CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 189/1994 and 195/1994 (ERNOULD I and II v. Governor of the Council of Europe Social Development Fund)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr Hans G KNITEL, judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Ernould lodged his first appeal on 7 July 1994 and his second on 7 November 1994. They were registered on 12 July 1994 and 10 November 1994 respectively, under file numbers 189/1994 and 195/1994.

2. On 11 April 1994, in connection with the complaint preceding the first appeal, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the decision dated 25 March 1994 to suspend him. In an order dated 25 April 1994 the Chair of the Tribunal refused the application.

On 19 August 1994, in connection with the complaint preceding the second appeal, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the decision to dismiss him dated 21 July 1994. In an order dated 5 September 1994 the Chair of the Tribunal refused the application.

3. The appellant lodged supplementary memorials in the two appeals on 16 September 1994 and 6 December 1994.

4. The Governor of the Council of Europe Social Development Fund submitted

observations in reply on 21 October 1994 and 31 January 1995.

5. The appellant lodged observations in reply to these on 18 November 1994 and 7 April 1995.

6. At the request of the Governor of the Fund the Tribunal asked the Chairman of the Disciplinary Board to forward copies of all documents which had been provided to the parties during the disciplinary proceedings against the appellant. The documents were duly filed with the Tribunal, which acknowledged receipt of them on 9 March 1995.

7. During the proceedings the parties requested that a number of witnesses be called. On 23 May 1995 the Tribunal decided provisionally that it was unnecessary to take evidence from the witnesses at that stage. It said, however, that it might order certain investigative measures after the hearings.

8. After deliberating on 26 June 1995 it decided, under Rule 14 of its Rules of Procedure, to join Appeals Nos. 189/1994 and 195/1994 as being closely connected.

9. The public hearing took place in Strasbourg on 27 June 1995. The appellant was represented by Mr J. D. Sicault, who practises as an avocat in the Paris Court of Appeal; the Governor by Mr J.-M. De Forges, who likewise practises as an avocat in the Paris Court of Appeal.

10. At the hearing the Tribunal noted that the parties withdrew their requests for the hearing of witnesses. It decided it was unnecessary for it to call witnesses of its own motion.

THE FACTS

11. The appellant began work with the Council of Europe Social Development Fund on 1 May 1990, on grade A5 (step 7), under an indefinite contract. Since 1 January 1991 he has held the post of Head of Administration and Personnel. At present he is on grade A5 (step 9-I). His duties include "management of staff, equipment and the operational budget, not excluding such short-term responsibilities as may prove necessary to meet departmental needs". He previously worked for OECD for over 25 years, ultimately as Deputy Head of the Inter-Organisation Section on Salaries and Prices.

He had disciplinary proceedings instituted against him and at the same time it was decided to suspend him. After the proceedings he was dismissed.

He has lodged two appeals. The first challenges the decision to institute disciplinary proceedings and to suspend him, the second is against his dismissal after the disciplinary proceedings.

The Social Development Fund ("the Fund")

12. The Social Development Fund - formerly the Council of Europe Resettlement Fund - was set up in 1956 under a Council of Europe partial agreement. It is also open to non-member

states.

The Fund is an intergovernmental financial institution with headquarters in Paris. Its capital is made up of financial contributions which its member states make by subscription of participating certificates offered to them in accordance with the percentage apportionment laid down in the Articles of Agreement. The Fund's priorities are aid to refugees, aid to migrants, and aid to populations stricken by natural or ecological disaster.

The Articles of Agreement were revised in 1993 but the revised version has not yet come into force since not all the member states have completed the ratification procedure.

13. The Fund comprises the Governing Board, which is its supreme organ and, among other things, lays down management policy; the Administrative Council, which has all the necessary powers to manage the Fund and issues general or specific instructions to the Governor; the Governor, who is responsible to the Administrative Council for day-to-day management of the Fund; and the Auditing Board, which audits the accounts and the balance sheet.

Secretarial services to the Governing Board, the Administrative Council and the Auditing Board are provided by the Council of Europe. The Governor and his secretariat are located in Paris.

In 1993 the Fund had 62 staff, on fixed term or indefinite contracts.

14. On 18 July 1956 the Administrative Council adopted Resolution 4 (1956), which provides that regulations of the Council of Europe - including the Staff Regulations - apply to staff of the Fund. It also provides: "In relation to officials of the Fund, the Governor shall exercise the powers assigned to the Secretary General of the Council of Europe under the above provisions".

In Resolution 247 (1993) the Governing Board of the Fund adopted the new Articles of Agreement (not yet in force), Article XI Section 1 (d) of which provides: "The Council of Europe Staff Regulations shall be applicable to the staff of the Fund in any matter not covered by a specific decision of the Administrative Council".

15. An agreement between the Governor of the Fund and the Secretary General of the Council of Europe which came into force on 16 February 1994 extended the Administrative Tribunal's jurisdiction to cover appeals lodged in the manner prescribed in Article 60 of the Staff Regulations against administrative acts of the Governor (as defined in Article 59 para. 1 of the Staff Regulations).

The facts of this particular case

16. The Fund's management bodies decided to have an internal audit carried out because it was suspected that Fund loans (which are made to projects of a social nature, more particularly for reception of refugees and building low-cost housing) were being misused.

17. At the Administrative Council's request Ernst & Young International produced three reports under an internal audit. The reports were dated 27 August, 12 October and 22 October

1992 and dealt respectively with the granting and monitoring of Fund loans, general Fund expenditure, and financial management of the Fund. They brought to light malfunctioning and irregularities within the Fund.

The report of 27 August 1992 on the granting and monitoring of loans, for instance, concluded that there was deliberate underprovision for identification, assessment and monitoring of projects and that as a result the Fund was unmethodical - careless, indeed - about monitoring the use of loans, a task which was wholly left to the beneficiary states.

It is evident from the report of 12 October 1992 on general expenditure that rules and procedures were neither laid down in detail nor applied, and that on the one hand this resulted in individual conduct and cases of discrimination which were contrary to professional ethics in an international organisation while on the other it gave the Governor greater power.

With regard to financial management, the finding of the report of 22 October 1992 was that the system did not provide the information essential for assessing the Fund's overall exposure to interest-rate and exchange risk or gauging its sensitivity to market movement and volatility, thus making it difficult to pursue an active policy in the markets.

18. The reports dealt with general Fund matters, not with individuals and made a number of recommendations.

19. An inspector (Mr Violette) subsequently reported on implementation of the recommendations.

His report, dated 16 September 1993, was likewise concerned with general Fund matters, not with individuals.

It confirmed the irregularities which the previous reports had found.

20. In a communiqué dated 10 November 1993 the Committee of Ministers of the Council of Europe deplored the malfunctioning and irregularities within the Fund. It declared its support for all the measures taken to remedy them and in particular for the Fund member states' decision to revise the Articles of Agreement. Lastly it recommended that the Fund's organs "clarify the responsibilities of the [Fund's] personnel and "suspend urgently the persons called into question by the audit".

21. On 15 November 1993 the Governor of the Fund, Mr Roger Vanden Branden, resigned.

22. In December 1993 the Governing Board ordered an administrative enquiry into the possible responsibilities of certain staff. The Council of Europe's Deputy Director of Administration, Mr Sharpe, submitted a report on 13 December 1993. This was concerned with 5 members of staff, of whom the appellant was one.

This report concluded that the former Governor was in charge of policy regarding the purchase and renting of premises, the work of the appellant in these areas being confined to administrative matters. On the other hand, Mr. Sharpe found the appellant responsible on the other points examined (see paragraph 27, sub paragraphs b-f, below), taking the view that the

potential extenuating circumstances did not completely release from his responsibility.

23. The new Governor, Mr Raphaël Alomar, took up his duties on 20 December 1993. He ordered a further enquiry, which gave rise to another report by Mr Sharpe, submitted on 18 March 1994. This report was concerned with 6 of the staff, including the appellant.

Mr Sharpe's first finding was that the internal audit, which the appellant says caused an excessive workload, could not be regarded as a significantly mitigating circumstance in that the appellant had had from January 1991 (when he began work with the Fund with a remit from the former Governor to "put the house in order") to 2 March 1994 (when Ernst and Young were asked to carry out the audit) to set about his task. Mr Sharpe similarly attached little weight to the understaffing which the appellant alleges.

Mr Sharpe went on to express surprise that the appellant had formalised the practice of ten-year withdrawals from the Autonomous Pension Fund (FAP), adding a requirement to the amended contracts that sums withdrawn be used to repay housing loans. He also found it surprising that no report on the financial effects of the arrangement had been requested until 1993, after the inspector's report. He further commented that the FAP management committee, of which the appellant was the secretary, should have been reactivated.

Mr Sharpe questioned the justification for a housing loan, which the appellant had received despite already owning a main residence in the Paris area.

Lastly, Mr Sharpe said he was not satisfied with the appellant's explanations about the making of two recordings of a Governing Board meeting held on 13 December 1993 and about the "safes episode".

On the other hand he considered the appellant's part in the buying and renting of Fund premises to have been limited although he had advised the former Governor on the subject.

24. Under Articles 54 to 58 of the Council of Europe Staff Regulations the Governor instituted disciplinary proceedings against three of the staff members called in question, including the appellant. At the same time he decided to suspend them (Article 57 of the Staff Regulations).

25. The appellant lodged a complaint, and thereafter an appeal (No. 189/1994), against the decision. After the disciplinary proceedings the Governor decided to dismiss him, a decision against which the appellant lodged a further appeal (No. 195/1994).

First appeal (No. 189/1994)

26. The Governor, contemplating disciplinary proceedings against the appellant, consulted the Chairman of the Council of Europe Disciplinary Board on 22 March 1994 about suspending him. On 25 March 1994 he gave the appellant a hearing. On the same day he drew up the report referring the case to the Council of Europe Disciplinary Board and instituting disciplinary proceedings (the referral report) and decided to suspend the appellant as from 25 March 1994. During the suspension the appellant continued to be paid in full. The referral report was sent to the appellant and his lawyer on 31 March 1994.

27. In the referral report the Governor charged the appellant with irregularities concerning in particular:

a) the purchase and renting of premises;

b) reimbursement of travel and other expenses;

c) staff recruitment and assessment, including granting special status to certain staff;

d) housing loans to staff, including the appellant himself;

e) the Autonomous Pension Fund, including the practices of withdrawals by staff after ten years' service and annual withdrawals by the previous Governor;

f) the lack of an inventory, with valuations, of fixed assets;

g) making two recordings of the Governing Board's meeting on 13 December 1993 even though, at its 129th meeting (8 and 9 June 1993), the Governing Board had decided that, contrary to previous practice, recordings of its meetings would henceforth be solely for the secretariat's use;

h) bringing in officers of the DST (the French counterintelligence service) to examine the mechanism and combination of a safe in his office and to open the safe in the Governor's office, and

i) failure to submit proposals concerning renewal of expired staff contracts.

The Chairman of the Disciplinary Board received the referral report dated 25 March 1994 on 29 March 1994 and forwarded it to the appellant and his lawyer on 31 March 1994. On 6 April 1994, in the appellant's presence, he drew lots to appoint the four members of the Disciplinary Board.

28. In a complaint dated 11 April 1994 the appellant challenged the decisions of 25 March 1994 to institute disciplinary proceedings and suspend him. Disputing that the Disciplinary Board had jurisdiction in respect of staff of the Fund, he also alleged that the procedure leading to his suspension had been unlawful. He further alleged that the matters with which he was charged were not disciplinary offences and pointed out that the decision complained of caused him prejudice difficult to redress.

29. On 11 April 1994, in connection with the complaint, he applied to the Chair of the Administrative Tribunal for a stay of execution of the suspension decision dated 25 March 1994 (see para. 2 above). In an order dated 25 April 1994 the Chair of the Tribunal refused the application.

30. On 9 May 1994 the Governor dismissed the complaint on the grounds that the Disciplinary Board had jurisdiction, the procedure had been lawful and the decisions were

justified by the seriousness of the charges.

31. The Disciplinary Board heard the appellant and the Governor, together with their lawyers, on 25 and 30 May 1994 respectively. The parties also submitted written observations during May and June 1994.

32. On 13 June 1994 the Governor submitted observations supplementing his previous reports and dealing on the one hand with the charges which had already been brought and on the other with further matters (to do with conversion work) which had come to his knowledge on 25 May 1994. On 15 June 1994 the Disciplinary Board informed the parties' lawyers that it had decided not to allow the Governor's further allegations on account of the three-month time limit for delivering its opinion. It also heard a witness (the acting Governor, Mr Lemerle, whom the appellant had cited) as well as oral submissions from the parties' lawyers. As shown by the documents provided to the Tribunal, at the start of this meeting the Chairman of the Disciplinary Board announced that one of the members of the Board, Mrs Boltho, was unable to be present on account of illness.

33. On 29 June 1994 the Board delivered an opinion finding, firstly that it was competent to do so but also that it was not appropriate for it to express a view on the suspension decision, since a complaint against the decision was still possible under Article 59 of the Staff Regulations. It further expressed the view that the decision to institute disciplinary proceedings had been taken after lawful procedure.

34. On the substantive issues it held that policy on the buying and renting of premises (see para. 27 (a) above) did not fall within the appellant's responsibilities.

With regard to reimbursement of travel expenses and other expenses and to housing loans to staff (see para. 27 (b) and (d) above) it expressed the view that the appellant had not displayed inaction amounting to a disciplinary offence. Here, it did not consider the appellant's own housing loan to be a disciplinary offence, though it did say that the manner in which the loan (which was for accommodation for his daughter) had been granted was possibly open to criticism.

On the lack of an inventory of the Fund's fixed assets, the making of the two recordings and the safes episode (see para. 27 (f), (g) and (h) above) it held that the appellant had not committed any disciplinary offences.

On the other hand, and without expressing a view on the question of renewal of contracts (see para. 27 (i) above) since it regarded the documentary evidence as inconclusive, it held that the appellant had committed a disciplinary offence in tolerating abnormal or irregular situations among the staff (see para. 27 (c) above).

It also found that he had committed a disciplinary offence by playing an active part in introducing the practice of ten-year withdrawals from the FAP and by approving the Governor's annual withdrawals (see para. 27 (e) above). It regarded this as a serious offence and punishable by one of the penalties laid down in Article 54 para. 2 (d) to (f) of the Staff Regulations.

Since the appellant held a senior post but had not taken up his duties until 1 January 1991, it recommended relegation in step, as provided for in Article 54 para. 2 (d) of the Staff Regulations.

35. On 7 July 1994 the appellant lodged his appeal against the Governor's decisions of 25 March 1994 to institute disciplinary proceedings against him and suspend him.

Second appeal (No. 195/1994)

36. In a decision dated 21 July 1994 the Governor dismissed the appellant with effect from 24 July 1994.

The grounds he gave were as follows:

- the appellant had tolerated abnormal or irregular situations among the staff;

- the illegal practice of ten-year withdrawals, in introducing which the appellant had played an active part, had seriously depleted the FAP, forcing the Administrative Council to make additional appropriations to it;

- the appellant was responsible for or had condoned serious irregularities in the reimbursement of national representatives' and Fund officials' expenses;

- he had applied a discriminatory policy regarding staff management, particularly in the renewal of contracts;

- he had been extremely irresponsible in the matter of housing loans to certain staff (and had himself obtained a large loan on his daughter's behalf without valid reason);

- he was personally and directly responsible for the failure to draw up an inventory, with valuations, of the Fund's fixed assets;

- he was personally and directly implicated in the secret recording of the Governing Board's meeting on 13 December 1993;

- without informing the new Governor he had knowingly agreed to bringing in DST officers to open the former Governor's safe;

- in December 1993 he had commissioned work with undue haste, had grossly underestimated the cost of the work and had paid abnormally high advances to the architect and contractors;

- he was seriously at fault in having agreed, without informing the Governor, to encroachments on common parts of the building for installation of a lift.

The Governor took the view that the appellant's experience of administrative meticulousness in his twenty years at OECD made his professional conduct at the Fund particularly inexcusable.

37. In a complaint dated 19 August 1994 the appellant challenged the legality of the decision of 21 July 1994. He alleged that the Disciplinary Board lacked jurisdiction and that there had been procedural irregularities. He likewise maintained that the decision was based in part on two new charges (relating to arrangements for various works at the Fund and to installation of the lift) as well as on charges which he denied and many of which the Disciplinary Board had rejected. Lastly, the penalty was manifestly disproportionate to the charges and thus flawed by legal error.

38. On 19 August 1994, in connection with the complaint preceding the second appeal, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the dismissal decision taken on 21 July 1994. In an order dated 5 September 1994 the Chair of the Tribunal refused the application.

39. On 2 September 1994 the Governor dismissed the complaint on the grounds that the proceedings had been lawful, that the Disciplinary Board's opinion was purely advisory and that the penalty was proportionate to the charges which the Disciplinary Board had upheld as well as to the matters on which he had based his decision. The decision dismissing the complaint was served on the appellant on 9 September 1994.

40. On 7 November 1994 the appellant appealed against the Governor's decision of 21 July 1994 to dismiss him.

THE LAW

41. The two appeals are directed against the decision of 25 March 1994 by the Governor of the Council of Europe Social Development Fund to institute disciplinary proceedings against the appellant and to suspend him (Appeal No. 189/1994) as well as the decision of 21 July 1994 to dismiss him (Appeal No. 195/1994).

42. Under Rule 14 of its Rules of Procedure, the Tribunal decided to join Appeals Nos. 189/1994 and 195/1994 as they were closely connected (see para.8 above).

43. These two appeals firstly challenge the lawfulness of the disciplinary proceedings. The appellant maintains that the Disciplinary Board lacked jurisdiction and that there was an irregularity concerning its composition. He likewise maintains that neither defence rights nor the sequence of steps laid down in the Staff Regulations were complied with.

He further alleges that the suspension was decided after unlawful procedure and that it was unjustified.

In Appeal No. 195/1994 he "takes serious exception" to the Governor's partly basing the dismissal decision on two new charges (relating to arrangements for certain works at the Fund and to installation of the lift) and he alleges breach of the adversariality principle.

He also denies the charges and contends that the matters to which they relate were not disciplinary offences. Lastly he submits that the penalty is disproportionate to the charges.

44. The Governor argues that Appeal No. 195/1994 is in any case inadmissible in that, he alleges, the appellant overran the sixty-day period laid down in Article 60 para. 3 of the Staff Regulations. The appellant disputes this.

The Governor also submits that, in Appeal No. 189/1994, the decisions of 25 March 1994 to institute disciplinary proceedings against the appellant and suspend him were legally justified and taken after procedure that was entirely lawful.

Under Appeal No.195/1994 he reiterates that the procedure was lawful and maintains that the penalty was factually sound and proportionate to the offences.

I. ADMISSIBILITY OF APPEAL No.195/1994

45. The Tribunal must first consider the Governor's objection that Appeal No.195/1994 is inadmissible.

46. The Governor argues that the appeal exceeded the time limit laid down in Article 60 para. 3 of the Staff Regulations. This provides that an appeal must be submitted within sixty days from notification of the decision challenged. Here, the decision of 2 September 1994 dismissing the complaint was served on 9 September 1994. The appeal should have been lodged by 8 November. It was dated 7 November but registered on 10 November 1994, outside the prescribed period.

47. In his observations in reply of 7 April 1995 the appellant contends that the appeal is admissible. He points out that Article 60 para. 3 of the Staff Regulations refers to "lodging" the appeal, and he submits that, for purposes of international case-law, the lodgement date is the date on which the appeal is handed in at the post office and not the date on which it reaches the Tribunal and is registered. In the present case the appeal was posted on 7 November 1994, within the prescribed period.

48. Article 60 para. 3 of the Staff Regulations provides:

> "An appeal shall be lodged in writing within 60 days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 3 ..."

Rule 16 para. 2 of the Administrative Tribunal's Rules of Procedure states:

> "Appeals shall be lodged in writing... Two copies thereof shall either be sent by registered post or handed to the Registrar, who shall acknowledge receipt".

49. The Tribunal notes that the Governor's decision to dismiss his complaint reached the appellant on 9 September 1994.

50. Thus the sixty-day period laid down in Article 60 para. 3 of the Staff Regulations ran from 9 September 1994 and expired on 8 November 1994.

51. The file shows that the appeal, dated 7 November 1994, was posted that same day by registered letter requiring acknowledgement of receipt. The appeal reached the registry on 10 November 1994 and was registered the same day.

52. The Tribunal therefore finds that the appeal was lodged within the sixty-day period laid down in Article 60 para. 3 of the Staff Regulations and is accordingly admissible.

II. LAWFULNESS OF AND JUSTIFICATION FOR THE SUSPENSION PROCEDURE

53. The appellant maintains that the suspension was unlawful in that it was imposed after procedure which contained irregularities and in that it was unjustified.

A. Lawfulness of the suspension

54. The appellant maintains that the procedure which led to the suspension was unlawful in that the Chair of the Disciplinary Board was not competent to be consulted, the suspension decision was not taken at the prescribed time and defence rights were contravened.

55. He firstly maintains that the Chair of the Council of Europe Disciplinary Board was not competent to be consulted on suspension of a Fund official. He argues that since Fund staff has no hand in appointing the Council of Europe Disciplinary Board its Chair was not competent to be consulted in proceedings against a Fund official.

56. He contends that under Article 57 para. 1, taken together with Article 55 para 3, of the Staff Regulations a suspension decision cannot be taken until after disciplinary proceedings have been instituted and that the suspension did not meet this requirement. The Governor consulted the Chairman of the Disciplinary Board by telephone at 10.30 am on 22 March 1994, before disciplinary proceedings had been brought (the proceedings were instituted on 25 March 1994).

57. Lastly, as regards the purpose of the prior hearing, he contends that the Governor informed him at the very start of the hearing, and before giving him any opportunity to present his defence, that he had decided to suspend him. In addition he maintains that, even assuming his suspension was urgently necessary in the interests of the service, the Governor could have taken very speedy action while still complying with the rules, whereas he committed numerous procedural irregularities.

58. The Governor maintains that the Council of Europe Disciplinary Board had jurisdiction in proceedings against staff of the Fund and that its Chair was therefore the authority which he was required to consult, under Article 57 para. 1 of the Staff Regulations, before taking the decision to suspend the appellant.

He submits that the procedure used was lawful as to the time at which the suspension decision was taken, there being no provision in the Staff Regulations that specifies at what point a suspension decision must be taken. In addition the suspension was a precautionary measure taken in the interests of the service. In the present case the disciplinary proceedings against the appellant were already under way when the suspension was imposed.

59. Under Appeal No.195/1994 he argues that, with regard to the time at which a staff member is suspended, the appellant confuses consulting the Chair of the Disciplinary Board, which took place on 22 March 1994 and preceded the decision to institute disciplinary proceedings, with the decision to suspend him, which was taken after the decision to institute proceedings.

60. The Tribunal points out that the suspension procedure, which is parallel to but separate from the instituting of disciplinary proceedings, is governed by Article 57 of the Staff Regulations, which lays down that an official may be suspended in "a case of serious misconduct liable to entail a disciplinary measure as referred to in Article 54, paragraph 2.d, 2.e and 2.f" (that is, relegation in step, downgrading, and removal from post). In addition, Article 57 para. 1 of the Staff Regulations provides: "... the [Governor] may, after hearing the Chairman of the Disciplinary Board, suspend the presumed author of the misconduct".

61. The Governor's consulting of the Chairman of the Disciplinary Board before he suspended the appellant was in accordance with Article 57 para. 1 of the Staff Regulations. The Tribunal finds that the Chairman of the Disciplinary Board was the authority competent to be consulted under that provision. It refers, *mutatis mutandis*, to its arguments below (see para.83 ff) on whether the Council of Europe Disciplinary Board had jurisdiction in proceedings against staff of the Fund.

62. On the question of the point at which the suspension decision was taken, the appellant relies on Article 54 para. 3 of the Staff Regulations, under which receipt of the referral report is what institutes disciplinary proceedings.

63. The Tribunal observes, however, that this provision, taken with Article 57 para. 1, cannot be interpreted to mean that a suspension may not - as the appellant alleges - be imposed until after disciplinary proceedings have been instituted. In the present case the instituting of disciplinary proceedings was certainly preceded by the Governor's consultation of the Chairman of the Disciplinary Board with a view to suspending the appellant as well as by the suspension decision itself, but that is not prohibited by any provision of the Staff Regulations: these does not provide that the suspension decision must come after referral of the case to the Disciplinary Board.

64. As regards, lastly, the appellant's argument that the Governor decided to suspend him before even letting him present his defence, the Tribunal would observe that there is no rule governing the matter. It further notes that after being sent a copy of the referral report and being given access to the other documents in the proceedings, the appellant, assisted by his lawyer, was heard by the Disciplinary Board and was therefore able to defend himself properly at that stage in the proceedings. The Tribunal therefore cannot see in what respect defence rights were contravened from this standpoint.

65. Subsequently the appellant likewise "had the opportunity to put his case to the Tribunal and have it rule on the lawfulness of the procedure" (see, *mutatis mutandis*, ATCE, Appeal No. 178/1994, Fender v. Secretary General, decision of 24 February 1995, para.45 *in fine*).

66. The Tribunal accordingly finds that the suspension decision was taken after lawful procedure.

B. Justification for the suspension

67. The appellant likewise challenges the suspension on substantive grounds.

68. He maintains that there is a connection between the suspension decision and the disciplinary measure subsequently imposed since, under Article 57 para. 1 of the Staff Regulations, "suspension is possible only if the penalty is one of those specified in Article 54 para. 2 (d), (e) and (f) of the Staff Regulations (relegation in step, downgrading, and removal from post)". Therefore, he argues, it is only after the disciplinary proceedings, and once the Disciplinary Board has delivered its opinion and the Governor has taken his decision, that it is possible to determine whether suspension was justified. In the appellant's view suspension is not justified "if the Governor decides to impose a penalty less severe than those specified in Article 54 para. 2 (d), (e) and (f) of the Staff Regulations or decides not to impose any penalty".

69. He adds that, even if the suspension is subsequently legitimised by the penalty imposed, the decision may be challenged before the Administrative Tribunal, which, in ruling on the legality of the disciplinary penalty, is then indirectly called upon to decide whether suspension was justified. He states that this his second appeal (No. 195/1994) against the penalty imposed (removal from post) seek just such a ruling.

70. The Governor argues that under Article 57 of the Staff Regulations serious misconduct resulting in a penalty other than those laid down in Article 54 para. 2 (d), (e) and (f) *may* justify suspension if, at the time of the suspension decision, it appears to warrant one of those three penalties. In his view, therefore, the Administrative Tribunal must perform a narrow review, confined to the question whether he was manifestly wrong in the legal significance, which he ascribed to the matters with which the appellant was charged.

71. Here the Governor argues that it need only be borne in mind that the internal audit, the inspector and Mr Sharpe all blamed the appellant for a large number of operational irregularities and anomalies, which could be regarded as amounting to serious disciplinary offences.

72. He observes, in addition, that the case for suspension was endorsed by the Disciplinary Board's opinion, whose unanimous finding was that the appellant had committed several offences punishable by one of the penalties laid down in Article 54 para. 2 (d) to (f) of the Staff Regulations. He therefore maintains that the decision was legally justified.

73. The Tribunal notes that under Article 57 "... the [Governor] may ... suspend the presumed author of the misconduct". In this matter he therefore has wide discretion, in exercising which he must nonetheless comply with the procedure laid down in the Staff Regulations and with defence rights and refrain from any abuse of authority causing injury to the staff member.

74. The Tribunal holds that in so far as, at the time of the suspension decision, the matters with which the appellant was charged were "liable" to justify suspension, which is a precautionary measure, and as the Governor did not act unreasonably, he did not exceed his powers.

75. In this connection the Tribunal notes that the Disciplinary Board stated that it was not appropriate for it to deliver an opinion on the Governor's suspension decision. With regard, however, to the required penalty, the Board's finding was that the appellant had committed a number of offences warranting one of the penalties laid down in Article 54 para. 2 (d) to (f) of the Staff Regulations - offences, that is, which were liable to result in suspension. The Governor was therefore entitled to decide that suspension was justified and in doing so did not exceed his discretion.

76. The Tribunal further notes that during the suspension the appellant continued to be paid in full.

77. As, therefore, the Governor did not act unreasonably in deciding to suspend him this ground of appeal must be dismissed.

III. LAWFULNESS OF THE DISCIPLINARY PROCEEDINGS AND JUSTIFICATION FOR INSTITUTING THEM

78. The appellant challenges on both procedural and substantive grounds the decision to institute disciplinary proceedings.

A. Lawfulness of the disciplinary proceedings

79. The appellant maintains that the decision to institute disciplinary proceedings was illegal because it resulted from unlawful procedure. He alleges firstly that the Council of Europe Disciplinary Board lacked jurisdiction and secondly that the procedure laid down in the Staff Regulations was not complied with, from the standpoint either of the prescribed sequence of steps or of defence rights.

1. The alleged irregularities concerning the Disciplinary Board

80. The appellant disputes the legality of the decision on the ground that the proceedings before the Council of Europe Disciplinary Board contained irregularities. He contends that the Disciplinary Board does not have jurisdiction in proceedings against staff of the Fund and that there were irregularities concerning the Board's composition.

a) Jurisdiction of the Disciplinary Board

81. The appellant maintains that the proceedings before the Council of Europe Disciplinary Board were unlawful in that the Board does not have jurisdiction over Fund staff. He points out that the Fund staff have no hand in appointing the Council of Europe staff representatives who serve on joint bodies, such as the Disciplinary Board, and are supposed to represent them. In so far, he alleges, as the Disciplinary Board was not a properly joint body and the Fund does not have a disciplinary board of its own, the decision complained of is null, having been taken on the basis of an opinion delivered by a body which did not have jurisdiction.

82. The Governor argues that the Disciplinary Board had jurisdiction in proceedings against staff of the Fund. He relies on Resolution No. 4 (1956) of the Fund's Administrative Council,

which provides:

> "2. Officials of the Fund shall be subject to the following regulations of the Council of Europe:
>
> i. those contained in the Administrative Regulations/Staff Rules;
> ...
>
> In relation to officials of the Fund, the Governor shall exercise the powers assigned to the Secretary General of the Council of Europe under the above provisions."

The Governor contends that from the Fund staff's special circumstances it is not possible to infer that the Disciplinary Board is not a properly joint body: the Fund is "attached to the Council of Europe and administered under its supreme authority (Article 1 of the Fund's Articles of Agreement). As, moreover, the Fund does not have a large staff, there is no plan - for "practical and ethical reasons" - to give it a disciplinary board of its own.

83. The Tribunal notes that the Fund's Articles of Agreement were adopted by the Committee of Ministers on 16 April 1956 and that Article 1 provides that the "Fund is attached to the Council of Europe and administered under its supreme authority".

84. In the Tribunal's view the Fund comes under the Council of Europe and consequently under Articles 59 to 61 of the Staff Regulations (which lay down the arrangements for appeals by Council of Europe staff) and the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations).

85. In addition, in Resolution 247 (1993), the Fund's Governing Board adopted new Articles of Agreement, which have not yet come into force. Article XI Section 1 (d) of these Articles of Agreement provides: "The Council of Europe Staff Regulations shall be applicable to the staff of the Fund in any matter not covered by a specific decision of the Administrative Council".

86. The Tribunal takes the view that the Fund's Administrative Council has accepted the Staff Regulations as they stand and that the Disciplinary Board's jurisdiction is accordingly established.

87. The Tribunal is not unaware that there is a problem concerning representation of the Fund's staff on the Council of Europe Disciplinary Board. In the present case it holds that this lack of representation was not a defect such as to render the proceedings unlawful.

88. It would point out that Article 55 of the Staff Regulations provides:

> "2. (...) The Secretary General shall also draw up a list containing, if possible, the names of two staff members from each grade in each category mentioned in Article 4. The Staff Committee shall at the same time transmit a like list to the Secretary General.
>
> 3. (...) The Chair of the Disciplinary Board shall, in the presence of the staff member concerned, draw lots from among the names in the above-mentioned list to

decide which four members shall constitute the Disciplinary Board, two being drawn from each list.

4. Members of the Disciplinary Board shall not be of a lower grade than that of the staff member whose case the Board is to consider."

(...)"

89. The Tribunal is aware of the difficulty here, which more particularly arises because the Fund does not have a large staff and because of the problem of meeting the requirements of Article 55 of the Staff Regulations, including those relating to grade. It is not for the Tribunal to say how the problem should be tackled but it observes that the Fund staff must be represented, whether directly or indirectly, on the Disciplinary Board and that it is for the parties concerned to agree arrangements for ensuring it.

b) Composition of the Disciplinary Board

90. The appellant maintains, too, that the composition of the Disciplinary Board was defective. He points out that Article 8 of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations) provides: "After consideration of the document submitted and having regard to any statements made orally or in writing by the staff member concerned and by witnesses ... the Disciplinary Board shall, by majority vote, deliver an opinion, stating its grounds, on the disciplinary measure appropriate..." He states that this requirement was not met as one of the members representing the staff (Mrs Boltho) was not present at the hearings at which the appellant gave evidence, yet she took part in the Disciplinary Board's deliberations. The appellant maintains that this vitiated the proceedings before the Disciplinary Board.

He submits that records of Disciplinary Board hearings are not verbatim and are no substitute for members' presence. Mrs Boltho's not attending the hearings altered her perception of the case, prevented her from asking questions and meant that she exerted a less persuasive influence.

91. The Governor states that Mrs Boltho's name was drawn at random from the Secretary General's list and maintains that her absence when the appellant gave evidence to the Disciplinary Board did not affect joint representation in or the objectivity of the proceedings. He observes that, although not present, she was able to familiarise herself with the content of the hearings by means of the record and that in any case the Board's opinion was unanimous and would therefore have been the same even if Mrs Boltho had formed a different view.

92. The Tribunal points out that, under Article 55 para. 1 of the Staff Regulations, the Disciplinary Board is made up of a Chairman and four members. In accordance with Article 55 para. 3 of the Staff Regulations, the Chairman of the Disciplinary Board drew lots in the appellant's presence on 6 April 1994 to decide the four members of the Disciplinary Board. There is no indication in the file that, when the Disciplinary Board heard the appellant and his lawyer on 15 June 1994, either the appellant or his lawyer objected to Mrs Boltho's absence, despite its being pointed out by the Chairman of the Board.

In addition the Tribunal notes that written observations were exchanged during the proceedings before the Disciplinary Board, and that Mrs Boltho, like the other members of the Board, was able to acquaint herself with them. She was also able to consult the record of the hearings and of the evidence (the minutes for which the Chairman of the Disciplinary Board is responsible under Article 10 of Appendix X to the Staff Regulations). It likewise notes that the Disciplinary Board's decision was unanimous and that there are no provisions governing attendance by members of the Board at each stage in the proceedings. Nevertheless, although the Disciplinary Board is not a judicial body and has only advisory authority, rules governing members' attendance at its meetings are desirable.

In the Tribunal's view, although Mrs Boltho did not attend the appellant's hearing, she was able to form an opinion on the basis of all the other evidence in the file and her absence did not affect the joint nature or objectivity of the proceedings before the Board.

This ground of appeal must therefore be dismissed.

2. Procedural soundness of the disciplinary proceedings

93. The appellant contends that the disciplinary proceedings were unlawful firstly in that the sequence of steps laid down in the Staff Regulations was not complied with and secondly in that defence rights were contravened.

a. The sequence of procedural steps

94. The appellant alleges that the decision to institute disciplinary proceedings contravened the prescribed procedure which, he maintains, consists in:

- a hearing of the staff member concerned (Article 56 para. 1 of the Staff Regulations);
- the decision to institute disciplinary proceedings, in the form of a report referring the matter to the Disciplinary Board, the report being communicated to the staff member (Article 55 para. 3 of the Staff Regulations);
- access to the file (Article 3 of Appendix X to the Staff Regulations);
- if any of the charges is liable to incur one of the three severest disciplinary measures, consultation with the Chair of the Disciplinary Board (Article 57 para. 1 of the Staff Regulations);
- a hearing of the staff member liable to suspension, and
- the suspension decision and its notification to the staff member (Article 57 para. 1 of the Staff Regulations).

95. The appellant contends firstly that the Governor informed him of the suspension decision right at the start of the hearing and not, as the Governor maintains, at the end of it. Since, he alleges, the instituting of disciplinary proceedings must precede the suspension, this proves that the decision to institute proceedings had already been taken before he was heard, contrary to Article 56 para. 1 of the Staff Regulations. He contends that the hearings were devoid of useful purpose (since they did not precede the decisions) and that this rendered the decision to institute disciplinary proceedings unlawful.

96. The Governor maintains that the prescribed procedure was complied with, the appellant having been informed and given a prior hearing and the Chairman of the Disciplinary Board having been consulted.

97. The Governor states that, in accordance with Article 57 para. 1 of the Staff Regulations, he consulted the Chair of the Disciplinary Board on 22 March 1994 and told him that he was contemplating taking disciplinary proceedings against the appellant and suspending him. On 25 March 1994 he gave the appellant a hearing, as required by Article 56 para. 1, and informed him at the end of it that he intended taking disciplinary proceedings. He then told him that he had now decided to suspend him. Consequently the appellant was given a hearing before disciplinary proceedings were instituted, and the proceedings were therefore lawful. In his observations under Appeal No. 195/1994 the Governor adds that although a draft suspension decision had been prepared before the hearing, it was still open to him, in the light of the appellant's explanations, to refrain from signing the draft decision and instituting disciplinary proceedings.

98. The Tribunal points out that, under Article 56 of the Staff Regulations, "disciplinary proceedings are instituted by the Secretary General (in this case the Governor) after a hearing of the staff member" and that, under Article 54 of the Staff Regulations, "any failure by a staff member to comply with his obligations under the Staff Regulations or other regulations, whether intentionally or through negligence on his part, may lead to the instituting of disciplinary proceedings and possibly disciplinary action."

99. In addition, where the alleged misconduct may incur one of the disciplinary measures laid down in Article 54 para. 2 (c), (d), (e) and (f) of the Staff Regulations (deferment of advancement to a higher step, relegation in step, downgrading, or removal from post), there is a requirement not only that the staff member be given a hearing before proceedings are instituted (Article 56 para. 1 of the Staff Regulations) but also that the Governor lay before the Disciplinary Board a report "clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed" (Article 2 para. 2 of Appendix X). This report (the referral report), which institutes the disciplinary proceedings (see Article 55 para. 3 of the Staff Regulations), is sent to the Chairman of the Disciplinary Board, who brings it to the knowledge of the Board members and of the staff member (Article 2 para. 3 of Appendix X). The staff member is then entitled to see his complete personal file (Article 3 of Appendix X).

100. The Tribunal has considered all the documentary and other evidence which the parties have submitted to it, including the Disciplinary Board's opinion. The documentary evidence shows that the Governor gave the appellant a hearing on 25 March 1994 and that on the same date he instituted disciplinary proceedings by signing the referral report provided for in Article 2 para. 2 of Appendix X to the Staff Regulations. Here, the Tribunal notes, the parties disagree. The appellant maintains that the referral report had already been written and signed before the hearing whereas the Governor contends that he did not sign it until after hearing the appellant and that he thereby instituted disciplinary proceedings while complying with the sequence of steps laid down in the Staff Regulations.

101. The Tribunal notes that the appellant's hearing consisted in an interview in which he had the opportunity to provide explanations and clarifications. In the Tribunal's view, that the report may have been prepared beforehand does not make the hearing any less precedent.

102. It further observes that, even though the appellant may have had the impression that the Governor's decision had already been taken, it finds no reason to draw any such inference itself. Even assuming the referral report had been signed beforehand, it remained open to the Governor not to forward it to the Disciplinary Board and thereby institute disciplinary proceedings. Lastly and most importantly, as the Governor pointed out at the Tribunal hearing on 27 June 1995, only three of the six people who were given a hearing later had disciplinary proceedings brought against them.

The sequence of steps laid down in the Staff Regulations for instituting disciplinary proceedings was therefore complied with.

b) Defence rights

103. The appellant firstly contends that, in view of the "haste" with which, at the end of the hearing on 25 March 1994, the Governor took the decision to suspend him, it would have made sense if, immediately after the hearing, he had been given the report referring the case to the disciplinary Board. In actual fact the report was sent to him more than a week after the decision to institute disciplinary proceedings and the decision to suspend him. He says that because of serious delay in letting him have the referral report he did not have access to his file as soon as Article 3 of Appendix X of the Staff Regulations required.

104. He further complains that it was at the hearing which the Governor gave him on 25 March 1994 that he was informed of the decision to institute disciplinary proceedings, at which time he was unaware of the content of Mr. Sharpe's reports and had not had any opportunity to comment on them. In his observations in reply under Appeal No. 195/1994 he states that the second Sharpe report went further than the first one by implicating him directly, and that withholding it from him compounded the other irregularities of which he complains.

105. He likewise maintains that the hearing was sprung on him and that he was not ready to answer the accusations made on 25 March 1994, particularly as what was presented on that occasion was a mere list of the areas in which he was suspected of offences and the charges themselves were not specified. He adds that at the hearing he was not assisted by a lawyer, whereas the Fund's lawyer was present.

106. Lastly he contends that he was unable to obtain access to all the administrative papers which he had asked to have and which he says he needed in order to defend himself properly before the Disciplinary Board. He maintains that these papers would undoubtedly have enabled him to answer the charge referring to abnormal staff situations, a matter for which the Disciplinary Board held him to blame, and that this might have made a difference to the Board's opinion and therefore the Governor's eventual decision. In his observations in reply, however, he acknowledges that since the end of the enquiry he has had access to the papers which he wished to consult.

107. The Governor points out that under Article 2 para. 3 of Appendix X to the Staff Regulations the Governor sends the referral report to the Chairman of the Disciplinary Board, who "brings it to the knowledge of the staff member". It is at that point, under Article 3 of Appendix X, that the staff member is entitled to see his personal file and the case file, and that

the appellant - as he does not dispute - in fact saw them in the present case. The proceedings, he says, were therefore unobjectionable from this standpoint.

108. He adds that the disciplinary proceedings were based on the audit reports and the two reports by Mr Sharpe. He points out that the findings of these reports agreed and that Mr Sharpe's second report confirmed the previous ones, on which the appellant had had an opportunity to comment. He thus contends that the appellant's not having had time to answer Mr Sharpe's second report does not affect the lawfulness of the proceedings.

109. He likewise maintains that, contrary to the appellant's assertion, and although this is not an argument which affects the legal position, the hearing on 25 March 1994 was not a surprise tactic: he had informed all those implicated by Mr Sharpe's first report that he would be concluding the enquiry on 25 March 1994.

110. Lastly he states that the appellant was given exceptional facilities for preparing his defence (for example, he was given permission to make photocopies, and any requests for documents were met, even when imprecise) and he disputes that the appellant did not have the desired access to documents. He submits that the decision to dismiss the appellant was taken after proceedings which in all respects were lawful.

111. The Tribunal notes that the Chairman of the Disciplinary Board received the referral report of 25 March 1994 on 29 March 1994 and sent it to the appellant's lawyer on 31 March 1994.

112. In the Tribunal's view, firstly, it is undoubtedly desirable that the referral report be communicated to the staff member immediately and that the staff member has the opportunity to present his defence to the charges.

113. In the present case the Disciplinary Board sent the appellant a copy of the referral report two days after receiving it, a lapse of time which is perfectly reasonable. In addition the fifteen days within which, under article 5 para. 1 of Appendix X, the staff member must lodge any observations do not start running until "the date on which he receives the report initiating disciplinary proceedings", that date being the only one which has any legal effect.

114. The appellant also alleges that the disciplinary proceedings began without his having seen the second Sharpe report or been given access to the administrative papers he had requested. He adds that the hearing was a surprise one at which he was unable to make observations in the presence of a lawyer.

The Tribunal points out in this connection that, under Article 3 of Appendix X to the Staff Regulations, as soon as the staff member charged receives the referral report he is entitled to see his complete personal file and to take copies of all documents relevant to the proceedings, an entitlement which was observed in the present case. The Tribunal likewise refers to paragraphs 64 and 65 above.

115. It therefore cannot find any contravention of defence rights and dismisses this ground of appeal.

B. Justification for instituting disciplinary proceedings

116. The appellant maintains that the decision to institute disciplinary proceedings was likewise illegal on account of the Governor's reasons for doing so.

117. He points out that the sole justification, which the Governor has offered for the disciplinary proceedings is "the extent and seriousness of the suspicions" concerning him. He maintains that the context to the cases was in actual fact political and that the Governor was bent on getting rid of the former management team.

118. The Governor maintains that the disciplinary proceedings were based on thorough and impartial investigation and denies that his decisions were politically motivated. He observes that in deciding whether disciplinary proceedings were necessary there is no need to know the full facts resulting in the penalty, otherwise there would be no point in adversarial disciplinary proceedings: it is in the light of the facts as known when the proceedings were instituted that any ruling must be given on the legal significance which the Governor ascribed to the facts and as to whether there was any manifest error in his assessment of them.

119. He states here that the various reports brought to light serious anomalies in the functioning of departments of which the appellant had charge, relating to buying and renting of premises, reimbursement of travel expenses and other expenses, recruitment and staff-assessment procedures (including the granting of special terms of service), housing loans to staff including the appellant himself (for accommodation for his daughter), the Autonomous Pension Fund (including staff withdrawals after ten years' service and the previous Governor's annual withdrawals) and the lack of an inventory of the Fund's fixed assets. The Sharpe reports, he observes, held the appellant responsible for these anomalies. In addition he notes that, among other things, the appellant twice admitted two persons to the Fund's premises whom he knew to be DST officers so that they could take away the lock of a safe for examination and repair. Lastly, despite the Governor's requests, the appellant failed to make any proposal concerning renewal of a staff member's contract which was about to expire.

120. The Governor maintains that these matters were such as to arouse "serious suspicion" in his mind. He says that he had seen for himself breaches by the appellant of his obligations under the Staff Regulations and he considers that when taken in aggregate these matters, for which the appellant was unable to give any satisfactory explanation, were all the more serious and warranted disciplinary proceedings.

Lastly he notes that further offences came to light during the disciplinary proceedings and that the Disciplinary Board had itself accepted that the appellant had committed various disciplinary offences.

121. The Tribunal points out that Article 56 of the Staff Regulations reads: "Disciplinary proceedings shall be instituted by the [Governor] ... "In addition it is established international case-law (see ABCE, Decision No. 76/1981 of 21 April 1982, Pagani v. Secretary General, para. 42; CJEC, Case 46/72, De Greef v. Commission, judgement of 30 May 1993, paras. 45 and 46; UNAT, Judgement No. 394 of 2 November 1987, Armijo v. Secretary-General of the United Nations, section XII) that he has wide discretionary powers in this sphere, subject to observance of defence rights and provided he does not manifestly exceed or misuse his

authority.

122. In the present case the Tribunal notes that defence rights were complied with (see para. 64 ff and para. 111 ff above). It observes that, as is clear from the file, the Governor took the decision to institute disciplinary proceedings in the light of various reports which had uncovered irregularities committed by the appellant among others. In addition he gave a clear statement of his grounds for instituting the proceedings.

123. The Tribunal accordingly finds that the Governor did not exceed his powers in instituting the disciplinary proceedings against the appellant and it therefore dismisses this ground of appeal.

IV. JUSTIFICATION FOR THE PENALTY

124. The appellant firstly alleges that defence rights were contravened by the Governor's basing his decision to dismiss him on two new charges - concerning arrangements for works carried out at the Fund's headquarters and for installation of the lift - which he had not submitted to the Disciplinary Board.

He also both denies the charges and that any disciplinary offences were involved.

Lastly he maintains that the penalty was disproportionate to the charges.

A. The alleged contravention of defence rights

125. The appellant firstly alleges that defence rights were contravened in that the Governor partly based the dismissal decision of 21 July 1994 on two new charges concerning arrangements for various works at the Fund's headquarters and for installing the lift. He considers that, in basing his decision in part on these new charges, the Governor committed two irregularities. On the one hand, he alleges, there was a requirement, under Article 2 taken together with Article 8 of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations), to consult the Disciplinary Board on the charges. Equally, it is alleged, he contravened defence rights, and more specifically the adversariality principle, in that on 15 June 1994 the Disciplinary Board had decided not to deal with the new charges and the appellant had therefore not had any opportunity to comment on them.

126. The Governor takes the view that the Disciplinary Board was wrong in refusing to consider the new charges submitted on 13 June 1994. He maintains, however, that they were not crucial to the dismissal decision and that they merely confirmed that the appellant's conduct was incompatible with keeping him on the staff. Thus the fact that the charges were not discussed before the Disciplinary Board did not, he argues, render the proceedings defective or contravene defence rights.

127. The Tribunal notes that in his complaint of 19 August 1994 the appellant disputed the lawfulness of the decision of 21 July 1994, among other things on the ground that it was partly based on two new charges relating to arrangements for various works at the Fund's headquarters and for installing the lift.

128. The Tribunal notes that in the referral report dated 25 March 1994 the Governor listed a further eight offences with which he charged the appellant and which he regarded as serious (see para. 27 above). These charges were submitted to the Disciplinary Board under Article 2 para. 2 of Appendix X to the Staff Regulations, which provides that the referral report must "clearly [specify] the reprehensible acts and the circumstances in which they were allegedly committed". In the Tribunal's view, if the appellant had been able to answer these additional charges before the Disciplinary Board the Board might at best have found in his favour on the new charges but would have returned exactly the same findings on the other charges. In addition it notes that the dismissal decision of 21 July 1994 was only partly based on the new charges which the Disciplinary Board did not examine. It accordingly holds that the new charges were not crucial to the Governor's decision as to the penalty.

In any case the Tribunal observes that the appellant was given a hearing on 21 July 1994 in accordance with Article 8 para. 2 of Appendix X to the Staff Regulations, which provides that after the Disciplinary Board delivers its opinion "[the Governor] shall take his decision within one month; he shall first hear the staff member concerned". He was then able to challenge the decision in a complaint dated 19 August 1994, and subsequently by lodging the present appeal with the Tribunal, in proceedings complying with the adversariality principle as well as with defence rights generally.

129. The Tribunal accordingly finds that not referring the charges to the Disciplinary Board did not interfere with defence rights to the extent of vitiating the proceedings and that defence rights were not contravened. This ground of appeal must therefore be dismissed.

B. The disciplinary nature of the charges and substantiation of the charges

130. The appellant maintains that the charges relate to matters which were not of a disciplinary nature. He argues that the Staff Regulations draw a distinction between service and conduct and that special procedure relating to conduct is laid down in Article 54 of the Staff Regulations, on disciplinary matters. Under Article 54 disciplinary proceedings may be instituted only in respect of failure by a staff member to comply with his obligations under the Staff Regulations or other regulations, whether intentionally or through negligence on his part. The appellant argues that what is meant here is misconduct. He likewise refers to Article 23 para. 3 of the Staff Regulations, which concerns dismissal, whether for disciplinary reasons in the case of conduct deemed unsatisfactory (para. b (ii)) or on the ground of manifest unsuitability or unsatisfactory work (para. b (iii)).

He considers that the charges relate to his standard of work and therefore do not fall under the disciplinary sphere. In deciding to institute disciplinary proceedings, he argues the Governor therefore contravened the relevant provisions of the Staff Regulations.

131. In addition he denies the charges on which the Governor based his decision to dismiss him, a decision which, he alleges, is illegal on account of factual error.

132. On the charges concerning "serious anomalies" in the reimbursement of expenses, housing loans to certain staff, including himself, the lack of an inventory of fixed assets with valuations, secretly recording the Governing Board's meeting on 13 December 1993 and the opening of the Governor's safe by DST officers, he refers to the opinion of the Disciplinary

Board, whose finding, after a thorough examination of the case, was that the charges concerning these matters were unfounded and no disciplinary offences had been committed. He maintains that in punishing him on the basis of those charges the Governor necessarily made a factual mistake. The Governor, he says, was not entitled to disregard his explanations and the Disciplinary Board's findings.

133. He states that he has constantly denied those of the charges which the Disciplinary Board upheld (those concerning the FAP and personnel management), that he continues to do so and that in his view the Board did not give adequate reasons for its findings on these two charges. Lastly he alleges that the Governor also based his decision to dismiss him on the French authorities' decision to conduct a judicial inquiry more particularly into the irregularities in management of the FAP, even though that in no way means that any charges have been substantiated.

134. The Governor makes the preliminary point that the appellant took up his duties on 1 January 1991, had been in charge of administration for over a year by the time the audit was commissioned from Ernst and Young and therefore bears responsibility for the persistence of the glaring irregularities identified by the auditors. In the Governor's view the workload resulting from the audit, on which the appellant relies, cannot excuse his culpable inaction, and he maintains that the appellant's level of responsibility, his previous experience at OECD and the circumstances of his recruitment make this failure to act even less excusable. He regards the appellant's conduct as undoubtedly a disciplinary matter.

135. He states that the charges were factually accurate and points out that he is not bound by the Disciplinary Board's opinion in the assessment of offences.

He considers that the Disciplinary Board misjudged the nature of the appellant's offences. He likewise points out that the Administrative Tribunal is not allowed to replace the Governor's assessment by its own and that its function is merely to satisfy itself that there was no manifest misassessment of the evidence.

136. The Governor goes on to detail the ten charges against the appellant.

- In the matter of the Autonomous Pension Fund (FAP) the former Governor, without consulting the Administrative Council, had issued a regulation dated 26 February 1989 which introduced the practice of ten-year withdrawals. This consisted in allowing members of the Fund staff who had completed 10 years' service to withdraw a sum from the FAP comprising the amount of their contributions and 100% of their share of the appropriations which the Administrative Council annually made to the FAP to balance its accounts. The Governor argues that the practice was illegal and that, since it altered the nature of the pension fund, the former Governor had no authority to introduce it. He also points out that the practice depleted the FAP.

The Governor maintains that the appellant formalised the practice and set it on a general footing and that as a result the Administrative Council was forced to top up the FAP with additional appropriations. He submits that the appellant should have pointed out to the former Governor that the 1989 regulation was illegal. He maintains too that the appellant helped to mislead the Administrative Council about the use to which the appropriations were being put

(while made out to be subsidies for balancing the books, the appropriations in actual fact financed the illegal loans introduced by the regulation of 26 February 1989).

- With regard to abnormal staff situations the appellant firstly did not put a stop to the irregularities in promotion and recruitment which the audit report brought to light (discriminatory promotions, employment of children of national representatives and children of staff, reserving certain posts for particular countries, and the lack of a staff assessment system) and secondly he allowed certain staff who were abroad to continue to enjoy special status contrary to the Staff Regulations and he even granted special status in new cases (an official on personal leave abroad received remuneration and an unjustified benefit was granted to the previous Governor's assistant) without informing or seeking permission from the relevant Fund bodies.

- Irregularities in the reimbursement of national representatives' and officials' expenses (reimbursement of unjustifiable expenses or without any documentary evidence of the expense) continued even after the internal audit.

- The appellant pursued a discriminatory staff-management policy. Firstly he renewed a staff member's contract without having any authority to do so and, in the case of other staff members whose contracts needed renewing, failed to submit draft contracts to him in time. Here the Governor states that, despite his requests, it was not until 17 March 1994 that the appellant provided him with a full list of fixed-term contracts due to expire (some of them, indeed, had expired three months earlier). Thus the Governor was unaware of the contract renewal problem until that date. This, he says, resulted in discrimination between staff, since the appellant did renew the contract of the Head of General Services on 17 December 1993 and has not, he alleges, produced any evidence that the acting Governors had authorised it.

- The appellant was extremely irresponsible in the granting and administration of the housing loans made to some staff (loans, for instance, were granted for the purchase of second homes or to staff who did not meet the minimum period of employment by the Fund or in cases where the loan applications were incomplete). He points out that the appellant himself improperly obtained a large loan for his daughter four months after taking up his duties.

- The appellant was personally and directly responsible for the lack of an inventory, with valuations, of the Fund's fixed assets: this, he states, was one of the appellant's responsibilities and he had been at the Fund since 1 May 1990 and its Head of Administration and Personnel since 1 January 1991.

- Although, at its 129th meeting, the Governing Board had decided that its meetings would be recorded exclusively for the secretariat's use, the appellant allowed his assistant to make a secret video-recording of its meeting on 13 December 1993, whose purpose was to elect a new Chair of the Governing Board, a new Chair of the Administrative Council and a new Governor. He contends that an order concerning the matter from the former Governor, who had just resigned (on 15 November 1993), does not exculpate the appellant.

- The appellant knowingly agreed, without informing him, to have DST officers open the former Governor's safe. This, he says, was an inexcusable disciplinary offence, and it was the appellant who was mainly to blame for it.

- In December 1993 the appellant was hasty in commissioning conversion work at the Fund's headquarters, grossly underestimated the cost (by nearly 50%, according to the Governor) as a result of overlooking certain items, for which, therefore, no provision was made in the budget, and paid the architects and contractors abnormally high advances (equal to 30% of the total cost of the work, whereas practice in the industry is for advance payments not to exceed 5% of the contract price).

- Lastly the appellant committed a serious offence by agreeing, in connection with installation of the lift, to encroachments on common parts of the building without the consent of the co-owners and without informing the Governor.

137. In his observations in reply in Appeal 195/1994 the appellant does not dispute that the Governor has discretionary powers as to the final decision and he accepts that the Governor was not legally bound by the Disciplinary Board's opinion. He contends, however, that the Governor deliberately ignored the findings of the Disciplinary Board's inquiry, thereby committing a factual error against which his discretionary powers are no defence. In this connection he maintains that the Governor's attitude is extremely suspect in that he took the same line with the other staff called in question and disregarded the Disciplinary Board's opinions, whether the technical findings (by deciding that there had been a disciplinary offence when the Disciplinary Board found none) or the recommendations as to the penalty (by imposing, as in the present case, a severer penalty than the Board recommended). He contends that although the Administrative Tribunal's powers of review of the Governor's disciplinary decisions are restricted, they are nonetheless wider than the Governor suggests (see ILOAT, Judgement No. 191 of 15 May 1972 in the Ballo case, confirmed by Judgement No. 1000 of 23 January 1990 in the Clements case, under which the Tribunal is entitled to review the lawfulness of a decision taken under discretionary powers).

138. In an appendix to his observations in reply dated 7 April 1995 the appellant advances the general defence that since taking up his duties on 1 January 1991 he had successfully tackled many of the problems and that the audit in May 1992, followed by the inspection, created an undue workload and interfered with the remedial action which was then in progress.

139. He goes on to deal in greater detail with the charges, which he alleges to be inaccurate.

- On the charges concerning abnormal staff situations he says, in particular, that he took various steps to improve recruitment and promotion arrangements (introducing job descriptions, discussing promotions with heads of department, revising and standardising staff contracts). He asserts that more rigorous procedures would not have solved the problems in the time available. He states that the irregularities concerning the conditions of service of staff abroad resulted from decisions taken before he started work at the Fund and that he dealt with most of the irregularities, whether by putting an end to the offending situation, rectifying it or introducing stricter supervision.

He denies that he pursued a discriminatory staff-management policy and maintains that, on the contrary, he standardised the system. On the question of non-renewal of contracts he says that he drew up notes for the new Governor when the latter took up his duties but that nothing was done about them until 17 March 1994.

- In connection with the FAP he points out that the regulation introducing ten-year withdrawals preceded his arrival at the Fund. He denies that he helped to formalise the practice and states that he merely implemented the former Governor's regulation and took steps to ascertain the effects of the withdrawals on the FAP's ability to meet its commitments.

- He disputes that the ten-year withdrawals were unlawful and refers to studies which purportedly show that the withdrawals were offset, essentially by the corresponding diminution in staff entitlements. He thus contends that he was in no way an accessory to depletion of the FAP by ten-year withdrawals.

- In the matter of housing loans he asserts that he took steps to end disparities and deficiencies as well as standardise arrangements and that he thus improved matters. He regrets that the Governor never questioned him about the circumstances in which a loan was granted to him for his daughter.

- He maintains that he recognised his responsibility for the lack of an inventory and valuations of the Fund's fixed assets and acted accordingly, as can be seen from the fact that such an inventory now exists.

- He denies all responsibility for the secret recording of the Governing Board's meeting on 13 December 1993 in that the recording was authorised in his absence by the former Governor and he (the appellant) merely put the cassettes in his safe after the meetings.

- He maintains he was unaware that the people brought in to deal with the safe were DST officers until they were present in his office.

- He considers himself blameless in the matter of the work commissioned at the Fund's headquarters. There had been provision for the work in the 1993 budget (drawn up in November 1992) and it was putting the work out to tender that caused the delay. In addition he maintains that advances paid were in accordance with practice, work done and funds available.

- Lastly he states that the co-owners of the building had met on 17 February 1989 and unanimously consented to the lift's encroaching on common areas.

140. The Tribunal firstly notes, as regards the disciplinary nature of the matters at issue, that Article 54 of the Staff Regulations refers to "any failure by a staff member to comply with his obligations under the Staff Regulations and other regulations", drawing no distinction between negligent service and unsatisfactory conduct. Moreover, the notion of disciplinary offence may include breach of professional duties, for example with regard to the quality of the work undertaken (see ILOAT, Judgement No. 247 of 21 October 1974 in the Nemeth case).

141. In the present case the Governor took the view that the matters to which the charges related were contraventions of Article 30 para. 1 ("... a staff member is ... responsible for discharging the tasks entrusted to him ...") and that the appellant had therefore committed disciplinary offences.

142. In the Tribunal's view the Governor, to whom fall all decisions as to whether to

institute disciplinary proceedings (see para. 121 above), was entitled to decide, and did not thereby exceed his discretionary powers, that the matters to which the charges related were disciplinary offences, the Tribunal's function being merely to ascertain whether the Governor's decision was vitiated by bias or significant factual error (see UNAT, Judgement No. 479, Caine v. Secretary General of the United Nations, section III).

143. The Tribunal further points out that the Governor is not bound by opinions of the Disciplinary Board (see, for example, UNAT, Judgement No. 210 of 26 April 1976, Reid v. Secretary-General of the United Nations, in particular section IV, where the Secretary General had come to a different conclusion from the Joint Disciplinary Committee and the Joint Appeals Board; see also ILOAT, Judgement No. 207 of 14 May 1973, Khelifati v. UNESCO, pp. 4 and 5, and, more recently, ILOAT, Judgement No. 1441 of 6 July 1995, Sock v. UNESCO, para. 20).

144. In addition, as regards substantiation of the charges, "it is for the Tribunal to judge, in the light of the evidence submitted by the two parties, whether proof of the charges emerges from the documents in the dossier" (see the aforementioned Khelifati judgement, p. 5). In the present case the Tribunal notes that the file provides objective evidence of many of the matters with which the appellant was charged.

In connection with the FAP, for instance, the appellant neither denies that there was a practice of ten-year withdrawals nor that he was involved in introducing it. With regard, too, to reimbursement of travel expenses, administration of staff loans and recruitment and promotion arrangements a great many deficiencies were brought to light, in particular by the audit reports.

The facts regarding the lack of an inventory of the Fund's fixed assets, the secret recording of the Governor Body's meeting on 13 December 1993 and the episode of the safe are likewise accurate even though the appellant contends that he was not responsible for those matters and that he helped remedy the lack of an inventory.

145. The Tribunal accordingly holds that the Governor was legally entitled to find that the charges were proved.

146. It concludes that this ground of appeal must be dismissed.

C. Proportionateness of the penalty

147. The appellant contends that the decision to impose the impugned penalty was invalidated by legal error in that it contravened the proportionality principle: from the file, read together with the Disciplinary Board's opinion, it is apparent, he submits, that the penalty was disproportionate to any offences he may have committed.

148. He firstly deplores the Disciplinary Board's recommendation, which, he says, did not take the special circumstances of his case sufficiently into account, in particular that he did not take up his duties as Head of Administration and Personnel until 1 January 1991, that the May 1992 audit interfered with the remedial action which he had put in train, that he accomplished a great deal despite the six levels of supervision above him (the two sets of auditors, internal and external, and the Fund's four organs) and that, in performing their work,

the auditors and investigators disregarded the fact that the Fund was a small institution in which financial considerations had long taken precedence over questions of sound day-to-day administration. He accordingly takes the view that the Disciplinary Board's recommendation of downgrading was disproportionate to the offences with which he was charged.

149. He accepts that the Governor was not bound by the Board's opinion but he contends that the two charges upheld by the Disciplinary Board did not amount to offences warranting dismissal and that, in imposing a penalty two degree severer, in the list of penalties laid down in Article 54 para. 2 of the Staff Regulations, than that which the Disciplinary Board had recommended, the Governor contravened the proportionality principle and was guilty of legal error.

150. The Governor maintains that dismissal was not disproportionate to the charges. He points out that downgrading, as recommended by the Disciplinary Board, and the penalty imposed differ by only two degrees of seriousness and that this is a matter which tribunals recognise as falling under the competent authority's discretionary powers. He further states that the penalty was based not only on the charges, which the Disciplinary Board had upheld, but on all the appellant's offences (including matters which the Disciplinary Board had not regarded as offences) since, in the Governor's view, the Board had been lenient in numerous respects. He contends that the number of offences and their seriousness warranted the penalty imposed.

151. In his observations in reply in Appeal No. 195/1994 the appellant maintains that the decision challenged was contrary to the proportionality principle in that the Governor consistently and too readily disregarded the Disciplinary Board's opinion. He adds that the Governor did likewise in each of the cases submitted to the Disciplinary Board "in what [he] cannot but call a purge".

152. The Tribunal points out that it is for the administrative authority - in the present case the Governor - to decide what penalty to impose and the Tribunal cannot substitute its own judgement for the administration (see, *mutatis mutandis*, ATCE, Appeal No. 178/1994, Fender v. Secretary General, para. 39).

153. It likewise points out that, under well-established case-law (see para. 143 above), the Governor is not bound by Disciplinary Board opinions.

154. On the other hand they have no say as to whether a disciplinary measure is called for, administrative tribunals are allowed to satisfy themselves that the punishment is appropriate and to set aside any punishment which is disproportionately severe.

155. In this connection there is error of law if the disciplinary measure is "out of all proportion to the objective and subjective circumstances in which the misbehaviour was committed" (see, for example ILOAT, Judgement No. 203 of 14 May 1973 in the Ferrecchia case; CJEC, Case 46/72, De Greef v. Commission, paras. 45-48).

156. The Tribunal notes that, in imposing a severe penalty, the Governor took into account both the nature of the offences and the appellant's conduct. In doing so he did not exceed his discretionary powers.

157. It takes the view that, despite his grade and duties, the appellant cannot be held responsible for the Fund's general malfunctioning. However, as Head of Administration and Personnel, on grade A5, he had important and delicate duties. In several respects he was unsupervised, reporting direct to the Governor, and most of the matters with which he is charged are attributable to him.

158. For instance, the file (in particular the Violette report of 16 September 1993) shows that in various respects the FAP rules were not properly applied. The FAP management committee, for example, of which the appellant was the secretary, gradually ceased to operate and the management remit given to an outside agency was not detailed enough to prevent aberrations in management of the FAP's assets. Similarly the pension scheme rules were changed although the Administrative Council and Governing Board had not been consulted (see Violette report, Part II, Appendix 4, p. 7/13). The changes were mainly made by the former Governor's regulation of 26 February 1989 introducing ten-year withdrawals, a practice which the inspector regarded as of "doubtful" legality (see his report, Part II, Appendix 4, p. 10/13).

As to whether this practice damaged the FAP, actuarial studies, which were not commissioned until after September 1993, whereas the appellant took up his duties on 1 January 1991, came to different, contradictory conclusions according to the approach adopted.

The Tribunal observes, however, that a savings-scheme approach clearly emerged which was very different from the pension-scheme approach laid down in the rules originally adopted by the Governing Board and the Administrative Council (see Violette report, Part II, Appendix 4, p. 11/13). In addition the new approach required that if the FAP's assets were insufficient to meet pension payments the Administrative Council vote the necessary appropriations to meet the Fund's obligations.

In the Tribunal's view such an arrangement was inherently contrary to the very principle of the pension fund, which was that the employer (the Fund) had a duty to its staff to ensure that after retirement they had regular income. It follows that the new approach was contrary to the purposes for which the FAP was set up.

The Tribunal notes from the first Sharpe report that the appellant approved the practice, informed the staff of it and helped systematise the procedures involved. In addition he linked the withdrawals to repayment of staff house-buying loans.

In the Tribunal's view he helped to introduce a practice contrary to the staff's interests without informing the Fund's supervisory and management bodies and he thereby committed a serious disciplinary offence.

159. The Tribunal further notes that after the Violette report of 16 September 1993 no steps were taken to put an end to the personnel-management and recruitment irregularities recorded in the report, irregularities to which the Governor draws attention in his observations.

It accepts that some irregularities began before the appellant arrived at the Fund, and also that dealing with them will be more gradual in some cases than others (such as the nationality imbalance among the Fund staff, a matter which it will take time for future

recruitment to rectify).

But that does not apply to certain other deficiencies, which should have been more readily remedied.

For instance, the Tribunal takes a very serious view of the appellant's failure to introduce objective recruitment and promotion arrangements. Scrutiny of recruitment since 1 January 1991 shows that until July 1993 no posts were advertised and that profiles of persons appointed did not always match the posts. This allowed accelerated internal promotions as well as recruitment of children of national representatives and children of Fund staff. Again, in September 1993 there were still no job descriptions for posts, and the failure to do anything about the lack of standardised written criteria for staff assessment militated against equal treatment of staff.

Lastly, some staff had special conditions of service - normally attaching to long-term assignments - without the Administrative Council's having been informed. The Tribunal notes that after Ernst and Young's audit report these cases of exceptional status were put a stop to. However, a contract was signed, for the period from 15 February to 31 December 1993, with a staff member who, although absent on leave for personal reasons in New York, was paid as a consultant, contrary to the Fund's rules. In addition the staff member concerned was completely unsupervised, even by the Personnel Department, and the Fund's supervisory bodies were not informed beforehand even though she performed representation work abroad.

The Tribunal notes that the areas at issue accounted for the bulk of the appellant's duties and it takes the view, given the Fund's size that he could have dealt with the irregularities speedily. The additional workload imposed by the audit cannot alone absolve him of blame in these matters.

160. With regard to house-buying loans to staff, which constituted a not insignificant benefit, the file, and more particularly the findings of the Violette report (Part II, p. 17/68), show that the loans were often unduly large in relation to the proportion of cost which staff themselves paid (which in turn meant that the only way of repaying the loan was to make early withdrawals from the FAP); that the rules favoured the higher-paid grades; and that there was no provision for informing the Administrative Council. Further, although steps were taken to improve matters, some requirements were not applied to new loan applications (1993). Lastly the Tribunal observes that the appellant himself received a loan which did not meet the requirements laid down.

In the Tribunal's view these deficiencies are likewise imputable to the appellant, whose grade and duties required that he draw the former Governor's attention to them and refrain from using a facility to which he was not entitled.

161. In the case of the irregularities in the reimbursement of national representatives' and staff members' expenses, irregularities which continued after the audit, the Tribunal again holds that the appellant's failure to take action and introduce more rigorous checking amounted to a serious offence.

162. It also notes Mr Violette's finding (see Part II, para. 79, p. 67/68 of the report) that the

lack of an inventory with valuations was "a serious defect in the Fund's internal control arrangements, regardless of accounting policy". His report states that valuations were under way but that because the appellant, in charge of general services, had not performed them as he went along, there was now a backlog which had necessitated recruiting an additional member of staff. An inventory of the Fund's fixed assets came within the appellant's department's province and he therefore carries some of the responsibility for the lack of an inventory for the period after 1 January 1991.

163. With regard to the charge of making two video recordings of the meeting on 13 December 1993, the Sharpe report of 18 March 1994 points out that the appellant was aware - or should have been - that at its 129th meeting the Governing Board had decided to make recordings of its meetings solely for the secretariat's use, this being one of his department's responsibilities. He is therefore liable for any offence committed in this connection, and he cannot plead in mitigation that the former Governor gave an order on the subject since by the time of the Governing Board's meeting on 13 December 1993 (to elect a new Chair of the Governing Board, a new Chair of the Administrative Council, and a new Governor) the former Governor had already resigned (on 15 November 1993).

164. In the matter of the safe the Tribunal holds that, as this was the second time they had been to the Fund, the appellant was aware that the people brought in were DST officers. They had come about a very important matter - opening the safe of the former Governor, who had not given back the keys - and no one knew what the safe contained. Since the Fund was an international organisation the appellant should have been more circumspect. At the very least he should have informed the new Governor that the people brought in were DST officers and by not doing so he committed a serious offence.

165. Lastly the manner in which the works were commissioned was likewise dubious, particularly as the contract was signed by the appellant, under authority from the Governor, on 19 November 1993, four days after the former Governor's resignation and when no acting Governor had yet been appointed.

166. After examining the file the Tribunal accordingly holds that the matters with which the appellant was charged and which were the basis for his dismissal amounted to serious offences, particularly those relating to the FAP and to staff management and recruitment.

167. In addition the Tribunal observes that at the time of the matters at issue a state of general disorder prevailed at the Fund. Although the Fund's leadership was mainly to blame for the mismanagement, the Tribunal takes the view that the higher the official's grade the greater his accountability and that an official in charge of a department is responsible for any shortcomings or negligence in the handling of matters with which that department is concerned.

168. In the Tribunal's view the fact that some of the irregularities pre-dated the appellant's arrival at the Fund is not sufficient to absolve him of blame. It also holds that the additional workload which the internal audit allegedly created was not a factor such as can excuse the appellant's failure to take action, since the inaction likewise affected the period from January 1991, the date on which the appellant took up his duties, to April 1992, the date on which the audit was commissioned.

169. The Tribunal accordingly finds no manifest disproportion between the offences with which the appellant was charged and the penalty which the Governor imposed.

170. It follows that the allegation of legal error must be dismissed.

171. To sum up no illegality is to be found.

For these reasons the Administrative Tribunal:

Declares the appeals unfounded;

Dismisses them; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 29 September 1995, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. RUSSO

Appendix 1

CHAIR'S ORDER OF 25 APRIL 1994

**in the case of TESSIER, ERNOULD and LELÉGARD v.
GOVERNOR of the Council of Europe Social Development Fund**

THE FACTS

1. The applicants are three officials of the Council of Europe Social Development Fund against whom disciplinary proceedings have been instituted. They hold grade A6, A5 and B6 posts as Director of Research and Loans, Head of Administration and Personnel and Head of General Services.

2. On 25 March 1994 the Governor of the Fund ordered the suspension of the three officials in accordance with the Council of Europe Staff Regulations, which apply to the staff of the Fund.

3. On 11 April 1994 Mr Ernould and Mr Lelégard lodged a complaint with the Governor, pursuant to Article 59 para. 1 of the Staff Regulations objecting to the aforementioned decision.

4. In a letter dated 11 April 1994 which reached the registry on 13 April 1994, the applicants filed an application to the Chair of the Administrative Tribunal for a stay of execution of the suspension orders.

5. On 14 April 1994 the Chair of the Administrative Tribunal invited the Governor to submit any comments he wished to make on the application for a stay of execution.

6. The Governor submitted his comments in a fax dated 15 April 1994. These comments were forwarded to the applicants on 18 April 1994.

7. On 21 April 1994 the applicants submitted their comments in reply. On 22 April, Mr Tessier indicated that he had submitted an administrative complaint on 21 April 1994. On 25 April, the remaining two applicants indicated the date on which they had lodged their complaints.

THE LAW

8. Under Article 59 para. 7 of the Council of Europe Staff Regulations, which according to Resolution 4 (1956) of the Fund's Administrative Council also apply to Fund staff member, an application for a stay of execution of an administrative act may be lodged if the execution of the decision is likely to cause "grave prejudice difficult to redress".

9. The applicants made the application for a stay of execution on the grounds that the execution of the suspension orders in question would cause them grave prejudice difficult to

redress. After questioning the validity and, in particular, the impartiality of the measures taken, the applicants maintain that any compensation or damages, if awarded, would come too late, the harm having already been done in psychological terms.

They further maintain that there can be no possible redress for the prejudice caused to them by public rumour.

In conclusion, the applicants argue that, even if their innocence is ultimately established, they will have no option but to seek other employment, this being extremely difficult given the unemployment situation and their age.

10. The Governor questions the admissibility of Mr Tessier's application, stating that he has requested a stay of execution without asking for his suspension to be annulled. The Governor also argues that it is impossible to rule on the application for a stay of execution without prejudging the main case, in other words, without making an assessment of the nature and gravity of the offences committed by the applicants. In his view, the Disciplinary Board has sole responsibility for such an assessment and its rights would be infringed if the Administrative Tribunal made either an implicit or an explicit assessment of the merits of the case.

The Governor also points out that he has sole responsibility for staff management and disciplinary decisions and that the measures complained of were taken following audits and inspections. He adds that, if it was established that the applicants were not guilty of any disciplinary offence, they would receive appropriate compensation.

11. The Chair of the Administrative Tribunal notes that Mr Tessier lodged his application for a stay of execution before submitting his administrative complaint. He thus requested a stay of execution of an administrative act which he had not yet challenged, and he produced no evidence justifying this course of action. His application must therefore be declared inadmissible.

12. As to the application by Mr Ernould and Mr Lelégard, the Chair observes that the existence of disciplinary proceedings does not present an obstacle to his examining the application. The latter's purpose is to obtain a stay of execution of an administrative act affecting the applicants and against which a complaint may be lodged.

13. The Chair considers that the ordering of suspension does not as such, and in the absence of specific elements, constitute grounds for assuming that the applicants would suffer "grave prejudice difficult to redress" within the meaning of Article 59 para. 7 of the Staff Regulations.

14. The Chair notes that the grounds put forward by the applicants are not sufficient to prove that the execution of the act complained of would cause them "grave prejudice difficult to redress". In particular, it should be noted that the Governor stated in his comments that, if it was established that the applicants were not guilty of any disciplinary offence, they would receive appropriate compensation for any prejudice which might be caused to them by the proceedings undertaken.

15. The Chair points out that his exceptional power under Article 59 para. 7 of the Staff

Regulations also calls for some self-restraint in his exercise (cf. Chair's Order of 31 July 1990, para. 12, in the case of Zaegel v. Secretary General). Furthermore, there is no question at this stage of examining the arguments put forward by the applicants their administrative complaints.

16. It follows from the above 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 para. 7 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Rules of Procedure of the Administrative Tribunal/Appeals Board,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

decide

- to declare inadmissible the application for a stay of execution submitted by Mr Tessier;

- to reject the application for a stay of execution submitted by Mr Ernould and Mr Lelégard.

Done and ordered in Savona, 25 April 1994.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. RUSSO

Appendix 2

CHAIR'S ORDER OF 5 SEPTEMBER 1994

in the case of ERNOULD (II) v. GOVERNOR of the Council of Europe Social Development Fund

THE FACTS

1. The appellant, an official of the Council of Europe Social Development Fund (grade A5), was the subject of disciplinary proceedings as a result of which he was suspended from his duties as Head of Administration and Personnel of the Fund.

2. On 29 June 1994 the Council of Europe's Disciplinary Board ruled that Mr Ernould had committed a disciplinary offence and that in its opinion the appropriate sanction was relegation in step.

On 21 July 1994 the Governor of the Fund dismissed Mr. Ernould with effect from 24 July 1994.

3. In a letter dated 19 August 1994 Mr. Ernould appealed against the aforementioned decision in compliance with Article 59, para. 1 of the Staff Regulations.

4. In a letter also dated 19 August, which the Registry received on 23 August 1994, the appellant lodged an application with the Chair of the Administrative Tribunal for a stay of the decision to dismiss him.

5. On 24 August 1994 the Chair of the Administrative Tribunal invited the Governor to send him his observations on the application for a stay of execution.

6. The Governor sent his observations by fax on 26 August 1994. These comments were forwarded to the appellant the same day.

7. On 29 August 1994 the appellant submitted his observations in reply.

THE LAW

8. Under Article 59, para. 7 of the Staff Regulations of the Council of Europe, which, according to Resolution no. 4 of 1956 of the Fund's Administrative Council, are applicable to Fund staff members, an application for a stay of execution of an administrative act may be made if such execution is likely to cause "grave prejudice difficult to redress".

9. The applicant's ground for this application for a stay of execution is that execution of the decision complained of would cause him grave damage difficult to redress.

First, he considers that if the case is heard before the Administrative Tribunal the situation will be very different and infinitely more heavily weighted against him if he is removed from his post.

Furthermore, in terms of his personal reputation and dignity, not being removed from his post would be far preferable to any form of redress.

10. The Governor considers that Mr. Ernould has failed to demonstrate that the damage caused would be "difficult to redress". First, he disputes that the Tribunal, ruling on the merits of the case, would necessarily be influenced by the fact that Mr Ernould had been removed from his post. Furthermore, he maintains that if the Tribunal, ruling on the merits of the case, were to conclude that the decision to remove Mr Ernould from his post was irregular, it would obviously take appropriate measures to redress the situation and its ruling would be binding on the Governor under the terms set out in Article 60 of the Staff Regulations.

11. In his observations in reply, the appellant argues that the damage is obvious: first, the pecuniary damage would be irreparable because it would be impossible for him to find employment at his age and, second, the non-pecuniary damage would be irreparable because despite his protestations of innocence, many people would harbour doubts as to his integrity.

12. The Chair considers that the decision to remove the appellant from his post does not in itself, and in the absence of specific elements, constitute a hypothesis generating grave damage difficult to redress for the appellant within the meaning of Article 59, para. 7 of the Staff Regulations.

13. Furthermore, he considers that the grounds put forward by the appellant are not sufficient to demonstrate that execution of the decision complained of would cause him "grave damage difficult to redress".

When the Tribunal examines the legality of a disputed measure as part of appeal proceedings, it disregards whether the disputed measure has already been executed or not.

Furthermore, with regard to the appellant's other submission, there is no reason at this juncture to prejudge either the outcome of the contentious proceedings or the scope of the implementing measures that would be required as the result of a possible decision by the Administrative Tribunal (order of the Chair dated 25 September 1992, paragraph 12, in the case of Müller-Rappard v. the Secretary General).

14. The Chair points out that his exceptional power under Article 59, para. 7 of the Staff Regulations also calls for some self-restraint in his exercise (cf. Chair's order of 31 July 1990, paragraph 12, in the case of Zaegel v. the Secretary General). Furthermore, there is no question at this stage of examining the arguments put forward by the complainants in their administrative complaints.

15. Finally, due note has been taken of the Governor's statement to the effect that if an appeal is submitted to the Administrative Tribunal and it then rules that the removal from post complained of was in fact irregular, the Governor is bound by the Tribunal's decision.

16. It follows from the above considerations that the application for a stay of execution is unfounded.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, para. 7 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Rules of Procedure of the Administrative Tribunal/Appeals Board,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL

Decide

- to reject the application for a stay of execution submitted by Mr Ernould.

Done and ordered in Savona on 5 September 1994.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. RUSSO