CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COMMISSION DE RECOURS
APPEALS BOARD

Appeal No. 7/1971 (André LAFUMA v. Secretary General)

The Appeals Board, sitting in private in Strasbourg, on 13 October 1972, under the presidency of Mr E. HAMBRO, Chairman, and in the presence of:

MM. G.H. van HERWAARDEN, Deputy Chairman, and
H. DELVAUX, Member

assisted by:

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

Having deliberated.

PROCEDURE

1. The appellant, represented by Mr J. ROBERT, Professor of Public Law at Paris University, lodged his appeal on 22 October 1971. The appeal was registered on the same day under file No. 7/1971.

The Secretary General, represented by Mr H. GOLSONG, Director of Legal Affairs, submitted his comments on 15 March 1972.

By letter of 22 March 1972, the appellant stated that he confirmed his previous submissions in their entirety but did not wish to make use of his right of reply. At the same time, he reserved the right to lodge in due course a list of witnesses whom he wished to be heard.

2. By letters of 19 May 1972, the Board's Secretary informed the parties that the Chairman had decided to invite them to appear before the Board and that the hearing had been fixed for 24 July 1972 at 3 p.m. If necessary, it would be continued on 25 July 1972.

At the same time the appellant was requested to inform the Board before 30 May 1972 of the names and particulars of the witnesses whom he wished to, be heard and the matters to which their evidence would refer.

3. By letter of 24 May 1972 the appellant submitted a list of witnesses whom he desired the Board to hear.

On 6 June 1972, the Secretary General submitted to the Board his comments on the appellant's request for the hearing of witnesses.

4. On 7 July 1972, the Secretary General's representative applied under Rule 16 of the Board's Rules of Procedure for an adjournment of the hearing fixed for 24 July 1972. By letter of 18 July 1972 the appellant agreed to this adjournment.

On 20 July 1972, the Chairman of the Board decided to adjourn the hearing to a later date. On 20 September 1972, the hearing was fixed for 13 October 1972 with a possible continuation on the 14.

By letter of 11 October 1972, the President of the Staff Association requested that the Association should be permitted "to inform the Board of the position adopted by the Staff" on the question of principle raised by this appeal or, alternatively, that the Staff Association should be authorised to take part in the proceedings as an appellant.

5. The public hearing was held on 13 October 1972 in the Human Rights Building at Strasbourg in the presence of the appellant and the parties' representatives (cf. para. 1 above).

At the hearing the Chairman stated that the Board had taken note of the Staff Association's application of 11 October 1972 but in view of the strict provisions of Rule 22 of the Rules of Procedure read in conjunction with Art. 2 of the Board's Statute it was unable to grant the application to intervene in the proceedings. The Board was, however, prepared to hear the representatives of the Staff Association in so far as they were assisting the appellant within the meaning of Art. 5 (3) of the Board's Statute.

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:

6. Mr André LAFUMA, a French national, who was born at Lille on 29 August 1923, was first appointed in 1949. He is at present serving in grade B6 and occupies the post of archivist in the Secretariat of the European Commission of European Rights.

7. The present appeal relates to the appointments to eight vacant posts in the Secretariat.

In his application to the Secretary General of 27 August 1971 (cf. para. 8 below) the appellant only mentioned six posts. But in his appeal, he refers to eight appointments (cf. paras. 12, 15, 16 and 17 below). In reply to a question by the Chairman, the appellant's representative stated at the hearing that there were in fact eight appointments.

These appointments were published in Bulletin No. 4 of 1 August 1971 relating to "Staff Changes" and appeared in Part I under the heading "Appointments". They are as follows:

- Mr Jean-Pierre MASSUE, A2 to the Office of the Clerk of the Assembly with effect from 1 June1971;
- Mr Wilson BARRET, A3 to the Directorate of Education and of Cultural and Scientific Affairs – Division for Educational Documentation and Research – with effect from 1 July1971;
- Miss Graziella BRIANZONI, A2 to the Directorate of Economic and Social Affairs with effect from 1 July 1971;
- Mr Giovanni BUQUICCHIO, A2 to the Directorate of Legal Affairs – Division II – with effect from 1 July 1971;
- Mr Giuseppe TESSARI, A2 to the Directorate of Economic and Social Affairs – Population and Vocational Training Division - with effect from 1 July 1971;
- Mr David PUGSLEY, A2 to the Directorate of Economic and Social Affairs – Social Division – with effect from 1 July 1971;
- Mr Abidin PERIN, A1 to the Directorate of Economic and Social Affairs – Social Division – with effect from 1 July 1971;
- Mr Hugh RICHARDSON, Al to the Directorate of Economic and Social Affairs – Social Division – with effect from 1 July 1971.

8. On 27 August 1971, the appellant, claiming to exercise his right under para. 1 of Art. 25 of the Staff Regulations, addressed the following memorandum to the Secretary General:

> "On returning from leave, I had occasion to peruse Bulletin No. 4 of 1 August 1971 relating to staff changes during the period May-July 1971.
>
> I note that in Part I of this Bulletin, under the heading 'Appointments', six posts A2/A3 (five of which are in the Directorate of Economic and Social Affairs) were filled on 1 July by direct appointment from outside the Secretariat without having been notified to existing staff members, in violation of Art. 3 of Rule No. 342 on the promotion of staff members.
>
> In accordance with Art. 25 (1) of the Staff Regulations, I respectfully request you to cancel these appointments since they were not made in accordance with the relevant provisions. I further request you to take the necessary steps to ensure that, in future, the Administration complies with the relevant regulations."

9. On 23 September 1971, Mr A. DAUSSIN, Director General of Administration and Finance, sent the following memorandum to the appellant on behalf of the Secretary General:

> "By memorandum of 27 August 1971, you requested the Secretary General to cancel six appointments to posts A2/A3 made on 1 July 1971 on the ground that you consider these appointments were made in violation of Art. 3 of Rule No. 342 of 27 June 1963 on the posting and promotion of staff members.
>
> The Secretary General has instructed me to give you the following information:
>
> Art. 3 (d) of Rule No. 342 provides that a post shall not be notified to the staff if 'it is clearly purposeless to do so'.
>
> However, Resolution 1531 33 adopted by the Committee of Ministers on 11 December 1953 requires the Secretary General to take account 'in appointing all officials of the Council of Europe and in filling vacancies of the qualifications and experience of persons already employed by the Council of Europe,

in so far as this is compatible with the desirability of recruiting fresh talent from time to time and of **ensuring an equitable geographical allocation** of appointments among nationals of the member states'.

In order to be able to offer existing staff members in the A grades reasonable career prospects the Secretary General must take special care to observe the obligations imposed on him with regard to geographical allocation when making appointments to A2/A3 which constitute the first steps in category A.

Since this geographical distribution is at present somewhat unsatisfactory with regard to certain member states it is necessary to have recourse to external recruitment at the level of the posts in question.

However, it is understood that once a satisfactory balance has been achieved, it will be possible to re-establish normal competition between external and internal candidates and at the same time A2/A3 posts will once more be notified within the Secretariat.

In view of what has been stated above the Secretary General considers that none of the existing texts on the posting and promotion of staff members has been violated and is therefore unable to comply with your request.

You have, moreover, referred in your memorandum to Art 25 of the Staff Regulations. In my opinion, this Article does not apply to the present case since no individual decision applicable to you has been taken."

SUBMISSIONS AND CONCLUSIONS OF THE PARTIES

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

As to the admissibility

10. The appellant considers that there is an individual decision applicable to him.

11. On this question he makes the following submission :

"Firstly it should be noted that, under Art. 25 of the Staff Regulations, a staff member may apply for the withdrawal or /amendment/ 'd'une décision de caractère individuelle prise à son égard'. The corresponding English text of this Article uses the expression 'individual decision applicable to him'. In its memorandum of 23 September, the Administration interprets this provision to mean that in every case there must be an individual decision applicable to the staff member to whom it is directly addressed and who is mentioned by name in the decision. However, the English text makes it possible to interpret this concept by analysing it into two objective components and this is the only interpretation which makes it possible to fulfill the true purpose of Art. 25, which is to protect the rights of staff members. For words 'individual decision applicable to him' imply that in each case, there must be a decision of an objectively individual nature (this consequently excludes any decisions of general application). This is in fact the case with regard to the appointments published in the Bulletin' Staff Changes' of 1 August 1971. It is further necessary that the objectively individual decision should be 'applicable' to him i.e. to the staff member applying for the withdrawal or amendment of the decision in question."

12. The appellant also submits the following argument:

"If the Appeals Board is unable to accept the interpretation suggested above and which best fulfils the purpose of those who drafted Art 25 of the Staff Regulations one must nevertheless come to the conclusion that, contrary to the position adopted in the Administration's memorandum of 23 September 1971, there was in fact an individual decision applicable to me. For the decision in question is the tacit decision rejecting my candidature which was made at the moment the appointments to the eight

> disputed posts were published. At the very least it may be argued that this tacit rejection is implied in the Administration's memorandum of 23 September 1971, in which it impliedly rejects my candidature for the eight posts in question and gives as its reasons for this implied decision the need to ensure an equitable geographical allocation of appointment."

13. At the hearing, the appellant's representative supported his argument by referring to the provisions governing the jurisdiction of the administrative tribunals of other international organisations and to the relevant provisions of the administrative law of certain European States.

14. The appellant concludes that "in one way or another I have established the existence of an individual decision applicable to me against which this appeal is directed".

As to the merits

15. The appellant states that when the eight posts in question were filled, contrary to Art. 3 of Rule No. 342 of 26 July 1963, none of them were notified to existing staff members.

The very number of posts filled without any notification whatever is enough to cast doubt on the propriety of the procedure followed. In the appellant's opinion, as far as existing staff members are concerned, the right of access to the international civil service consists of two essential components, namely:

- the right to apply for appointment to all the posts for which a staff member may reasonably assume that he fulfils the stipulated conditions;

- the right to a reasonable prospect of promotion which becomes of relatively greater importance when dealing with existing staff in the lower grades; this right should be more scrupulously observed when dealing with officials of lower rank and in this connection the case of those wishing to change their category would seem to deserve particular attention.

It follows that in the present case the individual decisions making appointments to the eight posts in question were applicable to the appellant to the extent that they deprived him of the two above-mentioned rights.

16. The Administration did not notify the eight posts in question because it appeared "purposeless" to do so (cf. memorandum of 23 September 1971, para. 9 above). In this connection the appellant observes that:

> "Rule No. 342 lays down the principle that posts shall be notified and that the cases when this is not done constitute exceptions to this rule. Being exceptions they must be interpreted strictly. Similarly, it is generally admitted that a person claiming the benefit of an exception is required to give reasons. In the present case it is already somewhat surprising that the Administration applied the exceptional procedure not in a single case or in two particular cases, but did so in a strangely general manner during a very short period of time (May-June 1971) when no notification was made in no less than eight cases."

17. Art. 3 of Rule No. 342 mentions the "qualifications required", which constitute an objective measure of appreciation. But in the present case, this was not the reason put forward by the Administration. The systematic and generalised use of the exception was justified by the need to "ensure an equitable geographical allocation of appointments". The same reason was advanced for all eight cases without distinction. The principle of strict interpretation

referred to (cf. para. 16 above) should have caused the Administration to justify in each particular case the need to ensure an equitable geographical allocation of appointments.

18. However, it may be doubted whether the argument advanced by the Administration is justified in view of the two above-mentioned rights (cf. para. 15). In this connection, the appellant submits the following arguments:

> "For, if the argument put forward by the Administration were to be admitted without qualification, it would follow that it could arrange matters so that no vacant post would ever be notified. For this purpose it is sufficient that at a given moment the geographical balance is upset (and in fact this balance is always upset in favour of or against a particular national group) in order to allege that notification has clearly become purposeless. In any case the existing staff is obviously not responsible for upsetting the geographical balance and it seems strange that it should be required to support the consequences. Indeed it is the Administration's responsibility to ensure the geographical balance but in such a way as not to prejudice the interests of existing staff. It might even be considered that the principle of 'estoppel' prevents the Administration from using the argument based on an equitable geographical allocation and that '*nemo auditur turpitudinem suam allegans*'."

19. In conclusion, the appellant applies for the cancellation of the appointments made or, alternatively, compensation for the damage suffered.

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

As to the admissibility

20. In the Secretary General's opinion the present appeal does not satisfy the requirements of Art. 25 (1) of the Staff Regulations, which provides that every decision appealed against before the Appeals Board must be an individual decision applicable to the staff member who contests it before the Board.

21. The appellant argues that Art. 25 (1) should be interpreted by separating the two parts of this provision; according to him the Board should first establish whether the decisions appealed against were "objectively" individual decisions and then decide that these decisions were in fact "applicable to him", seeing that only the English text of Art. 25 was compatible with the requirement of protecting staff members.

Although in the present case the appellant has not established that there are special reasons for considering that the two conditions laid down by the above-mentioned provision should be considered separately the fact is that, even if one accepted this argument, it would not be possible to grant what the appellant is asking for.

22. In this connection the Secretary General makes the following submission:

> "Firstly, to talk about a decision of an 'objectively' individual nature adds nothing to the fact that the decision is binding on all staff members and not only those to whom it is directly addressed. This is stating the obvious.
>
> On the other hand, the appellant's argument would appear to be irrelevant as far as the interpretation of the second phrase, consisting of the words 'applicable to him' in the English text and 'prise à son égard' in the French text, is concerned. In connection, one should first recall that, if there is a divergence between the scope of the two versions of Art. 25 (1), an interpretation should be sought which is compatible with both texts. In the Secretary General's opinion, however,

no problem of this sort arises in the present case since a reading of either text leads to the same conclusions."

23. The appellant has asked the Board to consider the meaning and scope of the words "applicable to him" or « prise à son égard » separately from the words "individual decision" or « décision individuelle ». Assuming that each of these expressions has its own meanings, it is necessary to find a construction whereby practical effect can be given to the expression in question.

On this issue, the Secretary General makes the following submission:

"In a general way, it seems that the terms in question are intended to define the nature of the interest which a member of staff must be able to rely on if he is to be given access to the Appeals Board. Firstly, it is clear that the intention was to exclude the *actio popularis* which could be brought by any member of staff who had an interest in applying for the cancellation of an individual decision. That would have been the position if the text of Art. 25 (1) had merely stated the first requirement, namely that of an individual decision. Since, however, the appellant must always have a direct interest if his action is to be admissible, it is conceivable, had the paragraph been so worded, that the interest required might have been very widely interpreted. The addition of the words 'applicable to him' or 'prise à son égard' can only be properly understood if one realises that their purpose is to define the scope and limits of the interests protected.

The Secretary General has already had occasion to remark that the decisions appealed against were not 'prises à l'égard du requérant' or 'applicable to him'.

Relying on the English text alone, however, the appellant mairtained that he was entitled to attack the decisions making the appointments because they were 'applicable' to him. As already mentioned [...], the English and French texts should be read together. This leads [...] to the conclusion that the concept of applicability stated in Art. 25 (1) of the Staff Regulations is more restricted than the concept of the effectiveness of a decision which, in the case of individual decision, may be defined as the fact of having validity within the legal system to which it belongs, i.e. the fact of having a legal existence not only with respect to the persons to whom it is addressed but also with regard to anyone having knowledge of its contents. The clear wording of the provisions Art. 25 (1) makes such an extensive interpretation impossible seeing that the decision appealed against must have been applicable to (prise à l'égard de) the staff member appealing against it. By way of example, the decision appointing an official of the Secretariat (let us say by way of illustration the appointment to the post of Head of the Mailing Office) has a general effect with regard to all the other members of the staff; they are required to respect the decision taken and to recognize the person appointed to the post as being entitled to exercise the functions determined by the Secretary General. However, the decision in question cannot logically be regarded as being 'applicable' to all staff members other than the person directly concerned.

The expression 'decision applicable to him' therefore means that the decision has been pronounced with the specific purpose of producing legal effects with regard to one or more specified persons and that the cause of the decision is to be found in the Administration's desire to alter the legal status of these persons. The persons to whom the protection extends are thus exactly the same as those in respect of whom the decision was taken, even if a number of other persons are liable to be indirectly affected by the decision."

24. The appellant has argued in this connection that the eight decisions making appointments were applicable to him in that they deprived him both of his right to apply for the posts and of his right to a reasonable prospect of promotion.

With regard to the first point, the Secretary General considers:

"that, the appellant can hardly maintain at the same time that his right to apply for the posts was violated" (cf. para. 15 above) "and request the Appeals Board to hold, if necessary, that the decision

> appealed against amounts to an implied decision rejecting his candidature with effect from the moment when the appointments to the eight posts in question were made public" (cf. para. 12 above).

As to the second point, namely that his "right to a reasonable prospect of promotion" has been violated, the Secretary General submits:

> "that, in the case in question, the possible transfer of Mr. Lafuma from grade B6 to grade A2 would have been not a promotion as he claims, but a change of category.
>
> Even if under the existing texts applicable to staff members of the Council of Europe it might be possible to assume the existence of 'a right to a reasonable prospect of promotion' which might be enforced by a staff member, if need be, before the Appeals Board, it is not possible to maintain that all staff members in categories B and C are entitled to be transferred to a higher category. Although he recognises that it is extremely desirable that experienced and properly qualified members of staff should have access to a higher category the Secretary General considers that it is impossible to maintain that a staff member can claim a right to be transferred to a higher category or even a right to a reasonable prospect of such a transfer. Even if such a hope might reasonably be entertained, it could in no case be considered as a right."

25. At the hearing the Secretary General's representative, in setting forth the arguments which he had submitted in writing on the question of admissibility, referred to certain inaccuracies in the appellant's submissions in particular as regards the number of appointments complained of (cf. also para. 7 above).

26. In conclusion, the Secretary General requests the Appeals Board to reject Mr. Lafuma's appeal as inadmissible on the grounds that the decisions complained of are not applicable to him within the meaning of Art. 25 (1) of the Staff Regulations.

As to the merits

27. If the Appeals Board should decide for reasons not apparent to the Secretary General to declare the appeal admissible the Secretary General would request the Appeals Board, as an entirely subsidiary submission, to declare the appeal ill-founded for the following reasons:

28. The present appeal is directed towards obtaining the cancellation of eight decisions making appointments on the ground that these appointments constitute a violation of the provisions of Art. 3 of Rule No. 342 on the posting and promotion of staff members of 26 July 1963.

This provision appears together with Arts. 2 and 4 under the title "Notification of vacancies", which describes the procedure to be followed when a post becomes vacant in the Organisation. In this connection, it is first stated in Art. 2 that when a post becomes vacant, the Secretary General shall first consider whether staff members in the same grade should be transferred to the post.

Art. 3 (d), which is relied on in the present case, reads as follows:

> "Where a vacant post is not filled as prescribed in Article 2 above, it shall be notified to staff members, unless the post be:
>
> (a) …
> (b) …
> (c) ….

(d) a post which it would clearly be purposeless to notify by reason, inter alia of the qualifications requires."

In this connection, it should be pointed out that the Secretary General's Rule No. 342 is merely a consolidation of the rules laid down by the Committee of Ministers, both in the Staff Regulations and in Resolution (53) 33. Indeed, this is stated clearly in the preamble to Rule No. 342. As a matter of fact Resolution (53) 33 requires the Secretary General when appointing members of staff to take account inter alia of "an equitable geographical allocation of appointments between nationals of the member States". The whole of Rule 342 is subject to this basic text.

29. In these circumstances the Secretary General formally rejects as false all the appellant's other submissions on the merits, submits that the appeal is ill-founded and requests the Board to reject it as such.

THE LAW

Under Art. 25 (1) of the Staff Regulations, a staff member may apply to the Secretary General for the withdrawal of an "individual decision applicable to him". The parties differ as to whether the decisions appointing eight members of staff which are the subject of the present appeal constitute, as the appellant maintains, individual decisions applicable to him within the meaning of Art. 25 (1) avoce and Art. 2 (1) of the Statute of the Appeals Board.

To solve this question the Board has not only taken into consideration the above-mentioned provisions governing its own jurisdiction, but has also examined the provisions defining the jurisdiction of the administrative tribunals of other international or supranational organisations to which the appellant referred in his oral submissions.

In the first place the Board notes that by virtue of Art. 91 of the Staff Regulations of the European Communities the Court of the said Communities has jurisdiction to decide on appeals by staff members, not only in the case of individual measures but also in the case of general measures. Under Art. 25 (1) of the Staff Regulations of the Council of Europe, the Board's jurisdiction would appear to be more restricted since this provision refers solely to "individual decisions". However, in the circumstances, the Board does not consider it necessary to examine this problem further, seeing that it is quite clear that each of the eight appointments appealed against constitutes an "individual decision", i.e. the appointment of a specified person to a specified post.

The Board also notes that the provisions defining the jurisdiction of other administrative tribunals require as a further condition of the admissibility of an appeal that the appellant should be affected, or claim to be affected, by the decision which is the subject of his appeal. Thus, according to Regulation 22 (c) of the OECD Staff Regulations and Article 4.21 of the NATO Staff Regulations, it is sufficient that the appeal relates to a decision which the appellant considers as an injury to him. On the other hand Art. 91 (1) of the European Communities' Staff Regulations seems to go further since it requires the existence of an act by which the appellant is aggrieved.

At all events the reference to the provisions governing the jurisdiction of administrative tribunals of other international or supranational organisations is only of very

limited interest in the present case, seeing that the Statute of the Appeals Board and Art. 25 (1) of the Staff Regulations, as at present worded, are subsequent to the principal international provisions cited by the appellant in support of his argument. For it is legally inadmissible to attempt to enlarge jurisdiction of the Appeals Board by relying on more widely worded texts already known at the time when Art. 25 (1) of the Staff Regulations and Art. 2 of the Statute of the Appeals Board were drafted since the only possible inference is that such texts were impliedly not followed.

The Board concludes that the only relevant text in the present case is Art. 25 (1) of the Staff Regulations taken in conjunction with Art. 2 of the Board's Statute.

However, these provisions contain in both the English and French texts the objective requirements that the appeal must relate to a decision applicable to the appellant.

The parties differ as to whether the eight appointments which are the subject of the present appeal constitute decisions applicable only to the eight persons appointed or whether they also constitute decisions applicable to the appellant.

The Secretary General favours the first interpretation and relies principally on the French text of Art. 25 (1), whereas the appellant relying mainly on the English text attempts to justify the second interpretation.

As regards the French text taken by itself, the Board considers that the expression « décision de caractère individuel prise à son égard » must be interpreted in the restricted sense suggested by the Secretary General: the appointment of a specified person to a specified post is a decision applicable only to that person even though it may indirectly affect a large number of other persons, in particular those who by reason of this appointment have been prevented from applying for the post.

As regards the English text of Art. 25 (1) the Board notes that the word "applicable" means "capable of being applied", "having reference"[i] or "having relevance"[ii]. This meaning of the word "applicable" could, if corroborated by other factors, justify the wide interpretation of Art. 25 (1) put forward by the appellant. It could equally, combined with other considerations, confirm the restrictive interpretation advanced by the Secretary General and confirmed by the French text of the same Article.

However, an interpretation of the English text which gave an appeal to everyone who was, or claimed to be, indirectly affected by a decision would, as the Secretary General submits, increase the number of possible appellants so as to include practically all members of the staff. Such an interpretation would not only be contrary to the wording of the French text, but would also deprive of all meaning the words "applicable to him" in the English text.

After considering the two interpretations, the Board has come to the conclusion that the words "individual decision applicable to him" in Art. 25 (1) were intended to limit the right of appeal to those persons only whose legal status is directly affected by a given decision. This interpretation which follows from the French text is also consonant with the English wording.

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[i] Cf. The Shorter Oxford English Dictionary, 3rd edition, reprinted with corrections 1952.
[ii] Webster's Third New International Dictionary, 1961.

It follows that the Secretary General's decisions which form the subject of the present appeal cannot be considered to have been applicable to the appellant within the meaning of Art. 25 (1) of the Staff Regulations.

The Board adds that it is fully aware of the importance for the staff of the Council of Europe of having an appeal against decisions by which it is affected, even indirectly. However, this jurisdiction is not conferred upon it by the present wording of the Staff Regulations and the Statute of the Appeals Board. Moreover, the function of the Board is to apply the Statute and not to amend it.

Now, therefore, the Appeals Board:

1. Declares Mr. André Lafuma's appeal inadmissible;
2. Orders that each party shall bear its own costs.

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

Chairman	Secretary
E. HAMBRO	K. ROGGE