

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeals Nos. 245 and 249/1998 (BOUILLON III and IV v. Secretary General)

The Administrative Tribunal, composed of:

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

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms Pascale Bouillon lodged her two appeals on 30 January and 6 November 1998. These appeals were registered on 3 February and 10 November under No. 245/1998 and No. 249/1998 respectively.
2. Supplementary memorials were filed by Professor D. RUZIÉ, representing Ms Bouillon in Appeal No. 245/1998, on 6 February 1998, and by Mr J.-P. CUNY, representing the appellant in Appeal No. 249/1998, on 4 December 1998.
3. The Secretary General submitted his observations on the appeals on 10 March and 18 December 1998. The appellant lodged observations in reply on 24 March 1998 and 21 January 1999. On 27 April 1998, the Secretary General presented a rejoinder concerning Appeal No. 245/1998.
4. On 19 March 1998, the appellant had submitted an application to the Chair of the Administrative Tribunal for interim measures concerning the Secretary General's decision of 16 March 1998 to open an "administrative inquiry". The Secretary General submitted his observations on this application on 27 April 1998.
5. Having considered the parties' arguments, the Chair was unable to accept the application

for interim measures. The parties were informed of this on 2 April 1998.

6. On 12 August 1998, the appellant submitted an application to the Chair of the Administrative Tribunal for a stay of execution of the Secretary General's dismissal decision of 5 August 1998. In an order of 4 March 1999, the Chair granted the stay of execution.

7. On 17 February 1999, the Staff Committee applied to intervene in the case in support of Ms Bouillon's conclusions regarding Appeal No. 249/1998. On 2 March 1999, having conferred with the parties, the Chair gave the Staff Committee until 9 March to submit written observations. In an order issued on 4 March 1999, the Chair listed the documents associated with the proceedings that should be communicated to the Staff Committee.

The Staff Committee's written observations were received by the Tribunal on 5 March 1999 and they were communicated to the parties in the case.

8. The public hearings took place in the Human Rights Building in Strasbourg on 27 July 1998 (Appeal No. 245/1998) and 24 March 1999 (Appeal No. 249/1998). At the first hearing, the appellant was represented by Professor D. RUZIÉ and, at the second, by Mr J.-P. CUNY. At both hearings, the Secretary General was represented by Mr R. LAMPONI, Head of the Legal Adviser's Department, assisted by Ms M. RANTALA, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

9. The appellant has been a permanent member of the Council of Europe staff since 1 February 1987 and since 1 July 1990 has been employed as a storekeeper on grade C4 in the European Directorate for the Quality of Medicines (EDQM-formerly European Pharmacopoeia Commission).

10. Since January 1992, the appellant has, with her hierarchical superior's support, been seeking a transfer. However, no transfer has been agreed.

11. Following the rejection of her application for the post of laboratory technician at grade C5 in November 1993, Ms Bouillon lodged an appeal with the Administrative Tribunal, which culminated in the setting aside of the Secretary General's rejection decision (ATCE, No. 186/1994, Decision of 24 February 1995).

The procedure was then resumed but Ms Bouillon again failed to be selected for the post for which she had applied. She again took the matter to the Tribunal, which confirmed the validity of the proceedings (ATCE, No. 212/1995, Decision of 29 March 1996).

12. Ms Bouillon has lodged Appeal No. 245/1998 against the Secretary General's decision not to entrust her with duties corresponding to the job description of her current post and Appeal No. 249/1998 against his decision to remove her from her post, following disciplinary proceedings.

Appeal No. 245/1998

13. The appellant states that since November 1993 she has no longer been exercising all the

duties described in Vacancy Notice No. 18/90 for her post, namely:

- packaging and preparing for dispatch all reference substances and any other items to be distributed by the laboratory;
- preparing loose reference substances for storage;
- high-precision filling and labelling of phials;
- managing the stock of packaging materials;
- helping from time to time in the laboratory.

14. The Secretary General states that the appellant's duties had first been listed in an initial job profile dated 20 July 1993, which the appellant had contested in an administrative complaint. Following a recommendation from her hierarchical superior, relating to inadequacies in the appellant's work and absences during working hours, her duties had been redefined and reduced in a job profile dated 2 December 1993. These were now confined to filling phials.

15. In a memorandum of 9 April 1996, in reply to a memorandum from the appellant, the Head of the Human Resources Division (now Human Resources Department) informed Ms Bouillon that he had asked her superiors to revise her duties and objectives, having regard to what was expected of colleagues in her department on the same grade.

He added that any transfer was conditional on there being a vacant post on the same grade whose profile matched that of the individual concerned, and the relevant department's agreement to her filling the post.

In December 1993, August 1995 and June 1996, a private doctor certified that the appellant could not undertake work involving repeated lifting on account of her state of health. In July 1996, the Council of Europe's medical adviser sent a memorandum to the Head of the Human Resources Division, supporting the appellant's request for a transfer, on medical grounds.

16. On 31 October 1997, since no transfer had come about, the appellant's legal adviser wrote to the Secretary General. He said that before advising Ms Bouillon to lodge an application with the Administrative Tribunal he was asking the Secretary General to consider the overall situation, with a view to responding favourably to the appellant's request for a transfer.

17. On 16 December 1997, following a reminder dated 1 December 1997, the Director of the Secretary General's Private Office replied that no satisfactory opportunity for transfer had yet arisen.

18. On 17 December 1997, the appellant submitted an administrative complaint to the Secretary General asking that she be fully entrusted with the duties corresponding to her job description.

19. The Secretary General rejected the complaint on 21 January 1998. He noted that the duties the appellant was required to carry out were among those assigned to her in the job description and corresponded to the qualifications required for her post and grade. These duties were allocated by her head of department pursuant to the latter's responsibility to organise and allocate duties in a way that best matched the needs of the work and each individual's skills.

20. The appellant therefore lodged this appeal to secure compliance with her job description and the granting of financial compensation for non-pecuniary damage.

Appeal No. 249/1998

21. The appeal is against the Secretary General's decision of 16 September 1996 to dismiss the appellant, following disciplinary proceedings.

A. The events leading to the disciplinary proceedings

22. The episode that led to the decision to open disciplinary proceedings against Ms Bouillon started on the morning of 24 February 1998. On that day, the Director of the EDQM surprised the appellant reading a personal magazine spread out on the phials waiting to be checked. The appellant was asked to resume her work. There was then an exchange of words between the two.

23. During the remainder of the morning, Ms Bouillon wrote a memorandum to the Head of the Human Resources Division concerning the incident with the Director of the EDQM. She complained that the latter had come to tell her that she (the director) intended to report her for inadequate work and had accused her of being well paid for doing nothing. She added that the incident could only increase the urgency of granting a transfer.

On the afternoon of the same day, she did not attend work and asked a colleague to set out the phials of products that she had to label.

24. Meanwhile, the Director of the EDQM sent two memorandums, dated 25 and 26 February 1998, to Ms Bouillon and the Head of the Human Resources Division respectively. In the memorandums, as well as describing the incident, she complained of Ms Bouillon's professional inadequacies.

B. The disciplinary proceedings

25. Following the memorandum of 26 February 1998 from the Director of the EDQM to the Head of the Human Resources Division, the appellant was made the subject of an administrative inquiry.

In a memorandum of 16 March 1998 delivered to her personally, the Deputy Director of Administration asked Ms Bouillon for explanations concerning the incident of 24 February 1998 and her repeated neglect of duty, described in reports by her hierarchical superior of 13 October 1997 and 25 February 1998, which were appended. The reports referred to the appellant's absences from work, failure to keep to working hours and serious breaches of her official duties.

Ms Bouillon was also invited to contact the Deputy Director of Administration to arrange an interview.

26. On 19 March 1998, the appellant's representative in Appeal No. 245/1995 lodged an application with the Deputy Director of Administration for the suspension of the disciplinary proceedings. On the same day, he lodged an application with the Administrative Tribunal for an interim measure whose effect would also be to suspend the administrative inquiry (see paragraph 4). Following an exchange of memorials between the parties, the Chair of the Tribunal rejected the application. In his view, the administrative inquiry, the outcome of which was not known, would not cause the applicant harm that would be difficult to repair.

Moreover, it did not appear at that juncture that the decision to open an administrative inquiry was such as to muddy the facts that had given rise to the inquiry and could also come within the purview of the appeal (letter of 2 April 1998 to the parties).

27. The appellant was given a hearing by the Deputy Director of Administration on 5 May 1998. They discussed the incident of 24 February 1998 and the reports of Ms Bouillon's hierarchical superior dated 13 October 1997 and 25 February 1998.

A report of the meeting was produced on 15 May 1998 and signed by the participants on 19 May.

28. On 3 June 1998, the Director of Administration informed the Secretary General in a memorandum that disciplinary proceedings should be taken against the appellant. He added that in view of the staff member's serious failure to comply with her obligations, it would be appropriate to envisage her dismissal.

29. On 9 June 1998, the Secretary General referred the matter to the Disciplinary Board. In the referral report, the Secretary General accused the appellant of:

- violation of Article 30, paragraphs 1 and 2, of the Staff Regulations, in connection with the episode of 24 February 1998, when the appellant failed to carry out her duties on that day and ignored the instructions given to her by her hierarchical superior;

- continued violation of Article 30 of the Staff Regulations, in that on a number of occasions the appellant failed to carry out the duties entrusted to her;

- repeated violation of Article 50 of the Staff Regulations, as supplemented by Instruction No. 16 of the Secretary General, by her systematic failure to respect working hours;

- incorrect statements on the records of phials filled to give a false impression of her work performance;

- violation of the duty of loyalty and integrity by which each staff member is bound under Article 25 of the Staff Regulations, particularly with regard to the aforementioned failures to carry out her duties, the incorrect statements on the record forms and her malevolent attitude to her work colleagues and hierarchical superior.

30. On 25 June 1998, Ms Bouillon presented her observations in reply to the Secretary General's referral report.

31. The Disciplinary Board hearing took place on 30 June 1998. Four witnesses were heard.

32. The Disciplinary Board submitted its opinion on 8 July 1998. It found that there had not been a breach of Article 30 of the Staff Regulations. It considered that, taken in isolation, the incident of 24 February 1998 could not be deemed to constitute misconduct liable to disciplinary action, and that Article 30 of the Staff Regulations could not be interpreted to mean that unsatisfactory work performance, even if significant on occasions, in itself constituted a disciplinary offence.

The Disciplinary Board also found that Ms Bouillon had not made incorrect statements on her

work in order to give a false impression of her work performance.

In response to the complaint of systematic failure to respect working hours, it considered that the appellant had frequently been in breach of her obligations.

Concerning the violation of the duty of loyalty and integrity, caused by the appellant's malevolent attitude, the Board stated that professional relationships were adversely affected by the impossibility of dialogue and that the problems had persisted since 1991, without any credible solution being found, or even any disciplinary action being taken where misconduct had been established. It was not the Board's responsibility to determine who was or were responsible for this situation.

Nevertheless, it stated that the appellant's misconduct in failing to respect working hours also constituted a breach of her duty of loyalty.

Finally, the Disciplinary Board found that the complaint concerning absences from work fell outside its jurisdiction.

It gave its opinion that the misconduct of which the appellant was accused was liable to disciplinary action, in the form of downgrading (Article 54, paragraph 2, sub-paragraph e, of the Staff Regulations).

33. On 21 July 1998, the Secretary General heard the appellant, in accordance with Article 8, paragraph 2, of Appendix X of the Staff Regulations.

34. In a decision of 5 August 1998, the Secretary General ordered the appellant's dismissal. Article 3 of the decision stipulated the termination of the contract with effect from 31 August 1998.

35. On 12 August 1998, the appellant lodged an administrative complaint against the dismissal decision. She argued firstly that the Secretary General's decision had failed to take account of the Disciplinary Board's opinion and that the seriousness of the measure imposed was not justified. She also stated that dismissal was prohibited by Article 60, paragraph 5, of the Staff Regulations. Finally, she accused the Secretary General of procedural irregularities and abuse of authority in that the alleged problems of work performance had been mixed up with the disciplinary problems *stricto sensu*.

36. On the same day, Ms Bouillon submitted an application to the Chair of the Administrative Tribunal for a stay of execution of the Secretary General's dismissal decision, pursuant to Article 59, paragraph 7, of the Staff Regulations.

The Chair granted the stay of execution in an order issued on 27 August 1998.

37. In a letter dated 16 September 1998, the Secretary General informed the appellant of his decision to reject the administrative complaint.

He argued firstly that he was not bound by the Disciplinary Board because of his discretionary power in this area. He also stated that the dismissal was not in breach of Article 60, paragraph 5, of the Staff Regulations, since the decision had been taken at the end of an autonomous and distinct stage of the proceedings, in which the rights of the

defence had been fully respected.

The Secretary General was entitled to take disciplinary action because the misconduct of which the appellant was accused was of a disciplinary nature.

38. On 6 November 1998, the appellant lodged this appeal against the rejection of her administrative complaint.

THE LAW

39. The appellant has appealed against the Secretary General's decisions to reject her two administrative complaints.

40. As the two appeals are closely connected, the Administrative Tribunal hereby orders their joinder, in accordance with Rule 14 of its Rules of Procedure.

Appeal No. 245/1998

41. The appellant challenges the Secretary General's decision not to entrust her with duties corresponding to her job description. She argues that this is in breach of the staff regulations and disregard general principles of law. She also considers that the situation in which the Organisation's actions have placed her has caused her non-pecuniary damage for which she wishes to secure compensation.

42. She notes that under Article 11 of the Staff Regulations, the Secretary General "shall assign each staff member, in the interests of the service, to a post in his or her category corresponding to his or her grade". Moreover, staff "are responsible for discharging the tasks entrusted to them" (Article 30 of the Staff Regulations).

The appellant's duties are described in Vacancy Notice No. 18/90 and in a job profile dated 2 December 1993, which specifies as her "normal activities" the preparation of reference substances (filling and labelling phials), and adds that the "occasional activities" listed in the Vacancy Notice must be specified in writing by her hierarchical superior.

The appellant does not dispute that filling phials is one of her responsibilities, but complains that for years this has been the only duty entrusted to her, in breach of her rights under the regulations. She considers that the Organisation is failing to make proper use of her skills and that she is the victim of downgrading as a covert disciplinary measure.

43. As an incidental matter, the appellant also complains of failure to respect safety standards for the users of substances that are potential health risks, in breach of Article 49 of the Staff Regulations. She states that she has never been given any safety instructions.

44. Regarding the alleged breach of general principles of law, she maintains that entrusting staff members with simple tasks for which they are manifestly overqualified is an infringement of their dignity. The contested decision reflects a lack of respect for her dignity and a breach of the principle of good faith.

45. In conclusion, the appellant asks the Tribunal to set aside the decision to reject her

administrative complaint, and to award her 50 000 French francs for non-pecuniary damage suffered and 12 000 French francs in costs and expenses.

46. The Secretary General states firstly that the job profile of 2 December 1993 can no longer be challenged, on account of the time elapsed. This appeal was solely concerned with whether the appellant had a particular right to undertake specific functions.

47. He also maintains that there had been no breach of any regulations.

Staff are normally entrusted with all the duties corresponding to their grade. Indeed, it would be contrary to the principles of good management simply to entrust a limited number of duties to a staff member of whom much more could be expected. Nevertheless, careful consideration must be given to the applicability of this principle in the current case.

The Secretary General notes firstly that the appellant's department has expanded and that the growing number of staff has made it necessary and helpful for them to specialise.

The appellant's current list of duties cannot be considered a covert downgrading since the duties she undertakes correspond to her grade. The decision to concentrate the appellant's duties was taken not only because she complained of having too much work but also and above all because her hierarchical superior had on a number of occasions observed shortcomings in the way she carried it out. Moreover, the other duties originally intended for the post-holder called for team work. It is clear from the case file of this and the preceding (No. 212/95) appeals that the appellant has a poor work relationship with her colleagues. She is also regularly absent for health reasons.

48. In the Secretary General's view, the regular health absences are not the consequence of the specific constraints of her post or, in particular, the repetitive nature of her work. The appellant is certainly not required to lift heavy objects, but handles reference substances weighing in the order of a few grams.

49. Concerning the alleged safety deficiencies, the Secretary General notes that since taking up her post the appellant has received all the safety instructions necessary.

50. As to the alleged breach of general principles of law, the Secretary General maintains that there has been no infringement of the appellant's dignity, but that decisions have been taken in the interests of the department with absolutely no intention of harming the appellant.

He denies that he has failed in his duty of good faith. There are no objections in principle to Ms Bouillon's transfer but it is extremely difficult to find her another post, in view of the rather specialist qualifications attaching to the Council of Europe's various C4 posts.

51. Finally, he considers the request for compensation for non-pecuniary damage to be unfounded. At all events, if the Tribunal decided to accept the appellant's request, this would in itself constitute adequate satisfaction. Besides, the Secretary General's decision is perfectly lawful and the alleged non-pecuniary damage relates to the period preceding the decision not to allocate new duties to the appellant, which is not the subject of this dispute.

In conclusion, the Secretary General asks the Administrative Tribunal to declare the application unfounded and to reject it.

52. In her observations in reply, the appellant states that she has never wished to deny the legality of the job profile of 2 December 1993, which referred to occasional duties. The appellant decided to refer the case to the Administrative Tribunal because such occasional activities have never, at any time, been defined.

Otherwise, she maintains her line of argument.

53. Since the appellant states that she does not intend to challenge the legality of the job profile of 2 December 1993, the Tribunal does not consider it necessary to rule on the Secretary General's objection that the matter is out of time.

54. The Tribunal notes that in lodging the appeal, the appellant maintains that she performs only some of her original duties and that, contrary to what has been stated, these have not been subsequently redefined or supplemented by "occasional activities".

Given the subject of the appeal, the Tribunal does not consider it necessary to rule on whether it is possible to alter the job description by a job profile and, if so, to what extent. The Tribunal must confine itself to determining whether, in this case, the rights invoked by the appellant were respected once the appellant's activities had started to be governed by the job profile, which the appellant was asking to be modified, or rather diversified.

55. The Tribunal notes that the Secretary General has not exceeded his powers in this area, given the grade and duties originally entrusted to the appellant.

56. Regarding the appellant's complaint of a failure to respect safety standards, the Tribunal finds that the administrative complaint that preceded this appeal was not concerned with this question, which is therefore a new point.

57. The Tribunal therefore concludes that no unlawful activity can be established. It is thus unnecessary to rule on the request for compensation for non-pecuniary damage.

Appeal No. 249/1998

58. The appellant challenges the Secretary General's decision to dismiss her following disciplinary proceedings. She maintains that the decision was unlawful on a number of grounds: abuse of procedure, violation of Article 60, paragraph 5, of the Staff Regulations, violation of the proportionality principle, violation of the rights of the defence, inadequate statement of reasons, insufficient evidence of the alleged facts of the case and abuse of authority. The appellant's arguments may be summarised as follows.

59. Including unsatisfactory work performance among the reasons for which the disciplinary measure was imposed was an abuse of procedure, since it is not a disciplinary offence. The Secretary General should not, therefore, have instituted disciplinary proceedings but should have applied the probationary procedure in Article 23, paragraph 3, sub-paragraph b, of the Staff Regulations, which includes a series of formal and substantive safeguards for staff members concerned.

60. The appellant also considers that the Secretary General was not empowered to impose the disciplinary measure of dismissal because its application would have made it impossible for

her to secure the remedy that she was seeking in Appeal No. 245/1998. This would be in breach of Article 60, paragraph 5, of the Staff Regulations.

61. She argues that once it is accepted that dismissal cannot be imposed for unsatisfactory work performance, the measure imposed is clearly disproportionate to the other alleged misconduct, namely systematic failure to respect working hours. She contends that the Secretary General dismissed her primarily on the grounds of unsatisfactory work performance. There is also the question of whether dismissal is justified solely on the grounds of systematic failure to respect working hours. According to the evidence of her hierarchical superior, as reported by the Disciplinary Board, this was one among a number of criticisms which would not justify undue emphasis (paragraph 31 of the opinion of the Disciplinary Board). Similarly, the Disciplinary Board itself noted that the staff member concerned had never been the subject of disciplinary measures on this subject, particularly through the deduction of debit hours from annual leave, pursuant to Instruction No. 16 (*ibidem*). The appellant wonders therefore whether it is conceivable that, in response to such an accusation, the Administration should fail systematically to apply the relevant instruction and then decide to dismiss her with no prior warning.

62. She also alleges a violation of the rights of the defence, since in his memorandum of 16 March 1998, the Deputy Director of Administration did not refer to Article 56, paragraph 1, of the Staff Regulations or to any delegation by the Secretary General. This constituted a breach of general principles of law, the Staff Regulations and Council of Europe practice, which placed the appellant in difficulty and seriously compromised her right to a fair hearing.

63. The reasons given were also inadequate, in that the Secretary General disagreed with the Disciplinary Board's conclusions concerning the absence of misconduct relating to two of the accusations made against the appellant and the type of disciplinary measure to be taken, but did not give reasons for his decision. In accordance with general principles of law, the decision in question was therefore seriously and manifestly unsatisfactory.

64. Concerning her assertion that there was insufficient evidence to support the facts, the appellant states that in the dismissal decision the Secretary General simply referred to the systematic failure to respect working hours, without supplying any details or evidence. Yet, the time sheets for April and May 1998 disproved the accusation that working hours were not respected, or at least that this was done systematically.

65. Finally, there was an abuse of authority in that the Secretary General instituted disciplinary proceedings against the appellant with the sole purpose of securing her dismissal. She claims that the disciplinary proceedings were trumped up following a minor incident, in order to get rid of the embarrassing evidence of errors and inconsistencies to which the appellant had drawn attention to in Appeal No. 245/1998. She also claims to have been for five years the victim of moral harassment, in contravention of Instruction No. 35 of 23 September 1998 on the protection of human dignity at the Council of Europe.

66. In conclusion, the appellant asks the Tribunal to set aside the decision of 16 September 1998 rejecting the administrative complaint concerning the disciplinary measure of dismissal. She also requests compensation for non-pecuniary damage and relies on the Tribunal to settle the amount. She also claims 24 000 French francs as costs and expenses in connection with this appeal.

67. The Secretary General maintains that there has been no abuse of procedure, since according to the Tribunal's case-law, he was quite free to use the disciplinary proceedings to challenge the appellant about other deficiencies in her work performance. Since she has shown neither the capacity nor the willingness to maintain a satisfactory standard of conduct over time the Secretary General considers that he has not exceeded his discretionary power in concluding that it would be illusory to expect any lasting improvement in her conduct and work performance following a probationary period, under the Article 23, paragraph 3, sub-paragraph b.iii, procedure, and in instituting disciplinary proceedings.

68. Moreover, Article 60, paragraph 5, of the Staff Regulations cannot be interpreted so broadly as to neutralise all disciplinary aspects. Otherwise, staff members would simply have to introduce a series of appeals to be exempted from their obligations, since any disciplinary measure would clearly alter staff's legal position.

69. The Secretary General notes that the complaint concerning the violation of the proportionality principle is presented as a corollary to that concerning the alleged abuse of procedure and argues that this complaint is therefore, like the other, unfounded. Since he was free to use the disciplinary proceedings to challenge the appellant about all her deficiencies, he was also free to use one single measure in response to them. Nor did he exceed his discretionary power in deciding to dismiss the appellant for a whole range of misconduct, since for one single form of it – systematic failure to respect working hours – the Disciplinary Board had recommended downgrading, the measure immediately preceding dismissal.

70. The appellant's defence rights were not, moreover, infringed at the meeting of 5 May 1998. Under Article 2 of the Staff Regulations and in accordance with the Administrative Tribunal's case-law, the duties of the Deputy Director of Administration give him full authority to conduct an interview as part of an administrative inquiry. Besides, Article 56, paragraph 1, requires the staff member concerned to be given a prior hearing but does not state that the hearing must be conducted by the Secretary General in person.

On the other hand, the appellant could have been in no doubt as to the purpose of the interview. In his memorandum of 16 March 1998, the Deputy Director of Administration stated that it formed part of an administrative inquiry and that the appellant would be asked to explain, in particular, serious failures to comply with her professional obligations.

71. Regarding the inadequate grounds for differing from the Disciplinary Board's conclusions, the Secretary General states that is clear from his decision that he reached a different conclusion from the Board concerning the facts of the case, their disciplinary implications and their seriousness. The reasons given were therefore adequate.

72. Regarding the disputed facts of the case, the appellant confines herself to questioning whether there was a systematic failure to respect working hours. Yet the notes produced by the appellant's hierarchical superior showed that she had been systematically at fault in this regard over a long period. These notes were drawn to the appellant's attention but she was unable to challenge them. The facts were thus sufficiently established and were substantiated in the supporting documentation.

73. Finally, the arguments submitted to show that there was abuse of authority have already been used by the appellant in Appeal No. 245/1998 to support the contention that she was the victim of harassment. In this case, the appellant fails to produce convincing evidence

that she is the victim of bias and her accusations do not stand up to close examination. Moreover, the Secretary General says that they have already been refuted in Appeal No. 245/1998, and that the appellant undertakes the duties appropriate to her post, with no harassment. Nor does she have any right to transfer, which depends on a post of the same grade being vacant and having a profile compatible with that of the applicant.

74. In conclusion, the Secretary General maintains that the appellant has failed to establish any violations of the relevant provisions and that the appeal must therefore be rejected. If, by any chance, the appeal were accepted, such a decision would constitute sufficient compensation for any non-pecuniary damage.

75. The Staff Committee, which has been authorised by the Chair to submit a written memorial (paragraph 7), emphasise firstly that the seriousness of the measure taken calls for increased vigilance regarding respect for the relevant statutory provisions. It is convinced that the Secretary General is in breach of Article 60, paragraph 5, of the Staff Regulations in taking a measure that by its nature makes it impossible to secure the remedy sought in Appeal No. 245/1998. The Staff Committee also believes that the Secretary General has inappropriately confused the disciplinary procedure provided for in Article 54 of the Staff Regulations with the procedure in Article 23, paragraph 3. The appellant was, in fact, dismissed primarily on grounds of unsatisfactory work performance. The Committee also notes that the Disciplinary Board made a legal assessment of the facts of the case which the Secretary General did not accept in his decision, and recommended a less serious measure than that finally taken. The Staff Committee considers that the Secretary General has offered no grounds in his disciplinary decision concerning the two points where he differed from the Disciplinary Board's conclusions and recommendations. There are thus no objective reasons for thinking that the Board's opinion has been properly considered and assessed. The Staff Committee considers that there is an essential formal requirement for the Administration to indicate why it chooses to differ from any mandatory or optional opinion of such a body.

76. The Tribunal finds that the appellant's complaints may be classified into two categories: those concerning the conduct of the disciplinary proceedings (violation of Article 60, paragraph 5, of the Staff Regulations and violation of the rights of the defence) and those concerning the merits of the disciplinary decision (proportionality of the measure, abuse of procedure, inadequate grounds, absence of evidence concerning the facts of the case and abuse of authority).

Regarding the conduct of the proceedings, the Tribunal does not consider that the Secretary General was in breach of Article 60, paragraph 5, of the Staff Regulations. He was perfectly free to institute disciplinary proceedings, because these were concerned with a matter other than that raised in Appeal No. 245/1998: the latter related to the duties undertaken by the appellant whereas the disciplinary proceedings were concerned with how she carried them out. To argue that the Secretary General could not institute disciplinary proceedings until the Tribunal had ruled on Appeal No. 245/1998 would, in the circumstances, amount to an excessive concern with formalities. The Tribunal recognises that on account of the overlap between certain questions, the nature of the conflict opposing the two parties and the recent referral to the Tribunal, there might be grounds for arguing that this was not the moment to institute disciplinary proceedings. Nevertheless, it is confirmed in its opinion by the fact that the proceedings concerned not only the events of 24 February 1998 but also prior ones (parts 2 to 5 of the disciplinary offences referred to in the report initiating disciplinary proceedings).

The Secretary General did not therefore exceed his discretionary power in deciding to institute disciplinary proceedings.

77. Nor were the rights of the defence adversely affected by the conduct of the proceedings. The Deputy Director of Administration's responsibilities fully entitle him to undertake an administrative inquiry, which was the first, albeit not compulsory, stage of the disciplinary proceedings. The latter only commenced with the report initiating disciplinary proceedings (Article 55, paragraph 3, of the Staff Regulations). It was at this point that all the rights of the defence relating to the conduct of the disciplinary proceedings had to apply, if the latter were to be valid. Article 56, paragraph 1, stipulates that the staff member concerned must be heard but, although it is desirable, he or she does not have to be clearly informed that this could be a preliminary stage of the disciplinary procedure.

Besides, the purpose of such a hearing is not to level accusations against the person concerned but to enable the Secretary General to form an opinion about the relative merits of instituting disciplinary proceedings, imposing relatively light sanctions for which the Disciplinary Board does not need to be consulted, namely a warning or a reprimand (Article 2, paragraph 1, of the Regulations on Disciplinary Proceedings, Appendix X of the Staff Regulations), or doing nothing at all. It is also clear from the memorandum of 16 March 1998 that the Deputy Director of Administration was carrying out an administrative inquiry into certain events concerning the appellant about which the latter had to supply explanations and that she could seek assistance from a person of her choice. According to the report of the meeting with the appellant, she was also told that a report would be submitted to the Secretary General, for a decision. Above all, the Tribunal recalls that after 19 March 1998, the appellant referred to the possibility of suffering harm which it would be difficult to remedy and, as part of Appeal No. 245/1998, submitted an application to the Chair of the Administrative Tribunal for interim measures concerning the administrative inquiry (see paragraphs 4 and 5).

This complaint must therefore be rejected.

78. Concerning the merits of the decision taken, the Tribunal must first look at the complaint regarding the proportionality of the disciplinary measure taken. According to the appellant, this complaint must be seen in relation to the alleged abuse of procedure. However, she also asks whether dismissal is consistent with the proportionality principle when considered solely in the context of the alleged systematic failure to respect working hours.

79. The Tribunal considers that the proportionality of the disciplinary decision has to be considered in the light of the particular conditions pertaining to this case. The appellant has been in conflict with her departmental head for several years. Some time ago, the conflict reached a level that cannot be ignored here. The Tribunal notes that the disciplinary measure taken is the most serious of those applicable at the Council of Europe. Yet, the Disciplinary Board dismissed two of the three complaints concerning the appellant, only upholding the one concerning the failure to respect working hours. The Tribunal recognises that the Secretary General has certain discretion in the choice of disciplinary measure, but the discretion is subject to the Tribunal's oversight. The question of the appellant's possible transfer has been raised and solutions sought (ATCE, Decision of 29 March 1996 in Appeal No. 212/1995, paragraph 16). At the hearing in a previous appeal, the appellant stated, without being contradicted by the Secretary General, that she had requested a transfer, that this had also been sought by the Director of the Pharmacopoeia, and that according to the most recent information she had had from Human Resources a possibility had recently

opened up. A transfer has therefore been requested on a number of occasions by the appellant, sought by her head of department and recommended by the Council's medical adviser. However, no decision has been taken in this matter. Moreover, as far as the Tribunal is aware, no transfer proposal has been made to the appellant. In the Tribunal's view, despite the specialist nature of the appellant's duties, it was not impossible to effect such a transfer in an organisation as large as the Council of Europe.

The Tribunal agrees with the Secretary General that there is no right to a transfer. However, it notes that in the interests of good staff management, and in view of the bad relations between the appellant and her colleagues and the hierarchy, such a decision should have been taken in this case as soon as possible. Besides, according to the notes produced in recent years, a transfer, which was also requested by her superiors, would also have been in the department's interest.

Yet, the matter was not dealt with, no such decision was taken and the situation steadily deteriorated. The appellant cannot be held entirely responsible for the facts for which she is criticised.

Under these circumstances, dismissal cannot be considered a proportional measure. It is therefore unlawful and must be annulled.

80. In the light of this conclusion, the Tribunal does not consider it necessary to consider the other grounds raised by the appellant.

However, the Tribunal wishes to draw the Secretary General's attention to the importance and value of giving detailed reasons when he differs from the conclusions reached by the Disciplinary Board, whether in his assessment of the facts or on the measures to be taken, after a case has been investigated. This is moreover the rule that applies in the Council of Europe's member states.

81. The appellant has asked for compensation for non-pecuniary damages and leaves it to the Tribunal to settle the amount. Given the facts of the case, the Tribunal does not consider such compensation necessary, since the appellant has undoubtedly contributed through her own conduct to creating the situation that is the background to this case.

82. The appellant, having used the services of a lawyer, claims 24 000 French francs in costs and expenses. The Tribunal considers that claim reasonable, within the terms of Article 11, paragraph 2, of the Administrative Tribunal's Statute.

For these reasons, the Administrative Tribunal:

Joins Appeals Nos. 245/1998 and 249/1998;

Rejects Appeal No. 245/1998;

Declares Appeal No. 249/1998 founded and annuls the disciplinary decision to dismiss the appellant;

Dismisses the claim for compensation for non-pecuniary damage;

Orders that the Secretary General reimburse the sum of 24,000 French francs in costs and expenses.

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

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO

Appendix 1

CHAIR'S ORDER OF 27 AUGUST 1998 in the case of BOUILLON v. the Secretary General

THE FACTS

1. The applicant is a permanent staff member of the Council of Europe assigned to the European Department for the Quality of Medicines.
2. Before this application for a stay of execution, the applicant lodged three appeals with the Administrative Tribunal. Two of these appeals ended with decisions (ATCE decision No.186/94 of 24 February 1995, and decision No.212/95 of 29 March 1996), whereas the third appeal, which was entered on 30 January 1998, is currently waiting to be heard by the Tribunal (Appeal No.245/98).
3. On 26 February 1998, the Head of the European Department for the Quality of Medicines wrote a note concerning the applicant.
4. On 9 June 1998, the Secretary General referred a report to the Disciplinary Board, which delivered its opinion on 8 July 1998.
5. On 21 July 1998, the Secretary General heard the staff member in accordance with Article 8, paragraph 2 of the Regulations on Disciplinary Proceedings (Appendix X to Staff Regulations).
6. On 5 August 1998, the Secretary General ordered the applicant's removal from post. According to the terms of the decision, the measure was to take effect on the same day and the applicant's contract with the Organisation was terminated on 31 August 1998.
7. On 12 August 1998, the applicant submitted an administrative complaint to the Secretary General by registered letter in accordance with Article 59, paragraph 1 of the Staff Regulations.

In this letter, she claimed that her statutory rights had not been respected before disciplinary proceedings were opened, that the Disciplinary Board's opinion had not been taken into account and that the decision that had been taken was not justified considering the seriousness of the measure that had been taken.

The applicant also alleged an infringement of Article 60, paragraph 5 of the Staff Regulations.

Finally, the applicant also claimed that the proceedings had been improper – leading to an infringement of the Staff Regulations and the general legal principle which forbids the improper exercise of authority - as both the challenged decision and the record of the meeting of 21 July 1998 showed that the Secretary General had, wrongly, mixed problems concerning an alleged lack of output with disciplinary problems in the strict sense.

8. In a note dated 12 August 1998, which was received on 14 August, the applicant submitted an application to the Chair of the Administrative Tribunal for a stay of execution of the decision to remove her from her post.

9. On 14 August, the Chair invited the Secretary General to send him any comments he might wish to make concerning the application for a stay of execution.

10. The Secretary General submitted his observations on 19 August 1998. The applicant sent her memorial in reply on 21 August 1998.

THE LAW

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

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

First, the disciplinary measure would mean that Appeal No. 245/98, which “the Tribunal is currently deliberating”, would serve “practically no purpose”. Furthermore, the disciplinary measure would also be interpreted as a new measure which, if Appeal No. 245/98 were to be upheld, would render unfeasible the redress sought. If this were so, the measure would be forbidden by Article 60, paragraph 5 of the Staff Regulations, whose aim is precisely to avoid irreparable damage being caused to a staff member whose appeal is pending before the Tribunal.

Finally, according to the applicant, as the disciplinary measure concerned is the gravest one possible, the Secretary General will certainly make use of Article 60, paragraph 7 of the Staff Regulations in order not to execute an annulment decision. With regard to this, the applicant states that if her appeal is rejected, she will certainly bring the case before the Tribunal and that she is not seeking compensation for a disciplinary measure which is illegal in terms of both procedure and substance.

In conclusion, the applicant requests that a stay of execution of the measure to remove her from her post be ordered “until the Tribunal has come to a decision regarding [her] pending appeal”.

13. For his part, the Secretary General maintains that the fact that a staff member has entered an appeal does not mean that he may not exercise his prerogatives under the terms of the Regulations on Disciplinary Proceedings. Furthermore, given the object and the aim of Article 60, paragraph 5 of the Staff Regulations, this provision cannot apply to measures taken following disciplinary proceedings held in the prescribed form concerning a different matter from that which is the object of the proceedings currently under way.

Second, as regards the applicant’s argument that he would certainly make use of Article 60, paragraph 7 of the Staff Regulations in order not to execute an annulment decision, the Secretary General claims that the applicant is making an assumption which has no basis in fact. The granting of a stay of execution presupposes the existence of a grave prejudice difficult to redress and cannot be justified by pure speculation regarding the attitude that the Secretary General will take in the event of an unfavourable decision. Furthermore, as the Administrative Tribunal would examine the lawfulness of any decision taken under the terms of Article 60,

paragraph 7, there could be no question, at this stage in the proceedings, of entering into an analysis of a hypothetical application of this provision.

Finally, the Secretary General emphasises that the applicant has not put forward any argument as to why any prejudice that might result from her removal from post would be difficult to redress. If the applicant were successful, she would be reinstated with full rights with retrospective effect, particularly as regards her salary. An annulment by the Administrative Tribunal of the decision appealed against would lead to the applicant's career being rebuilt and her salary arrears being paid. Furthermore, the Tribunal could order the payment of compensation for any other damage resulting from the annulled decision.

In conclusion, the Secretary General requests that the application for a stay of execution be dismissed, as the administrative proceedings do not concern the same facts as those in respect of which Appeal No. 245/98 was lodged and the applicant has not shown that she would be caused grave prejudice difficult to redress.

14. In her memorial in reply, the applicant maintains that if the disciplinary measure to remove her from her post were implemented, it would not be possible to execute any decision that found that the situation in respect of which Appeal No. 245/98 was brought was unlawful.

She also claims that the circumstances of the case justify a stay of execution. The points at issue in the current application fall into the same context as those at issue in Appeal No. 245/98. The fact that the disciplinary proceedings bore on events that, except for one, took place before Appeal No. 245/98 was lodged is, according to her, proof of this.

The real nature of the prejudice that would result from the disciplinary measure of removal from post being executed immediately is obvious, since the applicant's objective is to be fully reinstated and, at all events, to continue working for the Organisation. The financial aspects of the issue do not, therefore, affect the main redress sought in any way whatsoever.

15. The Chair of the Administrative Tribunal considers that the decision to remove the applicant from its post does not, in itself, and in the absence of specific elements, constitute a hypothesis generating "grave prejudice difficult to redress" for the person concerned within the meaning of Article 59, paragraph 7 of the Staff Regulations (see the Chair's Order of 5 September 1994, paragraph 12 in the case of *Ernould v. the Governor of the Council of Europe Social Development Fund*).

16. The Chair finds that the reasons put forward by the applicant are insufficient to show that the execution of the challenged act would cause her "grave prejudice difficult to redress". As regards the applicant's arguments based on paragraphs 5 and 7 of Article 60 of the Staff Regulations, he points out that it would be inappropriate at this stage to prejudge either the outcome of Appeal No.245/98, currently pending before the Tribunal, or the scope of the measures which would have to be taken if the Tribunal's decisions on Appeal No.245/98 or the appeal the applicant would lodge if she did not obtain satisfaction in the administrative complaint of 12 August 1998 were in her favour (*ibidem* paragraph 13).

As regards the other arguments put forward, the Chair notes that any financial prejudice could easily be redressed.

17. However, the Chair must consider whether there might be any other reasons that would justify granting the stay of execution that has been requested.

In connection with this, he notes that, as the applicant herself has pointed out, the proceedings complained of seem to be part of a dispute which has been going on for several years and which has led to appeals being lodged, one of which is pending before the Tribunal.

Considering the type of disciplinary measure that has been taken – the strongest measure possible – the Chair notes that, because of the context surrounding the case, the applicant could suffer grave prejudice, other than prejudice of a financial nature or prejudice provided for by paragraph 5 and 7 of Article 60 of the Staff Regulations, which would be difficult to redress. He is particularly referring to a moral prejudice. The Chair therefore considers that he has been presented with specific evidence which require that the stay of execution requested be granted (see the Chair's *Ad hoc* Order of 7 July 1994, paragraph 14 in the case of Eissen v. the Secretary General). The said stay of execution will also prevent the fair balance which must exist between the Council of Europe and the applicant from being upset.

18. The Chair reaches this conclusion while being fully aware of the fact that it is his duty to show restraint in the exercise of the exceptional power attributed to him by Article 59, paragraph 7 of the Staff Regulations (cf. the Chair's Order of 31 July 1990, paragraph 12 in the case of Zaegel v. the Secretary General). Furthermore there can be no question at this stage of examining the arguments put forward by the applicant in her administrative complaint.

19. It follows that the application is founded in so far as it concerns the stay of execution of the disciplinary measure of removal from post.

20. As regards the length of the stay of execution, the Chair notes that the applicant requests that it be granted until the day when the Tribunal delivers its decision on Appeal No.245/98. However, the Chair considers that, in the interest of the fair administration of justice, the length of the stay of execution should be fixed according to the course of the proceedings of the complaints procedure initiated by the applicant on 12 August 1998.

For these reasons,

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

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the requested stay of execution in so far as it concerns the execution of the disciplinary measure of removal from post;

- decide that the stay of execution shall lapse if the applicant does not exercise his right of appeal before the Administrative Tribunal within the period laid down in Article 60, paragraph 3 of the Staff Regulations, in the event that his complaint is dismissed;

- decide that the stay of execution shall expire on the day on which the Administrative Tribunal delivers its decision.

Done and ordered in Strasbourg on 27 August 1998.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Appendix 2

CHAIR'S ORDER OF 2 MARCH 1999

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

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

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

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

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

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

Having consulted the members of the Tribunal;

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

DECIDE

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

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO

Appendix 3

CHAIR'S ORDER OF 4 MARCH 1999

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

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

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

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

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

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

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

DECIDE

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

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

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO