REPORT FOR THE HEARING
delivered in Case 1/87 *

I — Facts and procedure

Mr Picciolo entered the service of the Commission of the European Communities on 12 August 1971 and was assigned to the Publications Office; as from 1 January 1983 he has been assigned to Directorate-General XVIII. In the meantime — on 24 June 1982 — he had been elected a member of the Luxembourg local Staff Committee, of which he subsequently became the vice-president.

The present proceedings, brought by him against the Commission, concern his periodic report for the period from 1 July 1981 to 30 June 1983.

That report, which was drawn up in November 1983 by Mr Verheyden, the Director of the Publications Office, after consultation with Mr Perry, the head of specialized department OP4 in the Publications Office, was countersigned on 5 December 1983 by Mr Van Goethem, a director in Directorate-General XVIII. It was notified to Mr Picciolo who, on 28 January 1984, made a number of critical comments. Those comments related to a lack of precision in the description of the duties performed by him, the inadequacy of the assessment of his ability regarding written and oral expression, the down-grading, by comparison with his previous report, of the assessment of his sense of responsibility, the fact that Mr Perry, being a member of the auxiliary staff, could not be regarded as his superior and could not therefore be consulted for the drawing up of his report, the absence of the consultations required for reports on officials who in addition hold office as staff representatives and, finally, the reduction from one period to the next in the level of the assessments contained in his periodic reports, which he considered to be attributable to differences with the the administration regarding personnel management in the Publications Office.

On receiving those comments, Mr Verheyden suggested opening the discussions provided for in Article 6 of the General Provisions for implementing Article 43 of the Staff Regulations ('the General Provisions'). Mr Picciolo rejected that suggestion and requested that the matter be referred to an appeal assessor. Mr Verheyden continued to propose discussions and sent invitations to Mr Picciolo for that purpose on two occasions, but to no avail. Then, in April 1984 he referred the matter to the *ad hoc* group of assessors provided for in the guide to staff reports for the preparation of periodic reports on officials holding office as staff representatives. That group expressed its views on 29 November 1984 and on 13 December 1984 Mr Verheyden sent to Mr Picciolo a fresh report to which a statement of those views was annexed; the report differed from the previous one, in so far as the applicant's duties were described in accordance with his wishes and the analytical assessment of his sense of responsibility was accompanied by the following comment: 'Mr Picciolo's departure in January 1983 made it necessary to review the commercial book-keeping at the Publications Office and as a result of that review his sense of responsibility can be correctly described as "very good"'.

* Language of the Case: French.

On 17 January Mr Picciolo requested that the new report be forwarded to the appeal assessor, Mr Mosar, a Member of the Commission of the European Communities; the latter, after a meeting with Mr Picciolo, decided, on 25 February 1985, to maintain in their entirety the assessments made by the first assessor. Mr Picciolo then asked for the matter to be referred to the Joint Committee on Staff Reports. After seeing the opinion of that committee, given at its meeting of 29 July 1985, the appeal assessor sent his final report to the applicant on 5 March 1986; it was identical to the report prepared by the first assessor, except that the observation concerning his sense of responsibility was now worded as follows: 'Mr Picciolo stopped working at the Publications Office in January 1983. As a result of the Office's accounts being made the responsibility of other officials, it was possible to put them in order, something which proved to be long overdue'.

On 5 June 1986 Mr Picciolo submitted a complaint to the Appointing Authority under Article 90 of the Staff Regulations. There was no response to the complaint within the prescribed period and on 2 January 1987 Mr Picciolo brought the present action before the Court.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure, after inviting the Commission to answer certain questions.

II — Conclusions of the parties

Mr Picciolo claims that the Court should:

(i) Annul the decision of Mr Nic Mosar, Member of the Commission of the European Communities, of 5 March 1986 establishing the final report on the applicant for the period from 1 July 1981 to 30 June 1983;

(ii) In so far as necessary, annul the implied decision rejecting the applicant's complaint through official channels against the said decision of 5 March 1986;

(iii) Order the Commission to pay him compensation of one franc in respect of the non-material damage suffered by him as a result of the successive wrongful acts and omissions affecting him;

(iv) Order the Commission to pay the costs pursuant either to Article 69 (2) or Article 69 (3) of the Rules of Procedure and to reimburse the expenses necessarily incurred for the purpose of the proceedings, such as the cost of arranging for an address for service, travel and subsistence expenses, and the remuneration of his lawyer pursuant to Article 73 (b) of those rules.

The Commission contends that the Court should:

(i) Dismiss the application as inadmissible or else as unfounded;

(ii) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — In support of his application for annulment, Mr Picciolo puts forward nine submissions.

(1) His first submission relates to the infringement of the third and fourth paragraphs of Article 7 of the General Provisions and of point C2 of the guide to staff reports: after an opinion had been obtained from the Joint Committee, the appeal assessor changed one of the comments in the periodic report in a manner unfavourable to the applicant, whereas the opinion of the committee can in no case enable the appeal assessor to make new assessments detracting from the position of the person concerned and, in addition, there is no explanation for the amendment made by the appeal assessor.

According to the Commission, that submission must be rejected since the amendment in question does not detract from the official's position but simply explains a statement contained in the initial periodic report; the explanation is based on matters of fact, and was given by the appeal assessor in the exercise of his absolute discretion after obtaining the opinion of the Joint Committee on Staff Reports.

(2) In the second place, the applicant submits that the second paragraph of Article 7 of the General Provisions and point B.9.3. of the guide to staff reports were infringed in so far as the appeal assessor did not hear the views of the first assessor and adopted his decision on the basis of an incomplete file lacking the initial report.

The Commission replies that, on the one hand, there were 'talks' and, on the other, that the file in the possession of the appeal assessor contained all the relevant documents and information.

(3) In the third place, Mr Picciolo alleges infringement of Article 6 of the General Provisions, of point B.8.1. of the guide to staff reports and breach of the general principle of the right to a fair hearing. The discussions contemplated in those provisions between the official concerned and the first assessor could not take place because the prescribed conditions were not observed when the assessor suggested that course of action. The applicant was thus deprived of a 'right of recourse' and that defect could not be remedied by a purely formal meeting between the official and the appeal assessor.

In the Commission's view, that submission is unfounded in so far as it was Mr Picciolo himself who refused on several occasions to enter into the discussions proposed by the assessor.

(4) The fourth submission, alleging infringement of the second paragraph of Article 3 of the General Provisions and of point B.5.2.2. of the guide to staff reports comprises two limbs: on the one hand Mr Van Goethem, a Director in Directorate-General XVIII where the applicant was assigned as from 1 January 1983 was not consulted by the first assessor before the report was drawn up and, on the other, the applicant's immediate superior in Directorate-General XVIII was likewise not consulted.

The Commission claims that the 'consultation' of the superior may take the form of a talk between the latter and the assessor before the report is drawn up. It adds that 'as regards the consultation of Mr Van Goethem, it should be noted that such consultation with other superiors is certainly not compulsory'. Finally, it notes that in any event the applicant's criticisms in that regard relate to the first periodic report, and these proceedings do not relate to that report.

(5) In the fifth place, Mr Picciolo submits that Mr Perry signed his report — what is

more, at a premature stage — but was not consulted before it was drawn up. He adds that Mr Perry, being at the time 'a member of the auxiliary staff', could not be regarded as his superior and therefore could not participate in the reporting procedure. Thus there was no prior consultation of the official's superior in accordance with the third paragraph of Article 2 of the General Provisions and point B.5.2.1. of the guide to staff reports.

In reply, the Commission refers to its observations concerning the previous submission as to the form which the 'consultation' of superiors may take. Moreover, it contends that Mr Perry's participation in the reporting procedure is not open to criticism: in its view, where a member of the temporary or auxiliary staff is called upon by the person in charge of an administrative unit to perform certain duties, he automatically is vested with the rights pertaining thereto, including that of reporting upon an official working under him.

(6) In the sixth place, the applicant alleges infringement of Article 5 of the General Provisions which states that 'explanations must be provided for any change in the analytical assessment since the last report'. According to the applicant, the contested report contains assessments inferior to those contained in the previous report, but without any explanation whatsoever by the first assessor or the appeal assessor. Having regard to the previous decisions of the Court (judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, and judgment of 14 July 1987 in Case 61/76 *Geist* v *Commission* [1987] ECR 1419) that constitutes an irregularity, and one to which attention has, moreover, been drawn by the Joint Committee on Staff Reports.

The Commission claims that that submission should be rejected on the ground that a statement of the reasons on which an assessment is based is required only in extreme circumstances; in the present case there are no such circumstances, in so far as all that is involved is a comment on a judgment which is in all very creditable to and full of praise for the applicant.

(7) The seventh submission is that, by virtue of the last paragraph of Article 7 of the General Provisions, the definitive report should have been issued by 31 December 1984, but it was not notified to the applicant until 5 March 1986, that is to say more than 14 months late.

The Commission concedes that there was some delay in drawing up the report but contends that it was imputable to the applicant himself and to the staff representatives, not to the Commission.

(8) Mr Picciolo also alleges breach of the general principle of the protection of legitimate expectations and of the general principles of equality of treatment, in so far as the administration deliberately disregarded the requirements both of the General Provisions and of the guide to staff reports.

The Commission states in reply that much care was taken by the first assessor and by the appeal assessor in drawing up and checking the report on the applicant, and efforts were made to enter into discussions with him and to take his observations into consideration. It contends that it cannot be accused of any infringement, either deliberate or unintentional, of the applicable provisions.

(9) The applicant's last submission is based on the internal rules of the Publications Office concerning the reporting procedure, which impose the requirement — not

complied within this case — of consultation of the Management Committee of the Office before reporting on any official in Category A.

The Commission contends that this submission is inadmissible in so far as it is based on the internal rules of a body other than the Commission.

B — In support of his application for compensation, Mr Picciolo submits that the failure to comply with time-limits, criticized in his seventh submission regarding annulment, constitutes a wrongful act or omission of such a kind as to render the administration liable. As the Court has recognized in similar cases (*Castille* v *Commission*, cited above, and Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359), a delay of that kind may be prejudicial to the official concerned. In this case, the applicant evaluates the non-material damage suffered as LFR 50 000; however, he limits his claim to symbolic damages of one franc.

The Commission contends that since it was not responsible for the delay it cannot be criticized for any maladministration and, moreover, the applicant has not proved the existence of the damage allegedly suffered by him.

IV — Replies to the questions put by the Court

(1) The Court asked the Commission to produce the views expressed by the Joint Committee on Staff Reports, the applicant's complaint, the General Provisions, the guide to staff reports and the internal rules of the Publications Office, and the Commission did so within the time-limit set for that purpose.

(2) In reply to a question as to the circumstances of the 'talks' between the first assessor and the appeal assessor, the Commission stated that on 19 February 1985 Mr Mosar had consulted Mr Verheyden by telephone in order to obtain the necessary further information and that that conversation constituted a detailed exchange of views on the file for Mr Picciolo's report.

Y. Galmot
Judge-Rapporteur