

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 248/1998 (X v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr José da CRUZ RODRIGUES, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Mrs Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr X lodged his appeal on 8 October 1998. On 12 October 1998, the appeal was registered under file No. 248/1998.
2. On 28 October 1998, the appellant's representative, Mr Jean-Pierre CUNY, a lawyer practising in Versailles, filed a supplementary memorial.
3. On 11 December 1998, the Secretary General transmitted his observations on the appeal. Observations in reply were lodged on 18 January 1999 by the appellant's counsel.
4. On 17 February 1999, the Staff Committee applied to intervene in the case, in support of the appellant's submissions. In an Order issued on 2 March 1999, having conferred with the parties, the Chair authorized the Staff Committee to submit written observations. Further to the Staff Committee's request of 3 March 1999, the Chair, by Order of 4 March 1999, specified the procedural documents which were to be disclosed to the intervening party.

The Staff Committee's written intervention was received by the Tribunal on 5 March 1999 and transmitted to the parties to the dispute.

5. The public hearing took place in the Human Rights Building in Strasbourg on 22 March 1999. The appellant was represented by Mr Jean-Pierre CUNY, and the Secretary General by

Mr Roberto LAMPONI, Head of the Legal Advice Department in the Directorate of Legal Affairs, accompanied by Mr Jörg POLAKIEWICZ, Administrative Officer in that directorate.

THE FACTS

6. The appellant, an A3 permanent staff member, commenced service with the Council of Europe on 5 October 1991. He was appointed to the Secretariat of the European Pharmacopoeia Commission (which subsequently became the European Directorate for the Quality of Medicines) with the duties of Scientific Administrative Officer.

7. In a memorandum of 9 February 1998, the Deputy Director of Administration notified the appellant of an administrative inquiry into an occurrence dating back to July 1997. It was stated in the memorandum that the appellant, while replacing Mr E. in the unit responsible for preparing reference substances, had requested the inclusion in a consignment of reference substances of a leaflet publicising the launch of a company, "S.", and the staging of a seminar organised by the company "Management Forum". The Deputy Director asked the appellant to give explanations concerning these facts "which, if proven correct, would raise a number of issues of professional conduct in relation to [his] duties in the Organisation". The appellant was also informed of the possibility of being assisted during the interview by a person of his choice.

8. The interview was held on 17 February 1998. The appellant explained that he had made the leaflet advertising company S. available to the relevant department but had not expressly requested its inclusion in the consignments. The Deputy Director asked him whether he was acquainted with company S. and could tell him who its owner was, and whether he had a personal interest in it. The appellant replied that his knowledge was confined to the information given in the advertising leaflet and that he had no personal interest in the company.

9. The Administration subsequently conducted an inquiry into S. establishing that the company was owned by the appellant's wife and that it had the same address as the appellant's personal address. On receipt of a memorandum dated 25 March 1998 notifying him of these findings, the appellant sought an interview with the Director of Administration. During the interview, held on 3 April 1998, he apologised for "not having told the whole truth about the information in his possession concerning the company [S.]".

10. On 23 April 1998, the Secretary General drew up the report referring the case to the Disciplinary Board, (the referral report) opening disciplinary proceedings against the appellant.

11. In the referral report, the Secretary General presented the facts behind the disciplinary proceedings in the following terms:

"1. On 15 July 1997, while temporarily handling the supervision of the unit responsible for purchase, reception and dispatch of samples and reference substances during the absence of Mr [E.] on annual leave (from 15 July to 14 August 1997), the staff member concerned had asked Mr [P.], a B3 assistant performing checks on the preparation of orders of reference substances – CRS – to include in the packages of CRS an advertisement concerning the launch of the firm [S.] and a seminar organised by the service company 'Management Forum' during which the staff member was to give a lecture.

Before acquiescing, in view of the unusual nature of these requests, Mr [P.] consulted Mr [C.] who was in charge of the Directorate for the Quality of Medicines (EDQM) that day. The latter refused permission for the distribution of the advertisement concerning the firm [S.].

The staff member was informed several days later that the advertisement relating to [S.] had not been dispatched.

When he returned to work on 18 August 1997, Mr [E] sent Mrs [A] a memorandum reporting this incident.

2. The European Pharmacopoeia monograph on pancuronium bromide requires the use of an impurity – dacturionium bromide – for a performance test. As this product was offered at an exorbitant price on the market, Mr [M.] asked the staff member to make a laboratory study of the decomposition of pancuronium – a solution sometimes used alternatively. The staff member carried out the study and, in an oral report to Mr [M.], stated that the results were negative. There is no written record of the study carried out by the staff member.

At the same time, however, the EDQM received an unsolicited fax from the company [S.] on 18 July 1997 offering its services. The staff member thereupon told Mr [M.] that he knew the firm in question. As it was able to supply the requisite substance at a more advantageous price than the other supplier contacted, an order was arranged with it on the staff member's recommendation backed by Mr [M.].

As these circumstances suggested that the staff member could have a personal interest in the firm [S.], the department concerned made an effort to find out about the firm.

It emerged that:

- the firm was apparently of recent origin, since the advertisement indicated that the fax and telephone numbers would not be available until after 27 July 1997;
- the firm acted as a go-between;
- a comparison of the firm's telephone number with the staff member's private number raised suspicion that there might be a link between him and [S.];
- the advertising leaflet gave a simple post office box number as an address.

...”

12. The passage of the report to the Disciplinary Board concerning the disciplinary offences which the appellant was alleged to have committed runs as follows:

“Having acted in a manner prejudicial to the Organisation by in effect carrying

on an occupational activity connected with a commercial company set up by his wife, in an area pertaining to his Council of Europe duties, placing him in a position to use the information and knowledge acquired in the course of his duties for his personal gain.

The obvious conflict of interests that could arise from an initiative of this kind necessitated, at the very least, a request to the Secretary General for permission in accordance with Article 32 of the Staff Regulations.

b) Having acted in a manner prejudicial to the Organisation:

- by requesting that a commercial advertising leaflet from [S.] be included in the consignments of reference substances (Article 25 of the Staff Regulations).

It is not contested that the staff member knew of the recommendations made in this respect by the European Pharmacopoeia Commission.

By transgressing this recommendation, prompted by concern to shield the EDQM from criticism detrimental to its image and by the same token to its mission, he acted against the interests of the service. This misconduct is aggravated by the circumstance that it was motivated by personal interest.

c) Having thus openly disobeyed the orders and instructions of his official superiors and thereby infringed Article 30 paragraph 2 of the Staff Regulations, this misconduct being aggravated by the circumstance that it was committed while the head of department was absent and Mr X was responsible for the running and supervision of the unit in question.

It is plainly apparent in this regard that, contrary to his assertions during his interview on 17 February 1998, the staff member was responsible for the supervision of the CRS unit.

Furthermore, it transpires from the memorandum sent by Mr [E.] to Mrs [A.] that he had expressly requested the dispatch of the advertisement with the orders.

d) Not having informed his department of his personal interest in the firm [S.], contrary to Article 36 of the Staff Regulations concerning personal interest in a service matter.

e) Having thus also contravened his obligation of integrity under the terms of Article 25 of the Staff Regulations, together with his obligation of loyalty, in that during his interview with the Administration he denied any connection with the firm [S.] or any personal interest in it.

In view of the gravity of the acts committed, the Secretary General contemplates imposing one of the sanctions prescribed in sub-paragraphs e) or f) of Article 54 paragraph 2 of the Staff Regulations.”

13. On 24 April 1998, the above report was transmitted to the Chair of the Disciplinary Board, who on 27 April 1998 drew its members by lot in the appellant's presence. The Chair then handed a copy of the file to the appellant and reminded him of his rights.

14. On 18 June 1998, the Disciplinary Board, having held its hearing on 26 May 1998, delivered its opinion.

The Disciplinary Board considered, on the facts found against the appellant, that he had committed the disciplinary offence of a breach of the duty of integrity and loyalty within the meaning of Article 25 of the Staff Regulations, by reason of the untruthful declarations made concerning the company S. during the administrative inquiry. It expressed the opinion that the charges against the appellant should entail by a way of disciplinary penalty a reprimand (Article 54, paragraph 2, sub-paragraph b, of the Staff Regulations) as a disciplinary measure.

The Board found no disciplinary offences in respect of the other accusations.

In particular, the Board did not consider that the appellant had engaged in a secondary occupational activity connected with his wife's firm, and that a request to the Secretary General for permission would have been devoid of purpose. In the Disciplinary Board's view, the contention that the appellant had in effect carried on an occupational activity of a commercial nature was founded on mere suppositions, as the file did not contain evidence that any act of management or of participation in the management of company S had been performed.

As to the request for the inclusion of an advertising leaflet on behalf of company S., the Disciplinary Board considered that the inquiry had not definitely established the conditions under which the request at issue had been submitted. In this connection, the Disciplinary Board noted the poor quality of certain personal relationships in the departments concerned. The Disciplinary Board moreover considered that there was insufficient proof of the allegation that the appellant had taken advantage of the absence of the head of department in committing the misconduct in question, and that there were substantial uncertainties about the appellant being in charge of the supervision and running of the department.

The Disciplinary Board further acknowledged that "when a staff member's spouse is implicated in a commercial relationship with the Organisation and the staff member is responsible for the spouse's link with the Organisation, the fact of the spouse's implication, judging by appearances alone, is apt to raise a question as to whether or not a personal interest exists". In the opinion of the Disciplinary Board, however, the charges against the appellant constituted nothing but insufficiently founded suppositions, since the appellant's personal interest in company S. could not be proven.

15. By decision A. P. No. 2251 of 15 July 1998, the Secretary General, after hearing the appellant, imposed on him the disciplinary measure of relegation in step for having failed to honour his binding obligations under Articles 25 and 36 of the Staff Regulations. The Secretary General's decision was grounded as follows:

"Whereas it stands proven that ..., the staff member's wife, owns firm [S.], incorporated in ..., at the address which is the home address of the staff member and spouse;

Whereas it also stands proven that this firm made unsolicited offers of service to the

EDQM with which the staff member, ...[the appellant] is serving, and that in the course of his duties the staff member was required to deal with an order for reference substances from that firm;

Whereas on that occasion the staff member did not disclose the fact that his wife owned the firm [S.];

Whereas, being questioned on 17 February 1998 by the Deputy Director of Administration concerning the firm in question, the staff member stated that he had no other particulars of the firm than those given in an advertising leaflet sent by the firm;

Considering that the staff member consequently failed to inform his official superiors that, as a member of his family was the owner of the firm making the offer of service, he could have a personal interest in this matter;

Considering that he thereby disregarded his obligations under Articles 25 and 36 of the Staff Regulations; ...”

In determining the disciplinary measure, the Secretary General considered that the appellant’s misconduct would normally warrant the severest sanctions. However, the fact that in the event the Organisation incurred no material or moral prejudice from the appellant’s misconduct and the circumstance that he had acknowledged the gravity of his misconduct, expressed his most sincere regrets and offered apologies were accepted by the Secretary General in mitigation of the sanction.

16. In an administrative complaint of 4 August 1998, the appellant challenged the legality of the decision of 15 July 1998. He asked the Secretary General to set aside the decision in question for non-compliance with essential procedural requirements, not giving reasons and violation of the rights of the defence.

17. On 1 September 1998, the Director of Administration on behalf of the Secretary General dismissed the complaint. He considered that the claims which concerned the hearing on 17 February 1998 and the report to the Disciplinary Board were inadmissible as out of time and in any case unfounded. Regarding the alleged absence of grounds for the Secretary General’s decision, he took the view that “as to the substance of the allegations, it should be observed that the Secretary General’s decision ascertains a number of facts and points out that under the terms of Article 36 of the Staff Regulations, personal interest in an official matter is a situation which arises when a staff member or one of his/her family is implicated in an official matter”. In his view, these findings constituted adequate grounds for the decision to hold an infringement of Article 36 of the Staff Regulations proven against the appellant.

THE LAW

18. The appellant challenged the Secretary General’s decision to dismiss his administrative complaint principally for its alleged breach of the general principles of law and failure to comply with the Staff Regulations. He claimed that the Secretary General had defied the general principle of law *nullum crimen sine lege* by placing an extensive construction *in malam partem* on Article 36 of the Staff Regulations. He also contended that the Secretary General in decision

A. P. No. 2251 had failed to state reasons for diverging from the opinion of the Disciplinary Board on two essential points. Lastly, he alleged violations of his defence rights, in particular the existence of bias against him, an attempt to influence the Disciplinary Board, and the paucity of the information supplied to him at the commencement of the disciplinary proceedings.

A. The Secretary General's preliminary objection

19. The Secretary General maintains that the appeal was to be dismissed as out of time with regard to the complaints concerning the conditions under which the disciplinary action was initiated, these having been raised for the first time in the administrative complaint of 4 August 1998. In his view, they should have been raised by the appellant in a complaint directly challenging the Secretary General's decision to institute disciplinary proceedings. The opening of disciplinary proceedings, it is argued, is a measure generating inevitable legal consequences which would affect the interests of the appellant by substantially altering his legal position, and thus constitutes a decision open to administrative complaint and, where appropriate, appeal before the Administrative Tribunal. In support of this contention, the Secretary General refers to the case-law of the Tribunal (see ATCE, Nos. 189/1995 and 195/1994, decisions in the cases of *Ernould v. Governor of the Council of Europe Social Development Fund*; Nos. 190/1994, 196/1994, 197/1994, and 201/1995, decisions in the case of *Lelegard v. Governor of the Council of Europe Social Development Fund*; and Nos. 197/1994 and 193/1994, *Roose v. Governor of the Council of Europe Social Development Fund*).

20. The appellant considers himself justified in referring the disciplinary decision to the Administrative Tribunal because of all the alleged procedural and substantive defects with which it is flawed and which concern the various stages. He submits that the defectiveness of a preparatory act is bound to reflect on the final decision.

21. The Tribunal recalls that, in accordance with Article 60, paragraph 1, of the Staff Regulations, it holds contentious proceedings only on appeals lodged after the dismissal of an administrative complaint pertaining to the dispute. In this respect, Article 60, paragraph 1, requires appellants to raise, as prescribed by Article 59, the complaints which they intend to bring before the Tribunal in due course. The formal requirements and procedures provided for in the Staff Regulations are designed to safeguard the principle of legal certainty inherent in the Council of Europe's legal order, in the interests of both the Organisation and its staff. Accordingly, this principle of legal certainty requires that it should be known at what point in time the lawfulness of an administrative act ceases to be subject to review by the international administrative authority (see ATCE, No. 241/1997, decision in the case of *Tonna v. Secretary General* of 9 November 1998; and ABCE, Nos. 118-128/1985, *Jeannin and Others v. Secretary General* of 30 April 1986, paragraphs 64 and 65).

22. The Tribunal has already had occasion to entertain appeals against the decision to initiate disciplinary proceedings, suspension from duty and the sanction imposed at the conclusion of the disciplinary proceedings. In view of their close connection, the Tribunal decided to join these in accordance with Rule 14 of its Rules of Procedure (see ATCE, Nos. 187/1994 and 193/1994, decisions in the cases of *Roose I and II v. Governor of the Council of Europe Social Development Fund* of 29 September 1995, paragraph 8; Nos. 189/1994 and 195/1994, decisions in the cases of *Ernould I and II v. Governor of the Council of Europe Social Development Fund* of 25 September 1995, paragraph 8; and Nos. 190/1994, 196/1994, 197/1994 and 201/1995,

decisions in the cases of Lelegard I, II, III and IV v. Governor of the Council of Europe Social development Fund of 25 September 1995, paragraph 8). In a subsequent case, however, the Tribunal, ruled on the questions of procedural irregularities concerning the opening of disciplinary proceedings and suspension from duty made in the course of the appeal against the disciplinary decision reached at the conclusion of the proceedings (see ATCE, No. 208/1995, decision in the case of Maréchal v. Governor of the Council of Europe Social Development Fund of 29 March 1996, paragraphs 47-55).

23. The Tribunal holds that a person affected by a decision to institute disciplinary proceedings can prove a direct and existing interest, within the meaning of Article 59, paragraph 1, of the Staff Regulations, in referring this decision initially to the Secretary General and subsequently, if appropriate, to the Administrative Tribunal, especially where the disciplinary authority has also ordered a measure of suspension.

24. Now, according to its settled case-law, the Tribunal, when entertaining an appeal against an administrative decision which the Secretary General has adopted by virtue of his discretionary power in respect of staff management, must establish, *inter alia*, whether the correct procedure was followed (see ATCE, No. 226/1996, decision in the case of Zimmermann v. Secretary General of 24 April 1997, paragraph 37 with references). Where a disciplinary decision is concerned, the jurisdiction of the Tribunal in an appeal against the disciplinary measure extends to any issue of irregularity raised by the disciplinary proceedings as a whole.

25. In conclusion, the objection that the complaint was out of time is to be dismissed.

B. Merits of the appeal

26. The appellant complains that the Secretary General in decision A. P. No. 2251 contravened the general legal principle of *nullum crimen sine lege* and failed in his obligation to state reasons. The appellant also alleges violations of the rights of the defence.

27. The appellant's first contention is that in interpreting Article 36 of the Staff Regulations, the Secretary General contravened the principle of legal definition of offences and penalties by placing an extensive construction *in malam partem* on this statutory provision.

The appellant considers that Article 36 of the Staff Regulations contains two different provisions. The first specifies a duty to provide information which binds each staff member of the Organisation, and the second defines a duty which binds the Secretary General and his/her Administration. The Secretary General, he claims, wrongly attached to the expression "personal interest" in the first sentence of Article 36 an extensive meaning inferred from the second sentence. In the appellant's opinion, the normal interpretation of the letter of Article 36 would be that a personal interest is an interest solely concerning the staff member. This analysis, he says, is corroborated by reference to the "Model Regulations for the European Civil Service", adopted on 6 July 1997 by the Governmental Conference on the European Civil Service, which contains two different provisions, one relating to the spouse's occupational activity and the other to personal interest in an official matter. The appellant considers, as did the Disciplinary Board, that he had no personal interest in the ordering of products from company S.

As a subsidiary plea, the appellant, referring to Article 25 of the Staff Regulations, stresses that his recommendation did not harm the interests of the Council of Europe, nor was it even prompted by any other interests than the interests of the service. In fact, he allegedly saved the Council a considerable sum by taking advantage of the services of a company supplying a substance needed by the Pharmacopoeia at less than half the price quoted by the other suppliers.

28. As to the second contention, the appellant maintains that in decision A. P. No. 2251 the Secretary General's sole concern was to state the reasons which had induced him to take a less severe measure against the appellant than the one which he had envisaged and announced to the Disciplinary Board in the report referring the matter to it. In particular, an effort should have been made to explain the divergence between the Disciplinary Board and the Secretary General as to the interpretation of Article 36 of the Staff Regulations, but the appellant considers the disciplinary decision over succinct as regards the scope of Article 36 of the Staff Regulations. Furthermore, he contends, it would be unavailing to object that in the decision dismissing the administrative complaint the Secretary General did specify the manner in which the appellant had infringed Article 36 of the Staff Regulations. The reasoning in this decision was allegedly far from convincing, besides which such an approach was incompatible with the general principles of law that preclude retrospective grounding of administrative acts.

29. Thirdly, the appellant complains of violations of the rights of the defence. Having regard to the terms chosen by the Secretary General in the wording of his report to the Disciplinary Board and of the disciplinary decision taken concerning him, the appellant claims that the Secretary General harboured a bias against him and had thus sought to influence the Disciplinary Board. He also submits that the Secretary General should have personally conducted the prior interview with the staff member subject to disciplinary action. He further claims that the Deputy Director of Administration, in the interview on 17 February 1998, did not mention having been delegated to conduct it and neglected to give the appellant comprehensive information concerning the disciplinary proceedings instituted against him.

30. As to the alleged violation of the general principle of law *nullum crimen sine lege*, the Secretary General contends that the distinction proposed by the appellant between, on the one hand, strictly personal interests, referred to in the first sentence of Article 36 of the Staff Regulations and concerning the individual staff member alone and, on the other hand, interests implicating one of the staff member's family, covered only by the second sentence of Article 36 according to the appellant, ignores both the normal meaning of the words in context and the object of the provision in question. In the Secretary General's opinion, a staff member's personal interest in an official matter is primarily his/her direct interest but also the interests of family or friends which may afford him/her indirect advantages of a financial kind or in any other way. In this respect, the Secretary General stresses that the two sentences of Article 36 form part of the same provision headed "official matters impinging on personal interests" and intended to avert any conflict of interest that might arise between staff members' duty to have regard exclusively to the interests of the Council of Europe in discharging their functions (Article 25 of the Staff Regulations) and other interests arising from their family or private connections. He also observes that the principle *nullum crimen sine lege* is a principle of criminal procedure which does not apply as such to disciplinary measures.

31. As to the second allegation, the Secretary General observes that the appellant complains chiefly of divergence between the Secretary General and the Disciplinary Board in their legal

assessment of the facts and in the choice of the appropriate sanction. In the Secretary General's opinion, both Article 56 of the Staff Regulations and Article 8 of the Regulations on Disciplinary Proceedings make it quite plain that the Secretary General alone is vested with disciplinary authority, whereas the Disciplinary Board has a purely advisory function. He asserts that the impugned decision indicated with sufficient clarity the facts found against the appellant, their legal classification as a breach of the obligations deriving from Articles 25 and 36 of the Staff Regulations, and also the mitigating circumstances. The Secretary General was not required to give explicit and detailed justification of the reason why he had not concurred with the Disciplinary Board. Furthermore, decision A. P. No. 2251 and the decision to dismiss the administrative complaint made it abundantly clear that the principle reason for diverging from the Disciplinary Board's opinion was the erroneous construction which this advisory body placed on Article 36 of the Staff Regulations.

32. Lastly, the Secretary General considers that the appellant's defence rights were amply secured at every stage of the disciplinary proceedings.

Since Article 2, paragraph 2, of the Regulations on Disciplinary Proceedings prescribes referral to the Disciplinary Board only where the alleged misconduct warrants one of the disciplinary measures provided for in Article 54, paragraph 2, sub-paragraphs c, d, e and f, of the Staff Regulations, the Secretary General should have based his report to the Disciplinary Board on a provisional assessment of the staff member's conduct. Disclosure of the proposed measure or measures to the Chair of the Disciplinary Board enables the Disciplinary Board to deliberate in full awareness of the Secretary General's position on the case before it, and assists the preparation of the staff member's defence.

Further, the Deputy Director of Administration, by virtue of his functions, has full authority to conduct an interview in connection with an administrative inquiry prior to the commencement of disciplinary proceedings. The Secretary General's personal intervention is required only before the adoption of the final decision, in accordance with Article 8, paragraph 2, of the Regulations on Disciplinary Proceedings.

Nor, according to the Secretary General, could the appellant have been in any doubt as to the purpose of the interview of 17 February 1998, considering the terms of the invitation dated 9 February 1998.

33. The Staff Committee, authorised by the Chair of the Tribunal to lodge written observations (paragraph 12 above), would firstly emphasise the importance of the function performed by the Disciplinary Board in disciplinary proceedings. The Staff Committee notes that in the instant case, the Disciplinary Board gave the facts a legal complexion which the Secretary General did not accept in decision A. P. No. 2251, and recommended a less severe sanction than the one finally decided upon. In the Staff Committee's view, the Secretary General gave no explanation in his disciplinary decision for the conclusions which he reached on these two points, differing as they did from the conclusions and recommendations of the Disciplinary Board. Thus, the Staff Committee discerns no objective proof that the Disciplinary Board's opinion was duly examined and considered. The obligation to state the reasons which prompt the Administration to diverge from a mandatory or optional opinion delivered by an advisory body is seen by the Staff Committee as constituting a substantive procedural requirement.

34. The Tribunal recalls that the provisions relating to disciplinary measures are set out in Articles 54 to 58 of the Staff Regulations. Disciplinary proceedings are regulated in detail by the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations), issued in pursuance of Article 56 of the Staff Regulations.

35. According to Article 54 of the Staff Regulations:

“1. Any failure by staff members to comply with their obligations under the Staff Regulations, and other regulations, whether intentionally or through negligence on their part, may lead to the institution of disciplinary proceedings and possibly disciplinary action.

2. Disciplinary measures shall take one of the following forms:

- a.* written warning;
- b.* reprimand;
- c.* deferment of advancement to a higher step;
- d.* relegation in step;
- e.* downgrading;
- f.* removal from post.

(...).”

36. The Tribunal points out that, in such cases, the Secretary General has discretionary power, subject to cases of manifest abuse of authority or of improper exercise of authority, and on condition that the rights of the defence are respected. It points out in particular that the Secretary General is not bound by the opinions of the Disciplinary Board (ATCE, Nos. 190/1994, 196/1994 and 197/1994, Lelegard decisions, paragraphs 132 and 133, cited above; and No. 208, Maréchal decision, paragraphs 62 and 63, cited above).

37. In the present case, the appellant, who in the course of his duties had occasion to deal with an order of products from company S and had later been questioned about the company, was accused by the Secretary General of having neglected to inform his immediate superiors that owing to his wife’s ownership of the firm submitting the offer of service, the transaction could impinge on his personal interests. Thus, the appellant was deemed to have “disregarded his obligations under Articles 25 and 36 of the Staff Regulations”.

38. Article 25 of the Staff Regulations is worded as follows:

“1. On taking up their duties, staff members shall sign the following declaration in the presence of the Secretary General:

‘I solemnly declare that I will carry out the duties entrusted to me as a member of the staff of the Council of Europe loyally and conscientiously, respecting the confidence placed in me. In discharging these duties and in my official conduct, I will have regard exclusively to the interests of the Council of Europe. I will not seek or receive any instructions in connection with the exercise of my functions from any government, authority, organisation or person outside the Council. I will refrain from any action which might reflect upon my position as a member of the staff of the Council or which

might be prejudicial morally or materially to the Council.’

2. Staff members may not, without the permission of the Secretary General, accept either directly or indirectly any material or other advantage offered in relation to the performance of their duties. This prohibition shall continue after the staff member’s employment has terminated.”

39. Article 36 of the Staff Regulations provides that:

“Staff members to whom it falls, in the course of their duties, to deal with a matter which impinges on their personal interests in a manner which might affect their objectivity shall so inform their immediate superior. They shall be relieved of responsibility for any matter involving themselves or a member of their family.”

40. The Tribunal notes that the appellant, who does not dispute the substance of facts on which the Secretary General based the decision to impose the sanction of relegation in step, alleges an extensive and erroneous interpretation of Article 36 of the Staff Regulations. In this connection, he invokes the principle *nullum crimen sine lege*.

41. The Tribunal observes that if lawfulness of administrative acts is to be secured, there can be no unpredictable interpretation of the provisions relating to the obligations of staff members. In particular, it should be possible for them to foresee whether certain types of conduct will entail disciplinary measures. This is the only interpretation compatible with the principle of rule of law, to which the Council of Europe Statute refers twice: firstly in the preamble and secondly in Article 3 (see ATCE, aforementioned Zimmermann decision, paragraph 28).

42. The appellant has stated the reasons why he felt he must adhere to an interpretation of Article 36 of the Staff Regulations to the effect that, contrary to the Secretary General’s opinion, only an interest that affects none but the individual staff member is a “personal interest” within the meaning of the first sentence of this provision.

43. The Tribunal notes that the concept of “personal interest” contained in Article 36 of the Staff Regulations, like many legal definitions, is fairly general. The interpretation and application of such texts depend on practice and, where applicable, on judicial review.

44. The Tribunal recalls that it needs to be guided in its interpretation of Council of Europe internal administrative regulations by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties, especially the “general rule of interpretation” as set out in Article 31, paragraph 1, of the Convention

Accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (ATCE, Zimmermann decision, paragraph 24).

45. On that basis, the Tribunal finds that the terms of Article 36 of the Staff Regulations do not compel the restrictive interpretation propounded by the appellant. The words “personal interest” do not necessarily have the sense of an advantage or gain benefiting the person directly, to the exclusion of indirect advantages. The fact that the second sentence of Article 36 explicitly refers to family members is not apt to sustain such an interpretation.

46. The Tribunal considers that the duties and obligations laid down in Articles 26 *et seq.* represent specific aspects of the general undertaking stipulated in Article 25 of the Staff Regulations. Consequently, bearing in mind the importance of an international civil servant's loyalty and integrity, it cannot be said that the concept of "personal interest" according to the first sentence of Article 36 excludes an indirect interest. The Tribunal does not consider this an extensive interpretation unfavourable to staff.

47. In the present case, the Tribunal considers that the appellant, even if not directly involved in the management of company S owned by his wife, treated its interest as his own. The appellant thus displayed his personal interest in company S when he made its advertising leaflets available to the department concerned, a fact not disputed by the appellant, and when, being consulted about the firm, he did not disclose his connections with its manager and even denied knowledge of any details beyond the particulars given in an advertising leaflet. The Tribunal considers these facts decisive in determining a breach by the appellant of staff members' duty to inform their superiors of any official matter that may impinge on their personal interests, and a breach of his obligations under Article 25 of the Staff Regulations.

48. In the Tribunal's view, neither did the disciplinary measure imposed on the appellant in accordance with Articles 25 and 36 of the Staff Regulations infringe the principle of lawfulness of administrative acts.

49. Furthermore, in the light of all evidence in the file, the Tribunal finds no manifest disproportion between the reprehensible acts and the disciplinary measure.

50. As to the complaint that the disciplinary decision lacked proper grounding, the Tribunal recalls that administrative acts must give sufficient indication of the reasons on which they are founded. This is an indispensable requirement for verifying the legality of the act in question and for transparency in staff management (ATCE, Nos. 231-238/1997, decision in the case of Fuchs and Others v. Secretary General of 29 January 1998, paragraphs 63-65; and No. 186/1994, Bouillon v. Secretary General of 24 February 1995, paragraph 35). The extent of this obligation may vary with the nature of the decision and must be examined in the light of the particular circumstances.

51. In the present case, the Tribunal finds that the statement of grounds for decision A. P. No. 2251 of 15 July 1998 contains, in the first four paragraphs, a summary of the facts found against the appellant. In the two following paragraphs, the Secretary General made a legal assessment of those facts. In particular, regarding the application of Articles 25 and 36 of the Staff Regulations, the Secretary General expressed the opinion that the appellant's "personal interest" arose from "the fact that a member of his family owned the firm making the offer of service". The final part sets out considerations relating to the appropriate sanction.

52. In the Tribunal's view, the decision dated 15 July 1998 was therefore adequately grounded both in fact and in law. Moreover, it is to be read in conjunction with the Secretary General's decision dismissing the administrative complaint, in which the Secretary General explained his interpretation of Article 36 of the Staff Regulations.

53. Thus, the appellant cannot justifiably claim that he lacked explicit and detailed information as to the reasons which had prompted the Secretary General to find a breach of the obligations deriving from Articles 25 and 36 of the OStaff Regulations.

54. As to the alleged violations of the rights of the defence, the Tribunal notes that the appellant's complaints concern the opening stage of the disciplinary proceedings.

55. Article 56, paragraph 1, of the Staff Regulations empowers the Secretary General to institute disciplinary proceedings "after a hearing of the staff member concerned".

56. The Tribunal recalls that the hearing of the staff member consists in an interview in which he/she has the opportunity to provide explanations and clarifications before the Secretary General takes a final decision to institute disciplinary proceedings (ATCE, Nos. 187/1994 and 193/1994, Roose decision, paragraphs 95 and 96, cited above).

57. In the present case, the Deputy Director of Administration sent the appellant a memorandum dated 9 February 1998 asking him to explain himself with regard to specific facts "which – if proven correct – would raise a number of issues of professional conduct in relation to [his] duties in the Organisation". The memorandum made reference to an "administrative inquiry" and summed up the occurrence in question. The appellant was further informed that he could be assisted during the interview by a person of his choice.

58. The Tribunal observes that Article 2 of the Staff Regulations provides that "hierarchical superiors in the Secretariat shall exercise their authority in the name of the Secretary General". Consequently, every administrative act is carried out in the name and on behalf of the Secretary General by virtue of a delegation of power. It is for the Secretary General to decide under what conditions and to which official he delegates his power. Such a procedure is in keeping with Council of Europe practice (ABCE, No. 114/1985, decision in the case of Sorinas Balfego v. Secretary General of 25 October 1985, paragraph 53). Assisting the Secretary General in his staff management functions is obviously one of the duties of the Deputy Director of Administration (ATCE, No. 226/1996, Zimmermann decision, paragraph 57, cited above). Article 56, paragraph 1, of the Staff Regulations does not carry an obligation for the Secretary General in person to hear the staff member.

59. While it is true that the memorandum of 9 February 1998 mentioned only an administrative inquiry without explicitly referring to Article 56, paragraph 1, of the Staff Regulations or to the possibility of disciplinary proceedings being instituted, it cannot be said that the reasons for summoning the appellant were not sufficiently comprehensible for him. Above all, the indication that "questions of professional conduct in relation to [his] duties in the Organisation" were involved and that he could be assisted by a person of his choice sufficed for him to realise the import of the interview in question.

60. Nor do the facts brought to the notice of the Tribunal disclose bias on the Secretary General's part. In this context, the Tribunal recalls that when such allegations are made in the course of an appeal, it rests with the appellant to present compelling evidence that the administrative decision against him was actuated by bias (ATCE, No. 192/1994, decision in the case of Fender II v. Secretary General of 29 September 1995, paragraph 28).

61. As to the terms of the report referring the matter to the Disciplinary Board, the Tribunal notes that Article 2, paragraph 2, of the Regulations on Disciplinary Proceedings stipulates:

“If the misconduct of which the staff member is accused may warrant one of the disciplinary measures provided for in Article 54, paragraph 2, sub-paragraphs c, d, e and f, the Secretary General shall lay before the Disciplinary Board a report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed.”

62. The Tribunal considers that the report referring the matter to the Disciplinary Board, transmitted to the staff member concerned through the Chair of the Disciplinary Board (Article 2, paragraph 2, of the Regulations on Disciplinary Proceedings), plays a decisive part in disciplinary proceedings. Article 2, paragraph 2, is not only intended to ensure that the Disciplinary Board can commence and, in accordance with Articles 5-8 of the Regulations, conduct, the disciplinary proceedings in full knowledge of the circumstances, but is also of crucial importance in the preparation of the defence and the proper conduct of the proceedings. For these purposes, exact and complete particulars of the disciplinary charges against the staff member are required. These particulars must include the acts in question and the legal characterisation of those acts.

63. The Tribunal notes that the appellant objects essentially to the final paragraph of the report to the Disciplinary Board in which the Secretary General expresses the opinion that “in view of the gravity of the acts, the Secretary General contemplates imposing one of the sanctions prescribed in sub-paragraphs e or f of Article 54, paragraph 2, of the Staff Regulations”. The Tribunal cannot accept the appellant’s contention that the Secretary General thus attempted to exert improper influence on the Disciplinary Board. Even though the terms employed, taken out of context, might give rise to a misunderstanding, in the context of the report referring the matter to the Disciplinary Board they were confined to making a provisional assessment of the acts deemed reprehensible.

64. Having regard to the evidence as a whole, the Tribunal discerns no violation of the rights of the defence.

65. The Tribunal accordingly cannot find any illegality

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares the appeal unfounded;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 20 May 1999, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO

Appendix 1

CHAIR'S ORDER OF 16 SEPTEMBER 1998 in the case of X v. Secretary General

THE FACTS

1. The applicant is an A3 permanent staff member of the Council of Europe appointed to the European Directorate for the Quality of Medicines.
2. On 22 June 1998, he applied for the grade A4 post advertised on 8 June by Vacancy Notice No. 45/98.
3. At that date, disciplinary proceedings relating to infringements of Articles 25 and 36 of the Staff Regulations had been instituted against the applicant, the Secretary General having referred the matter to the Disciplinary Board on 23 April 1998. On 15 July, after hearing the applicant in accordance with Article 8, paragraph 2, of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations), the Secretary General took a disciplinary measure in respect of the applicant (decision A. P. No. 2251).
4. In a memorandum dated 4 August 1998, the applicant lodged an administrative complaint with the Secretary General in accordance with Article 59, paragraph 1, of the Staff Regulations. He requested the Secretary General to set aside the contested decision on the ground of non-compliance with essential procedural requirements, not giving reasons and violation of the rights of the defence.
5. He alleged that decision A.P. No. 2251 was vitiated by procedural irregularities in that the staff member instructed by the Secretary General to conduct the hearing under the terms of Article 8, paragraph 2, of the Regulations on Disciplinary Proceedings had not mentioned this instruction. Furthermore, the Secretary General had allegedly applied pressure of a kind to the Disciplinary Board, as his report initiating the disciplinary proceedings specified the exact disciplinary measures which he proposed to take.
6. The applicant also contended that the Secretary General had not taken the Disciplinary Board's opinion into consideration but had aggravated the sanction recommended by it without stating adequate reasons.
7. Lastly, the applicant claimed that his defence rights had been violated because of the aforementioned procedural irregularities.
8. In a memorandum dated 1 September 1998, received by the Registry on 2 September 1998, the applicant applied to the Chair of the Administrative Tribunal for a stay of execution of the disciplinary measure.
9. On 2 September 1998, the Chair asked the Secretary General to transmit any comments he might wish to make concerning the application for a stay of execution.

10. The Secretary General submitted his comments on 8 September 1998. The applicant lodged his observations in reply on 11 September 1998.

11. On 14 September 1998, the Secretary General submitted remarks on the observations in reply, on which the applicant commented in turn on 16 September 1998.

THE LAW

12. Under the terms of Article 59, paragraph 7, of the Staff Regulations, an application for a stay of execution of an act of the Administration may be made if such execution is likely to cause the applicant “grave prejudice difficult to redress”.

13. The reason given for the present application for a stay of execution is that the challenged decision would cause the applicant “grave prejudice difficult to redress”.

14. The applicant has stated that the prejudice in question would affect his career development and promotion prospects. As he applied for the grade A4 post advertised on 8 June by Vacancy Notice No. 45/98, the execution of the disciplinary measure, including the record of it in the personal file made available to the members of the Transfers and Promotions Panel, could carry weight in the panel’s deliberations.

15. Having taken note of Mr X’s application and of the supporting contentions, the Secretary General “decided to suspend the procedure for appointment to the post advertised in Vacancy Notice No. 45/98 for which the applicant had applied, pending the outcome of the contentious proceedings which he had initiated (...). Consequently, the two applications received will not be referred to the Transfers and Promotions Panel until all possible question of the legality of the disciplinary measure taken against Mr X has been settled”.

16. In these circumstances, the Secretary General finds that there is no cause at the present stage to stay the execution of the disciplinary measure.

17. In his observations in reply, the applicant’s principal contention is that the decision taken by the Secretary General to suspend the appointment procedure exceeds his competence and may consequently be reversed by the competent body. As a subsidiary plea, the applicant observes that this decision by the Secretary General constitutes a flagrant breach of the provisions in force.

In conclusion, the applicant maintains his submissions.

18. In his rejoinder, the Secretary General contends that he was able to suspend the promotion procedure, rather than the disciplinary measure as the applicant had asked in applying for a stay of execution, precisely because of the margin of discretion allowed him in adopting simple precautionary measures. As the legality of the disciplinary measure had yet not been finally determined, he chose the most transparent measure.

Moreover, the Secretary General reiterates that he had full authority to decide this since he holds power of appointment.

19. In his comments in reply, the applicant reasserts, *inter alia*, his opinion as to the legality of the decision to suspend the appointment procedure.

20. The Chair observes that the applicant grounds his application for a stay of execution on the prejudice which he might incur should the disciplinary measure be considered in the Promotions Panel's deliberations before its legality is finally established.

It is obvious that once the Secretary General has decided that the Transfers and Promotions Panel will not even receive the two applications in question until all possible question of the legality of the disciplinary measure imposed on Mr X has been settled, it is no longer possible for the applicant to incur the prejudice claimed.

21. In so far as the applicant has denied that the Secretary General can validly suspend the promotion procedure, the Chair finds this issue is immaterial to the present application for a stay of execution and *a fortiori* to the administrative complaint dated 4 August 1998.

22. Furthermore, for the purposes of the urgent procedure in hand, it is not necessary to consider the question whether the decision at issue is a decision in the true sense or whether it is to be deemed null and void. In fact, it suffices for the Chair to hold that at the present stage there exists a situation which prevents any such prejudice from being incurred.

23. It follows that the application for a stay of execution is unfounded in the instant case.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 7, of the Staff regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Rules of Procedure,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- to reject the applicant's request for a stay of execution.

Done and ordered at Rome on 16 September 1998.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO

Appendix 2

CHAIR'S ORDER OF 2 MARCH 1999

in the cases of X v. Secretary General and BOUILLON v. Secretary General

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having regard to Appeals Nos. 248/1998, X v. Secretary General, and 249/1998 - BOUILLON v. Secretary General;

Having regard to the request to intervene lodged by the Staff Committee of the Council of Europe, with the aim of filing submissions in support of the appellants' conclusions;

Having regard to the observations submitted by the Secretary General on 25 February 1999;

Having regard to Article 10, paragraph 1 of the Statute of the Administrative Tribunal and Rule 39 of its Rules of Procedure;

Having consulted the members of the Tribunal;

Considering that the request tends to support the appellants' submissions;

DECIDE

- that the application by the Staff Committee to intervene in the proceedings is admissible;
- to grant until 9 March 1999 to submit observations in writing.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO

Appendix 3

CHAIR'S ORDER OF 4 MARCH 1999

in the cases of X v. Secretary General and BOUILLON v. Secretary General

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having regard to Appeals Nos. 248/1998, X v. Secretary General, and 249/1998 - BOUILLON v. Secretary General;

Having regard to the request by the Staff Committee, received by the Administrative Tribunal on 18 February, to intervene in the proceedings with the aim of filing submissions in support of the appellants' conclusions;

Having regard to Article 10, paragraph 1 of the Statute of the Administrative Tribunal and Rule 39 of its Rules of Procedure;

Whereas on 2 March 1999, the Chair, considering that the Staff Committee had established a sufficient interest in the settlement of the dispute, accepted its application to intervene and granted it eight days in which to file submissions;

Having regard to the request for communication of the procedural documents submitted to the Administrative Tribunal on 3 March 1999 by the Staff Committee;

DECIDE

- copies of the appeals, the further submissions, the Secretary General's written observations and the appellants' observations in reply will be communicated to the Staff Committee, with the exception of the appendices;

- these documents will be communicated to the Chair of the Staff Committee, with the proviso that, in the interests of the parties to the proceedings, he observes, in respect of all third parties, the general principle of law whereby the parties are entitled to have the proceedings prior to the public hearing kept confidential [cf., *mutatis mutandis*, European Court of Human Rights, Lawless Case (preliminary objections and questions of procedure), 14 November 1960, Series A No. 1, page 14];

Done and ordered in Savone, on 4 March 1999, the present order being notified to the parties to the proceedings and to the Staff Committee.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO