submit his observations on the information obtained.

3. In the case of disciplinary proceedings, the obligatory hearing of the official concerned by the appointing authority constitutes a peremptory legal requirement.
This principle must be interpreted as imposing on the appointing authority a duty to hear the official itself.
Only by observing this principle and in conditions which ensure protection of the rights of the officials concerned might the appointing authority, for reasons connected with the efficient running of its departments, entrust to one or more of its members the task of hearing the official.

In Case 35/67

AUGUST JOSEF VAN EICK, a former official of the Commission of the EAEC, residing at Ispra-San Giacomo (Varese, Italy), Cascine Maria Teresa, assisted by Marcel Slusny, Advocate of the Cour d'Appel, Brussels, Lecturer at the Independent University of Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 b/IV rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, taking the place of the Commission of the EAEC by virtue of Article 9 of the Treaty of 8 April 1965,.represented by its Legal Adviser, Jürgen Utermann, acting as Agent, with an address for service in Luxembourg at the offices of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application:

(a) for the annulment

— of the procedure followed before the Disciplinary Board;

— of the opinion of the Disciplinary Board delivered on 23 June 1967;

— of the decision taken by the Commission at its meeting of 4 July 1967 removing the applicant from his post; and

(b) for the payment of arrears of salary and compensation for material and non-material damage suffered.

THE COURT (First Chamber)

composed of: A. M. Donner, President of Chamber, R. Monaco (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

On 5 April 1967 the Commission of the EAEC decided to conduct disciplinary proceedings concerning August Josef Van Eick, a scientific officer in Grade A6, employed at Ispra.
On 13 April 1967 the Commission submitted a report to the Disciplinary Board regarding certain allegations made against Mr Van Eick. On 28 April 1967 the Board decided to order an inquiry into the matter and on 23 June 1967 it delivered a reasoned opinion on the disciplinary measure which it considered appropriate to this case.
The Board expressed its opinion as follows:

(a) *As regards the performance of his duties in the library:*

'As regards the performance of his duties in the library of the establishment at Ispra, having regard both to the qualifications which had led to his recruitment and to the grade in which he was classified, Mr August Van Eick could and should have made an effective contribution in his new post to the performance of the tasks assigned to his department.
With the exception of certain small tasks which he had to be expressly requested to perform, Mr Van Eick showed no initiative in ensuring that the day-to-work for which he was responsible was carried out and even expressly refused to carry it out himself, claiming that it did not correspond to his level.
Doubts which may be expressed by an official as regards the level of his post in no way relieve him of the obligation to carry out the work for which he is responsible in the post to which he is assigned.

.....

(b) *Unjustified absences and lack of punctuality:*

The facts complained of are not disputed, with the exception of the absence from 18 to 26 August 1966 for which Mr August Van Eick had produced a medical certificate at the appropriate time.
On several occasions Mr August Van Eick's attention was drawn to these many shortcomings, and earlier shortcomings as regards his punctuality have already been penalized by a reprimand.

.....

(c) *Failure to return the periodic reports:*

This fact is established and is not disputed.
However, during the hearing, Mr August Van Eick undertook to return this report within the shortest possible time.
The incident constitutes evidence of ill will on the part of Mr August Van Eick.

.....

(d) *As regards the facts complained of, taken as a whole:*

Taken as a whole, the facts of which Mr August Van Eick is accused constitute a serious failure to carry out the obligations incumbent upon an official.

However, the keen disappointment felt by Mr August Van Eick in 1962 on the discontinuance of an activity to which he had devoted all his energies may have influenced certain aspects of his behaviour.'

On the basis of the foregoing considerations the Disciplinary Board delivered the following opinion:

'Having regard to the circumstances of the case it would be proper to apply the sanction provided for in Article 86(2)(e) to Mr August Van Eick, namely downgrading, with classification in Grade A7, Step 6.'

By a memorandum of 26 June 1967 the Chairman of the Disciplinary Board transmitted this opinion to the Commission with the following note:

'In spite of the gravity of the facts on the basis of which the Board proposes one of the most severe disciplinary measures provided for by the Staff Regulations, the Members of the Board and I express the wish that Mr Van Eick be given the opportunity to make a valid contribution to the work of the Commission.'

Meanwhile, on 22 June 1967 the Commission had designated Mr Buurman to hear Mr Van Eick on its behalf, by virtue of Article 7 of Annex IX to the Staff Regulations of Officials.

In his report of 29 June 1967, Mr Buurman declared under this Article that it was impossible for Mr Van Eick to be heard.

During its meeting of 4 July 1967 the Commission decided to terminate Mr Van Eick's employment as from 1 August 1967.

The statement of reasons for this decision:

— *recapitulates* all the recitals of the opinion of the Disciplinary Board on each of the facts complained of, with the exception of the second recital concerning the failure to return the periodical report;

— *amends* as follows the recitals of the opinion 'As regards the facts complained of, taken as a whole':

— 'that, taken as a whole, the facts of which Mr August Van Eick is accused constitute an even more serious failure to carry out the obligations incumbent upon an official, as on several occasions the institution has in vain reminded him of the urgent need to reform his conduct which was considered to be incompatible with his position as a scientific officer. In these circumstances the most severe measure must be applied to Mr Van Eick, namely that provided for in Article 86(f) of the Staff Regulations of Officials.'

This decision, which was sent from Brussels on 13 July 1967, by letter of 5 July 1967 signed by Mr Funck, was received by Mr Van Eick on 15 July 1967.

On 13 October 1967 Mr Van Eick lodged the present application at the Court Registry.

On 11 March 1968 the applicant applied for legal aid.

In the light of the defendant's observations lodged on 29 March 1968 and after hearing the view of the Advocate-General, the Court (First Chamber) by order of 3 April 1968 granted legal aid up to the amount of BF 15 000.

By letter of 14 May 1968 the Registrar of the Court informed the applicant's Counsel that the Court (First Chamber) had considered it preferable for this sum to be paid 'when the case is concluded, unless special costs justify an application for an advance payment'.

Upon hearing the report of the Judge-Rapporteur and the view of the Advocate-General, the Court (First Chamber) decided that there was no need to conduct any preliminary measures of inquiry.

The parties submitted their oral observations at the hearing on 15 May 1968.

The Advocate-General delivered his opinion at the hearing on 12 June 1968.

II — Conclusions of the parties

In his application, the *applicant* claims that the Court should:

'1. Declare void and of no effect:
   — the procedure followed before the Disciplinary Board;
   — the opinion delivered by the Disciplinary Board on 23 June 1967;
   — the decision of the Commission of 4 July 1967 removing the applicant from his post;
2. Declare and adjudge that, following the annulment of the decision of the Commission, the applicant has the right to receive his salary and all the benefits

attaching to his position as an official, as from 1 August 1967;

3. To the extent necessary, order the defendant to pay the sums owing under this head, that is, BF 100 000, subject to the applicant's right to vary the said amount in the course of the proceedings;
4. Order the defendant to pay the sum of BF 25 000 to the applicant by way of damages in respect of the material damage suffered, subject to the applicant's right to vary this sum in the course of the proceedings;
5. Order the defendant to pay the sum of BF 100 000 to the applicant by way of damages in respect of non-material damage suffered, subject to the applicant's right to vary this sum in the course of the proceedings.'

The *defendant* contends that the Court should:

'— declare that the application is admissible but unfounded;
— dismiss the requests made by Mr Van Eick;
— order him to pay the costs to the extent provided for in Article 70 of the Rules of Procedure of the Court.'

III — Submissions and arguments of the parties

Admissibility

The *defendant* puts forward no objections to the admissibility of the application.

Substance

A — The application for annulment

The submissions and arguments of the parties may be summarized as follows:

1. *Infringement of the second paragraph of Article 4 of Annex IX to the Staff Regulations of Officials*

The *applicant* emphasizes that under this provision the official charged may call witnesses. He states that in this case he had applied by letter of 1 June 1967 for the examination of several witnesses but that of all the names which he put forward the Disciplinary Board decided to hear, as a witness called by the applicant, only Mr Van Scheepen.

The *defendant* replies by putting forward the following arguments:

— Contrary to the statement made in the application, the Disciplinary Board did not hear only Mr Van Scheepen, but also heard Mr Kramers and Mr Rittberger, both of whom were witnesses called by the applicant.
— It is not correct to state that the Disciplinary Board is bound to hear all the witnesses called by an official subject to disciplinary proceedings, as:
  (a) the disciplinary proceedings provided for in the provisions of the Staff Regulations are of an administrative or even investigatory nature, as the Disciplinary Board is itself merely an advisory body of the appointing authority;
  (b) in any case, a witness cannot be called before the Board if the facts on which the evidence of each witness is sought are not set out in such a way as to enable the Board to assess whether it would serve any useful purpose to hear him.

The application for the examination of witnesses contained in the applicant's letter of 1 June 1967 did not fulfil this requirement.

The *applicant* replies:

— *as regards the first argument*, that, although it is true that the Disciplinary Board heard three witnesses called by the applicant rather than one, it is nevertheless true that in the abovementioned letter the applicant had requested that at least eight witnesses be heard.

— *as regards the second argument*,
  (a) that the second paragraph of Article 4 and Article 5 of Annex IX to the Staff Regulations clearly show the great desire felt by the authors of this text to ensure respect for the applicant's rights to defend himself, the adversary nature of the hearings and the impartiality of the procedure, by

reason of the hybrid nature of the Disciplinary Board at once judicial and investigatory. When one reads, in Article 6 of this Annex, that the Board may order an inquiry in which each side may submit its case and reply to the case of the other side and that no other form of inquiry is provided for, it becomes clear that the procedure followed by this body is in no way 'inquisitorial';

(b) that the letter of 1 June 1967 had set out the facts on which he requested the witnesses to be examined: references to these facts are to be found next to the names of these witnesses. Moreover, it is difficult to see why the Board was anxious to hear three of these witnesses, although they had all been named in the same manner. Finally, even the brevity of the period within which the Board is required to transmit its opinion to the appointing authority could not justify the decision, for which no reasons were given, to hear only three of the eight witnesses called.

In its rejoinder the *defendant* states that proceedings such as a disciplinary inquiry may respect the principle of allowing the person concerned to state his case and reply to that of the other side and yet still be of an inquisitorial nature. In fact, this principle is respected once, as in this case, all the documents are communicated to the official concerned and he remains free to submit his observations and requests at any time.

As regards the application for the examination of witnesses contained in the letter of 1 June 1967, the applicant had merely annexed to this letter a list containing no less than 45 documents which he stated to be for the information of the Disciplinary Board, and stated that he wished a series of witnesses to be examined, in the order in which these documents were filed, on the facts indicated. In this way, instead of setting out the facts on which he wished the witnesses to be examined, he virtually left the Disciplinary Board to extract them from the documents which he had submitted to it. Moreover, when informed by letter of 13 June 1967 of the Board's decision to hear only some of the witnesses named, the applicant did not criticize this decision during the disciplinary proceedings, or give more details of facts likely to influence the Board's opinion. Its decision in this respect was in no way influenced by the need, to which reference has been made, to comply with the period laid down for the transmission of the Board's opinion to the appointing authority.

2. *Infringement of Article 6 of Annex IX to the Staff Regulations*

The *applicant* states, in particular:

— that the inquiry which the Disciplinary Board decided to hold pursuant to this provision was not one in which each side could submit its case and reply to the case of the other side;

— that the applicant was not present when the Board heard the statement made by one of its members on the 'Bird' project and he was unable to submit his observations on this point.

In reply, the *defendant* states that:

— during the first meeting on 28 April 1967, the Disciplinary Board decided to conduct an inquiry dealing in particular with the consideration of certain documents referred to in the 'report to the Board' but which had not been attached thereto. The applicant was informed of this decision by letter of 8 May 1967. He received copies of all the documents transmitted to the Board and submitted observations thereon in several letters addressed to this body. In addition, the Board sent to the applicant a copy of the minutes of each of its meetings, with the result that he was able to follow the procedure in all its details. This being so, it must be admitted that the inquiry conducted by the Disciplinary Board was genuinely one in which each side could submit its case and reply to the case of the other side.

— The statement concerning the 'Bird' project, made during the third meeting, formed part of the very discussions of the Board which, according to the second paragraph of Article 6 of Annex IX of the Staff Regulations, are to be secret.

As regards the inquiry conducted by the Disciplinary Board, the *applicant* replies that although a copy of the minutes of each meeting of the Board was of course sent *a posteriori* to the official concerned, he did not receive copies of the Rapporteur's measures of inquiry. The applicant was absent when the Rapporteur examined the correspondence referred to in the report initiating the proceedings and when he summarized it and drew certain conclusions. As the applicant was, therefore, only able to follow the conduct of these proceedings *a posteriori*, they could not be considered to be proceedings in which each side could submit its case and reply to the case of the other side.

The *defendant* rejoins that all the documents transmitted by the Commission to the Board were communicated to the applicant and that he was, at the same time, enabled to submit his observations. Moreover, there had been no special meeting during which the Rapporteur had examined the applicant's correspondence, nor any 'Rapporteur's record' in which the minutes of such proceedings were entered.

As regards the statement on the 'Bird' project, the *applicant* observes that it is not sufficient to say that it was submitted during a meeting which was devoted to the discussions of the Disciplinary Board, in order to conclude that it formed part of these discussions. Any discussion presupposes that the facts involved have previously been brought to light in the proceedings. However, the statement in question put before the members of the Board a new factor for their consideration, with the result that in this instance a witness was heard *in camera*, under the pretext of a discussion. The breach of the rights of the defence is thus particularly conspicuous, the more so:

— as the applicant had made an application for the examination of four witnesses on the subject of his work on the Bird project (letter of 1 June 1967) and the Board decided to hear none of them;
— as the author of the statement was a member of the Disciplinary Board and could not, therefore, combine this function with that of witness.

The *defendant* maintains that no statement was made on the Bird project, but only a brief statement on the 'subject' of the Bird report. It did not constitute 'evidence' but was merely information of a scientific nature intended to enable the members of the Board who did not have the same scientific training as the author of the statement to understand the Bird report, which was one of the documents forming the subject of the inquiry. This information clearly formed part of the secret discussions of the Board.

3. *Infringement of the rights of the defence*

The *applicant* observes that since the witnesses were heard on the morning of 21 June 1967, then at the beginning of the afternoon, his Counsel was given only approximately three-quarters of an hour in which to prepare his oral arguments and had thus been unable to draft a written memorandum. Moreover, the Disciplinary Board had prepared neither a verbatim record nor a summary of these oral arguments. It follows that, in the absence of such a memorandum, the Commission:

— took its decision without being aware of the arguments which the applicant had put forward before the Disciplinary Board;
— was unable to grasp the significance of the additional documents which were produced at the hearings following these oral arguments and which are referred to in the minutes.

The *defendant* makes the following observation:

— The oral argument before the Disciplinary Board forms merely one element in the defence of the official concerned, which is prepared as the proceedings of the Board take place. In this instance, the applicant received a copy of the report of the Board on 14 April 1967 and was informed on 8 May that the date for the examination of witnesses and the submission of oral arguments had been fixed at 21 June 1967. He had, therefore, a period of more than two months in which to prepare his defence.
— Three of the four most important witnesses were heard during the morning of 21 June and the sitting was adjourned a

first time for two hours. Thus there was sufficient time available in which to prepare oral arguments, in the applicant's defence, taking into account the conditions which could be drawn from the examination of the majority of the witnesses. The three-quarters of an hour which followed the examination of the last witness could have been devoted to completing the oral arguments which had thus been prepared. In addition, it seems to be a rule, in particular in criminal proceedings, that the oral arguments immediately follow the examination of witnesses.

— Furthermore, the applicant raised no objection on this point on the day of the hearing. On the contrary, he maintains in the application that these oral arguments 'had, however, appeared sufficiently convincing to the Disciplinary Board for it to propose nothing more than downgrading'.

— As regards the alleged impossibility of preparing a written note and the consequences thereof, it is sufficient to note that in accordance with the text of the Staff Regulations and Annex IX thereto, oral arguments are addressed solely to the Disciplinary Board and not to the appointing authority. Furthermore, instead of requesting, as he could have done, permission to lodge a written note, the applicant merely began his oral arguments by acknowledging the consistent concern for objectivity which had characterized the proceedings of the Board.

— Finally, it is not clear what advantage might be gained by the applicant in the unusual formality claimed in this instance, in particular as the authority responsible for taking the decision hears the official concerned in accordance with the third paragraph of Article 7 of the abovementioned Annex.

In reply, the *applicant* maintains that by claiming that his lawyer had 'a period of more than two months in which to prepare his defence and the oral arguments', the defendant is confusing quite distinct concepts. For it is clear that the word 'defence' appearing in the first paragraph of Article 4 of Annex IX to the Staff Regulations must not be interpreted in the sence of 'oral argument', but in the meaning developed in the second paragraph of this Article, according to which when the official appears before the Disciplinary Board he shall have the right to submit observations in writing or orally, to call witnesses and to be assisted in his defence by a person of his own choice. The 'oral argument', on the other hand, is an oral statement based on the written conclusions and on the submissions of the defence as appear from the various pleadings.

The applicant maintains that it is also incorrect to claim that the person chosen to assist him in his defence had been allowed two and three-quarter hours in which to prepare his oral argument. First, an oral argument is not prepared before all the evidence is known and, in this instance, one witness was still to be heard. Secondly, it is clear that as it was the custom to take lunch during the two hours which preceded the hearing of the last witness, the period allowed to the person representing the applicant was insufficient for the purpose of drafting written conclusions or a commntary on the evidence given at the hearing intended for subsequent transmission to the appointing authority.

Furthermore, the argument based on a comparison with criminal proceedings is also unfounded. First, no such proceedings are involved in this case; secondly, in such proceedings the accused's representative is informed, several days in advance, of the content of the criminal file in which appears the evidence of any witnesses involved in the case. Nothing of this nature took place in this instance.

The applicant goes on to acknowledge that it is true that Annex IX of the Staff Regulations does not oblige the Commission to consider the arguments of the person chosen to defend him before taking its decision, but it is also true that in providing that the official concerned shall first be heard, the second paragraph of Article 87 of these Regulations and Article 7 of Annex IX thereto allow it to be supposed that such a person may also be heard.

The applicant then recalls that in many of the legal systems of Member States the principle of the respect for the rights of the defence is an unwritten principle, wihch in

no way restricts its mandatory force and that, pursuing an argument which has already been put forward, the principles of the Convention on Human Rights are applicable to Community law. Finally, he states that although in his oral argument, the person representing him was appreciative of the objective manner in which the Disciplinary Board had performed its task, this appreciation could not later be invoked by the defendant to prevent him from criticizing such performance. First, this appreciation did not apply *ad futurum;* secondly, as the Disciplinary Board was both judge of and party to the proceedings, the applicants' representative could not criticize the Board's performance of its task before it had delivered its opinion.

The *defendant* states in its rejoinder that, after the examination of the three witnesses which had taken place during the morning, the applicant's representative was aware of almost all the 'evidence arising from the inquiry' which he required and that after the examination of the fourth witness he was only required to complete his oral arguments.

Furthermore, the defendant insists that there could be no question in this case of drafting a text which 'had later to be communicated to the appointing authority', as the provisions of the Staff Regulations in no way provide for the possibility for the applicant to address a written note to this authority summarizing the oral arguments. Nor may it be assumed on the basis of these provisions that the representative of the official concerned must be heard by this authority before it takes its decision and after the proceedings before the Disciplinary Board have closed.

4. *Infringement of the third paragraph of Article 7 of Annex IX to the Staff Regulations*

The *applicant* maintains that the third paragraph of Article 7 of Annex IX of the Staff Regulations and the first paragraph of Article 87 of these Regulations clearly show that the appointing authority is bound to hear the official itself, and is unable to delegate its power in this matter to anyone at all. In this case, however, the Commission delegated power to hear the applicant to Mr Buurman, Director of the Directorate-General for Administration and Personnel, before making its final decision.

He adds that, even supposing such a delegation of power to have been possible, it was as a result of a series of exceptional circumstances amounting to *force majeure*, in particular his illness, namely a violent toothache, that he was unable to be heard. Moreover, on 2 July 1967, he informed Mr Buurman that he was available, both to reply orally to his questions and to hand to him a written note.

The *defendant* replies that by reason of the complex structure of the institution and the scope of the tasks entrusted to it, to conclude that, before taking its final decision as a body, the Commission must *itself* hear the official concerned and has no power to entrust this duty to an associate of high rank was to distort the intentions of the authors of the Treaty. The wording of Article 7 does not prevent such a delegation of power.

As regards the impossibility of hearing the applicant, the report prepared by Mr Buurman on the applicant's failure to appear shows that he simply avoided this hearing. Finally, the defendant states that the applicant has provided no explanation as to the nature of the 'series of exceptional circumstances amounting to *force majeure*' which he alleges. As regards the alleged 'violent toothache' the medical certificate produced by the applicant neither shows the existence of toothache during the period under consideration, nor that it was of such a nature as to prevent his being properly heard on 28 June 1967. In any case, it did not prevent him from being present during the evening of 27 June 1967 at a cocktail party given by the Commission, nor from conversing with a number of his colleagues.

The *applicant* replies that the defendant's interpretation of the third paragraph of Article 7 of Annex IX to the Staff Regulations and of the first paragraph of Article 87 thereof leads to the situation, peculiar to say the least, that a body of high-ranking officials, delegated by the Commission, which has followed all the hearings, inquiries and pleadings and which has heard the witnesses as well as the official charged can only give an opinion which has no

binding force, while a single official whose rank is no higher than that of the majority of the members of the Disciplinary Board, who was not present at the hearings and who, in this instance, did not hear the applicant, may come to a final decision which invalidates the opinion of the Board.

The applicant states that both the provisions of the Staff Regulations in this matter and references to the legal systems of Member States indicate that a collegiate decision of a judicial nature can only be invalidated by another collegiate decision taken by a higher authority. In the present case, the Commission alone had the power not to follow the opinion expressed by the Board and then only in full knowledge of the facts of the case and after hearing the applicant. Thus, in this instance, Mr Buurman clearly had no standing in the matter.

In addition, says the applicant, one is struck by the haste with which, on 22 June 1967, Mr Buurman requested and obtained his delegated powers on the eve of the day on which the Disciplinary Board delivered its opinion: the regularity of this procedure appears questionable.

The applicant adds that the report prepared by Mr Buurman on 29 June 1967 shows that it was only during the evening of 27 June that this official handed to him the opinion of the Board on which he and his representative were invited to express their views the following day at 9.15 a.m. As the representative was unable to attend and the meeting had been put off until the following day, the applicant informed Mr Buurman in writing that violent toothache prevented him appearing. This did not prevent Mr Buurman from concluding that it was impossible to hear the official concerned, or the Commission from taking its decision in default of the applicant's appearance.

The applicant continues that the defendant's objections on the subject of his violent toothache are accompanied by no evidence, although the truth of the matter is shown by the medical certificate produced as a schedule to the application. It is true that the applicant was present at the cocktail party on 27 June 1967, but this does not imply that, 24 hours later, he did not suffer from a toothache which was so serious that he was unable to appear before Mr Buurman and was forced to visit a dentist.

Finally, the applicant notes that the Dutch copy of the letter from Mr Funck of 5 July 1967 contained in a schedule a copy in Dutch of the decision of the Commission which was also dated 5 July 1967. On the other hand, the French copies annexed to the French text of the same letter which was addressed to him several days later were not dated.

The *defendant* replies:

— that the Commission's interpretation of the provision of the third paragraph of Article 7 of Annex IX was in no way 'peculiar'. The task of the person empowered to conduct the hearing provided for in this provision consists of taking note of the observations of the official on the conclusions to be drawn from the earlier proceedings before the Disciplinary Board. This hearing is thus intended to allow the official concerned to have the last word before the appointing authority takes its decision. It may not, therefore, include 'a statement of the submissions of the defence by the adviser of the official concerned' since this party's intervention comes to an end at the close of the hearing before the Disciplinary Board. Moreover, it must be noted that during the disciplinary proceedings neither the applicant nor his representative contested the legality of the delegation of powers to Mr Buurman;

— As regards the 'haste' with which Mr Buurman had requested the Commission to make this delegation, it must, on the other hand, be regarded as evidence of good administration that the administrative measures enabling the Commission to reach its final decision were prepared in good time, while the proceedings before the Disciplinary Board were coming to an end. Mr Buurman was at that time deputy to the Director-General for Administration and in that capacity he suggested to the Commission that the necessary powers be delegated to him, having regard to the very short periods available to the Commission before the term of office of its members expired as a result of the merger of the executives which took place on 6 July

1967. (The defendant vigorously and expressly disputes that Mr Buurman was in any way responsible for the contested decision);

— As regards the report prepared by Mr Buurman, it must be recalled that, as from 23 June 1967, he had requested the applicant to contact the secretary of the Disciplinary Board for the purposes of the hearing provided for in the abovementioned third paragraph of Article 7. If the applicant was only informed of the Board's decision on 29 June 1967 this is because he was once more absent from Ispra, without the authorization of his superiors;

— It is for the applicant to establish that the toothache from which he had suffered on 28 June 1967 was unquestionably of such a nature as to prevent him from being validly heard the following day, as the medical certificate of 5 July 1967 merely refers, in a very general way, to a course of treatment followed by the applicant since 6 May 1967. Furthermore, it is at least curious that in his letter of 2 July 1967 the applicant considered that he was not obliged to make any allusion to his state of health or the treatment by his dentist; moreover, the dental certificate was only produced when the application was lodged in the following October;

— The letter of 5 July 1967 from Mr Funck represents the true facts, in that it refers to the decision of 4 July 1967. The Commission adopted its decision on this date on the eve of the day on which it received the applicant's letter of 2 July 1967. It is, therefore, irrelevant that the Dutch copy of this decision bears the date 5 July 1967. This detail could not justify the vexatious conclusions which the applicant appears to draw from it.

5. *The allegation that the statement of reasons for the contested decision was incomplete or based on erroneous considerations*

(a) The failure to return the periodic report

The *applicant* observes that the statement of reasons for the decision differs on this point from the opinion of the Establishment Board in that, contrary to the opinion, it does not refer to the undertaking given by Mr Van Eick to return this document as soon as possible.

(b) The failure to consider extenuating circumstances

The *applicant* observes that in one recital in its opinion the Disciplinary Board had taken into account as an extentuating circumstance the 'keen disappointment felt by Mr Van Eick in 1962 on the discontinuance of an activity to which he had devoted all his energies'. This recital was not adopted by the contested decision, with the result that it is impossible to determine whether the Commission ignored it or whether it had reasons for setting it aside.

The *defendant* replies that no rule of positive law obliges the Commission to refer to each of the circumstances taken into consideration by the Disciplinary Board or to justify the reasons for which it did not expressly refer thereto. Secondly, the applicant's belated declaration of intent concerning the return of the periodic report could not influence the seriousness of the shortcomings on the part of the applicant which had been found to exist. On the contrary, the absence of such a declaration might have constituted a factor aggravating these shortcomings.

Furthermore, as regards the 'keen disappointment felt by Mr Van Eick' the Disciplinary Board had not taken this account as an 'extenuating circumstance', since the concept of 'extenuating circumstance' belongs to the criminal law of certain Member States and, by its nature, cannot simply be transposed into the area of disciplinary codes of practice, which obey separate rules.

The *applicant* replies that it seems very surprising that the Commission adopted, word for word, the statement of reasons for the opinion of the Disciplinary Board, which was the only factor on which ti could base its decision, while omitting without any explanation the recitals favourable to Mr Van Eick, in order to conclude in favour of a disciplinary measure which was more

serious than that proposed by the Board. It is true that the Commission was not bound by this opinion, but, if it set it aside, it should have given reasons for its decision on this point and should previously have questioned the official concerned.

Furthermore, the defendant's argument that the concept of extenuating circumstances is unknown in the Commission's code of practice for disciplinary proceedings is unacceptable as, in this instance, there is no question of circumstances defined by law, but merely of a circumstance of fact which the Disciplinary Board considered had to be taken into account for the purposes of its opinion.

The *defendant* also states that from the mere fact that the Disciplinary Board only submits an opinion to the appointing authority, this body is fully entitled to adopt part of the reasons given for this opinion and to reject others. If, in this instance, the Commission did not adopt certain of the reasons relating to the return of the periodic report (which has not yet been returned), it is because it saw the applicant's undertaking to return it as a belated declaration of intent which could not influence the existence and the gravity of the shortcomings which had been found to exist.

Similarly, although in a recital to the contested decision concerning all the facts for which the applicant is criticized, the Commission did not take account of 'the keen disappointment felt by Mr Van Eick' this is because it regarded these facts as more serious than had the Disciplinary Board, on the ground that the warnings referred to in this recital had remained without effect.

6. *Erroneous nature of certain factual considerations referred to in the statement of reasons for the contested decision*

The *applicant* observes that the contested decision amends the first recital of the opinion of the Disciplinary Board 'as regards the facts complained of' by adding that the Commission had 'reminded' Mr Van Eick 'on several occasions ... of the urgent need to reform his behaviour'.

He maintains that the only warning given to him was that contained in the letter of 24 June 1965 from Mr Funck, a passage of which is reproduced in the report from the Commission to the Disciplinary Board, but which did not form the subject of a hearing. The Commission is thus wrong to allude to these reminders. Moreover, the facts for which Mr Van Eick was criticized at that period occurred well before he took up his post in the library.

The *defendant* replies that, contrary to the applicant's allegations,

— he received several warnings;
— the passage in question of the contested decision does not refer in particular to the letter from Mr Funck of 24 June 1965, but to all the various warnings addressed to Mr Van Eick both orally and in writing by his departmental and administrative superiors.

The *applicant* replies that the opinion of the Disciplinary Board refers only to the letter from Mr Funck. It may be admitted that after this warning Mr Van Eick was fairly often criticized for certain facts, but it was, nevertheless, mistaken to maintain that they also formed the subject of a warning.

The *defendant* states that it does not understand the statements on this point contained in the reply, as it considers that they are often contradictory. It refers therefore to the arguments formulated in its statement of defence.

7. *Erroneous or incomplete nature of the opinion of the Disciplinary Board and of the contested decision*

Finally, the *applicant* maintains that the second recital of the opinion of the Board and the third recital of the decision of the Commission conflict with the statement made by Mr Eder, which was quoted by the Commission itself, and with the documents nos. EUR/C/1261 and 1262/67 attached to the Commission's report to the Disciplinary Board.

This statement bears witness to the fact that the applicant carried out routine work and was involved in work other than that which was expressly requested of him.

Moreover, it is incorrect to claim that he had refused to carry out certain tasks on the pretext that they were not of his level. Such a refusal only occurred in cases in which the

tasks in question were in fact not of his level. Nevertheless, he occasionally showed evidence of good will and initiative but as he was sometimes criticized for these initiatives he was obliged to display a certain caution.

After observing that Mr Eder's statements are not connected with the facts referred to in the foregoing recitals, the *defendant* maintains that Mr Eder in no way stated that the applicant had taken part in work 'other than that which he was expressly requested to carry out' and that neither the opinion of the Board nor the contested decision, nor the statement of defence ever maintained that the applicant had carried out such work.

In addition, the argument that the level of the work entrusted to the applicant at the library did not correspond to his classification was formulated for the first time in the reply and thus constitutes a fresh issue within the meaning of Article 42(2) of the Rules of Procedure. For this reason it is inadmissible.

It is, at all events, expressly denied that the post assigned to the applicant included the duties of assistant librarian.

B — As regards the claims for damages

The *applicant* maintains that the annulment of the contested measures must result in the payment to him, by way of damages, of:

— his salary and all the benefits attaching thereto, as from 1 August 1967;
— the sums payable by way of the costs incurred in his defence in the disciplinary proceedings, and as travelling exprenses etc.,
— compensation for the non-material damage which he suffered as a result of the considerable difficulties caused by his dismissal.

The *defendant* maintains that, as the application for annulment was unfounded for the reasons set out above, the pecuniary claims which are submitted as a consequence of that application must also be dismissed.

It adds that, in any case, even if the Court were to annul the contested measures in whole or in part, the claim for compensation for the alleged non-material damage must be dismissed as such damage would be made good by the mere fact of annulment (cf. Joined Cases 18 and 35/65).

Grounds of judgment

Admissibility

The purpose of the application is the annulment of the procedure followed before the Disciplinary Board, of the opinion delivered by this Board and the decision taken by the Commission to remove the applicant from his post.

Under Article 91(1) of the Staff Regulations of Officials, any action between the Community and any person to whom those Staff Regulations apply regarding the legality of an act 'adversely affecting him' may be submitted to the Court.

The procedure followed before the Disciplinary Board is made up of a body of purely preparatory measures which are only capable of affecting the official concerned adversely to the extent to which they influence the opinion of the Board.

On this point, therefore, the application must be declared inadmissible and the complaints raised against this procedure must be considered in the context of the application directed against the opinion of the Board.

Substance of the Case

A — *Annulment of the opinion of the Disciplinary Board*

The applicant maintains, first, that the procedure followed before the Board is contrary to the Staff Regulations of Officials, and in particular to Articles 4, 6 and 7 of Annex IX.

In support of this submission, the applicant argues that the Board infringed Article 4 by deciding to hear only some of the witnesses called by the applicant.

The second paragraph of Article 4 of Annex IX to the Staff Regulations acknowledges that the official charged has the right to call witnesses before the Board. Although, within the context of the powers conferred upon it by Annex IX to the Staff Regulations, the Board is an advisory body of the appointing authority, it is, however, bound in the exercise of its powers to observe the fundamental principles of the law of procedure. In accordance with these principles it could not refuse to comply with an application for the examination of witnesses, once this request clearly indicates the facts on which there is reason to hear the witness or witnesses named and the reasons which are likely to justify their examination. It is, however, for the Board to assess both the relevance of the application in relation to the subject-matter of the dispute and the need to examine the witnesses named.

The Board could, in principle, take the view that the examination of only some of the witnesses called by the applicant was sufficient for the purposes of the inquiry into the case. Moreover, although the applicant had been informed of its decision to hear only some of these witnesses, he did not insist either in writing or at the hearing on the examination of the other witnesses named in his application of 1 June 1967. This being so, the Board was intitled and indeed obliged to take the view that the applicant was not presisting in his earlier application, but had accepted the Board's evaluation of the matter.

The first submission must, therefore, be dismissed as unfounded.

The applicant maintains that he was only able to follow *a posteriori* the conduct of the inquiry ordered by the Board on 28 April 1967. Furthermore, the Board is said to have heard one of its members on the 'Bird' project without enabling the official concerned to submit his observations so that a witness had been heard *in camera*, under the pretext of discussion. For these reasons, the applicant says that this inquiry was not one in which each side could submit its case and reply to the case of the other side, as required by the first paragraph of Article 6 of Annex IX to the Staff Regulations.

The first paragraph of Article 6 provides that if the Disciplinary Board requires

further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry 'in which each side can submit its case and reply to the case of the other side'. In the present case the minutes of the meeting of the Board of 28 April 1967 show that in this case the inquiry consisted in a consideration of the documents referred to in the Commission's report to the Board. It is not disputed all the documents submitted to the Board for this purpose were communicated immediately and in their entirety to the applicant, as were the minutes of all the meetings of the Board. The nature of an inquiry, in which each side can submit its case and reply to the case of the other side, did not demand that the official concerned should take part in the examination of these documents by the Rapporteur or in the report which the Rapporteur made to his colleagues in the course of the inquiry, but only that he be kept informed of the conduct of the inquiry and enabled, in good time, to submit his observations on the information obtained. The file shows that this requirement was satisfied by the communication of both the documents and the abovementioned minutes.

As regards the statement about the 'Bird' project, this was information given by a member of the Board to his colleagues which was intended to facilitate comprehension of the 'Bird' report which appeared among the documents forming the subject of the inquiry. Such a communication between the members of the Board falls within the sphere of internal discussion, which cannot be taken into account outside the meeting of the Board. The present submission must, therefore, be dismissed.

Furthermore, the applicant alleges that the proceedings before the Board did not respect the rights of the defence and are for this reason irregular. On this point he maintains that the Board did not allow the person whom he chose to assist him in his defence the necessary time in which to prepare a written note to bring to the notice of the Commission the final oral arguments put forward before the Board, and to inform it as to the scope and content of the additional documents produced during these proceedings.

It is unnecessary for the final oral arguments submitted to the Board to be recorded in writing, as they are intended only for this body.

The oral arguments constitute one of the factors which enable the Board to deliver a reasoned opinion on the disciplinary action appropriate to the facts established. It follows from the third paragraph of Article 7 of Annex IX to the Staff Regulations that the appointing authority shall take its decision in the light of this opinion and after hearing the official concerned. Moreover, by virtue of this provision, the official is enabled to submit his observations to the appointing authority on the opinion delivered by the Board and to provide any material information concerning the significance of the documents which he has produced and on which he intends to rely.

Therefore, as the present submission has no legal basis in the provisions of the Staff Regulations, it must be dismissed.

The applicant maintains that the second recital of the opinion of the Board contradicts the evidence which Mr Eder gave to that body during its fourth meeting. This evidence showed that the applicant carried out routine work and took part in work other than that which was expressly requested of him.

This evidence was referred to in the minutes of the fourth meeting of the Board and shows that in carrying out a study on the noise of reactors which had been entrusted to him in 1966 the applicant did not show the initiative necessary to ensure that the current work for which he was responsible was carried out. No contradiction can thus be shown to exist between this evidence and the above-mentioned recital. The present submission must, therefore, be dismissed as unfounded.

For all these reasons it must be concluded that the proceedings before the Board were conducted in accordance with the Staff Regulations and that the opinion drawn up by the Board at the close of these proceedings on 23 June 1967 must be regarded as regular.

B — *Annulment of the decision to remove the applicant from his post*

The applicant maintains that the task of hearing the official concerned which the Commission gave to Mr Buurman, a Director at the Directorate-General for Administration, is contrary to the third paragraph of Article 7 of Annex IX to the Staff Regulations. The result of this provision, when considered together with the first paragraph of Article 87 of the Staff Regulations, is to oblige the appointing authority to hear the official itself and to exclude any delegation of powers.

The third paragraph of Article 7 of Annex IX provides that the appointing authority shall take its decision within one month, and 'it shall first hear the official concerned'. In interpreting this phrase it is not possible to refer either to the first or to the second paragraph of Article 87 of the Staff Regulations, as these provisions refer to the hearing of an official in cases or at stages of the disciplinary proceedings which are different from those in this instance.

As a result, the justification for the applicant's submission may only be assessed in this case in the light of the third paragraph of Article 7 of Annex IX to the Staff Regulations.

By reason of the gravity of the disciplinary action to which the proceedings referred to in Annex IX to the Staff Regulations may lead, and having regard to the form of words employed, the article in question constitutes a peremptory legal

requirement. It must be interpreted as imposing on the appointing authority a duty to hear the official itself. Only by observing this principle and in conditions which ensure the protection of the rights of the officials concerned might the appointing authority, for reasons connected with the efficient running of its departments, entrust to one or more of its members the task of hearing the official concerned.

This requirement was not satisfied in this instance, as the task of hearing the official concerned was delegated by the appointing authority to an official of the institution. Such a procedure must, therefore, be regarded as irregular.

In view of this fact the contested decision appears to have been adopted in disregard of the condition set out in the third paragraph of Article 7 of Annex IX to the Staff Regulations. It must therefore be annulled.

C — *Payment of damages*

The applicant claims that the Court should declare and adjudge that following the annulment of the contested decision, he has the right to receive his salary and all the benefits attaching to his position as an official, as from 1 August 1967.

The measure requested is entailed in the execution of the judgment of the Court ordering this decision to be annulled. In accordance with Article 149 of the EAEC Treaty the Commission is required to take the necessary measures to comply with the judgment of the Court of Justice. It is thus unnecessary for any decision to be made on this claim.

In addition, subject to his right to vary this sum in the course of the proceedings, the applicant claims the sum of BF 25 000 by way of damages in respect of the travelling expenses and the costs of his defence which he has incurred in the course of the disciplinary proceedings.

Under Article 10 of Annex IX to the Staff Regulations, costs incurred on the initiative of an official in the course of disciplinary proceedings, in particular fees to a person chosen for his defence from outside the three European Communities, shall be borne by the official where the disciplinary proceedings result in any of the measures provided for under Article 86(2)(c) to (g) of the Staff Regulations. In the present case, as the contested decision to remove the applicant from his post has been annulled, the disciplinary proceedings concerning the applicant resulted in none of the disciplinary measures provided for in that Article. At the present stage of these proceedings, therefore, it is unnecessary for any decision to be made on this claim.

Finally, the applicant claims compensation for the non-material damage which he

has suffered as a result of the considerable difficulties caused to him by his removal from his post. The applicant has not set out in sufficient detail the nature and extent of these difficulties. This claim must therefore be dismissed.

Costs

Under the first paragraph of Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. As the defendant has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Atomic Energy Community, especially Articles 149 and 152;
Having regard to the Staff Regulations of Officials of the European Atomic Energy Community, especially Articles 25, 87 and 91 and Annex IX;
Having regard to the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT (First Chamber)

hereby:

1. **Annuls the decision taken by the Commission of the EAEC at its meeting of 4 July 1967 removing Mr August Van Eick from his post;**
2. **Dismisses the application as unfounded to the extent to which it is directed against the opinion of the Disciplinary Board;**
3. **Dismisses the claim for damages in respect of the non-material damage which he has suffered;**
4. **Declares that it is unnecessary to adjudicate on the other claims;**
5. **Orders the Commission of the European Communities to pay the costs of the proceedings.**

Donner Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 11 July 1968.

A. Van Houtte — Registrar

A. M. Donner — President of the First Chamber