EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Collective Complaint No. 26/2004 **Case Document No. 5**
Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France

RESPONSE BY SAGES TO THE WRITTEN SUBMISSIONS ON THE MERITS BY THE FRENCH GOVERNMENT

registered at the Secretariat on 13 May 2005

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COMPLAINT NO. 26/2004 (SAGES V. FRANCE); REPLY ON THE MERITS.

We have received the Government's observations on the merits in this case and submit our observations in reply.

The applicability of the Revised Charter to this case.

§ 328. In its submission, the French Government maintains:

- "*that the CNESER is not concerned with social rights or defending employees*" on the grounds that "*its membership is not confined to representatives of staff working in higher education establishments*" (page 2 of its submission);
- that "*the CNESER is not concerned with the exercise of the right to organise or relations between employers and employees*", and that as a result "*this complaint concerning means of challenging elections of members of the CNESER falls outside the scope of the Revised Charter*".

§ 329. Although, as the Government argues, the "*[CNESER] membership is not confined to representatives of staff working in higher education establishments*", such representation is still one aspect of it, as is shown by:

- the Government's own use of the term "*not confined to*", which implicitly but necessarily acknowledges that one of its functions is to represent the staff concerned. The Government also recognises in the final paragraph of 2.3 of its submission that the elected members concerned have the status of staff representatives;

- the fact that the electoral colleges relate to four different categories of staff, and while certain categories have been grouped together in the college in which the union has presented a list, it is still the case that distinctions are made between the various categories, both by the state in its definition of the electoral colleges and by the candidate organisations in the choice and ranking of candidates on their lists.

Representation of the staff concerned is therefore undoubtedly at issue in the elections to the CNESER

§ 330. Once trade unions are themselves invited to present lists of candidates to the CNESER election, the Government cannot claim to respect the right to organise while maintaining that these elections are "*not concerned with the exercise of the right to organise*", since **this would amount to a form of trade union activity in France that was denied all possibility of exercising associated legal remedies**. The preamble to the Revised Charter refers to the "*Ministerial Conference on Human Rights held in Rome on 5 November 1990*" and stresses "*the need, on the one hand, to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural*". The rule of law, referred to in the preamble to the European Convention on Human Rights, is necessarily one of the principles against which the provisions of the Charter invoked by the complainant trade union must be judged.

§ 331. The role and functioning of the higher education establishments concerned by CNESER opinions (in its consultative capacity) and decisions (in its judicial capacity) inevitably have an impact on "*relations between employers and employees*".

This is clearly and directly the case when the CNESER acts as a judicial body, since it is either an employee or the employer (head of establishment or state representative) who brings the case before it and employee and employer are thus the two opposing parties. Moreover, the majority of cases concerning such employees relate to "*relations between employers and employees*".

Similarly, the CNESER's opinions issued in its consultative capacity necessarily affect the working environment and working conditions and thus the financial and social interests of the employees concerned, even if the opinions are merely consultative and their impact may only be indirect. Moreover, the role of elected trade union representatives on the CNESER is necessarily to protect the financial and social interests of the employees they represent, since according to the relevant national legislation:

- "*The sole purpose of trade unions is the study and defence of the rights and material and non-material interests, both individual and collective, of the persons specified in their statutes*" (Article L 411-1 of the Labour Code).
- "*Breaches of Article L 411-1 committed by the leaders or managers of trade unions or groupings of trade unions shall be punishable by a fine of 3750 euros ...*" (Article L 481-1 of the Labour Code).

The fact that elected staff members subsequently sit in their own name and cannot therefore be forced to act according to instructions does not mean that they can no longer be considered to be acting as union representatives once elected to the CNESER, since such election does not automatically break the link between a trade union and the candidates on its list who are elected.

§ 332. The European Court of Human Rights has ruled, in the National Union of Belgian Police judgment of 27 October 1975, that **"***the members of a trade union have a right, in order to protect their interests, that the trade union should be heard***"**; and that while *"Article 11 para. 1 certainly leaves each State a free choice of the means to be used towards this end*", nevertheless "*the Convention requires ... that under national law trade unions should be enabled, in conditions not at variance with Article 11, ... to strive for the protection of their members'* (**§ 39**). The nomination (to

appear in a predetermined order on the list of candidates) and then election of trade union representatives on the CNESER is one of a number of ways of safeguarding the right of the trade union members concerned that their union be heard (and the author wishes to stress the Court's use of the singular, i.e. that it is indeed the trade union that should be heard). The Charter must also be considered to include, implicitly but necessarily, the safeguards in Article 11 of the Convention, whose scope and extent it supplements rather than restricts. Nor is Europe unique in safeguarding the right to organise in an instrument pertaining to civil rights and another concerned with economic and social rights, since the same duplication occurs in the two international covenants on Civil and Political Rights (Article 22) and on Economic, Social and Cultural Rights (Article 8). This reflects "*the indivisible nature of all human rights, be they civil, political, economic, social or cultural*" as stated in the preamble to the Charter. The Committee cannot therefore deny the complainant trade union the protection of the Charter and safeguards that have already been conceded by the ECHR in the abovementioned judgment. The complainant also notes that, although it is not formed on the basis of strictly equal representation, the CNESER includes both elected representatives and employer-nominated members and that its consultative functions do not therefore fall completely outside the scope of Article 6 of the Charter, and are thus protected by Article 5 (see, in particular, ECHR 23 November 1993, Van der Mussele v. Belgium (series A, No. 70), "*the facts in issue [do not] fall completely outside the ambit of"* the text, combined with Article 5, and ECHR 28 May 1995, Abdulaziz and al v. United Kingdom (series A, No. 94), according to which the violation falls within the ambit of the rights safeguarded).

§ 333. The preamble to the Revised Charter also refers to the need to "*adapt the substantive contents of the Charter in order to take account in particular of the fundamental social changes which have occurred since the text was adopted"*. Clearly, substantive contents are not confined to the Charter's formal contents, but also comprise the dynamic interpretation of the Committee and the ECHR. And as the Court notes in paragraph 70 of its Kress v. France judgment of 7 June 2001, "*the Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today (see, among other authorities, Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28)*", an approach that the Committee must also clearly apply to the Charter.

As another Council of Europe body, the Committee must therefore interpret the Charter's scope "*in the light of current conditions and of the ideas prevailing in democratic States today*". "*Whether seeking representation on public law bodies, as in the present case,[is] protected by Article 5*" (Committee's decision on the admissibility of this complaint) must therefore be answered in the affirmative as far as the CNESER and its associated elections are concerned.

The Committee will therefore consider the Revised Social Charter to be fully applicable to this case, particularly Article 5, either alone or in combination with the other Charter provisions referred to.

Compliance with Article 5 of the Revised Charter

§ 334. In its submission, the French Government argues that:

- Groups other than trade unions can present lists;
- Other qualified teachers in higher education represent less than 15% of the posts concerned in their electoral college;
- The SAGES did not receive enough votes to have any candidates elected;
- Each elector, and thus each candidate, "*can personally take action in the administrative court, either spontaneously or at the request of the organisation to which he or she belongs*" to secure the full or partial setting aside of the elections;
- "*It is quite usual for the right to challenge elections in the courts to be restricted to voters and candidates*" (with reference, for example, to the election of the President and of members of parliament).

§ 335. Regarding the first point of **§ 334**, we refer in particular to **§ 314** of our previous submission, which there is no need to add to or repeat here.

§ 336. Regarding the second point of **§ 334**, we consider the argument inapplicable, particularly in the light of the ECHR ruling in its ***Young, James and Webster v. United Kingdom*** judgment of 13 August 1981, on the subject of trade unions. "*Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*" Moreover, the issue raised concerns not the notion of the union's representativeness but that of the representation of the employees concerned before the courts in cases concerning the conduct of the election.

§ 337. The argument underlying the third point is also inapplicable, and moreover it is the relevant national legislation that prevents the trade union from securing the overturning of the election and then, following its rerunning, the election of one or two representatives. In accordance with the *nemo auditur* principle ("no one should profit from his or her own wrongdoing"), the defendant state cannot rely on the results of the election when it has itself made it impossible to challenge them.

§ 338. Regarding the fourth point of **§ 334**, we refer in particular to §**§ 315** and **316** of our previous submission, which there is no need to add to or repeat here.

§ 339. Finally, regarding the fifth point, the ECHR has ruled in paragraph 70 of the Kress v. France judgment of 7 June 2001 that the fact that legislation or practices *"have existed for more than a century and, according to the Government, function to everyone's satisfaction cannot justify a failure to comply with the present requirements of European law (see Delcourt v. Belgium, judgment of 17 January 1970, Series A no. 11, p. 19, § 36)*", and that "*the Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today (see, among other authorities, Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28"*.

The Committee must therefore consider this matter in the light of the "***present requirements of European law***", and interpret the Charter as a "***living instrument", "in the light of current conditions and of the ideas prevailing in democratic States today***".

The union also wishes to point out that in France the presidential and parliamentary elections are by voting for a single candidate, whereas the CNESER is elected by list system, and that the first two are not concerned with electing staff representatives, and as such do not come within the scope of the Charter, unlike the last mentioned. The comparison with elections to industrial relations courts is therefore much more relevant, and reinforces the complainant's case. Finally, the Government has failed to cite any case of legislation in other parties to the Charter that prevents trade unions submitting candidate lists for elections from subsequently challenging those elections' validity, and it therefore has to be concluded that no examples of this type exist and that such a ban in no way constitutes a general legal principle in the countries concerned.
Nor are there any such general principles to come to the aid of the defendant government.

Compliance with Article E of the Revised Charter (combined with Articles 5 and G)

§ 340. The Government's argument (page **7** of its submission) may be summarised by the following passages:

- "*as the CNESER and the industrial relations courts are quite dissimilar bodies, they are entitled to differ in their operating methods, including the arrangements for organising elections of their staff representatives and for challenging these elections*";
- "t*he different arrangements for electing staff representatives to the CNESER and employee representatives to the industrial relations courts do not therefore constitute discrimination*".

In other words, as the CNESER and the industrial relations courts are "dissimilar bodies", differences in treatment regarding the right to challenge elections cannot amount to a breach of Article E of the Revised Charter, in conjunction with Article 5.

§ 341. The complainant considers that unions' right to challenge the validity of elections of employee representatives based on the list system is not simply a question of "operating methods" but a fundamental safeguard of their right to put forward candidates for election. The fact that employees represented in the CNESER are public officials rather than employees with private law contracts is not sufficient to justify treating them differently as regards their right to ask the courts to set aside elections. Article G of the Revised Charter does not require situations to be similar in order to be applicable. It is enough for the circumstances to be equivalent and comparable, which in this case they are, not only as shown in **§§ 309, 311 bis and 317** of our previous submission but also as laid down by the ECHR in the ***Pellegrin v. France*** judgment of 8 December 1999 (Application No. *28541/95)*, since the staff concerned (candidates or electors) do not include "*members of the armed forces*" or of "*the police*", or of "*the administration of the State*", in the very restrictive sense given by the Court in that judgment, where it adopted the European Community's

interpretation of the law. Finally, according to Article E of the Revised Charter, "*the enjoyment of the rights set forth in this Charter shall be secured without discrimination*", and there is no justification for drawing a distinction where the Charter makes none.

Compliance with Article G of the Revised Charter

§ 342. Turning to the "*restrictions or limitations*" that the complainant contests, the Government makes no effort to show that its practice is "*necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*", and simply argues that there are no "*restrictions*" or "*limitations"* (though using the notion of "*usual ... restriction"*: see **§ 334**), since "*each trade union candidate, and more generally each member with the right to vote, can* ***personally*** *take action in the administrative court, either spontaneously or at the request of the organisation* ***to which he or she belongs***". This does not amount to a legal response and does nor establish any *necessary* circumstances that could justify a restriction or limitation of the union's right to seek redress in the courts. It is simply a means put forward by the French Government to get round the restriction or limitation of which the union has been and continues to be the victim. Contrary to what the Government maintains, this option cannot be considered to safeguard union rights because any challenge to the former must come not from the union but directly and **personally**, to use the defendant's own term, from one or more individuals. Yet, the specific purpose of Article 28 of the Revised Charter is to ensure that, in their dealings with employers, employees can be replaced by representatives who are granted special protection compatible with their trade union activities. Restricting the right to challenge elections to persons who do not enjoy such Article 28 protection is to deprive unions and their members of the safeguards that article offers them. We would also refer here to the points made in **§§ 315 and 316** of our previous submission.

Conclusion

§ 343. For these reasons, the complainant trade union maintains its previous conclusions, as supported and strengthened by the arguments in this submission.

For the complainant, Denis Roynard, President.