Board, however, considers that in the circumstances it is not necessary to decide this question. The appellant complains that she was not given a permanent appointment with effect from 1 January 1967. During the period in question (1 January 1967-17 October 1968) she worked as a member of the temporary staff.

Similarly the Board considers that it is not necessary in this case to decide whether and to what extent the Secretary General is liable for the acts of the medical adviser. Even assuming him to be liable in the present case, it has not been proved that the medical adviser committed the faults alleged by the appellant.

In view of the letter sent by Professor Kammerer to the medical adviser on 26 September 1968, which was produced by the Secretary General with his memorandum of 27 July 1970, it is, in the Board's opinion, clearly established that the medical adviser did not confuse the appellant with any other person bearing a similar name. In that letter Professor Kammerer mentions the circumstances in which the appellant was treated in his department in November 1964. Furthermore, he states that "the prognosis has greatly improved and... the appellant may be considered fit for permanent employment".

In the circumstances the Board does not consider it necessary to obtain further evidence.

Neither can the appellant complain that she has been prejudiced by the fact that the medical adviser gave his certificate on 17 October 1968 without examining her again.

28. As regards **the period from 17 October 1968 to 1 January 1969**, the Board makes the following observations.

It finds that when the medical certificate was issued on 17 October 1968 the appellant had neither a permanent contract nor the offer of one. She worked during the period in question (17 October 1968-1 January 1969) as a member of the temporary staff and was not offered a permanent contract until 1 January 1969.

The Board is, however, of the opinion that it must consider the entire contractual relationship between the parties and must have regard to the particular circumstances of the case.

The Board observes first that on 27 September 1966 the Administration offered the appellant, who had already worked for a year as a temporary staff member, a permanent appointment despite the fact that she had not yet undergone the prescribed medical examination. Moreover the appellant, after accepting this offer and taking up her duties in October 1966**,** was promoted in November 1966, i.e. still before her first medical examination.

It is true that the appointment offered her in September 1966 was limited by the Administration to the period 1 October-31 December 1966 seeing that she had not yet fulfilled the condition laid down in Art. 8 of the Staff Regulations. Nevertheless, a contractual relationship continues to exist between the Secretary General and her. She continued to be employed without interruption, the nature of her work hardly changed and the responsibilities exercised by her in the performance of her duties remained the same.

Finally, the Board points out that the appellant was asked to undergo a second medical examination while on the temporary staff. This fact suggests that the Administration was prepared to appoint her to the permanent staff as soon as the medical adviser gave a favorable opinion.

The Board accepts that a member of the temporary staff, even after issue of the medical certificate, has in principle no right to be appointed to the permanent staff. However, bearing in mind the whole contractual relationship between the parties and the specific circumstances of the present case, it considers that once the medical certificate was issued on 17 October 1968, the appellant could properly expect to be appointed to the permanent staff with effect from that date.

29. The Board considers that in accordance with Art. 6 (4) of its Statute part of the costs incurred by the appellant should be reimbursed.

Now therefore

the Appeals Board decides:

1 The appellant is entitled to reinstatement as a permanent official, with all the rights pertaining to that status, with effect from 17 October 1968;

2. The other applications contained in her appeal are dismissed;

3. The costs incurred by the appellant are to be reimbursed by the Council of Europe for an amount not exceeding five hundred French francs.

Done in French and English, the French text being authentic.

Chairman	Secretary
G.H. van HERWAADEN	K. ROGGE