CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 467/2010 (Seda PUMPYANSKAYA (I) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Luzius WILDHABER, Chair,
Mr Angelo CLARIZIA
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Mrs Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mrs Seda Pumpyanskaya, lodged her appeal on 8 July 2010. On the same date, the appeal was registered under No. 467/2010.

2. On 16 July 2010, the Chair decided that there were no grounds to grant anonymity in the present case.

3. On 8 September 2010, the appellant filed a supplementary memorial.

4. On 8 October 2010, the Secretary General submitted his observations on the appeal.

5. By a decision of 22 October 2010, the Tribunal rejected the request submitted by the appellant on 11 August 2010 seeking to obtain from the Chair reconsideration of his refusal of 16 July 2010 to grant anonymity (paragraph 2 above); consequently, the Tribunal confirmed the aforementioned decision of the Chair.

6. On 8 November 2010, the appellant filed a memorial in reply.

7. The public hearing in the present appeal took place in the court room of the Administrative Tribunal in Strasbourg on 27 January 2010. The appellant was represented by Mr Jean-Pierre Cuny, a member of the Versailles Bar, and the Secretary General was represented by Mrs Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Mrs Maija Junker-Schreckenberg, an administrative officer in the same department.

THE FACTS

I. THE FACTS OF THE CASE

8. The appellant is a Russian national aged 45. On 14 March 2005, she was recruited, as a staff member with a fixed-term permanent contract, as Director of Communication (grade A6). At the time at which the appeal was lodged, she occupied a position, still at grade A6 (Senior Adviser to the Secretary General on Communication and Outreach), attached to the Directorate General of Democracy and Political Affairs. Subsequently (since the beginning of February 2011), the appellant has no longer worked for the Organisation.

9. The appellant was appraised directly by the then Secretary General in respect of the years 2005, 2006, 2007 and 2008.

10. Following the expiry, on 31 August 2009, of the term of office of the Secretary General and the taking up of office of the current Secretary General (in October 2009), the duties of appraiser (n+1) were entrusted to the Deputy Secretary General. The appellant was informed of this at the end of December 2009.

11. On 18 February 2010, the appellant had her official appraisal interview.

According to the information supplied by the appellant, and not disputed by the Secretary General, the interview took place in a positive atmosphere. In particular, the Deputy Secretary General was said to have acknowledged that all the objectives set for the appellant had been achieved. The appellant adds that, however, during the final five minutes of the interview, the appraiser had brusquely informed her that she had assessed her performance over the year 2009 as "partially" satisfying the requirements of the post. The Deputy Secretary General had not replied to the appellant's immediate requests for explanations and had mentioned no specific fact on which her negative appraisal could be based.

12. On 19 February 2010, the appellant sent a memorandum to her appraiser requesting that she indicate the precise reasons, particularly the facts, which, in her opinion, justified this rating. She also asked whether her previous appraiser's opinion had been taken into consideration in the context of the appraisal for 2009.

13. The Deputy Secretary General replied to the appellant in a memorandum of 24 February 2010. Inter alia she asked her to provide her with certain further information and reminded her of her right to include comments on the appraisal form.

14. On 3 March 2010, the appellant replied to the aforementioned memorandum from the Deputy Secretary General. After providing her with the information requested, she disputed that the rating of which she had been informed for her performance in 2009 was justified. The appellant also, but unsuccessfully, requested a meeting with the Secretary General, to whom she continued to report directly according to the organisation chart.

15. In a memorandum of 4 March 2010, the Deputy Secretary General stated that she intended to alter neither the substance of her appraisal nor the final rating. The form was therefore finalised through the insertion of the appraisee's comments, dated 9 April 2010.

16. On 13 April 2010, the appellant made an administrative complaint in pursuance of Article 59, paragraph 1 of the Staff Regulations.

17. On 11 May 2010, the Secretary General rejected the administrative complaint.

18. On 8 July 2010, the appellant lodged the present appeal.

19. The appellant states that, at the beginning of February 2010, the Secretary General informed her of his intention not to renew her contract on its scheduled expiry date of 13 March 2010. The Secretary General asked the appellant to resign on the spot. He is also said to have assigned her to a position as a special adviser based in Geneva. With effect from 4 February 2010, the appellant was appointed to a position of special adviser, based in Strasbourg (and not in Geneva) and attached to the DGAP. These changes in the appellant's contractual situation took place in an unusual, or even an irregular way. In particular, the Secretary General asked the appellant to resign from her post as Director of Communication within 24 hours, without even giving her the most basic information about her new position. Furthermore, no time was granted to her to sign the new contract, the statutory requirement of five working days not therefore being complied with.

20. After the present appeal had been lodged, on 23 July 2010, the Secretary General told the appellant that he did not intend to extend her contract beyond its expiry date. The appellant ceased to work for the Council of Europe on 3 February 2011.

II. THE RELEVANT PROVISIONS

21. At the material time, the subject of appraisal was regulated by Rule No. 1305 of 13 July 2009. The parts of that order relevant to the present appeal are reproduced below:

Article 8 – Appraisers

"1. In this Rule the appraiser is also referred to as n+1. His/her appraiser is also referred to as n+2.

2. The appraisers shall be either specially appointed officials or Council of Europe staff members or temporary staff members covered by Rule No. 821 of 1 December 1992 laying down the conditions of recruitment and employment of temporary staff or Rule No. 1234 of 15 December 2005 laying down the conditions of recruitment and employment of locally recruited temporary staff members working in Information and Field Offices.

3. The Secretary General or the Deputy Secretary General shall draw up the appraisal reports on the heads of Major Administrative Entities, (…).”

Article 9 – Appraisal reports

“1. Appraisal reports shall be drawn up by the appraiser, using the appropriate electronic form, based on the appraisal interview.

2. The official language chosen by the appraisee shall be used for the appraisal exercise. With the appraisee’s consent, however, the appraiser may draw up the report in the other official language.

3. Appraisal reports shall be countersigned by the appraiser’s appraiser (n+2). Where the appraiser (n+1) is the head of a Major Administrative Entity, appraisal reports shall be countersigned by the Secretary General or Deputy Secretary General only if the appraisee so requests.

4. An appraisee who does not agree with the substance of the appraisal drawn up by the appraiser (n+1) may request an interview with the appraiser’s appraiser (n+2). The appraisee shall inform his/her appraiser (n+1) of this.

5. Before signing the appraisal form, the appraisee shall make any comments within five working days (not counting days of official journeys or leave).

6. The n+1 has the duty to provide the Secretariat members s/he will appraise with clear information about performance expectations throughout the reference period. S/he should give Secretariat members regular feedback about their performance, both in areas in which they are doing well, and in areas in which they can further develop. In particular, the n+1 should make sure that Secretariat members are informed in writing when, during a reference period, their work shows significant shortcomings. The n+1 shall help Secretariat members to reach their objectives.”

22. The “Guide to Appraisal” to which the appellant refers is a document prepared as “a compilation of basic information about appraisal”. It has been adopted by the Secretary General and distributed to all staff through the Intranet portal.

23. Rule No. 1285 of 28 November 2007 regulates the subject of staff under-performance. The relevant provisions thereof are reproduced below:

“1. An individual performance-enhancement process (hereinafter “the process”) shall be initiated for the benefit of staff members who, having been found lacking in effort, professional commitment or competencies, have received the lowest rating in the last appraisal exercise completed after the entry into force of this Rule or the next lowest rating in the last two appraisal exercises completed after the entry into force of this Rule.

2. The reasons why it is considered that the low rating(s) must be attributed to the staff member’s lack of effort, professional commitment or competencies - and not to structural deficiencies, inadequate management or medical or family problems - shall be contained in the relevant appraisal reports. The appraiser shall transmit the last appraisal report, within three working days of its signature by the staff member concerned, to the Head of his/her Major Administrative Entity.”

THE LAW

The appellant requests the Tribunal to declare void her appraisal report for the year 2009. She also requests the sum of 6 500 euros by way of reimbursement of all the costs occasioned by the present appeal.

24. For his part, the Secretary General requests the Tribunal to declare the appeal ill-founded and to dismiss it.

I. ARGUMENTS OF THE PARTIES

25. The appellant bases her claim on two grounds: breach of internal rules on appraisal and violation of the general principles of law.

A. First ground of appeal (breach of internal rules)

26. In respect of the first ground, the appellant argues that breaches occurred of Article 9, paragraph 6, of Rule No. 1305 (paragraph 21 above) and of Article 2 of Rule No. 1285 (*ibidem*), and that violations also occurred, in conjunction with those two breaches, of the general principle of law *legem patere quam ipse fecisti* and of the "Guide to Appraisal" (paragraph 22 above).

27. Firstly, the appellant emphasises that Rule No. 1305 is not the only source of secondary law relating to appraisal. In her view, account should also be taken of Rule No. 1285 on staff under-performance and of the "Guide to Appraisal". In fact, Rule No. 1285 contains provisions to be complied with by appraisers, particularly when the appraisee has received the "lowest rating" or the "next lowest rating", as is the appellant's case. The "Guide to Appraisal" must be taken into consideration, because of its general and abstract nature.

28. The appellant adds that the objective pursued by the respondent was to damage her career prospects, and that, in order to do so, he did not hesitate to breach the relevant rules.

29. In respect of the first part of this ground, the appellant argues that paragraph 6 of Article 9 was not complied with on several points. According to the appellant, she:

- received no clear information about performance expectations;
- was not informed in writing of her alleged shortcomings.

30. The appellant differs from the Secretary General – who does not deny the scope of this provision, and therefore the need for the appraiser to give a written warning to the appraisee – in that she considers that there is a need for a warning not only when the appraisee has received the lowest rating, but also – as in the appellant's case – when he or she has received the "next lowest rating".

31. The appellant challenges the restrictive interpretation by the Secretary General of the provision concerned. In her view, there is good reason to question both the logical and legal meaning of the term "significant shortcomings". In her view, any shortcomings likely to have a negative effect on the administrative and professional record of the staff member concerned are

"significant". In this context, the reference to Rule No. 1285 of 28 November 2007 on staff under-performance is particularly eloquent. Indeed, Article 22 *bis* of the Staff Regulations, on under-performance, provides that an under-performance process may be opened against a staff member only on the basis of one of the following two conditions: either the staff member received "the lowest rating in the last appraisal exercise", or he or she received "the next lowest rating in the last two appraisal exercises".

32. Thus, it is clear that the rating received by the appellant was a first step towards a process likely to have highly negative repercussions on the career of the staff member subjected to it. In the case of a staff member holding a fixed-term contract with the Organisation (such as the appellant), a rating of this kind jeopardises renewal of the contract. Where the evaluation of the damage suffered is concerned, this circumstance deserves to be emphasised.

33. In the light of these considerations, and particularly of the possibility of the opening of an under-performance process, it is particularly inappropriate to assert that the next lowest rating is not in itself a "significant shortcoming".

34. On another plane, the Secretary General's thesis seems unfounded. This is the plane which could be described as that of the "culture of the Organisation" and administrative practice. It suffices to refer to the statistics published by the Directorate of Human Resources on the Organisation's Intranet portal. It is apparent from this table that only 1.50% of staff members (a total of 41) received, like the appellant, the next lowest rating, i.e. had only "partially" satisfied the requirements of the post. In the Directorate of Communication, the appellant who was its Director was the only staff member in this situation.

35. In the context of these statistics, it may be asserted that, in administrative practice, the fact of having only partially satisfied the requirements of the post assuredly represents a significant shortcoming.

36. However, the appellant should have benefited from the safeguard introduced by Article 9, paragraph 6 of aforementioned Rule No. 1305.

37. The absence of information in writing is aggravated by the fact that, even orally during the "reference period", the appraiser never communicated to her any kind of criticism relating to the allegedly unsatisfactory nature of her performance.

38. The appellant is convinced that, in these conditions, the provision concerned was violated. An essential formality prescribed by that provision was not complied with, to the appellant's disadvantage.

39. As to the second part of this first ground, the appellant affirms that Article 2 of Rule No. 1285 requires the appraiser to explain the reasons why the low rating given must be attributed to the staff member's lack of effort, professional commitment or competencies.

In her view, any search in the appraisal report at issue for any kind of statement in this respect would be in vain: the appraiser gives no reason whatsoever for her opinion that the rating was attributable to the appellant's lack of effort, professional commitment or competencies.

Such a statement was all the more necessary for the fact that the previous Secretary General, in his appraisal report for 2008, had stated that the appellant had experienced "what some colleagues regard as harassment".

In these conditions, another essential formality was breached to the appellant's disadvantage. In practice, it is not enough, for the purposes of the regulations, to assert, or even (something that the respondent refrains from doing) to give reasons for an alleged shortcoming in a staff member; it is also necessary to make allowances, to consider the reasons underlying the shortcoming noted and to give grounds in this respect in the decision reached by the appraiser. In other words, the regulations require a particular effort to be attentive and diligent.

The appellant adds that, the Secretary General himself being responsible for the regulations, the violation of this Rule, like that of the previous Rule, also has to be regarded as a violation of the general principle of law *legem patere quam ipse fecisti*.

40. As to the third part of this first ground, the appellant highlights the fact that the "Guide to Appraisal" – distributed via the Intranet – constitutes an internal guide, one which the Organisation is duty bound to comply with. She refers in this respect to the case-law of the European Union's Civil Service Tribunal (judgment of 7 July 2009, Bernard/Europol, F-99/07 and F-45/08, and in particular paragraphs 79-80, 83-85 and 85-88).

41. The appellant adds that the "Guide to Appraisal" specifies that "The appraisal interview should not be the only time when appraisees and managers get together and talk: regular feedback is necessary (…). Appraisers are therefore strongly advised not to wait for the appraisal exercise before providing feedback." (Part IV, Dialogue and motivation, paragraph 2, Importance of feedback and the mid-year review).

42. For her, this instruction adds nothing new in relation to the aforementioned decision in Rule No. 1305. These requirements lag slightly behind those set out in the latter. It will nevertheless be noted that the appraiser did not comply with this minimum requirement, on account of the complete absence of feedback.

43. In the appellant's view, the regulations contained in the Guide are specifically intended to prevent cases like her own. Having received positive appraisals ever since 2005, she had throughout 2009, and until 31 August 2009 (and even beyond that), received positive feedback on her performance. Furthermore, if the Deputy Secretary General had had negative impressions in this respect, she had been perfectly at liberty to advise the appellant of this fact on the occasion of the two interviews which she had had with her, in August and October 2009.

44. The appellant adds that, in February 2010, she found out that over the same period and the final four months of the year, her appraiser had detected significant shortcomings. She adds that she had the right to be informed of these in time to enable her to remedy them. On this point, she says that the Guide stipulates that there should be an "informal review" enabling "staff members to see where they stand in relation to their objectives and, if necessary, take a fresh look at the objectives (…)".

45. The appellant points out that the appraiser changed during the reference period, and that the new appraiser thought that she had detected shortcomings in her way of serving over the reference period. In her view, it was necessary, in order to safeguard her right to understand the appraiser's viewpoint and, if need be, to make improvements, for her to be informed during the reference period, and not a month and a half after the end of that period, of the criticism directed at her.

46. In conclusion, the appellant is convinced that the appraisal report at issue is affected by specific and undeniable procedural defects.

B. Second ground of appeal (violation of the general principles of law)

47. Through her second ground relating to the violation of general principles of law, the appellant alleges a violation of the general principle of law whereby reasons must be given for administrative decisions and a violation of the principle of good faith.

48. In respect of the first part of this ground, the appellant immediately draws attention to the case-law of the Tribunal in respect of the Administration's obligation to give sufficient reasons for its acts (ATCE (formerly ABCE), appeal No. 151/1988, Bohner, decision of 1 December 1988, paragraph 28) and to international case-law on the obligation to state reasons for staff reports (Court of First Instance of the European Union, judgment of 25 October 2005, Micha/Commission, T-50/04, rec. FP p. 11-1499, paragraph 36).

49. The appellant points out that she was suddenly faced in February 2010 with a lowering of her rating as compared to previous appraisals. In accordance with international case-law, "in certain cases, particular care must be taken to give reasons. For example, in the case of reasons for an assessment comprising views less favourable than those which appeared in a previous assessment report. It is in fact important for reasons to be given for the decline noted by the authority, so that the official may judge whether the assessment is founded and, if need be, so that the Tribunal may exercise its judicial supervision" (Court of First Instance of the European Union, judgment of 17 May 2006, Lavagnoli/Commission, T-95/04, Rec. FP p. II-A-2-569, paragraphs 120-121).

50. The evidence placed in the file, and particularly the two memoranda which the appellant sent following her appraisal interview and her appraiser's comments in the context of the form, show that the appellant tried in vain to understand the reasons which had driven her appraiser to take the view that her performance had declined, where the management of human resources was concerned.

51. Thus, for one thing, the appellant supplied objective statistics and raised clear questions, such as "what are the facts" underlying her appraiser's negative appraisal in this respect.

52. The Secretary General, in his rejection decision, and the Deputy Secretary General, in her memorandum of 24 February 2010, emphasised the circumstance that the appraisal interview lasted approximately an hour. However, the length of an interview reveals nothing about the reasons for appraisals. The appellant benefited from no information from the Deputy Secretary General other than that referred to in the memorandum dated 3 March 2010, the Deputy Secretary

General telling her that she had received certain "signals" from DHR about discontent among some of her colleagues.

53. However, it has to be said that a "signal", an "indication", in order to be taken seriously, must at least contain verifiable and falsifiable facts. The appellant made written and oral requests for these facts. The Deputy Secretary General remained impervious to these requests, and on two occasions referred to the comments that she had made on the appraisal form. These comments, unfortunately, do not fill this gap. The reasons are not set out in detail and do not therefore meet the requirements of international case-law.

54. The absence of any reference to concrete facts also comes under the principle of good faith, which is the second argument on this ground.

55. In respect of the second part of the ground, the appellant points out that the general principle of law which requires international organisations to act in good faith should guide their administrative authorities in the exercise of their duties, and particularly in the management of their staff.

56. Firstly, the absence of information about the facts on which the negative appraisal of the appellant is based constitutes a true "failure to show (…) objectivity", to quote the Administrative Tribunal of the International Labour Organisation (ILOAT, judgment No. 1136 of 29 January 1992, consideration 6).

57. For the appellant, the absence of any information about the facts for which she was criticised, an absence which persisted notwithstanding the appraisal interview and the two memoranda which she sent to her appraiser, shows that the dialogue was defective. This was certainly not attributable to the appellant, who, on the one hand, put specific questions to which no reply was ever given, and, on the other hand, provided statistical and factual evidence which was not taken into consideration.

58. Secondly, the appellant argues that, according to case-law, any international organisation "owes it to its employees (…) to guide them in the performance of their duties (…) and to warn them (…) if they are not giving satisfaction" (ILOAT, judgment No. 2529 of 12 July 2006, consideration 15).

The appellant notes that the Secretary General, in his decision to dismiss the administrative complaint, does not dispute the existence of such an obligation, but affirms that it does not extend to staff of grades A6 and A7. She adds that, in order to justify what he said, the Secretary General emphasises that a staff member of grade A6, as is the appellant's case, enjoys a broad measure of independence appropriate to the exercise of high-level duties. However, it is easy for the appellant to reply that this independence reaches its natural limit through compliance with the hierarchical principle, on which the power to assess staff is also based. Furthermore, this is why the appellant was assessed directly by the Secretary General (or the Deputy Secretary General). As soon as a hierarchy has been established, hierarchical superiors' duty to provide support is a corollary thereof, whatever position the staff member occupies in the grade pyramid. The appellant points out in passing that the previous Secretary General held regular meetings with the Directors. This made it easy for him to issue instructions to them and offer them advice.

The absence of any guidance (and of any prior warning) is thus a second indication of the violation of the principle of good faith in the present case.

59. Thirdly, the appellant emphasises that, in the aforementioned memorandum of 19 February 2010, she had asked whether the opinion of her previous appraiser (until 31 August 2009) had been taken into consideration. The Deputy Secretary General gave no reply to that question.

Having drawn attention to the importance of consultation of the person under whom the appraisee performs his or her duties, and to European Union case-law on this issue, the appellant highlights the fact that showing good faith and providing requisite reasons are closely involved in the present case. The violation of two general principles at once reveals the existence of prejudice and a regrettable absence of objectivity.

In the light of these criteria and of the precautions required of the appraiser by the Court of Justice of the European Union, the appellant argues that she had been accused of under-performing without having been told of the facts on which the negative appraisal was supposed to be based so that she could comment on these and possibly challenge them. In this context, she argues that the rights of the defence were violated to her disadvantage. Furthermore, the circumstances described in respect of the decision not to renew her contract (paragraphs 19 and 20 above) should probably be considered in conjunction with the violation of these principles. Everything makes the appellant think that the unfavourable assessment of her performance was, in the Secretary General's eyes, a very useful premise for the decision not to renew her contract which he had already taken in his own mind.

In the light of these considerations, the appellant is convinced that the aforementioned general principles of law were breached to her disadvantage in the context of the appraisal procedure, and that these defects affected the appraisal itself, making it unlawful.

60. In conclusion, the appellant requests the Tribunal to declare void her appraisal report for the year 2009.

61. For his part, the Secretary General immediately observes that the appraisal procedure followed was applied in conformity with the provisions of the Staff Regulations relating to appraisal, and with Rule No. 1305 determining the means of application of the appraisal system.

62. After drawing attention to Article 8, paragraph 3 of Rule No. 1305 (paragraph 21 above), he points out that it was possible for the appellant's appraisal report to be written either by the Secretary General or by the Deputy Secretary General, as was done in the present case. In this respect, the Secretary General had been the appellant's appraiser until 31 August 2009, when his term of office came to an end, and the Deputy Secretary General had taken over with effect from 1 September 2009, firstly in her capacity as Secretary General *ad interim* until the new Secretary General arrived, and subsequently as Deputy Secretary General.

63. According to the Secretary General, the appraisal conducted by the Deputy Secretary General was based on an overall analysis of the appellant's work and performance during the reference period. The report had been drawn up on the basis of a careful and sufficiently reasoned

evaluation. In his view, the Deputy Secretary General, who had exercised the broad discretion available to her in this respect, had, in full knowledge of the facts, drawn the conclusion that the appellant had partially satisfied the requirements of her post.

64. Next, the Secretary General draws attention to international case-law regarding the scope of the discretion of international organisations.

65. In reply to the appellant's argument that she had not received any clear information about performance expectations, the Secretary General points out that the appellant had an objective-setting form which clearly set out her main activities, the objectives to be achieved and the competencies expected. As a staff member of grade A6, and head of the same major administrative entity for a five-year period, the appellant should therefore know what performance was expected. Furthermore, at her level of responsibility, and in view of her length of service in the post, the appellant should not need regular support from her manager (the Deputy Secretary General), who should be able to expect the appellant to show a considerable level of independence. In any case, the appraisal exercise is not a one-way process. If the appellant considered that she did not have clear information or did not know what performance was expected of her, she was perfectly at liberty to contact the Deputy Secretary General.

66. As to the argument that the appellant should have been informed of her shortcomings in writing during the year 2009, which she alleges was not done in contravention of Article 9, paragraph 6 of Rule No. 1305, the Secretary General notes that the appellant herself mentions in her documents that she was received on at least two occasions by the Deputy Secretary General between 31 August 2009 and the appraisal interview. For the Secretary General, dialogue thus took place, at least during these appointments. Furthermore, during the period up to 31 August 2009, the previous Secretary General also received the appellant on several occasions and informed her of the need to improve her managerial skills, particularly in view of the outcome of the harassment proceedings taken against her. So here, again, dialogue certainly did take place and explanations were given of the criticism of the appellant.

67. Where the lack of a written warning is concerned, the Secretary General points out that, in this case, the appraisal given merely indicated that, in respect of one of the objectives set, the appellant had only partially satisfied the requirements for the reference period, and did not say that there were significant shortcomings in the work done by the appellant. The opposite was the case, and the work done by the appellant in fields other than those relating to management was the subject of positive, even complimentary, comments. It was therefore clear that a written communication was not necessary.

68. The appellant alleges in paragraph 21 of her supplementary memorial that the Secretary General claimed that the need for a written warning exists only when the appraisee has received the lowest rating. The Secretary General denies this assertion. He had not argued that a written warning was necessary when the appraisee had received the lowest rating (and not when he or she had received the next lowest rating). He affirmed, and continues to affirm, that when, during the reference period, significant shortcomings are observed in the work of a person who is a member of the Secretariat, the n+1 has a duty to ensure that the person concerned is informed of this in writing. This was not so in the present case. The appellant is attempting here to "merge"

two texts serving a completely different purpose. Rule No. 1305 relates to staff appraisal, whereas Rule No. 1285 relates to dealing with staff under-performance.

69. In view of the differences in wording between Article 1 of Rule No. 1285 and Rule No. 1305, which does not mention the need for a written warning when an appraisee has received the lowest rating, the Secretary General concludes that there is one procedure for staff appraisal and another for dealing with staff under-performance, and that the latter is started if need be only at the end of the former. In the present case, it should be noted that the procedure for which Rule No. 1285 provides was not implemented, so there is no reason to refer to it.

70. Furthermore, the 2008 appraisal report by the previous Secretary General states, under the heading of "Leadership", that the appellant had been made aware of the problems and could not claim to have had no opportunity to improve, her managerial skills having been called into question since at least 2008.

71. Furthermore, in January 2009, the appellant had been received by the Director of Human Resources to discuss the situation within the Directorate of Communication, because of the number of staff members who had contacted the Directorate of Human Resources in this context. The discussion related to the atmosphere prevailing in the Directorate of Communication and the appellant's management style. At a meeting with the Deputy Secretary General on the subject of the contacts made by staff members of the Directorate of Communication with the Directorate of Human Resources and the Council of Europe doctor, the Director of Human Resources had informed the Deputy Secretary General of this discussion. Here again, it had been made clear to the appellant that her management style caused problems.

72. Furthermore, the appellant alleges a violation of the Guide to Appraisal. It should firstly be noted that this very useful document does not have the force of a statutory or regulatory text. As is stated in its introduction, "Both appraisers and appraisees are advised to take note of its contents". A search in it for any binding provisions would thus be in vain.

73. As far as the alleged violations of the general principle of law on the giving of reasons and of the principle of good faith are concerned, the Secretary General argues that the reasons for the lowering of the appellant's rating are made clear, both under Objective 2 on the form and under the headings "Influence and authority" and "Leadership", but also, in particular, in the appraiser's final comments.

74. The appellant's managerial abilities are clearly called into question by the Deputy Secretary General, and this is why the Deputy Secretary General considered that the appellant had "partially satisfied the requirements of the post".

75. The appellant, like a large number of appraisees, considers that her work is not recognised at its true value and that she deserves a better appraisal than the one given to her by her superior. The Tribunal points out that the appellant cannot substitute her own appraisal for that of an authority holding the power and competencies to evaluate her performance. She has an opportunity to add her own comments to the appraisal report in order to express her disagreement and the reasons why she considers that she deserves a better appraisal, and she did in fact make

use of this opportunity. On the other hand, she cannot draft her own appraisal report based on her vision of her own performance.

76. When the appellant demands verifiable facts as reasons for her appraisal, it should be pointed out that, although unachieved quantitative objectives can be proven by looking at the figures, shortcomings in terms of managerial skills cannot be mathematically measured. It should be pointed out that the appraisal report is not designed to list facts, but to contain comments on the objectives set and the competencies expected. Furthermore, as mentioned above, the Deputy Secretary General did not wish – solely in the appellant's interest – to refer to the procedures against the appellant, which for their part list criticisms of the appellant. In any case, the Deputy Secretary General's comments are more than enough to make the appellant understand the appraisal of her managerial skills, particularly as she is aware of the problems that exist.

77. Although the appellant asks whether the opinion of the previous Secretary General was taken into account, it has to be pointed out that it is the Deputy Secretary General who is the appellant's appraiser, and that it is therefore her opinion which must appear in the appraisal report. She was expected to express her views in all honesty. In any case, the appellant is aware of the previous Secretary General's opinion of her managerial skills; he had occasion to speak to her about her problems in this respect during their discussions prior to 31 August 2009. The Deputy Secretary General was personally instructed by the previous Secretary General, on the last day on which he was present at the Council of Europe, to be responsible for monitoring the appellant. The Deputy Secretary General, aware of all the evidence referred to, took it into account.

78. The appraisal report was written following an interview between the appellant and her appraiser. She was given an opportunity to reply by making comments. Consequently, the procedure was perfectly complied with, and the fact that a negative appraisal was made of certain of her results by no means deprives the appraisal of its lawfulness or of its conformity with the relevant regulations.

79. It is clear from all the aforementioned evidence that the appraisal report was drafted in accordance with usual practice and the applicable regulations. Consequently, the appellant's request for her appraisal report for year 2009 to be declared void can in no circumstances be allowed.

80. If, extraordinarily, the Tribunal were nevertheless to take the view that an irregularity had occurred in the appraisal procedure, it is nonetheless the case that, according to a principle widely recognised in international administrative case-law, a procedural irregularity could not lead to the voiding of an administrative decision unless that irregularity was of a substantial nature and was likely to cause actual damage to the appellant. It has to be said that, in this case, if an irregularity did occur, it was not of a substantial nature and did not cause any damage to the appellant.

81. It is clear from the aforementioned evidence that the appellant's appraisal report could not have had a different substance and should not, in consequence, be declared void.

82. From the foregoing considerations as a whole, it is clear that the Secretary General did not violate any regulation or the practice or general principles of law. Nor was there any misinterpretation of relevant evidence, erroneous conclusions or abuse of authority.

83. In the light of all this evidence, the Secretary General requests the Administrative Tribunal of the Council of Europe to declare appeal No. 467/2010 ill-founded and to dismiss it.

II. THE TRIBUNAL'S ASSESSMENT

A. First ground of appeal

84. The Tribunal must first consider the alleged violation of Article 9, paragraph 6 of Rule No. 1305.

85. The Tribunal notes that the appellant essentially criticises two things: the absence of clear information about performance expectations and the absence of information in writing about her alleged shortcomings.

86. The Tribunal notes that the appraisal report at issue was written in a context of criticism of the appellant's managerial skills over a period of five years. During that period, the appellant had been clearly told, during the various annual appraisal exercises, that there was a problem in terms of leadership and management. It is a fact that, in certain circumstances, the former Secretary General had expressed opinions which implied that, from his viewpoint, the appellant was not necessarily or fully responsible for the situation described. However, he also noted the need for improvement for the years ahead and the need to put in place a training system in order to improve performance. In view of her grade and duties and the importance which staff training should have in an international organisation like the Council of Europe, the Tribunal is very surprised that these plans were not carried out, despite having been requested at the Organisation's highest level of governance.

87. As to written information about her alleged shortcomings, the Tribunal notes that not until the end of December 2009 was the appellant informed that she would be appraised by the Deputy Secretary General, i.e. at the end of the period. The Tribunal does not know on which date it was decided that the Deputy Secretary General would appraise the appellant. Certainly, in pursuance of the principle of proper administration of the Organisation, the appellant should have been informed as early as September of the name of her new appraiser, and an interview should have taken place; however, in view of the nature of the criticism raised in the 2009 appraisal report, the Tribunal does not consider that there was a failure to meet the requirement for written information. Although it was an important field that was concerned, that of management of the staff of a Directorate, the Tribunal notes that day-to-day management of the Directorate had nevertheless been entrusted to the appellant's deputy, and that, as far as the Tribunal is aware, nothing particularly serious occurred during the period from September to December 2009 justifying written notification to the appellant.

88. The Tribunal therefore concludes that this provision was not violated.

89. In respect of the alleged violation of Article 2 of Rule No. 1285 (second part of the ground), the Tribunal notes that this relates to under-performance. However, that provision has to be read and interpreted in conjunction with Article 1 of the same Rule, of which it is the logical continuation (paragraph 23 above). This combined reading shows that the conditions for the drafting of appraisal reports to which Article 2 refers apply only to the requirements for the starting of the individual performance-enhancement process. Since the appellant was not subjected to this process – and there was at no time any question of so subjecting her – the Tribunal is not required to check whether this provision was complied with, and, in particular, whether the appraisal report was drawn up in accordance with this provision, as this provision comes into effect only for the purposes of under-performance. This would not have been so if an under-performance process had been begun against the appellant.

90. Having reached this conclusion, the Tribunal is not required to examine the appellant's allegation that a violation of the general principle of law *legem patere quam ipse fecisti* was combined with a violation of Rules Nos. 1305 and 1285 (paragraph 39, last sub-paragraph, above).

91. Finally, in reply to the argument that the "Guide to Appraisal" had been violated, the Tribunal notes that this is not a standard-setting text, but more of a guide to help and to facilitate the task of appraisers and the participation of appraisees in the appraisal exercise. Thus, it cannot be considered to be a source of law, failure to comply with which would entail a violation independent of any reference texts that may have been violated.

92. In conclusion, this ground of appeal must be rejected.

B. Second ground of appeal

93. Through this ground, the appellant alleges a violation of two general principles of law: the giving of reasons for administrative decisions, and good faith.

94. As to the first part of this ground, the Tribunal notes that the Deputy Secretary General gave sufficient reasons for her appraisal, in view of the previous appraisal reports which had concerned the same problem. Of course, the Deputy Secretary General could have given a more explicit indication of the reasons which had led her to conclude that one objective had been partially achieved; however, the appellant cannot argue that insufficient reasons were given for the appraiser's decision.

95. Having concluded that the Deputy Secretary General did not commit an error in the giving of reasons for the objectives, the Tribunal could wonder whether the Deputy Secretary General was right to state in the final rating that the objectives were partially achieved, rather than fully achieved. This question may arise in so far as the critical appraisal related only to one part of one of the seven objectives set for the year 2009. However, the Tribunal notes that, when she acted in this way, the Deputy Secretary General did not exceed, although she came very close to, the limit of her margin of discretion, and it is not for the Tribunal to substitute its own appraisal for that of the appraiser.

96. As to the second part of this ground, none of the arguments put forward by the appellant can lead the Tribunal to conclude that the appraiser did not act in good faith. In so far as the arguments put forward would be capable of bringing into play the principle of good faith, the Tribunal nevertheless notes the following.

97. Firstly, without it being necessary to give the details here, the Tribunal notes that, in the appraisal at issue, the Deputy Secretary General made a number of comments about staff management which led her to conclude that the related objective had been partially achieved. This conclusion led the appellant to challenge the appraisal through litigation.

98. The Tribunal notes that, in the preceding years' appraisals, comments had also been made by the then appraiser. The Tribunal refers to the appraisals for the years 2005 (*conduct observed*), 2006 (*leadership* and *management of team(s)*), 2007 (*leadership* and *management of team(s)*) and 2008 (*leadership* and *management of team(s)*). Certainly, in some statements, the appraiser expressed opinions which give the impression that, in his view, the difficulties encountered did not originate in the appellant's conduct, but more in the resistance of her subordinates. However, the statements made contain some comments, particularly on the subject of leadership and the level achieved, which every appraiser would be duty bound to indicate was lower than the other appraisals in the appellant's case. Furthermore, it was also envisaged that advice be given by the DHR on improving her knowledge in respect of leadership and management.

99. Secondly, the Tribunal notes that the appellant had had sufficient indications of ways of improving her rating in the staff management field at issue. Furthermore, she makes no criticism whatsoever of the action of the former Secretary General, who had set her objectives and been her appraiser for eight months. In addition, the appellant herself recognises that the previous Secretary General held regular meetings with the Directors. This made it easy for him to issue instructions to them and offer them advice. For the Tribunal, it follows that, during two-thirds of the appraisal period at issue, the appellant had the indications which she argued were absent; thus, this part of the ground is unfounded.

100. Thirdly, the Tribunal notes that the question of whether or not the Deputy Secretary General had asked the opinion of the former appraiser (the Secretary General who had left the Organisation), and the absence of a reply from the Deputy Secretary General on this point are not proof of the existence of a violation of the principle of good faith. It is just possible that they may constitute a violation of the procedure, but the appellant did not raise this point in her administrative complaint. Therefore, the Tribunal is not required to consider this question.

101. In the light of this finding, the Tribunal considers that it cannot be stated that the Organisation did not act in good faith.

102. Thus, this second ground of appeal is also to be rejected.

103. In conclusion, the appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Orders that each party bear its own costs.

Adopted by the Tribunal in Strasbourg on 23 June 2011, and delivered in writing pursuant to Rule 35, paragraph 1, of the Rules of Procedure of the Tribunal, on 26 July 2011, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	L. WILDHABER