CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeals Nos. 190/1994, 196/1994, 197/1994 and 201/1995 (LELÉGARD I, II, III and IV 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 Lelégard lodged his first appeal on 7 July 1994, the second and third appeals on 7 November 1994 and the fourth appeal on 23 February 1995. They were registered on 12 July 1994, 10 November 1994 (the second and third appeals) and 24 February 1995 respectively, under file numbers 190/1994, 196/1994, 197/1994 and 201/1995.

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 suspension decision taken on 25 March 1994. In an order dated 25 April 1994 the Chair of the Tribunal refused the application.

3. The appellant lodged supplementary memorials on 16 September 1994, 5 December 1994 (in connection with the second and third appeals) and 23 February 1995.

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

observations in reply on 21 October 1994, 30 January 1995 (in the second and third appeals) and 3 April 1995.

5. The appellant lodged observations in reply to these on 18 November 1994, 7 April 1994 (in the second appeal), 6 March 1995 (in the third appeal) and 15 May 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 in the proceedings. It said, however, that it might order certain investigative measures in the light of the hearings.

8. After deliberating on 26 June 1995 it decided, under Rule 14 of its Rules of Procedure, to join the four appeals as being closely interconnected.

9. The public hearing took place in Strasbourg on 26 June 1995. The appellant was represented by Mr J.-D. Sicault, who practises as an avocat in the Paris Court of Appeal; the Governor of the Council of Europe Social Development Fund was represented 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 written 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 service with the Council of Europe Social Development Fund on 1 January 1983, on grade B6. He was employed under fixed-term contracts, the last of which, a two-year contract, was dated 17 December 1993. As Head of General Services in the Administration and Personnel Department he was responsible to the Head of Administration and Personnel.

He had two sets of disciplinary proceedings instituted against him and on each occasion it was also decided to suspend him. After the first set of proceedings the penalty imposed was deferment of advancement to a higher step, while after the second set of proceedings he was dismissed.

The appellant has lodged four appeals. Two of these challenge the two decisions to institute disciplinary proceedings and suspend him and the other two are against the two penalties imposed 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 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 the 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 produced 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 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 the general situation at the Fund, 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 Van den 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. The report was concerned with five members of staff but not the appellant.

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 six of the staff, who included the appellant.

In his report Mr Sharpe said he had not been able to ascertain whether the appellant had brought it to the Governor's notice that there was no inventory of the Fund's fixed assets. Mr Sharpe expressed surprise, however, that although he had been responsible for management and insurance of the Fund's furniture and equipment for ten years, the appellant had not felt it necessary to have an inventory and had not drawn up an inventory of his own accord. In addition he stated that he was not satisfied with the explanations the appellant had given him concerning the

making of two recordings of a Governing Board meeting held on 13 December 1993 and the safes episode.

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

25. The appellant lodged a complaint, followed by an appeal (No. 190/1994), against the decision. After the disciplinary proceedings the Governor decided to defer the appellant's advancement to a higher step, a decision against which the appellant likewise lodged an appeal (No. 196/1994).

26. During the proceedings further matters came to light and when the Disciplinary Board refused to consider them on account of the time limit for delivery of its opinion, the Governor instituted further disciplinary proceedings and at the same time suspended the appellant again. These further proceedings were the subject of a third appeal (No. 197/1994). After the proceedings the Governor dismissed the appellant, a decision which the appellant again challenged (Appeal No. 201/1995).

First appeal (No. 190/1994)

27. 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 date he drew up the report referring the case to the 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 being paid in full. The Chairman of the Disciplinary Board received the referral report on 29 March 1994 and sent it to the appellant's lawyer on 7 April 1994. On 11 April 1994 the three reports of the audit together with Mr Violette's report and Mr Sharpe's two reports were forwarded to the appellant.

28. In the referral report the Governor charged the appellant with various irregularities, including:

a) not having an inventory of the Fund's fixed assets;

b) 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;

c) bringing in officers of the DST (the French counterintelligence service) to examine the mechanism and combination of the safe in the office of his superior (the Head of Administration and Personnel) and on a later occasion to open the safe in the Governor's office;

d) mismanaging the Fund's parking spaces and

e) entering the Fund's premises without permission on 28 March 1994, while under suspension.

29. 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 Council of Europe Disciplinary Board had jurisdiction over the Fund's staff, he complained 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 decisions complained of caused him prejudice difficult to redress.

30. 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 taken on 25 March 1994 (see para. 2 above). In an order dated 25 April 1994 the Chair of the Tribunal refused the application.

31. 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 particular seriousness of the matters with which the appellant was charged justified the decisions.

32. The Disciplinary Board heard the appellant and the Governor together with their lawyers on 25 and 30 May 1994 respectively.

33. 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 hand, with further matters to do with conversion work (see para. 26 above) 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 delivery of its opinion.

34. On 23 June 1994 the Disciplinary 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.

35. On the substantive issues it held that only the appellant's entering the Fund's premises without permission while he was under suspension (see para. 28 (e) above) amounted to misconduct.

It said that the appellant could not be held responsible for the lack of an inventory of the Fund's fixed assets (see para. 28 (a) above) because of his grade and because in 1989 the Governor had allegedly told him not to concern himself with the matter.

It held that there had not been any disciplinary offence regarding the safes (para. 28 (b) above), the two recordings (para. 28 (c) above) or the parking spaces (para. 28 (d) above).

It considered that the appellant's work at the Fund left a great deal to be desired but stated that, on the basis of the documentary and other evidence submitted by the Governor and the appellant, it was not satisfied that the Governor had shown any disciplinary offence to have been committed that warranted punishment more severe than a written warning.

36. 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. 196/1994)

37. In a decision of 21 July 1994 the Governor imposed the penalty of deferment of the appellant's advancement to a higher step. He agreed with the Disciplinary Board that the appellant's work left a great deal to be desired. Contrary, however, to the Board's findings, he took the view that the appellant had been actively involved in the anomalies affecting the Fund's management, that, by virtue of his duties, he was directly and personally responsible for the lack of an inventory of the Fund's fixed assets and for the secret recording of the Governing Board's meeting, that he had committed a serious offence in bringing in DST officers to open the Governor's safe and that he had abused his position in appropriating Fund parking spaces without paying for them.

38. In a complaint dated 19 August 1994 the appellant challenged the lawfulness of the decision of 21 July 1994. He contended that the Disciplinary Board lacked jurisdiction and that there had been procedural irregularities. The Governor, he said, had based his decision on charges which he denied and which the Disciplinary Board had largely dismissed. Lastly the penalty was manifestly disproportionate to the charges, and the decision imposing it was thus invalidated by legal error.

39. On 2 September 1994 the Governor dismissed the complaint challenging the deferment of advancement to a higher step on the grounds that the proceedings were lawful, the Disciplinary Board's opinion was purely advisory and the penalty was proportionate to the charge which the Board had upheld. The decision rejecting the complaint was served on the appellant on 9 September 1994.

40. On 7 November 1994 the appellant lodged an appeal against the Governor's decision of 21 July 1994 to defer his advancement to a higher salary step.

Third appeal (No. 197/1994)

41. After the Governor submitted additional observations to the Disciplinary Board on 13 June 1994 concerning further matters (to do with conversion work) which had come to his knowledge on 25 May 1994, the Disciplinary Board informed the parties' lawyers, on 15 June 1994, that it had decided not to consider the further allegations on account of the time limit for delivery of its opinion.

42. The Governor regarded the further matters as possibly justifying further disciplinary proceedings against the appellant and consulted the Chairman of the Disciplinary Board on 20 July 1994.

On 21 July 1994 he gave the appellant a hearing and drew up the referral report.

43. On the same date he decided to suspend the appellant as from 24 July 1994. During the suspension the appellant continued to be paid in full.

The referral report dated 21 July 1994 reached the Chairman of the Disciplinary Board by fax on 29 July 1994 and by post on 1 August. It was forwarded to the appellant's lawyer on 1 August 1994 and the appellant was sent the file during the proceedings.

44. In the referral report of 21 July 1994 the Governor charged the appellant with the following offences:

a) receiving in addition to his salary, while not contributing to the Fund's pension scheme, an amount equal to the employer's contribution which the Fund should have paid into the scheme;

b) on the day the new Governor was elected, getting the Head of Personnel to renew his contract when the latter had no authority to do so;

c) underestimating the cost of conversion work which the previous Governor had embarked upon at the Fund's headquarters;

d) not obtaining permission from the co-owners for work carried out by the Fund in parts of the building which were in common ownership;

e) commissioning the work on unacceptable terms;

f) not taking out the necessary insurance in time with the result that the work started late;

g) recabling the fourth-floor computer system with cable that was incompatible with other systems;

h) appropriating two parking spaces without paying for them, contrary to his statements when heard on 21 July 1994;

i) making private use of cellars and storage space belonging to the Fund, and

j) insuring the Fund's official vehicle in his own name with a firm which specialised in insurance of vintage motor cars and which insured his own vintage motor car.

45. In a complaint dated 19 August 1994 the appellant challenged the decisions of 21 July 1994 to institute disciplinary proceedings and suspend him.

He referred, *mutatis mutandis*, to the grounds set out in his complaint of 11 April 1994 (the subject of Appeal of No. 190\94) concerning the first set of disciplinary proceedings and the first decision to suspend him. Thus he implicitly disputed that the Disciplinary Board had jurisdiction in respect of Fund staff, complained that the procedure leading to the suspension had been unlawful, alleged that the matters with which he was charged were not disciplinary offences and pointed out that the decisions complained of caused him prejudice difficult to redress.

46. On 2 September 1994 the Governor dismissed the complaint: the Disciplinary Board had jurisdiction, the procedure had been lawful and the decisions were justified by the particular seriousness of the offences.

47. On 19 September 1994 the Disciplinary Board decided to hold a hearing of both parties. On 14 October 1994 the appellant was heard, evidence was taken from four witnesses, and the lawyers of both parties made submissions.

48. On 25 October 1994 the Board delivered an opinion in which it held 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.

49. On the lawfulness of the decision, it firstly referred to the prevailing laxity and informality at the Fund during the period with which most of the charges were concerned and said that a staff member of lower grade such as the appellant could scarcely be expected to take a stand against the general tendency, particularly one who was on fixed-term contracts and thus reliant on the administration for his continued employment.

50. It held itself no longer competent to express a view on the charge of appropriating parking spaces: the Governor had already punished the appellant on that count and the charge was not a new one. In the Board's view the Governor had not shown the appellant to commit disciplinary offences warranting any disciplinary measure.

51. On 7 November 1994 the appellant appealed against the Governor's decisions of 21 July 1994 to institute disciplinary proceedings against him and suspend him.

Fourth appeal (No. 201/1995)

52. In a decision dated 18 November 1994, after giving the appellant a hearing on the same day, the Governor dismissed him with effect from 21 November 1994. His stated grounds for doing so were that:

a) the appellant had committed an offence in agreeing to be paid more than the regulation amount, the additional amount being equal to the employer's contribution which the Fund should have paid into the pension scheme on his behalf;

b) the appellant personally carried some of the responsibility for the underestimate of the cost of the conversion work and for the terms on which the work had been commissioned, and

c) it was the appellant's failure to take out insurance cover for the work in time that had caused it to begin late and when heard on 21 July 1994 he had lied about having exclusive use of two parking spaces for which he did not pay.

The Governor further stated that his decision took into account the appellant's overall conduct.

53. In a letter dated 29 November 1994 the appellant challenged the lawfulness of the dismissal decision dated 18 November 1994, on the grounds that the Disciplinary Board lacked jurisdiction, there had been procedural irregularities, the decision was factually in error in that it was based on charges which the appellant denied and which the Disciplinary Board had dismissed, the charges related to matters not of a disciplinary nature, and the penalty was disproportionately harsh. The appellant further pleaded victimisation by the Governor, particularly as the Disciplinary Board had recommended that no disciplinary measure be imposed on him.

54. By letter dated 26 December 1994 the Governor dismissed the appellant's complaint: the proceedings, he said, had been lawful, the Disciplinary Board's opinion was purely advisory and the penalty was proportionate to the offences, which compounded those with which the first set of disciplinary proceedings had dealt and revealed conduct incompatible with working as an international civil servant.

55. On 23 February 1995 the appellant appealed against the Governor's decision of 18 November 1994 to dismiss him.

THE LAW

56. The appellant's four appeals are directed against the Governor of the Council of Europe Social Development Fund's decisions of 25 March 1994 and 21 July 1994, both of which instituted disciplinary proceedings against him and suspended him (Appeals Nos. 190/1994 and 197/1994) and the decisions of 21 July 1994 and 18 November 1994, the first of which deferred his advancement to a higher step and the second of which dismissed him (Appeals Nos. 196/1994 and 201/1995).

57. Under Rule 14 of its Rules of Procedure the Tribunal decided to join the appeals, as they were closely connected (see para. 8 above).

58. In Appeals Nos. 190/1994 and 197/1994 the appellant firstly challenges the lawfulness of the disciplinary proceedings. He alleges that the Disciplinary Board lacked jurisdiction and that the procedure laid down in the Staff Regulations was contravened. He likewise maintains that the suspensions were imposed after procedure that contained irregularities. In Appeals Nos. 196/1994 and 201/1995 he reiterates the allegations made in Appeals Nos. 190/1994 and 197/1994 concerning procedural irregularity.

He challenges the two suspension decisions and the two decisions instituting disciplinary proceedings as unjustified and therefore illegal.

He denies the charges and disputes that they relate to disciplinary matters. He further argues that the penalties imposed are disproportionate to the charges. In Appeal No. 201/1995 he lastly complains of having been victimised by the Governor, contrary to the principles of impartiality and good faith.

Lastly he complains that defence rights were contravened. In his observations in reply to the Governor's observations in Appeal No. 196/1994 he takes strong exception to the Governor's bringing a sixth charge of having a hand in management irregularities at the Fund, a charge not put to the Disciplinary Board, in contravention, he argues, of defence rights.

59. The Governor raises the preliminary objection that Appeal No. 196/1995 is inadmissible on account of failure to meet the sixty-day time limit laid down in Article 60 para. 3 of the Staff Regulations. The appellant disputes that he overran the time limit.

The Governor maintains, under Appeals Nos. 190/1995 and 197/1994, that the decisions dated 25 March 1994 and 21 July 1994 to institute disciplinary proceedings against the appellant and suspend him were legally founded and taken after lawful procedure.

Under Appeals Nos. 196/1994 and 201/1995 he repeats his assertion that there were no procedural irregularities and maintains that the penalties were factually well-founded and not disproportionate to the offences. Under Appeal No. 201/1995 he further states that their proportionality must be assessed on the basis of the appellant's overall conduct.

I. ADMISSIBILITY OF APPEAL NO. 196/1994

60. The Tribunal must first consider the Governor's objection that Appeal No. 196/1994 is inadmissible.

61. 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.

62. 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 the appeal reaches the Tribunal and is registered. In the present case the appeal was posted on 7 November 1994, within the prescribed period.

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

> "An appeal shall be lodged in writing within sixty 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".

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

65. 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.

66. 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.

67. 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 TWO SUSPENSIONS

68. The appellant maintains that the two suspension decisions were unlawful in that they were taken after procedure which contained irregularities and in that they were unfounded.

A. Lawfulness of the two suspensions procedures

69. The appellant maintains that the procedure which led to the suspensions was unlawful in that the Chairman 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.

70. 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 had no hand in appointing the Council of Europe Disciplinary Board, its Chair was not competent to be consulted in proceedings against a Fund official.

71. He contends that under Article 57 para. 1, taken together with Article 55 para. 3, of the Staff Regulations, suspension cannot be imposed until disciplinary proceedings have been instituted and that neither suspension met that requirement. In Appeal No. 190/1994 the Governor consulted the Chair of the Disciplinary Board by telephone at 10.45 am on 22 March 1994 and in Appeal No. 197/1994 he consulted him, also by telephone, on 20 July 1994, in both cases before disciplinary proceedings had started (they were instituted on 25 March 1994 and 21 July 1994 respectively).

72. Lastly, in Appeal No. 196/1994, he also contends, as regards the purpose of the prior hearing, that the Governor had decided to suspend him even before giving him an opportunity to present his defence. 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.

73. 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 he was required to consult, under Article 57 para.1 of the Staff Regulations, before taking the decision to suspend the appellant.

74. He likewise maintains that the procedure used was lawful as to the time at which the two suspension decisions were taken. He says there is no provision in the Staff Regulations that specifies at what point a suspension decision must be taken. In addition, the suspensions were precautionary measures taken in the interests of the service. In both cases disciplinary proceedings against the appellant were already under way when the suspensions were imposed.

75. Under Appeal No. 196/1994 he argues that, with regard to the time at which an official is suspended, the appellant confuses consulting the Chairman 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 disciplinary proceedings. Under Appeal No. 201/1995 he also expresses the view that the appellant persists in confusing the suspension procedure with the disciplinary proceedings on the one hand and the instituting of disciplinary proceedings with making the referral report available on the other, and that the appellant is mistaken in arguing that consultation of the Chairman of the Disciplinary Board (for

purposes of a suspension) must take place after disciplinary proceedings have been instituted.

76. 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). 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".

77. The Governor's consulting the Chairman of the Disciplinary Board before suspending the appellant was in accordance with Article 57 para. 1 of the Staff Regulations. The Tribunal finds that the Chair of the Disciplinary Board was the authority competent to be consulted under that provision. It refers, mutatis mutandis, to its arguments below (see para. 98 ff) on the question whether the Council of Europe Disciplinary Board had jurisdiction in proceedings against staff of the Fund.

78. 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 report referring the case to the Disciplinary Board is what institutes disciplinary proceedings.

79. 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 the two sets of disciplinary proceedings was certainly preceded by the Governor's consultations of the Chair of the Disciplinary Board with a view to suspending the appellant as well as by the suspension decisions themselves, 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.

80. 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.

81. 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*).

82. The Tribunal accordingly finds that the suspension decisions were taken after lawful procedure.

B. Justification for the suspensions

83. In Appeal No. 190/1994, in which he refers the Tribunal to his observations in his second appeal (No. 196/1994), the appellant likewise challenges the suspensions on substantive grounds.

84. 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.

85. In this connection the appellant points out that the penalty imposed on him - deferment of advancement to a higher step - is not one of those justifying suspension under Article 57 para. 1 of the Staff Regulations. He concludes that the decision to suspend him therefore had no legal basis.

86. Similarly, in Appeal No. 197/1994, he challenges the decision to suspend him with effect from 24 July 1994. He refers to his arguments in his first appeal (No. 190/1994) and alleges that the decisions complained of are indicative of the Governor's having victimised him. In the appellant's view, on evidence of such doubtful relevance the Governor was unjustified in suspending him again and should have drawn the appropriate conclusions from the first set of proceedings, which resulted in a penalty (deferment of his advancement to a higher salary step) that did not allow suspension.

87. The Governor argues, in Appeals Nos. 190/1994 and 197/1994, 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.

88. Here the Governor stresses, under Appeal No. 190/1994, the cumulative significance of at least three serious disciplinary offences (not having any inventory of fixed assets, making two recordings of the Governing Board's meeting on 13 December 1993, and the episode of the safes). Similarly, under Appeal No. 197/1994, he stresses the occurrence of not one, but at least five serious disciplinary offences (knowingly asking or agreeing to be paid improperly the employer's contribution to the pension scheme and thus a higher than regulation salary; getting the Head of Administration and Personnel, who had no authority to do so, to renew his contract on 17 December 1993 without the acting or new Governors' being informed; commissioning the work at the Fund's headquarters on questionable terms; delay to and underestimating the cost of the work; lying about the parking spaces he had appropriated and not paid for; and making private use of Fund cellars without permission).

89. The Governor further points out that he is not bound by Disciplinary Board opinions. In the Governor's view the Board here misjudged the seriousness of the charges and failed to grasp the impossibility, in view of his conduct, of keeping the appellant in post. This is why he imposed more severe penalties than the Board had recommended penalties, which retrospectively justify suspending the appellant.

90. 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.

91. The Tribunal holds that the fact that the penalty ultimately imposed after the first disciplinary proceedings was not as severe as the penalties which may justify suspension is not, in itself, a consideration such as to render the suspension decision, which was a precautionary measure, illegal. In so far as, at the time of the suspension decision, the offence was "liable" to justify suspension and in so far as the Governor's decision was not unreasonable, the Governor did not exceed his powers.

92. In addition the Tribunal notes that during both suspension procedures the appellant continued to be paid in full.

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

III. LAWFULNESS OF THE TWO SETS OF DISCIPLINARY PROCEEDINGS AND JUSTIFICATION FOR THE TWO DECISIONS TO INSTITUTE THEM

94. The appellant challenges on both procedural and substantive grounds the two decisions to institute disciplinary proceedings.

Each party advances the same arguments in all four appeals, either elaborating on or referring to observations already lodged.

A. Lawfulness of the two sets of disciplinary proceedings

95. The appellant maintains that both decisions to institute disciplinary proceedings against him were illegal because they 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. Jurisdiction of the Disciplinary Board

96. The appellant maintains that the decisions complained of were unlawful in that the Board does not have jurisdiction over Fund staff. He points out that Fund staff had 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 decisions complained of are null, having been taken on the basis of an opinion delivered by a body which did not have jurisdiction.

97. 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.

98. 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 ".

99. 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).

100. 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".

101. 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.

102. 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.

103. 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, to 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."

104. 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.

2. Procedural soundness of the two sets of disciplinary proceedings

105. 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 in several respects.

a) The sequence of procedural steps

106. The appellant alleges, in both Appeal No.190/1994 and Appeal No.197/1994, that both decisions 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 any of the three severest disciplinary measures, consultation with the Chairman 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).

107. The appellant contends firstly that the Governor informed him of the suspension decisions during the hearings and not, as the Governor maintains, at the end of them. Since, he alleges, the instituting of disciplinary proceedings must precede the suspension, this proves that the decisions 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 decisions to institute disciplinary proceedings unlawful.

108. 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.

109. Under Appeal No.190/1994 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.196/1994 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 institute disciplinary proceedings.

110. Similarly, under Appeal No.197/1994, the Governor states that, in accordance with Article 57 para. 1 of the Staff Regulations, he consulted the Chairman of the Disciplinary Board on 20 July 1994 and told him that he was contemplating taking disciplinary proceedings against the appellant and suspending him. On 21 July 1994 he gave the appellant a hearing, as required by Article 56 para. 1, and informed him at the end of the hearing that he intended reopening the disciplinary proceedings he had just closed. 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. 201/1995 he adds in this connection that the appellant confuses, among other things, the instituting of disciplinary proceedings and communication of the referral report.

111. 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 concerned" 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".

112. 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, 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).

113. The Tribunal has considered all the documentary and other evidence which the parties have submitted, including the Disciplinary Board's opinion. The documentary evidence shows that the Governor gave the appellant a hearing on 25 March 1994 in connection with the first disciplinary proceedings and on 21 July 1994, and that on those same dates he instituted disciplinary proceedings by signing the referral reports provided for in Article 2 para. 2 of Appendix X. Here, the Tribunal notes, the parties disagree. The appellant maintains that the referral reports had already been written and signed before the hearings whereas the Governor contends that he did not sign them 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.

114. The Tribunal notes that the appellant's hearings consisted in interviews in which he had the opportunity to provide explanations and clarifications. In the Tribunal's view, that the reports may have been prepared beforehand does not make the hearings any less precedent.

115. It further observes that, even though the appellant may have had the impression that the Governor's decisions had already been taken, it finds no reason to draw any such inference itself. Even assuming the referral reports had been signed beforehand, it remained open to the Governor not to forward them to the Disciplinary Board and thereby institute disciplinary proceedings. Lastly and most importantly, as the Governor pointed out at the Tribunal hearing on 26 June 1995, only three of the six people who were given hearings 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

116. In Appeals Nos. 190/1994 and 196/1994 the appellant 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 ten days 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 to the Staff Regulations required.

117. Similarly, in Appeal No.201/1995, the appellant's premise is that, under Article 57 para. 1 taken together with Article 55 para. 3 of the Staff Regulations, it is not permissible to impose a suspension until after disciplinary proceedings have been instituted. This presupposes, he argues, that on 21 July 1994, the date of the second suspension decision, the second set of disciplinary proceedings had already been instituted. However, on that date the report constituting the decision to bring proceedings had not yet been communicated to him and he was therefore not aware of the precise charges against him.

118. In addition he complains that at his hearing by the Governor on 25 March 1994 he was informed of the decision to institute disciplinary proceedings even though he was still unaware of the content of Mr Sharpe's second report and when he had not had any opportunity to present observations in the presence of his lawyer.

119. 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 were therefore unobjectionable from this standpoint.

120. The Tribunal notes that, in Appeal No.190/1994, 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 7 April 1994. The three audit reports, the inspector's report and Mr Sharpe's two reports were forwarded to the appellant on 11 April 1994. Similarly, in Appeal No.197/1994, the Chairman of the Disciplinary Board received the referral report dated 21 July 1994 by fax on 29 July 1994 and by post on 1 August. The report was forwarded to the appellant's lawyer on 1 August 1994 and the file was sent to the appellant during the proceedings.

121. 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.

122. It notes that, in the first set of disciplinary proceedings, there was undoubtedly a considerable lapse of time before the referral report was made available, though the Easter holidays were a contributory factor.

123. This, however, does not affect the legal position since the 15 days within which the appellant was required to lodge observations do not start running, under Article 5 (1) of Appendix X, until "the date of receipt initiating disciplinary proceedings", which is the only date with any legal effect.

124. As regards the appellant's allegation that the disciplinary proceedings were instituted without his having seen Mr Sharpe's second report or had any opportunity to present observations in the presence of a lawyer, the Tribunal points out that, under Article 3 of Appendix X to the Staff Regulations, a staff member, on receiving the referral report, is entitled to see his complete personal file and take copies of all documents relevant to the proceedings and that this was complied with in the present case. The Tribunal refers, in addition, to paragraphs 80 and 81 above.

125. It therefore cannot find any illegality under this ground of appeal, which must therefore be dismissed.

B. Justification for the disciplinary proceedings

126. The appellant maintains that the decisions to institute disciplinary proceedings were likewise illegal on account of the Governor's reasons for doing so.

127. In Appeal No. 190/1994 he refers to his observations on this question in Appeal No. 196/1994, which contests the penalty (deferment of advancement to a higher step) imposed by the Governor after the first disciplinary proceedings. He points out that suspicions and the allegation that, at the hearings he was given, he had not been able to give satisfactory explanations of the matters with which he was charged are the sole justification the Governor offers for instituting disciplinary proceedings. In Appeal No. 197/1994 the appellant refers to these same observations.

128. In addition, more particularly in connection with Appeals Nos. 196/1994 and 201/1995, he maintains that the context to the cases was in actual fact political and the Governor bent on "getting rid of the former management team".

129. The Governor 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.

130. In Appeal No. 190/1994 the Governor refers, in this connection, to an omission and various offences by the appellant which the second Sharpe report brought to light (not having an inventory

of the Fund's fixed assets; making two recordings of the Governing Board's meeting on 13 December 1993; admitting two DST officers to the Fund's premises to have them take away the lock of a safe for examination and repair; and the decision (which the Governor stepped in to prevent being put into effect) to have them open the safe in the Governor's office. In the Governor's view the seriousness of these matters (especially when taken together) and the appellant's inability to give satisfactory explanations for them justified the bringing of disciplinary proceedings. The Governor further observes that during the disciplinary proceedings the appellant entered the Fund's offices although under suspension. He lastly points out that the Disciplinary Board held that the appellant had committed a disciplinary offence.

131. Similarly, in Appeal No. 197/1994, the Governor states that on 13 June 1994 he brought further matters to the notice of the Disciplinary Board, whose Chairman told him that, on account of the Board's time limit, he should institute further disciplinary proceedings if he saw fit. In the Governor's view there were several matters that warranted further proceedings. He charges the appellant with knowingly asking or agreeing to receive employer's pension contributions he was not entitled to and thus a higher than regulation as well as with getting the Head of Administration and Personnel, who had no authority to do so, to renew his contract on 17 December 1993 without either the acting Governors or the new Governor being informed. A further charge concerns the manner in which work at the Fund's headquarters was commissioned, delay to the work and underestimation of its cost. The Governor says that the appellant lied about parking spaces which he allegedly appropriated without paying for them and he accuses him of making private use of cellars belonging to the Fund. He contends that the number of offences and their seriousness justified further disciplinary proceedings.

132. 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.

133. In the present case the Tribunal notes that defence rights were complied with (see para. 80 and para. 120 above). It observes that, as is clear from the file, the Governor took the decisions to institute disciplinary proceedings in the light not only of various reports which uncovered irregularities committed by the appellant among others but also of further matters which were discovered during the proceedings. In addition he gave a clear statement of his grounds for instituting the proceedings.

134. 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 PENALTIES

135. The appellant firstly alleges that defence rights were contravened by the Governor's basing himself on a sixth charge (having a hand in management irregularities at the Fund) without ever substantiating it, providing any explanations concerning it or submitting it to the Disciplinary Board.

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

Lastly he maintains that the penalties were disproportionate to the charges and that the Governor displayed bias and contravened the principle of good faith.

A. The alleged contravention of defence rights

136. The Tribunal notes that in his observations in reply of 7 April 1995 in Appeal No. 196/1994 the appellant "takes strong exception" to the Governor's reliance on a sixth charge, that of having a hand in management irregularities at the Fund, which, he maintains, was never substantiated, explained or submitted to the Disciplinary Board. He alleges that defence rights were thereby contravened.

137. The Tribunal notes that the appellant did not refer to this matter in his complaint of 19 August 1994 and that since 21 July 1994 he has not asked the Governor for any explanation of the charge. It was not until 7 April 1995, in his observations in reply in Appeal No. 196/1994, that he raised this complaint. In the oral proceedings the Governor did not dispute the admissibility of the complaint.

138. Whatever view is taken, the Tribunal holds that this ground of appeal is in any case unfounded for the following reasons.

139. In his decision of 21 July 1994 deferring the appellant's advancement to a higher step, the Governor said, in the statement of reasons, that the appellant had played an active part in the irregularities affecting management of the Fund.

140. The Tribunal regards this more as a summary of the charges which follow than a charge in itself. However, even assuming that it constitutes a further charge in its own right, not submitting it to the Disciplinary Board did not interfere with defence rights to the extent of rendering the proceedings defective. 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 has delivered its opinion, the Secretary General (in this case the Governor) takes his decision within one month and after first hearing the staff member. The appellant was then able to challenge the decision in his complaint of 19 August 1994 as well as in the present appeals to the Tribunal, in proceedings complying with the adversariality requirement as well as with defence rights generally.

141. The Tribunal accordingly takes the view that the proceedings were lawful and that there was no contravention of defence rights. This ground of appeal must therefore be dismissed.

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

142. In Appeals Nos. 196/1994 and 201/1995 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 Articles 54 ff of the Staff Regulations, which deal with 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 submits that what is meant here is misconduct.

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.

143. In addition he denies the charges on which the Governor based the penalties, which, he alleges, are illegal on account of factual error.

144. In Appeal No. 196/1994, with regard to the only charge which the Disciplinary Board upheld (trespass on the Fund's premises while under suspension), the appellant maintains that the Governor tried to legitimise the penalty by heaping charge upon charge and by taking charges into account which the Disciplinary Board had rejected. He refers to the Disciplinary Board's finding that he could not be blamed for the lack of an inventory of the Fund's fixed assets on account of his grade and because in 1989 the then Governor had told him it was not his responsibility. In the matter of the safes and the two recordings the Board opined that no disciplinary offence had been committed, and that was also its finding on the question of parking spaces. In the appellant's view the Governor was not entitled to disregard his explanations and the findings of the Disciplinary Board, which had conducted a thorough enquiry. He alleges that the decision to defer his advancement to a higher step was thus flawed by factual error.

145. In Appeal No. 201/1995 he likewise denies the charges on which the Governor based his decision to dismiss him. He points out that, in the Disciplinary Board's view, none of the further charges warranted a disciplinary measure, and he contends, as in Appeal No. 196/1994, that the Governor was not entitled to disregard his explanations and the findings of the Disciplinary Board, which had conducted a thorough enquiry.

146. The Governor maintains that the charges are factually accurate and that the appellant's denial of them is mere assertion, relying solely on the Disciplinary Board's findings that no disciplinary offences were involved. The Governor points out that Disciplinary Board opinions are for his guidance only and that he is not bound by them in his assessment of fault.

147. In the present case he takes the view 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.

148. Under Appeal No. 196/1994 he states that the penalty was based on various charges: entering the Fund's premises without permission, having a hand in management irregularities at the Fund, not having an inventory of the Fund's fixed assets before 1991 and not revaluing it since, bringing in DST officers to open the Governor's safe, secretly recording the Governing Body's meeting on 13 December 1994, and appropriating Fund parking spaces.

149. The Governor firstly observes that the appellant acknowledges there was no inventory while trying to absolve himself of blame by relying on instructions allegedly given by the previous Governor but of which there is no proof. The Governor maintains that an inventory was one of the appellant's responsibilities and that, having been appointed in 1983, he took six years to address the task. This, he argues, was not a matter merely of not doing the job properly, a question merely of standard of work. He submits that it amounted to a contravention of Article 30 para. 1 of the Staff Regulations and thus to a disciplinary offence. He points out that Article 30 para. 1 provides:

"Whatever his rank in the organisation, a staff member is required to assist and advise his superiors. He is responsible for discharging the tasks entrusted to him".

150. Secondly, as regards the safes episode, the Governor considers that the appellant committed an initial offence in December 1993 by not refusing the services of the DST officers who came to examine the first safe (the Head of Administration and Personnel's), and a second more serious offence by bringing them in again in January 1994, despite being aware of who they were, to open the Governor's safe and not telling him that they were counterintelligence officers.

151. Thirdly the Governor states that, despite being aware of the Governing Board's decision at its 129th meeting that recordings of its meetings were to be for the secretariat's exclusive use, the appellant made two video recordings of the meeting held on 13 December 1993. That his instructions came from the previous Governor, or so the appellant maintains in his defence, does not exonerate him (see UNAT, Judgement No. 479 of 18 May 1990, Caine v. Secretary General of the United-Nations). In this matter there was therefore a serious disciplinary offence.

152. Lastly the Governor maintains that the appellant, who was in charge of allocating parking spaces, had sole free use of two parking spaces which he permanently occupied for purely private purposes and a third parking space for which he paid a fee. He thus deprived two staff of parking spaces and took improper advantage of his position. This likewise constituted a serious disciplinary offence.

153. In Appeal No. 201/1995 the Governor maintains that the decision imposing the penalty was likewise factually well-founded.

He notes in this connection that the appellant, whose dealings were with the former Governor direct and in person, asked, or at least agreed, to be paid more than the regulation amount in that, while not a member of the pension scheme, he was drawing the equivalent of the employer's contribution which the Fund should have been paying into the autonomous pension fund on his behalf. For the conversion work at the Fund, which began late and on abnormal terms, the appellant had full authority and reported direct to the former Governor and not to his immediate superior. Nor did the Disciplinary Board question that the appellant had appropriated parking spaces for which he did not pay. It merely took the view that these various matters either did not amount to disciplinary offences or were not matters for which the appellant had personal responsibility. In addition the Governor maintains that the appellant's statements about insurance cover for the conversion work are inaccurate. All in all, he argues, disloyalty and lying are the main issues, and he contends that the charges are factually accurate and the offences imputable to the appellant.

154. The Governor objects to the Disciplinary Board's postulating a climate of "administrative laxity" at the Fund at the time and he considers it unacceptable to absolve the appellant of blame on that ground. In view of the considerable latitude which the appellant was allowed the Governor takes the view that he cannot be absolved of personal responsibility and all blame for his actions imputed to his immediate superior. He adds that the appellant showed no intention of taking a stand against the laxity which the Disciplinary Board had noted or of playing an active part in the remedial action which had been set in train, and that this is indicative of overall conduct incompatible with working as an international civil servant.

155. In his observations in reply in Appeal No. 196/1994 the appellant does not deny the

Governor's discretionary powers as regards the final decision, and he acknowledges that the Governor was not legally bound by the Disciplinary Board's opinion. However he accuses the Governor of deliberately rejecting the Board's findings and thereby making a factual error against which his discretionary powers are no defence. He maintains, in this connection, that the Governor's attitude is extremely suspect in that he took precisely the same line with the other staff called in question and ignored the Disciplinary Board's various opinions, whether its findings (deciding that there had been a disciplinary offence where the Board had found none) or its recommendation as to the penalty (imposing a more severe one, as in the present case, than the Board had advised). The appellant argues that although the Administrative Tribunal's powers to review a decision of the Governor in a disciplinary matter 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).

156. In his observations in reply in Appeal No. 201/1995 the appellant maintains that even if some of the charges are factually accurate he did not - and the Disciplinary Board so held - have responsibility for the matters concerned. He likewise notes that the Governor filed observations on only five of the ten charges on which the decision to dismiss him was based and he contends that the Governor confines himself to generalities (such as the charges of disloyalty and lying) instead of bringing charges backed up with documentary evidence. Lastly, as regards the Disciplinary Board's references to laxity at the Fund at the time of the matters at issue and to his occupying a subordinate position, the appellant states that the Board in no way took these considerations as "postulates" in finding him innocent of the charges.

157. 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 unsatisfactory service and unsatisfactory conduct. Moreover, the notion of a 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).

158. In the present case the Governor took the view that the matters with which the appellant was charged were contravention 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.

159. In the Tribunal's view the Governor, to whom fall all decisions as to whether to institute disciplinary proceedings (see para. 132 above), was entitled to decide, under his discretionary powers, which he did not thereby exceed, that the offences were disciplinary ones, the Tribunal's function being merely to determine whether the Governor's decision was invalidated by bias or by significant factual error (see UNAT, Judgement No. 479, Caine v. Secretary-General of the United Nations, section III).

160. 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, p. 5 and, more recently, ILOAT, Judgement No. 1441 of 6 July 1995, Sock v. UNESCO, para. 20).

161. 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 Khelifati judgement, p. 5). In the present case the Tribunal notes that the appellant simply asserts that the charges are false. He does not specify in what respect.

162. However the documents in the file provide objective evidence of the matters with which the appellant is charged. This applies, in particular, to the charges relating to entering the Fund's premises without permission while under suspension, the lack of an inventory, the episode of the safes, making the two recordings and accepting payment of the employer's contribution, as well as to the charges concerning the commissioning and insurance of works.

163. In the Tribunal's view, therefore, the Governor was legally entitled to regard the charges as substantiated.

164. It accordingly finds that this ground of appeal must be rejected.

C. Proportionality of the penalties and the allegations of bias and breach of good faith

165. The appellant contends that the decisions to impose the penalties complained of are invalidated by legal error in that they contravened the proportionality principle: from the file, read together with the Disciplinary Board's opinion, it is apparent, he submits, that the penalties were disproportionate to any offences he may have committed.

166. In Appeal No. 196/1994 the appellant firstly deplores the Disciplinary Board's recommendation that he be given a written warning for entering the Fund's premises. He states that he has never denied having done so but that, at the time, he was not aware that it was an offence. He acknowledges that the Governor was not bound to accept the Board's opinion but he argues that, in imposing a penalty two degrees more severe under Article 54 para. 2 of the Staff Regulations, which lists the available penalties in order of severity, the Governor contravened the proportionality principle and thereby committed a legal error.

167. In Appeal No. 201/1995 he observes that the Disciplinary Board recommended that no penalty be imposed. In dismissing him the Governor applied the most serious penalty available, thus effecting a quantitative leap. In addition, he points out that the Governor dismissed him on the basis of his overall conduct, treating the further matters, with which the second set of disciplinary proceedings was concerned, as compounding those brought to light in the first set of disciplinary proceedings. The latter had already been punished and the appellant argues that they could not be punished a second time. In addition he alleges that the leap taken by the Governor was qualitative as well as quantitative in that the effect of dismissal is immediate termination of employment, a punishment reserved for the most serious cases. He maintains that the punishment was thus disproportionate.

168. Lastly he contends that the further disciplinary proceedings were deliberately instituted to bring about his dismissal and that, whether or not this was an abuse of procedure, it amounted to victimisation by the Governor and was incompatible with the principles of impartiality and good faith which international organisations are required to observe in their dealings with their staff (see ILOAT, Judgement No. 832 of 6 June 1987 in the Ayoub and others case).

169. Under Appeal No. 196/1994 the Governor maintains that deferment of advancement to a higher step was not disproportionate to the charges. He points out that written warning, as recommended by the Disciplinary Board, and the penalty imposed differ by only two degrees of seriousness, and 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 held not to constitute offences) since, in the Governor's view, the Board had been lenient in numerous respects. He maintains that the number of offences and their seriousness justified the penalty imposed.

170. In Appeal No. 201/1995 the Governor points out firstly that the Disciplinary Board delivers an opinion only. Secondly the disciplinary authority's decision must have regard to the staff member's overall conduct and consequently it is not possible to treat the two sets of proceedings as completely separate. The Governor in fact expresses reservations as to whether the Disciplinary Board was entitled to oblige him to institute further disciplinary proceedings. At all events he takes the view that its doing so did not deprive him of his authority to take his decision in the light of the appellant's overall conduct and to regard the further offences as compounding those previously punished, thus warranting a most severe penalty. He argues that it is in the light of the appellant's overall conduct that the proportionality of the penalty to the offence must be assessed. Lastly he states that it was the Disciplinary Board's decision which forced him to take the decisions which are under challenge. He does not comment on the allegation of bias.

171. In his observations in reply under Appeal No. 196/1994 the appellant maintains that the decision challenged was contrary to the principle of proportionality and that the Governor consistently and too readily disregarded the Disciplinary Board's findings.

172. In his observations in reply under Appeal No. 201/1995 he argues that even if the disciplinary authority were entitled to have regard to a staff member's overall conduct in taking its decision, the Governor here relies on more than one set of disciplinary proceedings in justifying the dismissal, thus invoking the concepts of duration and reoffending. The appellant maintains that in his case all element of reoffending was totally lacking and he challenges the "aggregation" of the charges brought in the two successive sets of disciplinary proceedings. He contends that if the Disciplinary Board had considered all the charges at once, its findings would probably have been the same. Thus even if regard had to his overall conduct, there is still the question whether the penalty was proportionate to the charges, which the Disciplinary Board regarded as warranting a mere written warning.

173. On the question of legal error on account of disproportionality of the penalty, the appellant refers to his observations in Appeal No. 196/84. There, he concedes that the Disciplinary Board's opinions are advisory but he alleges that both the findings and the recommendation as to the penalty were rejected with the object of getting rid of the former management team.

174. Lastly he alleges that the Governor evades the allegations of bias and victimisation even though the fact that the Governor felt compelled to institute further disciplinary proceedings is indicative of his determination to get rid of him. He also reiterates that the decision appealed against caused him serious pecuniary and non-pecuniary harm.

175. 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's (see, *mutatis mutandis*, ATCE, Appeal No. 178/1994, Fender v. Secretary General, para. 39).

176. It likewise points out that, under well-established international case-law (see para. 160 above), the Governor is not bound by Disciplinary Board opinions.

177. On the other hand, although 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.

178. 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, para. 2; CJEC, Case 46/72, De Greef v. Commission, paras. 45-48).

179. 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.

180. It takes the view that the appellant, on grade B6, cannot be held responsible for the Fund's general malfunctioning. In several areas, however, the appellant was unsupervised and reported direct to the former Governor and he therefore carries responsibility for at least some of the matters with which he was charged.

181. Maintaining an inventory of the Fund's fixed assets was undoubtedly one of his duties, for his contract specified management and insurance of furnishings: in particular his terms of employment gave him responsibility for upkeep and repair of furniture and equipment, placing orders under FF 50.000 in value, and routine dealings with suppliers and insurance companies.

The Tribunal notes in this connection Mr Violette's finding (see Part II, para. 79, p. 67/68 of his 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 also mentioned 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.

The Tribunal notes the appellant's assertion that in 1989 he drew the Governor's attention to the lack of an inventory with up-to-date valuations. The Sharpe report of 18 March 1994 stated, however, that it had not been possible to verify the assertion. In the Tribunal's view, in any case, the appellant would not thereby be absolved of blame since carrying out an inventory was one of his duties as head of general services.

182. With regard to the charge of making two video recordings of the meeting on 13 December 1993 despite the Governing Board's decision, at its 129th meeting, to make recordings of meetings solely for the Secretariat's use, the Tribunal notes that the appellant has produced a written instruction from the former Governor dated 1 July 1993. The Tribunal observes, however, that by 13 December 1993, the date of the Governing Board's meeting, the former Governor had resigned (he had done so on 15 November 1993).

The Tribunal accordingly holds that as the appellant was aware of the decision the Governing Board had taken at its 129th meeting and therefore knew that making more than one recording was a breach of the rules, and as, in addition, the meeting was an important and delicate one (it elected a new Chair of the Governing Board, a new Chair of the Administrative Council and a new Governor), at the very least he should have sought advice as to how to proceed. Responsibility for making the second recording therefore lies with the appellant, who in this matter committed a serious offence.

183. In his report of 18 March 1994 Mr Sharpe stated that he was not satisfied with the appellant's explanations about the safes episode. The Tribunal, too, considers that, on the second occasion at least, the appellant was aware that the people he was dealing with were DST officers. They had been brought in 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. He should have informed not only his immediate superior but also, in view of the seriousness of the matter, the new Governor that the people he had brought in were French counter-intelligence officers, and by neglecting to do so he committed a serious offence.

184. As regards the charge of receiving payment of the employer's contribution, the Tribunal notes from the appellant's employment conditions for the periods from 1 January 1991 to 31 December 1992 and 1 January to 31 December 1993 that he was not in the Fund's pension scheme, that no contributions to the scheme were deducted from his salary and that employer's contributions - to which he was not entitled - were paid to him as an addition to his salary. Thus he was indeed paid more than the regulation amount and undoubtedly derived financial gain thereby.

Although there is no evidence in the file that the appellant himself requested the additional payments from the former Governor, the fact remains that he agreed to employment conditions which he knew to be unlawful. In addition, there is no written request by the appellant for membership of the pension scheme dating from before 15 November 1993 whereas on the day of the former Governor's resignation he promptly made such a written request to the Head of Personnel and offered to make back-payments for his previous periods of employment.

185. Lastly the Tribunal holds that the appellant should not have entered the Fund's premises while under suspension and that, in view of the suspension, he should have been more prudent.

186. Having examined the file, therefore, the Tribunal cannot find any manifest disproportion between the charges and the penalties.

187. The appellant further alleges that the Governor was biased and that the principle of good faith was contravened.

188. The principle of good faith, which is based on well-established international legal precedent, recognises the fact that "the staff of international institutions and their representatives must be entitled to rely on respect by the administrative authorities of the undertakings entered into by such authorities" (see ABCE, No. 133-145/1986, Ausems and others v. Secretary General, decision of 3 August 1987, para. 79).

189. Here the appellant relies on the allegedly political context of the case and asks the Tribunal to find in his favour solely on the basis of his own allegations.

190. However, the Tribunal can find no evidence in the file that the Governor displayed bias or unreasonableness towards him or that there was any contravention of the principle of good faith.

191. On the contrary it takes the view that the decisions appealed against were concerned only with examining the appellant's conduct and were prompted only by matters of which there was solid proof.

192. In addition it observes that at the time of the matters at issue a state of general disorder prevailed at the Fund. Although the Fund leadership was mainly to blame for the mismanagement, the Tribunal takes the view that the higher an 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. The appellant was not senior in grade but he did have a large measure of independence in the performance of his duties (see para. 180 above) and had a special relationship with the former Governor.

193. Consequently the allegation of legal error must be dismissed.

194. 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

Read out in public on 29 September 1995

by H G KNITEL

Appendix

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