CONSEIL DE L'EUROPE———
————COUNCIL OF EUROPE

COMMISSION DE RECOURS
APPEALS BOARD

Appeal No. 5/1971 (David Follett PUGSLEY (I) v. Secretary General)

The Appeals Board, sitting in Strasbourg, on 3 December 1971, under the presidency of Mr. G.H. van HERWAARDEN, Deputy Chairman, and in the presence of:

MM. H. DELVAUX, Member, and
S. VEROSTA, Substitute Member

assisted by:

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

Having deliberated.

PROCEDURE

1. The appellant, Mr. D.F. PUGSLEY, introduced the present appeal on 27 August 1971. The appeal was registered on the same day under file No. 5/1971.

2. The Secretary General, represented by Mr. H. GOLSONG, Director of Legal Affairs, submitted his comments on the appeal on 27 September 1971.

The appellant's observations in reply were received on 28 October 1971.

3. An oral hearing was held before the Board, in the presence of the appellant and the Secretary General's representative, on 3 December 1971.

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

THE FACTS

The facts not in dispute between the parties may be summarised as follows:

4. David Follett PUGSLEY, a British citizen born in 1944, was on 1 October 1969 appointed a temporary staff member for a period of three months. This contract was renewed in December 1969 for a further period of one year and in January 1971 for a further period of six months. On 1 July 1971 the appellant was appointed a permanent staff member, grade A2,

and received a fixed term contract of two years' duration. His resignation from the Council of Europe will take effect on 14 February 1972.

5. As a permanent staff member, the appellant was under Art. 6 (1) of the Regulations Concerning Salaries and Allowances of the Permanent Staff entitled to a settling-in allowance which, according to para. 3 of Art. 6, "shall be payable when the staff member takes up his duties". Art. 6 (4) provides that a staff member "who resigns before completing two years' service" shall be required to repay to the Council of Europe a sum proportionate to the length of time he would have had to serve in order to complete two years' service. Payment of the settling-in allowance is made subject to an undertaking by the staff member that he will comply with this obligation.

On 1 July 1971, the appellant signed an undertaking that he would repay part of the installation allowance if he should resign "before completing two years' service (that is to say before 30 September19711". He added: "Note that the words of the undertaking are 'in the case of my resignation before completing two years' service', not 'two years' service under a permanent contract'...".

This declaration was returned to the appellant under cover of a note of 2 July 1971 from the Treasurer of the Secretariat who, pointing out that the appellant's permanent contract had only taken effect on 1 July, refused to pay the settling-in allowance unless the appellant replaced in his undertaking the date of 30 September 1971 by that of 30 June 1973.

The appellant complied with this request in a new declaration dated 5 July 1971. At the same time he reserved his position as to the interpretation of the term "two years' service" in Art. 6 (4) of the above Regulations.

On 26 July 1971, the settling-in allowance was paid to the appellant.

6. In the meanwhile, the appellant had on 6 July 1971 made an application to the Secretary General, under Art. 25 (1) of the Staff Regulations, referring to the Treasurer's above note of 2 July and requesting a decision "that I settled in Strasbourg and began working for the Council of Europe on 1 October 1969 and that this is the relevant date if any question should arise as to the repayment of part of the settling-in allowance".

On 5 August 1971, this request was, in the name of the Secretary General, refused by the Director of Administration, who also made a reservation as to the admissibility of the application and further observed that his reply constituted "only an explanation of the legal situation as it results from the texts applicable and in no way affects any right or obligation you may have under the provisions in force concerning your legal position as a permanent member of staff".

7. On 22 November 1971, the appellant addressed a note to the Treasurer in which he mentioned that his resignation from the Council of Europe would take effect on the evening of 14 February 1972. He requested the Treasurer to let him know "whether you intend to ask me to repay a proportion of my settling-in allowance and, if so, the **exact sum in francs** which I shall be asked to repay".

The Treasurer replied on the following day that the appellant would be requested to repay the sum of 2,133.54 French francs.

SUBMISSIONS OF THE PARTIES

The submissions made by the parties may be summarised as follows:

As to the admissibility of the appeal

8. The **appellant** submits that the Treasurer's note of 2 July 1971, against which his appeal is directed, constitutes an "individual decision" in the sense of Art. 25 (1) of the Staff Regulations and that the appeal is therefore admissible.

9. The **Secretary General**, who in his written observations had raised the question of the admissibility of the appeal in connection with Art. 25, has not pursued this issue at the hearing before the Board.

As to the merits of the appeal

10. The appellant submits that the Treasurer's note of 2 July 1971 violates Art. 6 (4) of the Regulations Concerning Salaries and Allowances of the Permanent Staff. He considers that the term "two years' service" in Art. 6 (4) covers all service, whether under a permanent or a temporary contract, and he relies in particular on:

- the name of the allowance concerned;
- the phrase "two years' service" in Art. 6 (4);
- the presumption against discrimination; and
- common sense.

11. The appellant does not consider that the Treasurer's note can be based on Rule No. 105, insofar as that Rule limits the period of two years mentioned in Art. 6 (4) of the Regulations to the period which begins to run from the date of permanent employment. He submits that the Secretary General, who issued Rule 105 in order to implement the Regulations, had no power to amend these Regulations, which had been adopted by the Committee of Ministers.

12. The Secretary General submits that the Treasurer's note of 2 July 1971 was issued in conformity with the provisions governing the payment of the settling-in allowance. He considers that the term "two years' service" in Art. 6 (4) of the Regulations covers permanent service only, and he relies in particular on:

- the text of Art. 6 (4);
- the term "permanent staff" in Art. 6 (1);
- the purpose of the settling-in allowance.

13. The Secretary General also considers that Rule No. 105, which confirms the above interpretation, was validly issued under Arts. 1 (3) and 26 of the Staff Regulations in conformity with Art. 6 of the Regulations Concerning Salaries and Allowances of the Permanent Staff.

CONCLUSIONS OF THE PARTIES

14. The appellant requests the Board to declare that the Treasurer's refusal to pay the settling-in allowance to the appellant on his undertaking to repay part of it, if he resigned before 30 September 1971, was a violation of Art. 6 (4) of the Regulations Concerning Salaries and Allowances of the Permanent Staff.

15. The Secretary General requests the Board to declare the application ill-founded.

THE LAW

As to the admissibility of the appeal

16. In his written observations, the Secretary General has raised the question of the admissibility of the appeal under Art. 25 of the Staff Regulations. The Board notes that this issue has not been pursued at the hearing. Nevertheless it finds it necessary to decide it before dealing with the merits of the case.

17. It follows from Art. 25 of the Staff Regulations that proceedings under this Article may be instituted by a staff member in the following conditions:

- the decision shall be of an individual nature;
- it shall be applicable to the staff member;
- the staff member shall allege the non-observance of the Staff Regulations, the administrative;
- rules or the conditions of employment.

The Board finds that these conditions are satisfied in the present case. The decision attacked by the appellant, i.e. the Treasurer's note of 2 July 1971, was addressed to the appellant and concerned the undertaking which he had signed on 1 July. It thus constituted an individual decision applicable to him. The appellant also alleges the non-observance of an administrative rule, namely, of Art. 6 (4) of the Regulations Concerning Salaries and Allowances of the Permanent Staff.

18. The other conditions of admissibility having been fulfilled as well, the Board therefore concludes that the appeal is admissible.

As to the merits of the appeal

19. The appellant alleges that the decision of 2 July 1971 violates Art. 6 (4) of the Regulations Concerning Salaries and Allowances, which provides with regard to the settling-in allowance that a staff member whose contract is terminated during his period of probation or who resigns before completing two years' service shall be required to repay to the Council of Europe a sum proportionate to the length of time which he would have had to serve in order to complete two years' service.

In support of this allegation, the appellant refers to:

- the name of the allowance;
- the phrase "two years' service" in Art. 6 (4);

- the presumption against discrimination; and
- common sense.

20. As regards, first, the name of the allowance, it is true that the title of Art. 6 is "Settling-in allowance". This does not mean, however, as the applicant seems to suggest, that any staff member, who following his arrival at the Council of Europe has actually settled in, is entitled to settling-in allowance under Art. 6. It is clear from the terms of para. 1 of Art. 6 that the Article as a whole concerns permanent staff members only.

21. The appellant also submits that the term "two years' service" in Art. 6 (4) covers all service, whether under a permanent or a temporary contract. The Board cannot accept this view for two reasons. First, Art. 6 (4) refers to the case of two years' service after mentioning the period of probation which is provided for in permanent contracts only; in this connection the Board observes that, under the contract system of the Council of Europe (cf. Office Circular No. 352 as amended by Office Circular No. 397), permanent staff members always receive an initial two-year contract. Secondly, the French text of Art. 6 (4) speaks of resignation before the end of « la deuxième année de service ». This confirms that the final date of the period referred to in Art. 6 (4) is the end of the second year of the service concerned, i.e. that under the permanent contract.

22. In the third place, the appellant submits that, in case of doubt, Art. 6 (4) should be interpreted in accordance with the presumption against discrimination between two categories of staff members who are expected to do the same work. This argument is not relevant as, in the view of the Board, there is no doubt as to the interpretation to be given to the terms of this provision.

The Board has nevertheless considered the appellant's submission that the work he has performed as a temporary staff member was the same as that of a permanent staff member. But even in that case he could not claim the same rights as a permanent staff member.

The primary criterion for his status as an agent of the Secretariat is not the work he performs but the type of the contract he holds. The differences in status between temporary and permanent staff members may *de lege ferenda* in certain cases give rise to considerations calling for a further assimilation of the status of temporary agents to that of their permanent colleagues. However, any person when signing a temporary contract as staff member of the Council of Europe, accepts the clauses of this contract and all the regulations governing it.

In this connection the Board observes that the question of the calculation of the period referred to in Art. 6 (4) does not arise as long as a staff member is only temporary because, during this period, he is not entitled to a settling-in allowance under para. 1 of this Article. He is, of course, free to settle in on his arrival at the Council of Europe but the expenses resulting from this decision are at his own risk. The Board further notes that the contract of a permanent staff member, who has received the settling-in allowance, may be terminated during the probationary period by the administration with the result that the agent concerned, although he has in fact settled in, will have to repay the greater part of the allowance.

The Board also considers that the undertaking by a permanent staff member to repay a proportionate part of the settling-in allowance, should he leave before completing the two years' service, constitutes an integral part of his permanent contract; the permanent contract is only to be offered on the condition that the person concerned signs the undertaking as well.

23. The appellant finally submits that common sense requires that the allowance should have been paid on the date when he took up his duties as a temporary staff member, being the date on which he actually settled in, and that the period of two years mentioned in Art. 6 (4) should be counted from that date. This argument is equally without foundation. As stated above, it is clear from the terms of Art. 6 (1) that only permanent staff members are entitled to a settling-in allowance. Common sense does not require that service completed under a temporary contract should be counted under Art. 6 (4) such an interpretation might in a given case lead to the unreasonable result that a staff member could, immediately after having received a permanent contract and the settling-in allowance, decide to leave the Council of Europe and to keep the allowance as a premium.

24. The Board concludes that service performed under a temporary contract cannot be taken into account in the calculation of the two years' period mentioned in Art. 6 (4). It follows that the terms of Rule No. 105 do not, as the appellant seems to suggest, differ from those of Art. 6 of the Regulations. The question whether Rule No. 105 is ultra vires, and therefore void, does consequently not arise and the appellant's allegation that the decision of 2 July 1971 violates Art. 6 (4) of the Regulations is ill-founded.

As to costs

25. The Board does not consider that the appeal constitutes an abuse of procedure within the meaning of Art. 6 131 of the Statute.

Now therefore the Appeals Board:

1. Declares the appeal admissible;
2. Decides to declare the appeal ill-founded and rejects it;
3. Decides that each party shall bear its own costs.

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

Chairman	Secretary
G.H. van HERWAADEN	K. ROGGE