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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 - 30 July 2004

VIEWS

Communication No. 1015/2001

Submitted by: Paul Perterer (represented by counsel, Mr. Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 31 July 2001 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to the State party on 27 September 2001 (not issued in document form)

Date of adoption of Views: 20 July 2004

On 20 July 2004, the Human Rights Committee recommends that the Committee consider for adoption the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1015/2001. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-first session

concerning

Communication No. 1015/2001**

Submitted by: Paul Perterer (represented by counsel, Mr. Alexander H.
E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 31 July 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant
on Civil and Political Rights,

Meeting on 20 July 2004,

Having concluded its consideration of communication No. 1015/2001, submitted to the
Human Rights Committee on behalf of Paul Perterer under the Optional Protocol to the
International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of
the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Paul Perterer, an Austrian citizen. He claims to be a
victim of violations by Austria¹ of articles 14, paragraph 1, and 26 of the Covenant. He is
represented by counsel.

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal
Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo,
Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada,
Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen,
Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 In 1980, the author was employed by the municipality of Saalfelden in the province of Salzburg. In 1981, he was appointed head of the administrative office of the municipality. On 31 January 1996, the mayor of Saalfelden filed a disciplinary complaint against the author with the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg alleging, *inter alia*, that the author had failed to attend hearings on building projects, that he had used office resources for private purposes, that he had been absent during office hours, and other professional shortcomings. Moreover, the mayor claimed that the author had lost his reputation and the confidence of the public because of his private conduct.

2.2 On 29 February 1996, the trial senate of the Disciplinary Commission initiated proceedings against the author, and on 28 May 1996, suspended him from office, reducing his salary by 1/3. On 4 June 1996, the author challenged the chairman of the senate, Mr. Guntram Maier, pursuant to section 124, paragraph 3², of the Federal Civil Servants Service Act. During a hearing held in June 1996, the chairman himself dismissed the challenge, arguing that the Salzburg Civil Servants of Municipalities Act³, as well as the Federal Civil Servants Act (Federal Act), permitted a challenge only with respect to members, but not the chairperson of the senate.

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

² Section 124, paragraph 3, of the Federal Civil Servants Act provides: “With the order instituting proceedings (Verhandlungsbeschluß), the accused shall be notified the composition of the senate, including replacement members. The accused may challenge, without stating reasons, a member of the senate within one week after the order has been served. Upon request of the accused, up to three civil servants may be present during the hearing. The hearing shall otherwise be held *in camera*.”

³ Section 12 of the Salzburg Civil Servants of Municipalities Act reads, in pertinent parts: “(1) A Disciplinary Commission for Employees of Municipalities is established at the Office of the Provincial Government to conduct first instance disciplinary trials. (2) The Disciplinary Commission is composed of a chairperson, deputy chairpersons, and the necessary number of members. (3) The Provincial Government shall appoint for a period of three years the chairperson and the deputy chairpersons, who have to be chosen from among the civil servants with legal training employed by the Office of the Provincial Government or the Regional Administrative Authorities and the members – with the exception of those members delegated by the municipalities pursuant to paragraph 5 – who have to be chosen from among the civil servants employed by the municipalities governed by the present Act. (4) The Disciplinary Commission tries and decides cases in senates composed of a chairperson and four members. The chairperson and two members chosen from among the civil servants employed by municipalities are appointed by the Provincial Government. (5) Two further members of the senates are delegated by the municipality which is a party to the proceedings. If the municipality fails to delegate two members or replacement members [...] within a period of three days after a written request, the chairperson shall select civil servants of the Provincial Government as additional members. [...]”

2.3 After the author had submitted a medical report by a neurologist to the Disciplinary Commission, stating that he was unfit to stand trial, this report was forwarded, allegedly by the chairman of the trial senate, to the Regional Administrative Authority in Zell am See which, on 7 August 1996, summoned the author to undergo a medical examination to assess his aptness to drive a vehicle. The author subsequently brought criminal charges against the chairman, Mr. Maier, for breach of confidentiality in public office. This complaint was later dismissed.

2.4 On 4 July 1996, the trial senate of the Disciplinary Commission dismissed the author. By decision of 25 September 1996, the Disciplinary Appeals Commission for Employees of Municipalities (Disziplinaroberkommission für Gemeindebedienstete), on the author's appeal, referred the case back to the Disciplinary Commission, on the basis that the participation of the chairman constituted a violation of the author's right to a fair trial, since the right to challenge a member of the senate also extended to its chairperson.

2.5 On 26 March 1997, the trial senate of the Disciplinary Commission, presided by Mr. Michael Cecon, initiated a second set of proceedings against the author. During a hearing in April 1997, the author challenged the composition of the trial senate, arguing that the two members nominated by the municipality of Saalfelden lacked independence and impartiality due to their status as municipal officials or employees. The senate dismissed the challenges and, on 1 August 1997, again dismissed the author from service. In an undated decision, the Appeals Commission upheld the dismissal. On 2 December 1997, the municipality of Saalfelden terminated the payment of the author's reduced salary as well as his coverage under the public health insurance scheme.

2.6 On 7 January 1998, the author complained against the decision of the Appeals Commission to the Austrian Constitutional Court, alleging breaches of his right to a fair trial before a tribunal established by law. On 11 March 1998, the Court refused leave to appeal and referred the case to the Administrative Court which, on 10 February 1999, set aside the decision of the Appeals Commission, holding that the author had been unlawfully deprived of his right to challenge members of the trial senate of the Disciplinary Commission.

2.7 After the Appeals Commission had referred the matter back to the Disciplinary Commission, the trial senate, by procedural decision of 13 July 1999, initiated a third set of proceedings, again suspending the author from office. The author subsequently challenged the senate chairman, Michael Cecon, and two other members appointed by the Provincial Government for lack of impartiality, since they had participated in the second set of proceedings and had voted for his dismissal. By procedural decision of 3 August 1999, the chairman of the senate was replaced by the substitute chairman, Guntram Maier, who had chaired the trial senate in the first set of proceedings, and who had refused to desist when challenged by the author, and against whom the author had brought criminal charges. The author then reiterated his challenge, specifically challenging Mr. Maier, as being *prima facie* biased because of his previous role. On 16 August 1999, the chairman informed the author that Mr. Cecon would resume chairmanship.

2.8 The author subsequently filed complaints against the procedural decisions of 13 July and 3 August 1999 with the Constitutional Court, alleging breaches of his right to a trial before a tribunal established by law because of the composition of the trial senate, at the same time

requesting the Court to review the constitutionality of the Salzburg Civil Servants of Municipalities Act (Salzburg Act), insofar as it provided for the participation of members delegated by the interested municipality. On 28 September 1999, the complaints were rejected by the Constitutional Court and, on 21 June 2000, by the Administrative Court, after the matter had been referred to it.

2.9 Meanwhile, on 23 September 1999, the Disciplinary Commission had dismissed the author from service, after it had rejected a formal request to summon defense witnesses and to admit further evidence. On 11 October 1999, the author lodged an appeal against his dismissal with the Appeals Commission, which confirmed the trial senate's decision on 6 March 2000, without a hearing and after the author had challenged its chairman (who was later replaced) and the two members appointed by the Provincial Government due to their participation in previous decisions in his case. On 14 March 2000, the municipality of Saalfelden once again terminated the payment of the author's reduced salary, as well as his public health insurance coverage.

2.10 On 25 April 2000, the author filed a complaint against the decision of 6 March 2000 of the Appeals Commission with the Administrative Court, challenging the composition of the trial and appeal senates, the trial senate's refusal to hear defense witnesses and to admit further evidence, and other procedural irregularities. On 29 November 2000, the Court dismissed the author's complaint as unfounded. By reference to a previous decision concerning a different case, the Court rejected the author's objection to Mr. Cecon's repeated chairmanship during the third set of proceedings.

The complaint

3.1 The author alleges violations of his rights under article 14, paragraph 1, read in conjunction with article 25, and under article 26 of the Covenant, as his trial was neither "fair" nor "public" nor concluded expeditiously, but was unduly delayed and conducted by bodies biased against him. He argues that proceedings concerning employment matters are "suits at law" within the meaning of article 14, paragraph 1, irrespective of the status of one of the parties.⁴

3.2 The author concedes that States parties may establish specialized tribunals to deal with, *inter alia*, employment disputes for civil servants, as long as such establishment is based on reasonable and objective criteria and to the extent that such tribunals are independent and impartial. But as, pursuant to section 12, paragraph 5, of the Salzburg Act, two members of the senates had been delegated by the interested municipality and merely served for one specific trial, the principle that a tribunal must be independent from the executive and legislative branches, as well as from the parties to the proceedings, was violated. The author also argues that

⁴ The author refers to Communications No. 112/1981, *Y. L. v. Canada*, decision on admissibility adopted on 8 April 1986, and No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*, Views of 4 November 1988.

the duration of office terms is a relevant factor when assessing the independence of tribunal members.⁵

3.3 The author contends that his right to a public hearing under article 14, paragraph 1, was violated, because the hearings before the trial senates of the Disciplinary Commission were held *in camera*, pursuant to article 124, paragraph 3, of the Federal Act, and since neither the Appeals Commission nor the Constitutional or Administrative Courts held any hearings in his case. No “exceptional circumstances”⁶ justified the exclusion of the public.

3.4 The author submits that, contrary to the principle that judges must not harbor preconceptions about the matter before them, several members of the trial senate during the third set of proceedings were of necessity partial, considering that they either continued to work as municipal employees of Saalfelden, or that they had previously been challenged by the author. In particular, the fact that Mr. Cecon resumed chairmanship after having been challenged by the author and replaced by Mr. Maier, whom the author, in turn, challenged because of his role during the first set of proceedings, established “understandable, verifiable and legitimate” cause to suspect that both available chairmen were biased against the author because of the challenges.

3.5 According to the author, the trial senate promoted the interests of the other party by furnishing witnesses for the prosecution with copies of their testimonies given during the first and second proceedings, by allowing them to quote from their previous statements, and by rejecting the author’s requests to call witnesses as well as to admit further evidence. The trial senate allegedly manipulated the transcript of the 1999 hearing so as to make it appear as if the prosecutorial witnesses had actually given original testimony.

3.6 The manipulated transcript was allegedly only transmitted to his counsel two and a half weeks after the deadline for appealing the Disciplinary Committee’s decision of 23 September 1999 to dismiss him, thereby depriving him of an opportunity to discover the procedural irregularities and to bring them to the attention of the Appeals Commission. These irregularities, as well as the trial senate’s decision exclusively to hear prosecutorial witnesses, also violated his right to equality of arms, guaranteed by article 14, paragraph 1, of the Covenant.

3.7 The author submits that the length of the proceedings, which caused him expenses of 1.2 million ATS in legal fees and lasted for almost 5 years, starting with the filing of the disciplinary complaint against him by the mayor of Saalfelden on 31 January 1996, and ending on 8 January 2001 when he received the final decision of the Administrative Court, amounts to an unreasonable delay, in violation of his right to a fair hearing under article 14, paragraph 1. He argues that the subject matter of the proceedings, while being of particular importance to him, was not complex, which was underlined by the fact that the decision of the trial senate of 23 September 1999 was taken after only one hour of deliberations and amounted to only five pages. The following delays totaling three years were attributable to the State party, given that the first

⁵ The author refers to CCPR, 21st Sess. (1984), General Comment 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (article 14)*, at para. 3.

⁶ Reference is made to *ibid.*, at para. 6.

two sets of proceedings were null and void, as they had been conducted by trial senates composed in obvious breach of domestic procedural law: (a) from 4 June 1996, when the chairman of the trial senate in the first set of proceedings refused to relinquish chairmanship, until 26 March 1997, when a new trial senate was constituted; and (b) from 8 April 1997, when the author challenged members of the trial senate in the second set of proceedings, until 13 June 1999, when the trial senate was constituted in the third set of proceedings.

3.8 The author submits that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

The State party's observations on admissibility

4.1 By note verbale of 26 November 2001, the State party challenged the admissibility of the communication, arguing that it is incompatible with article 14, paragraph 1, of the Covenant, and that the author has failed to exhaust domestic remedies.

4.2 The State party submits that the author has failed to raise his claims related to the lack of publicity of the proceedings, as well as the alleged irregularities regarding the transcript of the 1999 hearing, before the domestic tribunals. While his failure to assert the latter claim before the Appeals Commission might be justified by "a potentially delayed service" of the transcript, this was not the case with respect to his later complaints to the Constitutional and Administrative Courts. Similarly, the author had raised the issues that two members of the trial senate in the third set of proceedings had been nominated by the municipality of Saalfelden and that the witnesses for the prosecution had been provided with copies of their previous testimonies only in his appeal to the Appeals Commission, without asserting this claim in his subsequent complaint to the Administrative Court.

4.3 The State party contends that the only procedural flaws which the author raised in his appeal to the Administrative Court of 25 April 2000 related to the rejection of his requests to hear defense witnesses and to admit further evidence, the alleged bias of the members of the Disciplinary Commission, the failure of the Appeals Commission to hold an oral hearing, and to the length of proceedings. With respect to the latter, the author had failed to exhaust domestic remedies in relation to his claim that the proceedings had been unreasonably delayed, as he had only challenged this delay retroactively, without availing himself of the possibilities to file a request for transfer of competence (*Devolutionsantrag*), enabling individuals to bring a case before the competent higher authority if no decision is taken within six months, or to file a complaint about the administration's failure to take a decision within due time (*Säumnisbeschwerde*), with the Administrative Court, in order to reduce the length of the proceedings.

4.4 The State party asserts that the author should have claimed a violation of his right to a fair trial by invoking the constitutionally guaranteed ban of arbitrariness before the Constitutional Court, instead of appealing the decision of 6 March 2000 of the Appeals Commission before the Administrative Court, whose competence was limited to reviewing the lawfulness of administrative decisions under ordinary law. It concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 Lastly, the State party argues that the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol, since article 14, paragraph 1, of the Covenant does not apply to disputes between administrative authorities and civil servants exercising powers intrinsic to the nature of the public service, concerning their admission, career or termination of employment under public law.⁷

Author's comments on the State party's observations on admissibility

5.1 By letter of 27 January 2001, the author argues that the State party itself concedes that he raised the partiality of the trial senate in the third set of proceedings, its rejection of his requests to hear defense witnesses and to admit further evidence, the Appeals Commission's failure to hold an oral hearing and the unreasonable delay of the proceedings before the Administrative Court, and thus admitted that he had exhausted domestic remedies with regard to these claims.

5.2 The author challenges the State party's objection that he had failed to claim a violation of his right to a fair trial before the Constitutional Court by invoking the constitutionally guaranteed arbitrariness ban, stating that he had brought the complaint against his dismissal in the third set of proceedings directly to the Administrative Court only because the Constitutional Court had previously refused to deal with his substantially similar complaints relating to his dismissal in the second set of proceedings and to the procedural decisions of 13 July and 3 August 1999, referring them to the Administrative Court. In these complaints, he had alleged breaches of his right to a fair trial, in particular to a trial before a tribunal established by law, and, in one case, had requested the Constitutional Court to review the constitutionality of the Salzburg Act, insofar as it provided for the participation of members delegated by the municipality. By reference to the Committee's jurisprudence, the author argues that he is not required to submit a complaint to the domestic authorities over and over again, if the same matter has been rejected earlier.⁸

5.3 The author contests the State party's argument that he failed to challenge the manipulation of the transcript of the third trial hearing domestically, arguing that the transcript was withheld from his counsel so that the manipulations of the witnesses' testimonies were only discovered on review of the case file by counsel for the present communication. The failure to transmit the transcript to him in due time was attributable to the State party, which therefore should be precluded from asserting non-exhaustion of domestic remedies in that regard. The author concludes that the State party had the opportunity to remedy the alleged violations, since all complaints submitted to the Committee were in substance raised before the Austrian Constitutional and Administrative Courts.

⁷ The State party refers to the judgments of the European Court of Human Rights in Applications No. 28541/95, *Pellegrin v. France*, 8 December 1999, at paras. 64 *et seq.*, and No. 39564/98, *G. K. v. Austria*, 14 March 2000.

⁸ The author refers to Communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989.

5.4 As to the State party's *ratione materiae* objection, the author submits that, according to the Committee's jurisprudence⁹, article 14, paragraph 1, applies to proceedings relating to the dismissal of civil servants. This followed from the principle that human rights treaties must be interpreted in the manner most favourable to the individual¹⁰, as well as from a "contextual" analysis in the light of article 25 of the Covenant, which had no equivalent in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and indicated that the scope of article 14, paragraph 1, was wider than that of article 6, paragraph 1, ECHR. Moreover, he suggests that the Committee should not follow the restrictive and artificial approach taken by the European Court in *Pellegrin v. France*, which excluded civil servants who "wield a portion of the State's sovereign power" from the protection of article 6, paragraph 1, ECHR.¹¹

5.5 Lastly, the author submits that the State party's argument that he could have accelerated the proceedings by requesting a transfer of competence (*Devolutionsantrag*) or by lodging a complaint about undue delay of proceedings (*Säumnisbeschwerde*) related to the merits rather than the admissibility of his complaint that the proceedings had been unreasonably delayed. On the merits, he argues that none of the individual stages of the three sets of proceedings exceeded the duration of six months necessary for the above remedies. Moreover, while State parties were required to ensure expeditious proceedings, no corresponding obligation existed for individuals charged with disciplinary charges. On the contrary, individuals had a right to resort to whatever remedies to defend themselves against such charges, even if these remedies contributed to a delay.

The State party's additional submissions on admissibility and observations on merits

6.1 By note verbale of 27 March 2002, the State party further elaborated on its objections to admissibility and submitted its observations on the merits of the communication. On admissibility, it reiterates that the author failed to exhaust domestic remedies, adding that the dismissal of his earlier complaints by the Constitutional Court did not absolve him from specifically challenging the alleged deficiencies of the third set of proceedings. It maintains that the author's request for constitutional review of section 12, paragraph 5, of the Salzburg Act was based on an alleged lack of clarity of that provision rather than the alleged lack of independence of the members of the Disciplinary Commission delegated by the municipality of Saalfelden.

⁹ Reference is made, *inter alia*, to Communication No. 824/1998, *N. M. Nicolov v. Bulgaria*, Decision on admissibility adopted on 24 March 2000, at para. 8.3; Communication No. 468/1991, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993; and Communication No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*.

¹⁰ The author refers, *inter alia*, to the Advisory Opinion of the Inter-American Court in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, no. 5.

¹¹ See European Court of Human Rights, Application No. 28541/95, *Pellegrin v. France*, judgment of 8 December 1999, at para. 65.

6.2 While conceding that the transcript of the 1999 trial was served on the author only two weeks after the deadline for appealing to the Appeals Commission had expired, the State party submits that, under the applicable law, the author could have raised any deficiencies in the transcript throughout the appeal proceedings and in his subsequent appeal to the Administrative Court.

6.3 The State party maintains that, similar to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant does not apply to disputes between the administrative authorities and civil servants directly participating in the exercise of public powers¹², such as the author, as reflected in the convergence of both provisions and, in particular, in the identical wording of their pertinent parts in the French authentic versions. The only exception recognized by the European Court of Human Rights concerned cases in which the claims relate to an essentially economic right. That the author's dismissal may ultimately have had a financial impact did not as such turn his case into a matter of civil rights and obligations.¹³ Nor did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a penalty equivalent to a criminal sanction.

6.4 Subsidiarily, the State party submits that, even if article 14, paragraph 1, was applicable, the Committee would be limited to a review of whether the alleged irregularities in the disciplinary proceedings amounted to a denial of justice or were otherwise arbitrary. This was not the case because domestic authorities had carefully examined compliance with the procedural rules and only confirmed the author's dismissal after having conducted three sets of proceedings. Similarly, the assessment of the relevance and value of requested evidence was a matter to be determined by the national courts, subject only to an abuse control. The author's evidentiary requests were dismissed on legitimate grounds, as they related to issues on which he had already provided documentary evidence.

6.5 The State party argues that the author failed to substantiate his claim concerning the alleged bias of members of the trial senate, which could not automatically be inferred from their participation in the previous proceedings. The participation of members who had been challenged without reasons did not as such call into question the impartiality of the tribunal, since the right to challenge senate members without stating reasons had to be distinguished from challenging a senate member for bias.

6.6 The State party submits that the author's right to appear before an independent and impartial tribunal was safeguarded by the freedom from instruction of the Disciplinary Commission's members (section 12, paragraph 6, of the Salzburg Act). Moreover, decisions of the Disciplinary Commission are subject to appeal to the Appeals Commission as well as the Administrative Court, which are both independent tribunals competent to examine questions of fact and law and, in the case of the Appeals Commission, composed of members not delegated by the interested

¹² Reference is made, *inter alia*, to the dissenting opinion of the Committee members *Graefrath, Pocar and Tomuschat* in Communication 112/1981, *Y. L. v. Canada*, at para. 3.

¹³ The State party refers to the judgments of the European Court of Human Rights in *Pierre-Bloch v. France*, judgment of 21 October 1997, at para. 51, and in *Pellegrin v. France*, judgment of 8 December 1999, at para. 60.

municipalities and appointed for three-year-terms. Without prejudice to the fact that the State party considers the Disciplinary Committee a tribunal within the meaning of article 14, paragraph 1, it argues that the author's right to be heard by an independent and impartial tribunal would therefore be secured even if the Disciplinary Commission were denied the quality of an independent and impartial tribunal, since article 14, paragraph 1, does not require States parties to have a decision on civil rights issued by a tribunal at all stages of appeal.

6.7 The State party contends that the 1997 trial transcript was sent to the witnesses in order to provide all persons involved in the 1999 proceedings "with the same state of information regarding their previous statements and procedural steps." The convergence between the 1997 and 1999 trial records merely reflected that the witnesses had made corresponding statements in the two oral hearings. Under section 44 of the Austrian Administrative Procedure Act, transcripts of hearings need not quote witnesses' testimonies entirely; summarizing the relevant content of such testimony did not amount to a manipulation.

6.8 As to the alleged lack of publicity of the proceedings, the State party submits that the exclusion of the general public was justified in the interest of official secrecy, which is frequently an issue in disciplinary proceedings. In order to protect an accused civil servant against secret administration of justice, section 124, paragraph 3, of the Federal Act allowed for the presence of up to three civil servants nominated by the accused as persons of confidence during the oral hearings.

6.9 The State party refutes the author's claim based on the lack of an oral hearing during the appeal proceedings, arguing that no such hearing is required if the case can be determined on the basis of the files, in connection with the statement of appeal. Since the author's appeal was confined to procedural complaints, without raising any new facts, the appellate bodies justifiably decided not to conduct a new oral hearing.

6.10 The State party submits that the author himself admitted that the statutory deadline for adopting a decision was met for any of the stages of the different sets of proceedings to which he was a party; the author went through the various stages of appeal on his own initiative, without any delay caused by the authorities and courts. For the State party, the author has failed to substantiate a violation of his rights under article 14, paragraph 1, read in conjunction with article 26 of the Covenant.

Additional comments by the author

7.1 By further submission of 14 June 2002, the author reiterates that he was not required to submit the same complaint to the Constitutional Court over and over again, given that the Court had clearly stated in its decisions of 11 March 1998 and 28 September 1999 that the author's case involved neither violations of his constitutional rights nor the application of an unconstitutional law, despite the fact that the Salzburg Act provided for the participation of two senate members delegated by the respondent party.

7.2 The author argues that, if a State decided to split the competencies of reviewing the fairness of proceedings under constitutional and ordinary law, between the two highest courts, applicants

could only be required to submit a complaint to one of them. The State party was given sufficient opportunity to comply with its obligation to remedy the alleged violations, since the Administrative Court was competent to provide such a remedy upon examination of his complaint, even if “on a different formal level” than the Constitutional Court.

7.3 The author reiterates that, according to the Committee’s jurisprudence¹⁴, article 14, paragraph 1, encompasses all proceedings of a civil or criminal character, whether or not civil or public servants are parties. By contrast to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant makes no distinction between categories of civil servants, and is generally applicable to employment-related disputes. This follows from the clear wording (“suits at law”) of article 14, paragraph 1, which the State party tried to ignore by reference to the European Court’s contradictory case law that had no bearing on the Covenant system.

7.4 The author submits that the State party implicitly concedes that the participation of two senate members delegated by the municipality of Saalfelden in the disciplinary proceedings constituted a breach of article 14, paragraph 1. The lack of independence and impartiality of the Disciplinary Commission was not cured by the review of his dismissal on facts and law at the appeal level, since neither the Appeals Commission nor the Administrative Court conducted an inquiry into the facts on their own, being bound by the findings of fact of the first instance trial senate. In the absence of an adversarial oral hearing at the appellate stage, the author was deprived of his right to a fair and public hearing by an independent and impartial tribunal and, more specifically, of an opportunity to impeach the testimony of the prosecutorial witnesses. Moreover, the appeals senate was as partial and dependent as the trial senate.

7.5 For the author, the decision of whether or not to call witnesses cannot be left to the unlimited discretion of the national tribunals, arguing that the State party failed to refute his allegation that the trial senate had denied him equality of arms in presenting his defense. Similarly, the State party’s explanations concerning the falsification of the 1999 trial transcript were illogical.

7.6 As to the length of proceedings, the author reiterates that the fact that he had been compelled to proceed to the first or second appeals levels to have clearly illegal acts of the trial senate set aside could not be attributed to him.

7.7 The author challenges that the exclusion of the general public from the trial senate hearings was justified in the interest of official secrecy, since none of the charges against him involved matters of a secret nature. Most of the counts concerned allegations of improper behaviour, while the other charges related to public rather than secret matters. In any event, the Disciplinary Commission could have dealt *in camera* with any issue requiring secrecy and could have used acronyms to ensure the privacy of third persons. The assistance of up to three civil servants in disciplinary proceedings failed to meet the standard of a “public hearing” within the meaning of

¹⁴ The author cites Communications No. 112/1981, *Y. L. v. Canada*, No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*, and No. 824/1998, *N. M. Nicolov v. Bulgaria*, as well as Communication No. 454/1991, *Enrique Garcia Pons v. Spain*, Views adopted on 30 October 1995.

article 14, paragraph 1, which also served the purpose of safeguarding the transparency of the administration of justice.

Additional observations by the State party and author's comments

8. Both parties made additional submissions on 14 and 27 January 2003, respectively. The State party argued that, by failing to request an oral hearing before the Administrative Court, the author had waived his right under article 14, paragraph 1, to a fair and public hearing, since he must have been aware, on the basis of his legal representation by counsel, that without an explicit request to that effect, proceedings before the Administrative Court were usually only conducted in writing. The author considers the State party's additional observations procedurally inadmissible, on the basis that they were submitted out of time (i.e. more than six months after submission of his comments of 14 June 2002), thereby unduly prolonging the proceedings.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 With regard to the State party's objection *ratione materiae*, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties.¹⁵ The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. In the present case, the State party has conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant. While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. Consequently, the Committee declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1, of the Covenant.

9.3 As to the author's claim that the lack of an oral hearing during the appeal proceedings violated his right to a fair and public hearing under article 14, paragraph 1, the Committee has noted the State party's argument that the author could have requested an oral hearing before the Administrative Court and that, failing this, he had waived his right to such a hearing. The

¹⁵ See Communication No. 112/1981, *Y. L. v. Canada*, at para. 9.2; Communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

Committee also notes that the author has not refuted this argument in substance, and that, throughout the proceedings, he was represented by counsel. It therefore considers that the author has failed to substantiate, for purposes of admissibility, that his right to an oral hearing has been violated. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.4 The Committee has taken note of the State party's objection that the author did not exhaust domestic remedies in relation to his claims concerning the lack of independence of the two members of the trial senate delegated by the municipality of Saalfelden in the third set of proceedings, the lack of publicity of the hearings before that senate, the fact that copies of the 1997 testimonies had been sent to the prosecutorial witnesses prior to the 1999 trial hearing, and the alleged manipulation of the 1999 trial transcripts. After careful examination of the author's complaints to the Appeals Commission (complaint dated 11 October 1999) and to the Administrative Court (complaints dated 21 January and 25 April 2000), the Committee observes that the author has failed to raise these claims before the Appeals Commission or, in any event, before the Administrative Court.

9.5 Moreover, it does not appear from the file before the Committee that the author challenged the participation of the trial senate members, on the basis that they had been designated by the municipality, in his constitutional complaint challenging the trial senate's procedural decision of 13 July 1999. Consequently, the Committee concludes that the author has failed to exhaust domestic remedies with regard to these claims and that, consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.6 With regard to the remainder of the communication, the Committee has taken note of the State party's argument that the author should have lodged a complaint with the Constitutional Court against the confirmation of his dismissal by the Appeals Commission in the third set of proceedings, in order to have this decision reviewed not only under ordinary, but also under constitutional law. In this regard, the Committee recalls its consistent jurisprudence that article 5, paragraph 2 (b), of the Optional Protocol does not require resort to domestic remedies which objectively have no prospect of success.¹⁶ Although the author's constitutional complaint of 25 August 1999 concerned the second rather than the third set of proceedings, the allegations underlying this complaint were substantively similar to the claims raised in his complaint of 25 April 2000 to the Administrative Court. The Committee also observes that, by the time the author appealed the decision of the Appeals Commission of 6 March 2000, the proceedings had already extended over a period of more than four years.¹⁷ Under these circumstances, the Committee is satisfied that the author, by filing a complaint against his dismissal in the third set of proceedings with the Administrative Court, has made reasonable efforts to exhaust domestic remedies.

¹⁶ See Communications No. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, at para. 12.3.

¹⁷ Cf. Communication No. 336/1988, *Andre Fillastre and Pierre Bizouarn v. Bolivia*, Views adopted on 5 November 1991, at para. 5.2.

9.7 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim that the alleged bias of the members of the trial senate in the third set of proceedings, its rejection of the author's request to hear witnesses and to admit further evidence, its delay in sending him the 1999 trial transcript, and the length of the disciplinary proceedings raise issues under article 14, paragraph 1.

9.8 To the extent that the author alleges a violation of his rights under article 26 of the Covenant, the Committee finds that he has failed to substantiate, for purposes of admissibility, any claim of a potential violation of that article. The communication is therefore inadmissible under article 2 of the Optional Protocol, insofar as article 26 is concerned.

Consideration of the merits

10.1. The issue before the Committee is whether the proceedings of the trial senate of this Commission violated article 14, paragraph 1, of the Covenant.

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial.¹⁸ The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the re-appointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission.¹⁹ Moreover, while the Administrative

¹⁸ See Communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

¹⁹ See p. 3 of the decision of 6 March 2000 of the Appeals Commission, No. 11-12294/94-2000.

Court examined this question, it only did so summarily.²⁰ In the light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

10.5 With respect to the rejection by the Disciplinary Commission of the author's requests to call witnesses and to admit further evidence in his defense, the Committee recalls that, in principle, it is beyond its competence to determine whether domestic tribunals properly evaluate the relevance of newly requested evidence.²¹ In the Committee's view, the trial senate's decision that the author's evidentiary requests were futile because of the sufficient written evidence does not amount to a denial of justice, in violation of article 14, paragraph 1.

10.6 As to the trial senate's failure to transmit the 1999 trial transcript to the author before the end of the deadline for appealing the decision of the Disciplinary Commission of 23 September 1999, the Committee observes that the principle of equality of arms implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments²². However, the Committee observes that adequate preparation of one's defense cannot be equated with the adequate preparation of an appeal. Furthermore, it considers that the author has failed to demonstrate that the late transmittal of the 1999 trial transcript prevented him from raising the alleged irregularities before the Administrative Court, especially since he admits himself that the alleged manipulation of the testimonies was only discovered by counsel for the present communication. The Committee therefore concludes that the author's right to equality of arms under article 14, paragraph 1, has not been violated.

10.7 Regarding the length of the disciplinary proceedings, the Committee considers that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms. The Committee observes that responsibility for the delay of 57 months to adjudicate a matter of minor complexity lies with the authorities of Austria. It also observes that non-fulfillment of this responsibility is neither excused by the absence of a request for the transfer of competence (*Devolutionsantrag*), nor by the author's failure to lodge a complaint about undue delay of proceedings (*Säumnisbeschwerde*), as it was primarily caused by the State party's failure to conduct the first two sets of proceedings in accordance with domestic procedural law. The Committee concludes that the author's right to equality before the courts and tribunals has been violated.

²⁰ See p. 7 *et seq.* of the decision of 29 November 2000 of the Administrative Court, No. Zl. 2000/09/0079-6.

²¹ *Cf.* Communication No. 174/1984, *J. K. v. Canada*, decision on admissibility adopted on 26 October 1984, at para. 7.2.

²² See General Comment 13, at para. 9.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
