AS TO THE ADMISSIBILITY OF

Application No. 27633/95
by Helga STADLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 10 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 21 February 1995 by Helga STADLER against Austria and registered on 15 June 1995 under file No. 27633/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1946 and residing in Maria Enzersdorf. She is a civil servant in the Ministry for Agriculture and Forests (Bundesministerium für Land- und Forstwirtschaft).

The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Relevant facts

a. Disciplinary proceedings

In December 1989 the Ministry's Disciplinary Board (Disziplinarkommission) decided to institute disciplinary proceedings against the applicant. She filed a complaint against this decision with the Administrative Court (Verwaltungsgerichtshof). On 23 April 1990 the Disciplinary Board discontinued the disciplinary proceedings on the ground that these proceedings had become time-barred. On 28 June 1990 the Administrative Court therefore discontinued the proceedings on the complaint brought by the applicant.

Her further requests for re-opening of the disciplinary proceedings as well as appeals remained unsuccessful.

These disciplinary proceedings were the subject of a previous application to the Commission (No. 23125/93) which the Commission, on 31 August 1994, declared inadmissible.

b. Proceedings for the determination of an extra duties allowance

From 1984 onwards the applicant was the deputy head of the department for internal auditing (Interne Revision) in the Ministry for Agriculture and Forests. From 1 April 1989 to 31 March 1990 S., the head of the department, was on temporary leave and seconded to the Court of Audit (Rechnungshof). From the beginning of this period the applicant as his deputy headed the department.

On 16 May 1989 the applicant filed a request for an extended extra duties allowance (Verwendungszulage; see below "Relevant domestic law") with the Ministry of Agriculture and Forests to compensate her for her additional work load and her additional responsibility as deputy head of the department.

On 27 June 1989 M. was appointed as provisional head of the department for internal auditing. This appointment was made public in August 1989.

On 21 September 1989 the responsible civil servant in the Ministry of Agriculture and Forests qualified the applicant's request as one for a simple extra duties allowance (Verwendungsabgeltung) and transmitted this request for approval to the Federal Chancellor's Office (Bundeskanzleramt).

On 18 December 1989 the Ministry for Agriculture and Forestry, in a summary decision (Dienstrechtsmandat), granted the applicant a simple extra duties allowance for the period from 1 April 1989 until 30 June 1989.

On 3 January 1990 the applicant filed objections (Vorstellung) against the summary decision. She submitted that M., head of the department for external auditing, had been appointed as provisional head of the department for internal auditing on 29 June 1989. This appointment was only effective as from 28 August 1989. As she had not been officially removed from her position as substitute head of the department, she continued to occupy the position of substitute head even after the appointment of M. Consequently, she was entitled to an extended extra duties allowance also for the period after 30 June 1989. Though the calculation of the allowance must be altered after M. had started to work on 30 August, the allowance could not be cancelled completely. Furthermore she pointed out that M.'s position as head of the department for external auditing was incompatible with his functions in the department for internal auditing. This circumstance would have to be taken into account in the calculation of the simple extra duties allowance. She therefore requested the re-calculation of her "simple extra duties allowance (extended extra duties allowance)".

By letter of 14 February 1990 the Ministry of Agriculture and Forests informed the applicant that it intended to grant her a simple extra duties allowance for the period from 1 April 1989 until 31 August 1989. It stated that the appointment of M. as provisional head of the department for internal auditing was effective as from 30 August 1989. Therefore the applicant's function as substitute head of the department had ended on 30 August 1989. As far as the incompatibility of M.'s functions as head of the department for external auditing and provisional head of the department for internal auditing was concerned, the Ministry pointed out that the Federal Chancellor's Office had stated that there were no grounds for incompatibility of the functions. Besides this, this question was

irrelevant for the assessment of the applicant's simple extra duties allowance.

On 19 May 1990 the applicant commented on the Ministry's letter of 14 February 1990. She repeated that she was still substitute head of the department for internal auditing, contested that M. had been validly appointed and again raised doubts about the compatibility of M.'s functions. She claimed a simple extra duties allowance for the whole period of actual substitution, namely from 1 April 1989 until 31 March 1990.

On 14 February 1991 the Ministry for Agriculture and Forests granted the applicant a simple extra duties allowance for the period from 1 April 1989 until 31 August 1989 and dismissed her request for an allowance for the period from 1 September 1989 until 31 March 1990. The Ministry found that the applicant had actually been in charge of the department as substitute to the head from 1 April 1989 until 30 August 1989. For this period she was therefore entitled to a simple extra duties allowance.

On 4 April 1991 the applicant, represented by counsel, filed a complaint with the Administrative Court. She submitted that the former head of the department had decided to stay permanently with the Court of Audit. The post of the head of the department was therefore vacant. As she had never been removed from her functions as actual head of the department and as someone was needed in the department who did not exercise any incompatible functions, she was still provisional head of the department. Since only the abstract scope of her responsibilities was decisive for the allowance she had a right to a simple extra duties allowance until 31 January 1991, on which date she had been seconded to the Office of the Parliament (Parlamentsdirektion).

On 14 September 1994 the Administrative Court dismissed the complaint. Referring to the provisions of Section 30a paras. 1 (3) and 5 of the Salaries Act (Gehaltsgesetz) it found that the only issue to be determined was whether or not the applicant had been entitled to a simple extra duties allowance. She had not complained to the Administrative Court that she had been entitled to an extended extra duties allowance and the case file did not show that she had been entitled to such an allowance.

After the appointment of M. and in any case after 1 September 1989 the applicant had no longer performed any duties connected with the position of a head of the department. Under the law a right to a short-term allowance required that these duties must be actually exercised, therefore the applicant did not satisfy the conditions for a short-term allowance after this date. The mere function of a substitute to the head of the department without the actual fulfilment of the respective duties was not sufficient. The validity of M.'s appointment was therefore irrelevant. This decision was served on the applicant on 6 October 1994.

On 17 November 1994 the applicant filed a complaint (Säumnisbeschwerde) with the Administrative Court in which she complained that the Ministry had failed to decide her application of 16 May 1989 for an extended extra duties allowance. She also filed a request with the Administrative Court for the re-opening of the proceedings on her complaint of 4 April 1991 as she considered that the Ministry for Agriculture and Forests had concealed from the Administrative Court that she had filed on 16 May 1989 a request for an extended extra duties allowance.

c. The applicant's position in the department for internal auditing

On 22 September 1989, after M. had been appointed as provisional head of the department for internal auditing, the applicant contested M.'s appointment and requested a formal decision stating that she was

in charge of the department.

In its decision of 1 March 1990 the Ministry for Agriculture and Forests stated that the applicant was the deputy head of the department for internal auditing. Neither the transfer of S., the former head of the department, to the Court of Audit nor M.'s appointment as provisional head of the division had affected her position.

Against this decision the applicant lodged a complaint with the Administrative Court.

On 14 September 1994 the Administrative Court dismissed her complaint and found that the appointment of an interim head of the department did not deprive the applicant of her function as deputy head.

d. The applicant's position in the public administration

By letter of 24 October 1990 the Ministry of Agriculture and Forests released the applicant from her functions and assigned her to another department (III B 11) where she was appointed as substitute to the head of the department.

The applicant objected to this transfer and complained that a valid transfer would have required a formal decision (Bescheid) instead of an order (Weisung) as it concerned a qualified change of her employment (qualifizierte Verwendungsänderung). She refused to take up her functions in the new department.

On 21 January 1991 the Ministry of Agriculture and Forests seconded the applicant to the Office of the Parliament (Dienstzuteilung) and informed her that this temporary measure had no effect on her position in the new department.

On 14 February 1991 the applicant requested a formal decision finding that she was still deputy head of the department for internal auditing.

After the termination of her secondment to the Office of the Parliament on 1 March 1992, the applicant went on holidays and sick-leave until the end of February 1993. During her holidays the Ministry of Agriculture and Forests assigned her as from 1 May 1992 to the department III B 6. Again the applicant contested the validity of this measure and requested a formal decision to be taken.

Subsequently the applicant filed a complaint with the Administrative Court in which she complained about the Ministry's failure to take a formal decision.

On 28 September 1994 the Administrative Court ordered the Ministry to take the requested decision.

On 13 December 1994 the Ministry for Agriculture and Forests took this formal decision and dismissed the applicant's request. It found that the applicant's position in the public administration had not been substantially affected by the mere transfer from one department of the Ministry to another. This measure therefore had not required a formal decision to be taken.

In January 1995 the applicant lodged a complaint with the Administrative Court against the decision. Repeating her previous arguments that the posting decisions were unlawful she pointed out that in the department III B 6 her position as substitute to the head of the department was not respected, that she got no training and that she was also otherwise badly treated by her superior and colleagues.

This complaint is still pending before the Administrative Court.

B. Relevant domestic law

Section 30 a paras. 1 and 5 of the Salaries Act (Gehaltsgesetz), insofar as relevant, reads as follows:

[German]

> "(1) Dem Beamten gebührt eine ruhegenußfähige Verwendungszulage, wenn er dauernd
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> ...
>
> 3. ein besonderes Maß an Verantwortung für die Führung der Geschäfte der allgemeinen Verwaltung zu tragen hat und diese Verantwortung über dem Ausmaß an Verantwortung liegt, das Beamte in gleicher dienst- und besoldungsrechtlicher Stellung tragen.
>
> (5) Leistet der Beamte die in Abs. 1 erwähnten Dienste nicht dauernd, aber mindestens während eines Kalendermonates, so gebührt ihm hiefür eine nicht ruhegenußfähige Verwendungs-abgeltung ..."

[Translation]

> "(1) A civil servant is entitled to an extra duties allowance which has to be taken into account when assessing his pension claim, if he permanently
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> ...
>
> 3. has a considerable level of responsibility for the accomplishment of tasks of general administration and if this level of responsibility exceeds the one which is normally connected with a position in an equal grade.
>
> (5) If the civil servant does not permanently perform the duties mentioned in para. 1, but at least during one month, he is entitled to an extra duties allowance, which shall not be taken into account when assessing his pension claim ..."

COMPLAINTS

1. The applicant complains about the disciplinary proceedings in various respects and invokes Article 6 para. 1, 7 and 13 of the Convention.

2. She further complains under Article 6 para. 1 of the Convention that the proceedings on the determination of her position within the Ministry were unfair and unreasonably lengthy. Under Article 14 of the Convention she complains that M.'s appointment amounted to a discrimination against her as a woman.

3. She also complains under Article 4 of the Convention that the transfer to another department within the Ministry amounted to forced labour as she feels unqualified to fulfil the required tasks which do not correspond to her previous tasks.

4. Lastly, she complains under Article 6 para. 1 of the Convention that the proceedings on the determination of an extra duties allowance had been unfair. She submits that she was denied access to the administrative file, that the Ministry had wrongly altered her request for an extended extra duties allowance into one for a simple extra duties allowance and that for this reason the Administrative Court's decision was based on incorrect facts in that her claim to an extended extra duties allowance was wrongly dismissed by the Administrative

Court. She also complains about the length of the proceedings and submits that the Administrative Court has not yet decided on her request for a long-term allowance.

THE LAW

1. The applicant complains about the disciplinary proceedings in various respects and invokes Articles 6 para. 1, 7 and 13 (Art. 6-1, 7, 13) of the Convention.

However, the Commission need not determine whether or not the facts alleged by the applicant disclose any appearance of a violation of the Convention rights invoked by her, as under Article 27 para. 1 (b) (Art. 27-1-b) the Commission shall not deal with an application which is substantially the same as a matter which has already been examined by the Commission and if it contains no relevant new information.

The Commission observes that the applicant has filed a previous application (No. 23125/93) concerning the disciplinary proceedings conducted against her, which the Commission on 31 August 1994 declared inadmissible. The present application does not contain relevant new information in this respect.

It follows that this part of the application must be rejected under Article 27 para. 1 (Art. 27-1) of the Convention.

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings on the determination of her position within the Ministry for Agriculture and Forests were unfair and unreasonably lengthy.

The Commission recalls that disputes relating to the recruitment, careers and termination of service of civil servants fall outside the scope of Article 6 para. 1 (Art. 6-1) of the Convention (Eur. Court HR, Francesco Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-B, p. 26, para. 17; Neigel v. France judgment of 17 March 1997, para. 43, to be published in Reports 1997-I). Furthermore, no right to promotion is guaranteed by the Convention (Halford v. the United Kingdom, Comm. Report 18.4.96, para. 89).

The Commission observes that the applicant's complaints relate to the proceedings on the determination of the specific functions to be performed by the applicant within the public sector. However Article 6 para. 1 (Art. 6-1) of the Convention does not apply to such proceedings.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains that the appointment of a male civil servant as provisional head of the department amounted to a discrimination against her on the basis of her sex and invokes Article 14 (Art. 14) of the Convention.

The Commission recalls that Article 14 (Art. 14) of the Convention has no independent existence in that, as stated in the Convention itself, it covers only "rights and freedoms recognised in the Convention" (No. 10733/84, Dec. 11.3.85, D.R. 41, p. 211; No. 10503/83, Dec. 16.5.85, D.R. 42, p. 162; No. 23728/94, Dec. 16.5.95, unpublished).

The Commission refers to the above finding that the applicant's complaint regarding the determination of her position in the civil service falls outside the scope of the Convention and therefore is incompatible ratione materiae with its provisions.

It follows that also this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant further complains under Article 4 (Art. 4) of the Convention that the transfer to a new department within the Ministry amounted to forced labour as she feels not qualified to fulfil the required tasks which do not correspond to her previous tasks.

The Commission recalls that the concept of forced or compulsory labour within the meaning of Article 4 para. 2 (Art. 4-2) comprises two elements. These elements are first that the labour or service must be performed by the person concerned against his or her will and secondly that the obligation to perform this labour or service must be either unjust or oppressive, or must itself constitute avoidable hardship (No. 9322/81, Dec. 3.5.83, D.R. 32, p. 180; No. 20781/92. Dec. 29.6.94, D.R. 78-A, p. 116; No. 22351/93, Dec. 15.5.96, unpublished).

The Commission cannot find that any of the above criteria is met in the present case. Therefore, there is no appearance of a violation of the applicant's rights under Article 4 (Art. 4) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings on the determination of an extra duties allowance were unfair. She submits that she was denied access to the administrative file, that the Ministry had wrongly altered her request for an extended extra duties allowance into one for a simple extra duties allowance, that for this reason the Administrative Court's decision was based on incorrect facts and that her claim to an extended extra duties allowance was wrongly dismissed by the Administrative Court. She also complains about the length of the proceedings and submits that the Administrative Court has not yet decided on her request for a long-term allowance.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission need not determine whether or not the proceedings concerning an extra duties allowance involved a determination of the applicant's civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, because the above complaint is, in any event, inadmissible for the following reasons.

The Commission observes that the applicant initially filed a request for an extended extra duties allowance. The Ministry altered this request into one for a simple extra duties allowance, as it considered that the applicant did not fulfil the requirements for an extended extra duties allowance, and in summary proceedings granted a simple extra duties allowance for a specific period. During the proceedings on the applicant's objections before the Ministry and in her subsequent complaint to the Administrative Court, the applicant never contested the qualification of the allowance granted as a simple extra duties allowance. Rather, she explicitly contested the period for which a simple extra duties allowance should have been paid. In her various submissions she either mixed the terms or requested the determination of a simple extra duties allowance. In particular, in her complaint to the Administrative Court, which she submitted with the assistance of a lawyer, no reference was made to the qualification of

the allowance nor to her initial request for an extended extra duties allowance. The Administrative Court's decision was therefore based on the applicant's explicit statements and requests in her complaint. Insofar the applicant alleges that access to her file had been denied the Commission observes that the applicant has not shown that she ever had made a formal request to inspect her file and that such a request had been refused.

In these circumstances the Commission finds that the above proceedings do not disclose any appearance of a violation of the applicant's right to a fair hearing under Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. Lastly, the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings on the determination of an extra duties allowance.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of this complaint to the respondent Government.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaint as regards the length of the proceedings for an allowance.

and, unanimously,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber