OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 25 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The case on which I am giving my opinion today is concerned with the dismissal of the applicant from the service of the Council of the European Communities as a result of disciplinary proceedings against her.

The facts are in part known from previous proceedings brought by the applicant against the Council (Cases 58 and 75/72). I need to remind you only of the following:

The applicant entered the service of the Communities in January 1964 and was established as an official with the Council in Grade C 4 on 16 July 1964. At first she was employed as a secretary. In November 1965 she suffered a riding accident. As a result she was for a time completely and then partially incapable of working. In October 1968 the applicant was assessed as 15 % permanently disabled under the insurance system provided by the Staff Regulations for accidents outside work.

She had already previously, namely as from 13 July 1967, been employed in the Registry of the Council as a typist and administrative secretary. From January 1971 to January 1972 she was employed as bookkeeper. Since, as the Council says, for reasons of organization, it was not possible to continue this work, it was suggested that the applicant should be transferred to the typing pool. She objected to this on the ground that for health reasons it was not possible for her to do typing. Thereupon she was examined by the Council's doctor who also brought in a specialist. The conclusion of the doctors was that the applicant was able to undertake typing and this view was maintained even after the applicant produced a medical certificate to the contrary effect. Accordingly, as recorded in a note dated 24 May 1972, the applicant was transferred to the typing pool. The applicant did not comply with this order but continued to remain in her previous office in the Council's Secretariat.

In view of this on 20 June 1972 a decision was taken ordering the forfeiture of remuneration in accordance with Article 60 of the Staff Regulations on the grounds of the applicant's unauthorized absence. The applicant brought Cases 58 and 75/72 against the two decisions of 24 May and 20 June 1972 respectively, but she was unsuccessful. Both applications were dismissed as unfounded by judgment of 17 May 1973 ([1973] ECR 511).

While the Court action was pending the Council resolved on 16 October 1972 to bring disciplinary proceedings against the applicant for not complying with the last sentence of the third paragraph of Article 21 and the first paragraph of Article 55 of the Staff Regulations. On 6 November 1972 the Disciplinary Board was appointed and this held several meetings. On 4 July 1973 four members of the Disciplinary Board — for health reasons a fifth member had no longer taken part in the proceedings after 5 December 1972 — gave the opinion required of them. It put forward two solutions: should the applicant make it known that she intended to take up her place again in the Secretariat within the period of one month from notification of the opinion, and also if within this period the applicant should apply to resign, there should be only a reprimand;

1 — Translated from the German.

should the applicant continue to refuse to comply with the order of transfer or if she should show by making use of other procedural means that she was not aware of her duties as an official she should be dismissed without however forfeiting either in part or in whole her claims to the retirement pension. The Disciplinary Board recommended in addition that before this step was taken the applicant should be medically examined.

The appointing authority followed this recommendation. On 25 July 1973 the doctor who was asked to make the examination came once again to the conclusion that the applicant was in a position to do typing. Since the applicant however produced certificates from several specialists containing differing conclusions the Secretary-General of the Council ordered a further examination on behalf of both parties. In addition, in view of the unsettled question of her state of health, the applicant was requested in a letter dated 26 July 1973 to work temporarily in the Secretariat of the Staff Committee where there was filing work to be done. This offer was however subsequently withdrawn since the applicant did not present herself for the said work.

For the purpose of the said medical examination and in application of the provisions applying to the Invalidity Committee a three-man board was appointed composed of a medical officer of the Council appointed on 6 August 1973, a doctor appointed by the applicant on 9 August 1973 and a third doctor jointly appointed by these two doctors. This committee made a report on 21 November 1974 to the effect that the applicant was in a position to do typing. The report however was not signed by the doctor appointed by the applicant. Since the applicant continued to refuse to comply with the order of transfer on 29 January 1975 the final hearing by the Secretary-General took place as provided for in the disciplinary procedure. The applicant produced two further medical reports on her state of health. After these had been submitted to the two doctors who had signed the said report and after they nevertheless adhered to their findings, the decision was taken on 24 February 1975 to dismiss the applicant with effect from 1 March 1975.

A complaint lodged by the applicant against this on 20 May 1975 remained unanswered. Accordingly on 17 December 1975 the applicant brought the matter before the Court. She submitted the following claims:

— that the decision of 17 October 1972 to commence disciplinary proceedings be declared null and void;
— that the disciplinary proceedings and the opinion of the Disciplinary Board of 4 July 1973 be declared null and void;
— that the medical report of 21 November 1974 be declared null and void;
— that the hearing of the applicant on 29 January 1975 be declared null and void;
— that the decision of 24 February 1975 to dismiss her be declared null and void and that it be found that the applicant continued from 1 March 1975 in the employment of the Council as an official in Grade C 3.

My opinion on these claims is as follows:

1. First an objection to the admissibility of the application must be dealt with. The Council considers all the claims inadmissible, apart from the one relating to the decision to dismiss the applicant. As regards the bringing of the disciplinary proceedings it relies on the fact that no complaint was made within the time limit prescribed in the Staff Regulations. With regard to the remaining claims it refers to the legal nature of the acts concerned and alleges that in so far as Article 90 of the Staff Regulations is concerned these are not acts of the appointing authority but simply preparatory measures.

My impression of this is that the objection in truth has been settled. I say this because the reply speaks only of an application for the annulment of the decision to dismiss the applicant and for a declaration that she continued in the employment of the Council after 1 March 1975. With regard to the remaining claims criticized by the Council, they are obviously used as supporting material for the claim and there is certainly nothing objectionable in this.

If this interpretation is not correct I must substantially agree with the Council. It is true I would not go as far as not to allow a challenge to the bringing of the disciplinary proceedings, which is without doubt a measure adversely affecting the person concerned within the meaning of the Staff Regulations. This would not be in accord with the sensible tendency which emerges from the case-law to avoid a multiplicity of actions and, where an act concluding proceedings is contested, to allow preparatory measures to be included in the action. However, I consider the Council to be correct in thinking that an independent application for annulment of the other contested measures and the formulation of separate claims in respect of them is not possible. The criterion is that on their own they are not measures adversely affecting the person concerned within the meaning of the case-law but are only of a preparatory nature; in particular they in no way originate from the appointing authority. On this, reference may be made in particular to the judgment in Case 35/67 *(Van Eick* v *The Commission of the European Communities* [1968] ECR 329) which contains such a ruling. Therefore if the other claims have not been dropped by the applicant it must be held that they can be considered only as supporting material in connexion with the challenge made to the measure terminating the proceedings. This would, moreover, adequately protect the applicant's interests for if the action were successful, that is if the decision to dismiss her were annulled, the grounds of the judgment would show clearly which parts of the procedure were defective and needed to be repeated.

2. A first ground of claim, to which I now turn, relates to Article 59 (3) of the Staff Regulations. The applicant infers from this and from the fact that she has produced medical certificates with regard to her inability to work that the appointing authority was obliged to bring the matter before the Invalidity Committee before she was reproached for her unauthorized absence and before disciplinary proceedings were brought.

I can deal with this question relatively briefly. In my opinion the interpretation of Article 59 (3) causes no difficulties. When it says that cases in dispute shall be referred to the Invalidity Committee for an opinion it is clear that this refers solely to paragraphs one and two. Both paragraphs are concerned however only with sick leave, that is inability to work and absence from work and not with the question whether an official can do certain work and not whether a relevant assignment to a post is lawful. This view was also held to be correct in Joined Cases 58 and 75/72 and this is of special interest since that case was concerned with the legality of the posting of the applicant and the stopping of the salary payment due to unauthorized absence from the service under Article 50 of the Staff Regulations. If that is possible without previously involving the Invalidity Committee the same must also be true of bringing disciplinary proceedings. It should not be overlooked in this respect that Article 60 itself refers to disciplinary measures that may apply and that moreover in the disciplinary proceedings in question here no other complaints were made save non-compliance with the duty to obey (Article 21 (3) of the Staff Regulations) and disregard of Article 55 of the Staff Regulations according to which officials in active employment shall at all times be at the disposal of their institution.

Against this it does not matter that later after the conclusion of the disciplinary proceedings a medical board was established on the lines of the Invalidity Committee; further it is irrelevant that such a committee acted outside the scope of Article 59 in another case (Case 31/71 *Gigante* v *Commission of the European Communities* [1975] ECR 337). What is important is that the Disciplinary Board did not recommend that the Invalidity Committee should be brought in but only that there should be a medical examination. Further it is obvious that the actual examination which took place *inter partes* did not have its origin in an obligation arising from the Staff Regulations. The same is true of Case 31/71. There, too, there was no necessity to put the matter to the Invalidity Committee but the Commission with the applicant's agreement considered it expedient solely for the purpose of elucidating objectively certain disputed medical questions.

Thus there cannot be said to be an infringement of Article 59 (3) of the Staff Regulations or disregard of a similar established practice in the present case.

3. A second ground of claim is that the Disciplinary Board was no longer complete after its third meeting, that is from 5 December 1972, and its opinion was not therefore signed by all members. The applicant considers this such a serious defect that she regards the opinion of the Disciplinary Board as unlawful and cannot therefore constitute the basis of the disciplinary decision taken.

In considering this objection which must certainly be given considerable weight it must first be ascertained what may be gathered from the relevant provisions on the composition of the Disciplinary Board, the conduct of the disciplinary proceedings and the opinion to be delivered by the Disciplinary Board.

Article 4 of Annex 2 to the Staff Regulations thus provides that the Disciplinary Board shall consist of a chairman and four members. Article 5 provides that the appointing authority shall appoint the chairman; two of the members are drawn from a list which the appointing authority draws up and the two others from a list for which the Staff Committee is responsible. It is expressly laid down in this provision that the official charged may make objections in respect of any members of the Board other than the chairman and that any member may be asked to be excused from serving, provided he has legitimate grounds. If this happens then the second paragraph of Article 5 (3) provides that the chairman shall, by drawing lots, fill the vacancy. With regard to the proceedings, Article 7 of Annex IX provides that the Disciplinary Board shall deliver an opinion by a majority vote. Of importance also is Article 8 which provides that the chairman shall not vote on matters before the Board save on procedural questions or in case of equality of votes. Further Article 9 provides that the reasoned opinion shall be signed by all members of the Disciplinary Board.

In my opinion this shows clearly, and in this the applicant is right, that the Disciplinary Board is correctly constituted only if it has five members and its opinion is basically the responsibility of the majority of the four members who are drawn from the said lists. In support of this reference may be made to the fact that the opinion must be signed by all the members including the members within the meaning of Article 4 of Annex II. In this connexion it is also important to note that provisions have been considered necessary with regard to filling any vacancies on the Disciplinary Board. This means, in my view, that the Board must always be complete. Nor is there any ground for considering this provisions to be restricted to cases of objections to members or requests to be excused from serving, quite apart from the fact that in the present case the fifth member

apparently withdrew because of pregnancy leave — since this was foreseeable recourse ought to have been had from the start, because this was foreseeable, to Article 5 (3) of Annex II. Furthermore, reference may be made to the previous case-law on this subject. Thus in Case 46/72 *(De Greef* v *Commission of the European Communities* [1973] ECR 543) the parity composition and the necessity to reach majority decisions on this basis was stressed. Logically this can mean only that as many members from the staff side as from the administrative side must take part and since if only one member from each side takes part there can be no majority, this means that all four members must take part in the decision.

Owing to the absence of a member at a particular stage in the procedure it can no longer be said in the present case that the Disciplinary Board was correctly constituted. It must also be recognized that the provision according to which the chairman should vote only in case of equality of votes was disregarded.

Nor is it possible by way of justification to turn, as was attempted, to related rules of French and Belgian law making other provisions where a member of a disciplinary board is absent. It appears that in French law, in the absence of express provisions on a quorum, it is sufficient if one more than half the members are present, that is to say, in the absence of a representative from the staff side it is considered correct that a member of the other side should also withdraw. It is apparently sufficient under Belgian law that at least half the members are present and it is moreover considered necessary that representatives of the Ministry and the trade unions are present in the same numbers. These references could be significant to us only if there were no Community provision on the matter and a clear solution to the present problem did not follow from its wording and context. The same applies to the reference to the fact that for the Joint Committee in Article 3 of Annex II to the Staff Regulations it is *expressly* provided that the proceedings shall be valid only if all members are present. Apart from the fact that it is always necessary to be careful with arguments *a contrario,* I consider such an argument *a contrario* not valid in relation to the Disciplinary Board because it cannot come into consideration under the general system which manifestly governs the Disciplinary Board and which has just been referred to.

Whether, from the fact that the Disciplinary Board was not properly constituted and that the chairman improperly took part in the decision, the other conclusion must follow, namely that the opinion of the Disciplinary Board is wholly invalid and the disciplinary decision based on it is unlawful cannot, in my opinion, be said without further consideration.

Although it is true, as was stressed in Case 35/67 *(Van Eick),* that the Disciplinary Board must have regard to the basic principles of procedural law, such as in the hearing of witnesses, and even if it must be admitted that in the finding of the facts and perhaps also in determining the disciplinary decision which must be ultimately taken by the appointing authority the Board has considerable weight, it must nevertheless not be forgotten that we are concerned only with an advisory body whose proposals are not binding. If this important characteristic is borne in mind, then in assessing defects such as those in the present case significance may be attached to the fact that the applicant's legal advisers did not make an appropriate objection *before* the conclusion of the disciplinary proceedings (the Council pointed this out without being contradicted). Such conduct in national procedural law, at least in cases of minor infringements; excludes any subsequent objection (cf. for example Eyermann-Fröhler, Kommentar zur Verwaltungsgerichtsordnung, Note 17 to Article 137).

Further, and this is even more important, it is necessary to recall the Council's remark that there was no reference in the opinion to a dissenting view but that on the contrary members of the Disciplinary Board have confirmed that the opinion was reached unanimously. If in these circumstances one considers what the probable outcome of the proceedings would have been had the Disciplinary Board been fully constituted, there is nothing to indicate that there could have been any other result. If it is assumed that the fourth member (who incidentally was drawn from the list provided by the administration) who was absent as from a particular time had adopted a dissenting opinion, then there nevertheless remained a sufficient majority of three votes to carry the opinion. If it is further assumed that this member – I do not know whether it is at all possible to speak of a probability on this point – may have won a further member to his view, then there would have been an equality of votes and in this case the vote of the chairman, who likewise signed the proposal, would have been decisive. In addition, let me say again, it should not be overlooked that the appointing authority is not bound by the opinion of the Disciplinary Board in so far as the proposal with regard to the sanction is concerned. In view, however, of what has emerged from the proceedings on the assessment of the applicant's conduct – she has shown herself quite obstinate on repeated occasions, such as in relation to the offer of another occupation – there is not the slightest ground for assuming that a disciplinary decision would have been different even if there had been a different proposed sanction by the Disciplinary Board.

All this brings me, although let me stress once again I am of the opinion that the rules governing the constitution and procedure of the Disciplinary Board are not to be lightly disregarded, to the conclusion that the defects mentioned do not justify the opinion of the Disciplinary Board being declared invalid and the disciplinary decision based on it annulled for want of a proper basis.

4. I come then to a further ground of claim which relates to the medical report of 21 November 1974 which is likewise important with regard to the decision to dismiss the applicant. Three objections were made to this:

(a) First the applicant objects to the participation of the third doctor appointed by the first two doctors named on the ground that he was faced with a conflict of interests since as a rule he is employed on behalf of the insurance company with which the Community has concluded an agreement.

(b) Then the applicant doubts the scientific value of the report because it has not dealt with dissenting medical opinions and in particular has not made a detailed comparison with a report made by a doctor consulted by the applicant.

(c) Finally reference is made to the fact that the report has been signed by only two doctors. Since the doctor appointed by the applicant gave medical reasons for his refusal to sign, it is alleged that it was necessary to seek additional experts.

The following observations are called for on this argument:

(a) I see no ground for acknowledging the validity of the first objection. So far as the appointment of the medical board set up to examine the applicant's state of health is concerned, the Council adhered to the provisions regulating the constitution of an Invalidity Committee. Thus sufficient guarantee was given for the protection of the applicant's interests. Since the appointment of the third doctor had to be made by agreement, this constituted an opportunity to exclude any conflict of interests that might have been anticipated. Since this was not done and since the applicant also neglected to make an appropriate

objection after she became aware of the relevant factors, she cannot now be heard to claim that the appointment of the third doctor appears open to objection on the ground of a conflict of interests.

(b) With regard to the scientific value of the experts' report on which the applicant casts doubt, it is significant, and here at the same time I will give my views on the question whether the anticipated conflict of interests just mentioned took place, that there were many meetings of the Medical Board and repeated examinations of the applicant, as appears from the report itself, before the report was issued; furthermore, specialists were called in and a wide range of medical documents were considered. It is also clear that the report discusses the opinion of other doctors and that after the production of further medical documents in January 1975 additional considerations were discussed which, however, did not lead to a change of conclusion. In view of this the impression may well be gained, and such an observation is open to a layman in medical matters, that the examination was a serious and careful one. At any event it appears to me that there is no reason for disregarding the report in question on the ground that certain medical views were not expressly mentioned, that there was not an even more detailed discussion of dissenting views or a more exact comparison of the various reports some of which were, moreover, quite short and that finally the board adopted the opinion of *one* specialist although one of the experts appointed by the applicant found the report of another specialist who was not personally known to the board more complete and precise.

(c) Finally, with regard to the fact that the doctor appointed by the applicant did not sign the report it must be observed that further examinations took place as a result of his opinion and therefore that the line which he took was not without its consequences. Further, and this is more important, the case-law has already stressed in connexion with the work of an invalidity committee that the refusal of one of the doctors to sign the final report is of no account. I refer to the interlocutory judgment of 12 March 1975 in Case 31/71 *(Gigante* [1975] ECR 344) and the judgment in Joined Cases 42 and 62/74 *(Velozzi* v *Commission of the European Communities* [1975] ECR 879). I do not doubt that the same must apply in the present case since it is clear that the Council allowed the medical examination *inter partes* by analogy with the provisions governing the Invalidity Committee. The report made as a result is legally valid even though it bears the signatures of only two of the doctors who took part.

5. It thus remains to consider the last objection that when the applicant was interviewed by the Secretary-General of the Council on 29 January 1975 her counsel was not allowed to express his views.

It is not necessary to inquire whether the observation on the hearing in the extract of the minutes put before us is correct and that the applicant's counsel was present and had the opportunity to speak or whether, as the applicant says, this was not so. The criterion must be that according to the clear wording of Article 4 of Annex IV to the Staff Regulations provision is made for representation only in the proceedings before the Disciplinary Board and not in respect of the final hearing of the person concerned. Furthermore it has not been shown that there is a general legal principle that a representative must be allowed to speak at the final hearing. Since however in the present case use was in fact made of the opportunities expressly provided for and the applicant could see to it that her interests were

sufficiently protected, there is certainly no cause to declare the disciplinary proceedings defective, on the grounds of diminution of the rights of the defence, even if the applicant's counsel was not allowed to speak at the hearing.

6. Accordingly, all that remains for me to do is to propose that the application should be dismissed *in toto* as unfounded and that a ruling on costs should be made in accordance with Article 70 of the Rules of Procedure.