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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Collective Complaint No. 23/2003 **Case Document No. 5**
Syndicat occitan de l'éducation v. France

OBSERVATIONS FROM THE FRENCH GOVERNMENT ON THE MERITS

registered at the Secretariat on 19 April 2004

(TRANSLATION)

OBSERVATIONS OF THE FRENCH GOVERNMENT ON THE MERITS OF COMPLAINT No.23/2003 SUBMITTED BY THE SYNDICAT OCCITAN DE L'EDUCATION (SOE) TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

In a decision dated 13 February 2004 the European Committee of Social Rights declared admissible Complaint No.23/2003 submitted on 18 November 2003 by the *Syndicat Occitan de l'Education* against France.

The SOE maintains that Act No.84-16 of 11 January 1984 laying down rules on the national civil service contravenes Articles 5 and 6 of the Revised European Social Charter in that it does not allow trade unions considered non-representative to put forward candidates in some civil service elections.

The complaint prompts the following observations from the French government.

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Act No.96-1093 of 16 December 1996 amended the representativity rules on the national civil service, the local civil service and the hospital civil service by introducing, as in the private sector, a two-round system for election of staff representatives to the civil service joint administrative boards. Article 14 of Act No.84-16 of 11 January 1984 laying down rules on the national civil service, as amended by Article 94 of Act No.96-1093 of 16 December 1996, provides that members representing staff on one of the civil service joint administrative boards are elected in two rounds of voting with proportional representation. The third paragraph of the article provides that "in the first round of voting the lists are put forward by representative public-servants' trade unions".

The complainant maintains that this rule infringes Articles 5 and 6 of the Revised European Social Charter by hindering unions regarded as non-representative from taking part in elections of staff representatives to the civil service joint administrative boards and by preventing new trade unions from taking part in such elections.

1. The rules on participation in staff elections to the civil service joint administrative boards:

1.1 – The relevant legislation and regulations:

Firstly, as stated, Article 94 of Act No.83-1093 of 16 December 1996 amended **Act No. 83-634 of 13 July 1983** laying down rights and obligations of public servants, to which it added the following **Article 9 bis**:

> ***"To be regarded as representative of all staff governed by the provisions of the present Act, trade unions or groupings of trade unions:***
>
> *1. shall have one or more seats on each of the civil service superiors councils (the national civil service council, the local civil service council and the hospital civil service council);*
>
> *2. or shall obtain 10% or more of votes cast in elections of representatives of staff governed by the present Act to the joint administrative boards and 2% or more of votes cast in those same elections in each of the civil services. The share of the vote shall be assessed as in the latest election to each of the aforementioned councils.*
>
> *For the purposes of the previous paragraph, a groupings of civil service unions shall mean a trade-union grouping with statutes which specify its title and provide for it to have its own management bodies, appointed directly or indirectly by a deliberative body, and to have its own permanent resources deriving in particular from payment of membership fees".*

Article 94 of the Act of 16 December 1996 also replaced some provisions concerning appointment of members to the joint administrative boards of the national, local and hospital civil services - namely, the second paragraph of **Article 14 of Act No.84-16 of 11 January 1984** laying down rules on the national civil service, the third paragraph of Article 29 and the first two sentences of the sixth paragraph of Article 32 of Act No.84-53 of 26 January 1984 laying down rules on the local civil service, and the third paragraph of Article 20 of Act No.86-33 of 9 January 1986 laying down rules on the hospital civil service. They were replaced by the following provisions:

> ***"Members representing the staff shall be elected by proportional representation with two rounds of voting. In the first round the lists put forward shall be those of representative trade unions. If no list is submitted by such trade unions or if the number of voters is lower than a***

minimum set by decree of the Conseil d'Etat, a second round shall be held, after an interval set by the same decree, in which the lists may be put forward by any civil service trade union.

For the purposes of the previous paragraph the following shall be regarded as representative:

1. Civil service trade unions lawfully affiliated to a grouping of trade unions meeting the conditions laid down in Article 9 bis of Act No.83-634 of 13 July 1983 laying down rights and obligations of public servants;

2. Civil service trade unions meeting, in the context in which the election is held, the provisions of Article L133-2 of the Labour Code. Trade unions affiliated to the same grouping shall not put forward competing lists in the same election. The conditions governing implementation of the present paragraph shall be laid down as necessary by a decree of the Conseil d'Etat. Objections to lists put forward shall be made to the competent administrative tribunal within three days after the time limit for submission of lists. The administrative tribunal shall deliver its decision within fifteen days after submission of the objection. The objection shall not have suspensive effect."

Decree No.97-40 of 20 January 1997 amended Decree No.82-451 of 28 May 1982 on the joint administrative boards with regard to implementation, within the national public service, of the provisions of Article 94 of Act No.96-1093 of 16 December 1996. It stated (Article 5):

"The lists shall be submitted by representative trade union organisations at least six weeks before the date set for the elections and each list shall include the name of an official in charge of the list who shall be authorised to represent the organisation in all electoral matters…"

Article 11 states:

"If no list has been submitted by representative trade union organisations or if the number of votes cast is less than half the number of voters on the electoral list, a further ballot shall be held no earlier than six weeks and no later than ten weeks after the date originally set for the ballot if no representative trade union organisations have submitted lists, or after the date of the first ballot if fewer votes were cast than specified above. In this second round of voting any civil service trade union organisation may submit a list."

1.2 – The provisions criticised by the complainant:

The legislative and regulatory scheme described in paragraph 1 provides for two-round election of staff representatives to the joint civil

service boards, the first round being confined to representative civil service trade union organisations, the second round, if any, being open to all civil service trade union organisations.

In the first round, for representative trade unions, representativity is assessed by two methods, the first of which presumes representativity in the case of trade unions which obtained a certain number of votes or seats in previous elections, the other of which gauges representativity according to the criteria laid down in Article L133.2 of the Labour Code.

a) Presumed representativity:

This presumption is made according to wholly objective criteria based on the results of previous work elections. It thus cannot be in any way discriminatory.

Under Article 9 bis of Act No.83-634 of 13 July 1983 those trade unions are presumed representative which are lawfully affiliated to a trade union grouping which has one or more seats in each of the three public-service councils or has obtained 10% or more of the votes in the three public services taken together, including at least 2% of the votes in each of the three individually. Six trade union organisations currently meet those requirements: the CGT, the CFDT, the CFTC, the CGC, the FO and the UNSA. Representativeness is presumed in respect of these groupings under paragraph 1 of Article 9 bis – that is, by virtue of the number of seats which they hold in each of the three public-service councils (national, local and hospitals). On these councils the number of staff seats is allocated to trade union organisations according to the number of votes which they obtained in the elections to the joint administrative boards.

It is thus the voters themselves who decide between the different organisations. Those who obtained most votes in the particular public service have seats on the council for that public service.

It makes sense for a trade union to be presumed representative when it has seats on each of the three councils since to hold those seats it must have won a significant proportion of the votes cast by members of each of the public services.

b) Demonstrable representativity:

Where a trade union's representativity cannot be presumed as a result of its not meeting the conditions laid down in Article 9 bis of the Act of 13 July 1983, it may take part in the election in precisely the same way if it can demonstrate its representativity. Under Article 14 of Act No.84-16 of 11 January 1984, any trade union whose representativity cannot be presumed in the above manner may establish its representativity in the particular election in the light of the criteria laid down in Article L133.2 of the Labour Code: number of members, independence, membership fees, level and length of experience, and patriotic attitude during the Occupation (this last criterion is no longer applied).

The aim and effect of this provision is precisely to enable new trade unions, or unions which, since the previous elections, have become more representative through effective action, increased membership and so on, to take part in elections.

The complainant thus has no grounds for maintaining that the system excludes new trade unions from elections. It merely excludes from the first round those trade unions which cannot be regarded as representative by any standard –that is, those which did not win sufficient votes in the previous elections or were unable to take part in them, or which, in terms of their characteristics, have far too few members, for example, or far too little experience in the particular electoral context to claim to represent the relevant staff to the administrative authority. That in no way prevents a trade union from developing its representativity effectively by means of other action aimed at the staff which it seeks to represent, participation in elections being only one of many means of action which trade unions have for performing their role.

2. The administrative authorities assess a trade union's representativity in a non-discretionary manner and perform that compulsory function under the supervision of the courts:

This assessment is performed only in respect of trade unions whose representativity cannot be presumed, that presumption being automatic – and the authorities therefore having no say – in the case of unions that meet the requirements. **The assessment is performed in a manner which rules out any suggestion of discrimination.**

2.1 – The administrative authorities are required to examine representativity in the light of the criteria laid down in Article L133.2 of the Labour Code:

To the criteria of member numbers, independence, membership fees, level and length of experience and patriotic attitude during the Occupation (this last criterion being no longer applied) laid down in Article L.133-2 of the Labour Code, judicial and administrative case-law has added the criteria of union activity and audience.

For assessment of these criteria, reference should be had to the case-law on trade-union representativity. Judicial interpretation of the criteria has established that the criteria do not apply concurrently in a given case and that the object is to see if there is a number of indications of a trade union's representativity or non-representativity. Thus a particular trade union's failing to meet one or more of the criteria in Article L133.2 of the Labour Code is not in itself proof of non-representativity as failure to meet one of the criteria may be offset by meeting the others.

In addition, Article 15 of the above-mentioned Decree No.82-451 of 28 May 1982 requires that if the administrative authorities find that a list does not meet the requirements of Article 14, 3rd and 4th paragraphs, of Act No.84-16, they must give the official in charge of the list a reasoned decision declaring the list inadmissible. The circular of 23 April 1999 on implementation of the Decree of 28 May 1982 specifies that each of the

criteria must be examined and that the statement of reasons must include all the factors which led to the conclusion that the trade union was non-representative.

2.2 – The admnistrative authorities assess trade unions' representativeness under judicial supervision:

Article 14, 8th paragraph, of Act No.84-16 of 11 January 1984 provides:

> *"Objections to the lists submitted shall be made to the competent administrative court within three days after the time limit for submission of candidatures. The administrative court shall deliver its decision within fifteen days after submission of the objection. The objection shall not have suspensive effect".*

This procedure in the administrative court is an emergency one to settle any disputes before the election.

The administrative authorities again have no discretionary powers to extend the period for assessing a list's admissibility: under Article 15 of Decree No.82-451 of 28 May 1982 they must communicate the reasoned decision on a list's inadmissibility no later than the day after the time limit for submission of candidatures.

In this matter the circular of 23 April 1999 stresses that the administrative authorities must display diligence. It states that it is essential that the services responsible for receiving the lists of candidates be able to give a decision on lists' admissibility on the actual submission day. This presupposes that trade unions have already been scrutinised for representativity and appropriate structure. Nothing prevents from inviting the trade unions to inform the Administration, before the submission of the candidatures, of their intention to participate in the elections. Nor is there anything to prevent the administrative authorities' asking trade unions to supply it with the necessary information for assessing representativity.

3. These rules on work elections are not contrary to Articles 5 and 6 of the Charter:

Article 5 of the Charter ("The right to organise") reads:

> *"With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall*

apply to persons in this category shall equally be determined by national laws or regulations."

Article 6 of the Charter ("The right to bargain collectively") reads:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;

2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

a) Legitimacy of the system:

The system described above in no way disregards these provisions, in which, moreover, there is no evidence of a right of non-representative trade unions to be consulted by the administrative authorities or to take part in elections of staff representatives. On the contrary, the system matches the objectives set out in the allegedly contravened provisions in that it promotes well-organised joint consultation between the administrative authorities and staff representatives.

The election arrangements pursue the legitimate aim of avoiding fragmentation of trade union representation and ensuring effective consultations with the trade unions by limiting the administrative authorities' consultation partners to the unions most representative of all the civil services (national, local and hospitals).

The system likewise ensures that members of joint boards elected from trade unions have a degree of legitimacy, whether in the civil services as a whole or in the particular civil service to meet whose needs the elections are being held.

Furthermore, the strict framework within which trade-union representativity is assessed, when it cannot be presumed, **rules out any**

discriminatory performance of the assessment, because the assessment is subject to judicial review under emergency procedure**.**

b) In addition, the principle of concordance between representativity and the setting in which the election is being held does not restrict the right to take part in work elections:

The relevant Act (paragraph 2 of Article 14 of Act No.84-16 of 11 January 1984 laying down rules on the national civil service) makes clear that representativity is to be assessed in the setting in which the election is being held.

This legal requirement reflects the established case law of the *Conseil d'Etat* (CE, 21 July 1972, *Fédération syndicale chrétienne des travailleurs des PTT*, AJDA, 1973 p.376; CE, 28 July 1995, *Syndicat de fonctionnaires, agents et ouvriers de la météorologie et de l'aviation civile*, Application No.157.356).

The principle is that a trade union organisation which has gathered sufficient votes from all areas of a ministerial department to be represented at national level and to have members in most of the department's civil service categories will not be unrepresented at local level unless it has gathered very few votes at the level and in the body of civil service staff with which the election is concerned.

On the other hand a trade union organisation which has gathered too few votes at national level to be represented at that level can be represented at the local level if it has gathered sufficient votes at the relevant level and within one or more groups of civil servants.

Thus the concordance principle increases a trade union's chances of taking part in work elections given that there is an election for each joint administrative board.

4. The European Committee of Social Rights has itself recognised the French concept of trade-union representativity to be in conformity with the Social Charter:

In this connection it is important to point out that, in its 15th report (Conclusions XV-I) with regard to the concept of trade-union representativity in the public services, the European Committee of Social Rights held that the situation in France was in conformity with Article 5 of the Charter. Pages 244 to 249 of the conclusion deal with trade union representativity in French law on both the private and public sectors. With regard to the public sector the report stated (p.247):

> *"In the public sector, the monopoly for representative trade unions to take part in the first round of elections is, according to the report, to avoid the vote being scattered and a large number of trade unions, some representing very small staff categories and likely to receive only a few votes. Such an arrangement would not be conducive to effective bargaining between the authorities and staff representatives (…).*

As regards the representativity requirement for the purpose of obtaining the operating facilities provided for in trade union legislation, the report states that representativity is assessed at the level at which the right is exercised or granted and is governed both by the criteria in Article L133-2 of the Labour Code and by election results. Only the most representative trade unions in each authority are provided with the premises and equipment needed for their trade union activity. Moreover, only information meetings held by the most representative trade unions entitle staff to leave of absence.

Among the rights not subject to any representativity requirement are: the right to display and circulate trade union documents and to collect contributions on the administrative authority's premises; the right to hold legally required or information meetings on the administrative authority's premises; and the right to between ten and twenty official days' leave per year for trade union representatives to attend the union's legally required meetings or its congresses.

***The Committee recalls that it held in the sixth supervision cycle, as regards the criteria for the representativity of trade unions, that the French legislation could be regarded as complying with Article 5 of the Charter, since the conditions laid down in Article L133-2 of the Labour Code could not be considered as a hindrance to the exercise of the freedom to associate (Conclusions VI, p.29)**."*

5. The national system described has also been deemed compatible with other convention provisions binding France as regards the right to organise:

5.1 – Firstly it has been ruled to be compatible with Article 11 of the European Convention on Human Rights:

Article 11 of the European Convention on Human Rights reads:

"*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

France's *Conseil d'Etat* held in its **Dalbies judgment (No.190749 of 9 April 1999)** that the system was not incompatible with Article 11 of the European Convention on Human Rights:

> *"Under Article 94 of the Act of 16 December 1996, which the contested decree implemented, only trade union organisations representing all categories of staff in the three civil services are allowed to submit lists of candidates in the first ballot of staff to elect trade union representatives to the specialist joint boards without having to demonstrate their representativity; however Article 94 also allows other trade union organisationss to submit lists in the first or second ballot depending on whether or not, in the particular election, they meet the representativity requirements laid down in Article L 133-2 of the Labour Code; thus neither those provisions, nor those of the contested decree implementing them, are incompatible with the right to organise as recognised by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".*

Very recently the *Conseil d'Etat* also held that the provisions of Article 14 of the Act of 11 January 1984 were compatible both with Articles 11 and 12 of the European Convention on Human Rights and Articles 22 and 24 of the International Covenant on Civil and Political Rights (CE No.225 276 of 15 March 2002, Fédération nationale des syndicats autonomes FNSA PTT).

> *"Under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of the International Covenant on Civil and Political Rights, everyone has the right to found a trade union together with others for the protection of his interests;* ***the provisions of Article 14 of the Act of 11 January 1984, which merely make the presentation of lists of candidates for election as staff representatives conditional on trade union representativity, are compatible with these provisions****; nor do the provisions disregard the provisions of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 24 of the International Covenant on Civil and Political Rights, which deal respectively with freedom of expression and prohibition of all discrimination; consequently the applicant has no basis for objecting to the decree on the ground of incompatibility of the provisions of Article 14 of the Act of 11 January 1984 with the international conventions relied upon".*

The European Court of Human Rights confirmed that compatibility in FSU v. France, No.49258/99, judgment of 29 January 2002. It held that the application, in which the trade union FSU had submitted complaints similar to those made to the Committee, was manifestly ill-founded and therefore inadmissible. In particular the Court said (translation):

> "The Court points out that in its judgment in National Union of Belgian Police v. Belgium [of 27 October 1975 pp.17 and 18,

paras. 38 and 39] it held that **Article 11.1 did not guarantee any particular treatment of trade unions, or their members, by the state, such as the right to be consulted by it. This was not an element inherent in a right guaranteed by the Convention.** Although trade union members have a right that their union be heard, each state is free as to the choice of means to that end. What the Convention requires is that under national law trade unions should be enabled to strive for the protection of their members' interests. It follows that the state may restrict the obligation to consult the trade unions provided that it does not thereby interfere with freedom to organise and is not acting discriminatorily, contrary to Article 14 … **As the Government points out, participation in joint administrative boards is only one of the ways in which public service trade unions carry on their activities …"**

5.2 – The International Labour Organisation also found the legislation to be compatible with International Convention No.87 on Freedom of Association and Protection of the Right to Organise:

In a **recommendation adopted at its 330th session (2003) further to a report of the ILO Committee on Freedom of Association, the ILO** rejected complaint No.2193 against the government of France, lodged by the Syndicat National de l'Enseignement Technique Action Autonome and alleging a breach of International Convention No.87 on the Freedom of Association and Protection of the Right to Organise. In its complaint the SNATAA alleged that France was in breach of Convention No.87 on Freedom of Association and Protection of the Right to Organise on account of its legislation determining the most representative trade unions for purposes of sitting on joint public-service bodies. The committee, however, on grounds that may be transposed to the present dispute, held as follows:

" 686. ***Regarding the specific case, the Committee notes by way of introduction that the criteria for determining representativeness are established by law and that they are established for the purposes of participation in the various joint bodies consulted by the administration on civil servants' careers and working conditions.***

687. ***As regards the criteria themselves, the Committee notes that those on which the presumption of representativeness is based meet the requirements recalled above in that they are based on specific, instantly verifiable data. This also applies to the ordinary law criteria*** *which, even if (as the complainant emphasises) they are not quantifiable, are sufficiently detailed in the Labour Code and are based on objective elements of the composition and running of a trade union organisation which are customarily taken into account in determining representativeness. While noting the Government's observations on jurisprudence in the matter to the effect that the determination of these criteria allows the*

administration a certain flexibility in assessment, the Committee emphasises that this flexibility is largely to the benefit of trade union organisations to the extent that they do not have to meet all these criteria concurrently; moreover, this assessment is carried out under the supervision of an administrative judge, a point to which the Committee will return later on. Furthermore, the ***Committee takes full note of the Government's explanations as regards the fact that representativeness is assessed according to ordinary law criteria within the framework of the election and that this condition is by its very nature more favourable to trade union organisations with a local presence.***

…

689. ***The Committee notes that the assessment of the admissibility of lists of candidatures by the administration is carried out under the supervision of a judge, and that such supervision can be carried out with full knowledge of the facts*** *because, under the terms of Section 15 of Decree No.82-451 of 28 May 1982, as amended by Decree No.98-1092 of 4 December 1998, the administration must justify any decision of inadmissibility, which has to be given within a short period (at the latest the day after the deadline for submitting candidatures). The Committee notes, from the implementation documents attached to the complaint and to the reply, that the appeal to the judge is made and considered according to an emergency procedure and that the role and responsibilities of the administration as regards the admissibility of the lists of candidatures have been set out in detail in the implementing documents of the law and in particular in the memoranda of the Ministry of Education.*

690. From the above considerations, the Committee concludes that the legislative provisions regarding the determination of the representative civil servants' trade union organisations for the purposes of the election of staff representatives to joint civil service bodies is not incompatible with the principles of freedom of association."

These various findings are entirely transposable to the present case as regards the alleged infringements of the Revised European Social Charter.

On all the grounds set out above, the complaint by the Syndicat Occitan de l'Education should be dismissed.

Documents attached

1. European Committee of Social Rights, Conclusions XV-1, France, Article 5, pp 258 to 263.
2. Extract from the report of the ILO Committee on Freedom of Association (330th session).
3. European Court of Human Rights, admissibility decision of 29 January 2002 on Application No.49258/99, F.S.U. v. France.
4. Conseil d'Etat, judgment No.225276 of 15 March 2002, FNSA PTT.
5. Conseil d'Etat, judgment No.190749 of 9 April 1999, Dalbiès.