

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

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 78/1981 (Anna-Nadia PAGANI (II) v. Secretary General)

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,
Mr Raul VENTURA and
Sir Donald TEBBIT, Members,

meeting in private in Strasbourg on 20 July 1982, assisted by:

Mr Michel DE SALVIA, Secretary, and
Miss Margaret KILLERBY, Deputy Secretary,

having deliberated, has given the following decision.

PROCEDURE

1. The appellant brought her appeal on 22 December 1981. The appeal was registered on the same day as case number 78/1981.
2. The appellant's representative, Mr G. Napoletano, Professor at the University of Sassari (Italy), communicated the further pleadings of 4 March 1982 to the Secretary of the Board. They were communicated to the Secretary General of the Council of Europe on 16 March 1982.
3. In a letter of 16 March 1982 the Secretary General was invited to submit his comments on the appeal within a period ending on 28 April 1982.

His comments were submitted on 8 April 1982 and communicated to the appellant for a reply by 21 May 1982. She did not make use of this option.
4. In a letter of 3 May 1982 both parties were informed that the hearing was fixed for 15 June 1982.
5. In a letter of 11 June 1982, the appellant stated that she would not attend the hearing for reasons of health.

6. Since the appellant had failed to make her intentions regarding the holding of an audience known within the time limit allowed her which terminated on 19 June 1982, the Board decided to take a decision on the basis of the documents alone, in accordance with its decision of 15 June 1982.

THE FACTS

The facts set out by the parties may be summed up as follows:

7. Miss Anna-Nadia Pagani, of Italian nationality, entered the service of the Council of Europe on 13 September 1976 as a shorthand typist of grade B2, step 1, assigned to the Directorate of Administration and more specifically the Language Services, Documents and Conference Division (English "typing pool"). Her conditions of employment stipulated that she would occasionally be called upon to work in Italian for the Deputy Secretary General and other Italian officials.

By Decision A.P. No. 2417 of 15 December 1976, the appellant was placed in step 2 of her grade from 13 September 1976, in view of the "special duties frequently required of her-duties demanding language skills which cannot normally be required for her post". Article 2 of this Decision stated that if she were assigned permanently to another department, she would "remain classified at the step which [she] has reached at the time of transfer, for two years from the date at which [she] reaches the said step". (translation).

8. Having passed a French language examination, the appellant was awarded, with effect from 1 June 1977, the language allowance provided for in Article 7 of the Regulations concerning salaries and allowances of permanent staff (in force at the time of the events now Article 9 of the current Regulations).

9. On 15 February 1979, the appellant was placed at the disposal of the Directorate of Legal Affairs, Division IV, and returned to her original department by a decision of 27 May 1981.

10. This decision was the subject of appeal No. 76/1981 brought by the appellant on 17 July 1981, on which the Board gave its decision on 21 April 1982.

11. In a memorandum of 29 July 1981 the appellant informed the Head of Language Services, Documents and Conference Division (to which she was assigned) that she refused to type any documents in Italian on the grounds that her assignment to the "English typing pool" proved that her working language was English and that only work in that language could be required of her.

12. By Decision A.P. No. 3028 of 18 September 1981, the Director of Administration and Finance withdrew, with effect from 1 October 1981, the incremental step granted her under Decision A.P. No. 2417, on the grounds that she had announced that she did not intend to make use of the language skills in recognition of which this classification had been accorded her. Decision A.P. No. 3028 states that "as a result, she remains classified in the present step of her grade until 1 October 1982, instead of until 1 October 1981" (translation).

13. In a memorandum of 23 September 1981, the appellant informed the Director of Administration and Finance of her surprise at the measures which had just been taken regarding her and asked him to “clarify ... the nature” of Decision A.P. No. 3028.

14. The appellant requested the withdrawal of the contested decision in her memorandum of 1 October 1981 to the Secretary General, stating in particular:

“Pending the decision of the Board of Appeals I have decided to abide strictly by the terms of my contract. I am a B2 shorthand-typist arbitrarily transferred by the Director of Legal Affairs to the English typing pool; under my present situation, I type just in one language – as foreseen by my contract – English, because I am in the English typing pool.”

15. In a memorandum of 21 October 1981, the Director of Administration and Finance informed the appellant that Decision A.P. No. 3028 “simply draws the administrative conclusion from your declared and established intention of doing no further work in Italian in the pool; the sum paid to you for this reason is thus no longer justified, and its continuation would constitute ‘unjust enrichment’, a privilege with nothing in return.” (translation). The same memorandum stated that the Secretary General had decided to submit the appellant’s administrative appeal to the Advisory Committee on Disputes.

16. On 15 December 1981, the Secretary General brought the matter before the Advisory Committee on Disputes. On 18 January 1982, the latter gave its opinion that the appellant’s complaint against Decision A.P. No. 3028 was unfounded.

17. On 28 January 1982, the Secretary General rejected the appellant’s administrative complaint.

18. The present appeal is against Decision A.P. No. 3028 of 18 September 1981 withdrawing from the appellant the incremental step in her grade accorded to her by Decision A. P. No. 2417 of 15 December 1976.

SUBMISSIONS OF THE PARTIES

I. The appellant asked for the Decision A.P. No. 3028 to be annulled for illegality, formal defect, failure to justify the action, excess of authority and misuse of powers.

The submissions of the appellant may be grouped as follows:

A. Regarding the interpretation to be given to Decision A.P. No. 2417

19. The appellant alleged that the contested decision, the grounds for which were stated to be her refusal to type any texts in Italian, was founded, wrongly, on the assumption that the classification awarded her by Decision A.P. No. 2417 was granted her in recognition of her services in Italian.

In her eyes, this was clear from the memorandum of 21 October 1981 sent to the appellant by the Director of Administration and Finance (cf. “The facts”, paragraph 16).

Such an interpretation would, in her view, be contrary to Article 7, paragraph 1 of the Regulations concerning salaries and allowances of permanent staff of 19 September 1972

(in force at the time of the events now Article 9, paragraph 1 of the present Regulations) which allegedly constituted the legal basis of Decision A.P. No. 2417 and stipulated that “A language allowance equal to the value of the increment per step for the grade B2 may be granted to staff in grades B1 and B2 who give evidence of an adequate knowledge of the two official languages.”

The appellant alleged that it followed from the above provision that the exceptional classification instituted by Decision A.P. No. 2417 could not have been awarded her in recognition of her knowledge of Italian, since this was not one of the official languages of the Council of Europe.

Nor in her view was it possible to argue that the exceptional classification accorded her by Decision A.P. No. 2417 was in recognition of her knowledge of Italian by claiming that this decision was founded on Article 12 of the Staff Regulations in force at the time (Article 41, paragraph 2 of the current Staff Regulations) which stated “The Secretary General may award a special allowance to members of staff performing duties of special responsibility beyond that normal for their rank.”

She argued that this provision allowed the Secretary General to give staff members responsibilities corresponding to a higher rank only on condition that the staff members concerned received an equivalent allowance, and that in the case in point this provision could not apply, since knowledge of Italian did not correspond to the normal duties of any rank.

B. Regarding the effects of Decision A.P. No. 3028

20. The appellant considered that the contested decision constituted a misuse of powers in that it was in fact intended to punish her refusal to type any texts in Italian.

She alleged that the measure taken concerning her amounted to relegation in step, which was one of the disciplinary measures which might be taken against staff under Article 54, paragraph 2 of the Staff Regulations.

She also alleged that Decision A.P. No. 3028 was taken in breach of Article 54, paragraph 1 of the Staff Regulations which stated that “Any failure by a staff member to comply with his obligations ... may lead to the institution of disciplinary proceedings and possibly disciplinary action.” In the case in question, no disciplinary proceedings were instituted against the appellant before the disciplinary action which she alleged was taken against her.

II. The submissions of the Secretary General can be summed up as follows:

A. Regarding the interpretation to be given to Decision A.P. No. 2417

21. The Secretary General stated that the incremental step conferred on the appellant by Decision A.P. No. 2417 had indeed been granted her in recognition of the special duties required of her in Italian on the basis of Article 12 of the Staff Regulations in force at the time (Article 41, paragraph 2 of the present Staff Regulations).

In his view, the appellant could not legitimately claim that the exceptional classification instituted by this Decision had been accorded her under Article 7 of the

Regulations concerning salaries and allowances of permanent staff members (Article 9 of the present Regulations), namely in recognition of her knowledge of French. In fact, the language allowance provided by the above-mentioned article could be awarded only to those staff members who give evidence of an “adequate knowledge of the two official languages”. It had always been the Administration’s practice (now laid down in Article 9, paragraph 3 of the new regulations concerning salaries and allowances) that such knowledge must obligatorily be established by a suitable language examination. But at the time the appellant was granted the allowance in question she had not taken any examination in French.

Furthermore, the appellant in fact received the language allowance provided for under Article 7 of the said Regulations with effect from 1 June 1977 in recognition of her knowledge of French, after taking an examination for this purpose.

The Secretary General argued that it was therefore obvious that the incremental step already conferred on the appellant by Decision A.P. No. 2417 of 15 December 1976 with effect from 1 October 1976, could not have been awarded in recognition of her knowledge of French but solely in order to reward her work in Italian.

Furthermore, the appellant herself had said as much, notably in her memorandum of 4 June 1981 to the Secretary General in which she stated “In December 1976 I was granted an incremental step with retroactive effect on account of the work I had to do in Italian.”

In the Secretary General’s view, therefore Decision A.P. No. 2417 had indeed been taken on the basis of Article 12 of the Staff Regulations (which is expressly mentioned in the said Decision) in respect, of the special duties in Italian required of the appellant.

Lastly, the Secretary General commented that the “special responsibilities” referred to in the above-mentioned provision did not necessarily correspond to the duties of a higher grade, as the appellant claimed, but to special duties performed by certain officials which corresponded neither to the normal duties of their own grade nor to those of any other grade (notably typing in non-official languages).

He concluded that Decision A.P. No. 3028 withdrawing from the appellant the financial benefit of the exceptional classification instituted by Decision A.P. No. 2417 was without defect.

B. Regarding the effects of Decision A.P. No. 3028

22. The Secretary General stated that the contested decision could not be interpreted as a disciplinary measure.

According to him, the appellant was not relegated in step. She kept the step she had already reached, but remained in that step until 1 October 1982, instead of 1 October 1981.

In any case, Article 2 of Decision A.P. No. 2417 had already stated that if the appellant were transferred on a permanent basis to another service, she would retain whatever step she had then reached for two years from the date at which she reached it. Obviously if

this eventually materialised, it could not be considered a disciplinary measure. A fortiori, if the appellant, while remaining in the same division, refused to do the work in consideration of which the allowance had been awarded her withdrawal of the allowance could not be considered a disciplinary measure.

Furthermore, the incremental step was conferred on her exceptionally and not as promotion (which could occur in the course of employment only through seniority), in order to allow her to receive the increment corresponding to the step.

The Secretary General argued that it was in the nature of all allowances that they might be withdrawn at any time if the conditions under which they had been awarded cease to apply and that in the case in point, the appellant's refusal to type any texts in Italian fully justified the withdrawal of the allowance corresponding to an incremental step in her grade, since this allowance had lost its justification and its continuation constituted unjustified enrichment.

He concluded that the allegation of misuse of powers could not therefore be upheld.

THE LAW

23. The appellant has appealed against Decision A.P. 3028 of 18 September 1981 withdrawing from her the incremental step conferred on her by Decision A.P. No. 2417 of 15 December 1976.

24. She asks for Decision A.P. 3028 to be annulled.

In support of this appeal, she cites several grounds, which she formulates as follows: "illegality, formal defect, failure to justify the action, action in excess of authority and misuse of powers".

In the Board's view, these grounds can be grouped into a mistake of law, procedural defect and misuse of powers.

- Regarding the mistake of law

25. The Board observes that under the appellant's conditions of employment, she was required to type work in Italian which might occasionally be asked of her. As emphasised by the Board in its judgment No. 76/1981 on the appellant's first appeal, "Although it is stated that this work may be asked of her by certain specified officials, the Board considers that this is not a general restriction, but an eventuality allowed for because of the linguistic needs of the Council of Europe where its typing staff are concerned."

26. It also observes that although the terms used in Decision A.P. No. 2417 (cf. "The facts", paragraph 8) awarding the appellant an incremental step in her grade, may give rise to ambiguity, which is certainly unfortunate, as the Advisory Committee on Disputes noted in its opinion No. 1/82, by referring without further clarification to "special duties" which might be asked of the appellant, it is nevertheless certain that this step was awarded her in recognition of her typing in Italian.

27. In accordance with the Administration's practice such duties constitute a special responsibility in the terms of Article 12 of the Staff Regulations as then in force (Article 41, paragraph 2 of the present Staff Regulations). It was on the basis of this provision that the appellant was awarded an incremental step in her grade by Decision A.P. No. 2417 of 15 December 1976, with effect from 1 October 1976.

28. It follows that this allowance was awarded her not in respect of her knowledge of French, which was established subsequently by the test which she took to this end in May 1977 and in consideration of which she was awarded, as from 1 June 1977, the language allowance provided for in Article 7 of the Regulations concerning salaries and allowances of permanent staff members then in force (Article 9 of the present Regulations). The same applies to the work performed by the appellant in English, which is her normal working language and corresponds to the normal duties of her grade.

29. Consequently, Decision A.P. No. 3028 withdrawing from the appellant the benefit of the additional step awarded her by Decision A.P. No. 2417 contains no mistake of law.

- Regarding the procedural defect

30. The Board notes that, under the appellant's conditions of employment, she was required to type certain texts in Italian which might be asked of her, as stated in paragraph 26 above.

31. In the Board's view, her refusal to do any work in Italian must be considered as a failure to perform her professional obligations liable to lead as such to disciplinary action under Article 54 of the Staff Regulations.

32. In the case in question, Decision A.P. No. 3028 states that because of the appellant's refusal, "she remains classified in step 6 of her grade until 1 October 1982, instead of until 1 October 1981". While this measure does not expressly correspond to a relegation in step, it is in reality tantamount to such a measure.

Even if it is to be regarded as deferment of advancement to a higher step, it would nonetheless have to be considered to constitute a disciplinary measure as provided for in Article 54, paragraph 2 of the Staff Regulations.

33. Article 54, paragraph 1 of the Staff Regulations states that "any failure by a staff member to comply with his obligations under the Staff Regulations, and other regulations, (...) intentionally (...) may lead to the institution of disciplinary proceedings and possibly disciplinary action".

Article 56 provides that "Disciplinary proceedings shall be instituted by the Secretary General after a hearing of the staff member concerned" (paragraph 1); "Disciplinary measures shall be ordered by the Secretary General after completion of the disciplinary proceedings provided for in Appendix X to these regulations" (paragraph 2).

34. As the Board pointed out in its judgment No. 76/1981 (paragraph 42), the Secretary General has discretionary powers to decide whether to institute disciplinary proceedings.

35. When the Secretary General actually takes what amounts to a disciplinary measure after an official fails to perform his duties, he may not deprive the official of the guarantees inherent in the disciplinary proceedings laid down in Appendix X to the Staff Regulations.

36. The institution of disciplinary proceedings does in fact entail a number of guarantees.

For example, under Article 2 of Appendix X, a “report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed” shall be communicated to the staff member concerned.

Under Article 3, “On receipt of the report, the staff member charged shall be entitled to see his complete personal file and to take copies of all documents relevant to the proceedings.”

Under Article 5, “The staff member concerned shall have not less than fifteen days from the date of receipt (of the report) initiating disciplinary proceedings to prepare his defence” (paragraph 11); “When the staff member appears before the Disciplinary Board, he shall have the right to submit written or oral observations, to call witnesses and to be assisted in his defence by a person of his own choice.” (paragraph 2).

Failure to respect this procedure is of a nature to jeopardise the rights of the defence which, in disciplinary matters, are essential to all Council of Europe staff.

37. The Board, without having to examine here the question of whether there has been a disguised disciplinary measure, finds that in this case no proceedings were instituted with regard to the appellant and that she has therefore been deprived of the opportunity to present a defence against the measure taken against her.

38. This conclusion is not invalidated by the fact the incremental step was given to the appellant to reward work she would be required to do in Italian, on the basis of Article 12 of the Staff Regulations then in force (Article 41, paragraph 2 of the present Regulations).

39. In fact, in principle any allowance may be withdrawn if the conditions which justified its award are no longer met.

40. However a distinction must be made between the methods available to the Secretary General to adapt staff members’ remuneration to the specific nature of some of the duties which they may be called upon to perform.

41. The staff members may be given an allowance limited to regular payment of an additional remuneration, or, as in the case in point, an incremental step within their grade. Award of such an incremental step also confers on staff members all the guarantees arising there from, particularly with regard to the protection of their rights in disciplinary matters and irrespective of whether the incremental step was awarded as promotion or for any other reason.

42. The contested decision is therefore not only characterised by a fundamental procedural defect, but is also in breach of the rule laid down in Article 56, paragraph 2 of the Staff Regulations.

- Regarding misuse of powers

43. The Board, having found defects which call for the annulment of the decision, does not consider itself required to decide whether misuse of powers occurred in this case.

For these reasons,

the Appeals Board:

Declares the appeal founded;

Annuls Decision A.P. N. 3028 of 18 September 1981;

Decides that the Council of Europe shall pay the appellant the costs incurred by her, to the amount of two thousand francs.

Done at Strasbourg at a public hearing on 20 July 1982, the French text being authentic.

The Secretary to the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

W.J. GANSHOF VAN DER MEERSCH