

NINETY-EIGHTH SESSION

Judgment No. 2388

The Administrative Tribunal,

Considering the complaint filed by Mr T.C. M. against the European Organization for Nuclear Research (CERN) on 3 November 2003 and corrected on 8 February 2004, the Organization's reply of 13 May, the complainant's rejoinder of 6 July and CERN's surrejoinder of 16 August 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1946 and has German nationality. Having worked at CERN continuously since November 1976 as an Unpaid Scientific Associate on secondment from a German institute, he became a staff member of the Organization in July 1984. His initial limited-duration contract was converted to an indefinite appointment in July 1987. He is a Senior Physicist and is currently in career path F, salary band c. At the time of the material facts, he worked in what was then known as the Experimental Physics Division (EP) as ALICE* TPC** Field Cage Project Leader and AIT Group*** Leader.

In the complainant's 2002 appraisal report, his immediate supervisor rated his performance "above expectations" and proposed that he be promoted to career path G. The appraisal report was then submitted to the Division Leader for approval. At a meeting on 27 June 2002, the Division Leader informed the complainant that he had decided not to put him forward for promotion in the 2002 exercise. This decision was confirmed on 15 September 2002 when the complainant received the final version of his 2002 appraisal report, in which the Division Leader had indicated that his promotion was "[u]nfortunately not possible within the divisional priorities".

On 12 November 2002 the complainant initiated an internal appeal against the decision not to promote him, contending in essence that it was tainted with prejudice and lack of objectivity following a disagreement which had arisen between him and his Division Leader. During the period when his own performance appraisal was being prepared, the complainant wrote an appraisal report for a staff member whom he supervised – Mr H. For reasons which he discussed at length with Mr H., he rated his performance only partially satisfactory and proposed that the award of his next periodic step be deferred for six months, that is until 1 January 2003. The Division Leader did not accept the complainant's proposal, which he considered disproportionate. Instead, he signed Mr H.'s appraisal report in the box corresponding to "fully satisfactory performance" and postponed the decision on his periodic step until September 2002 pending a further performance appraisal. In addition, without consulting the complainant, he transferred Mr H. to another group involved in the same project. Shortly afterwards, Mr H.'s new Group Leader submitted a new performance appraisal which likewise contradicted the complainant's assessment, stating that Mr H.'s performance was fully satisfactory. The complainant felt that this incident had influenced the decision not to promote him.

In its report dated 10 July 2003, the Joint Advisory Appeals Board (JAAB) found that the proposal to promote the complainant had been examined and rejected in compliance with the applicable rules, and that the reason why the complainant had not been selected was that competition for promotions to career path G is intense. It considered that the circumstances surrounding Mr H.'s performance appraisal had not played a significant role in the impugned decision and concluded that there were no grounds for altering the decision. The Board declined jurisdiction to rule on the complainant's claim for moral damages. By a letter of 5 August 2003, the Director of Administration informed the complainant that, by delegation from the Director-General, he had decided to accept the Board's recommendation. That is the impugned decision.

B. According to the complainant, the Administration failed to consider all the facts of the case. It accused him of "weak management", particularly in connection with Mr H.'s performance appraisal, whilst ignoring the "horrendous" way in which the matter was handled by his superiors. It sought to justify the unilateral decision to transfer Mr H. by referring to a "deterioration of [Mr H.'s] working environment", yet did not identify the causes of

that deterioration. The complainant argues that the Administration thus gave the impression that he was somehow at fault. It considered that his appraisal of Mr H. was “contradictory”, but did not give him an opportunity to explain his position before deciding to transfer Mr H.. Furthermore, it disregarded the fact that although his supervisors were aware that allegations of mobbing were being made against him, they failed to alert the Equal Opportunities Advisory Panel, in breach of the applicable rules.

He further contends that by deciding the transfer without consulting or informing him, the Administration abused its authority, since the decision directly affected his status, authority, position and career within the Organization. He maintains that the impugned decision was tainted with personal prejudice on the part of his Division Leader, resulting from their disagreement over Mr H.’s performance appraisal and the submission of the subsequent “irregular counter-appraisal” by Mr H.’s new group leader.

Lastly, the complainant submits that a breach of due process was committed by the Administration in that it refused to allow him a proper defence and a fair hearing. Despite his numerous requests, it failed to inform him of the reasons for its decisions and to obtain his response. He was denied a fair hearing before the JAAB, because the Organization was represented by his Division Leader, and he was given no opportunity to defend himself against the allegations made against him.

The complainant asks the Tribunal to set aside the impugned decision and to order CERN to promote him to career path G with retroactive effect. He also claims moral damages and costs.

C. The Organization submits that decisions regarding promotion are discretionary in nature and that as such they are subject to only limited review by the Tribunal. It considers that the impugned decision was taken in full compliance with the applicable procedure.

Having received the complainant’s 2002 appraisal report, the Division Leader consulted the Divisional Advancement Board, which ranked the candidates for promotion in order of priority (high, medium or low). In the complainant’s Division, 21 candidates had been proposed by their supervisors for promotion to salary band Fc or to career path G. The Board considered that the complainant’s case should be treated as a medium priority. The Division Leader then made his own decision as to which staff members he would put forward for promotion, taking into account in particular the 2002 Guidelines for Senior Staff Advancement, which stated that eligible candidates would be “[t]he best career path F staff [...]”. The Division Leader felt that the complainant could not be considered one of the best career path F staff, notably because of his managerial performance. He discussed his decision with the complainant on 27 June 2002, mentioning the handling of Mr H.’s performance appraisal as well as the difficult relations between the complainant’s group and Mr H.’s new group, with which close collaboration was required. In the event, of the 21 candidates under consideration, only four were promoted to career path G in the 2002 exercise, whilst two candidates were promoted to salary band Fc.

The Organization points out that in January 2004 the complainant filed a complaint for harassment which is pending before CERN’s Equal Opportunities Advisory Panel, the outcome of which he will be able to challenge in due course if he so wishes. Although CERN raises no objection to receivability on that account, it categorically denies that the impugned decision reflected any form of harassment and considers that the complainant’s allegations to that effect have no place in the present proceedings. It also draws attention to the fact that in 2003, whilst the complainant was again not selected for promotion to career path G, he was nevertheless promoted to a higher salary band.

D. In his rejoinder the complainant submits that the Organization is refusing to consider the causal link between the events surrounding Mr H.’s performance appraisal and the decision not to promote him in the 2002 exercise. He presses his pleas.

E. In its surrejoinder the Organization reiterates its main arguments, emphasising that Mr H.’s performance appraisal was merely one of a number of factors that were taken into account in deciding not to propose the complainant for promotion. It describes the complainant’s reaction to the decisions taken by his Division Leader in connection with Mr H.’s performance appraisal as “out of all proportion”.

CONSIDERATIONS

1. The complainant was at the material time classified in career path F, salary band b. He has since been advanced to band c. He challenges the decision of 5 August 2003 by which the Director of Administration, by delegation from the Director-General and in accordance with the recommendation of the Joint Advisory Appeals Board, upheld the decision of the Division Leader not to put him forward for promotion to career path G in the 2002 exercise.

2. In his submissions, the complainant contends that the Administration failed to consider the facts completely, showed personal prejudice and abused its authority. He also argues that it denied him a proper defence and a fair hearing, thereby rendering the impugned decision void for breach of due process.

3. The Tribunal notes that the change of career path sought by the complainant constitutes a promotion to the highest career path in CERN's salary scale. The 2002 Guidelines for Senior Staff Advancement stated that eligible candidates for promotion to career path G would be:

“[t]he best Career Path F staff who are recognised as being scientifically / technically / administratively of the highest professional competence and capable of leading major projects/services. They should be known and valued throughout CERN and outside, in those institutions / organisms where their profession is important. These staff can be asked by the Director-General to represent CERN in high-level external meetings on the basis of their standing and ability. They must perform their duties in an exemplary manner.”

The facts show that the Organization adhered to these guidelines and likewise to the relevant Staff Rules and Regulations and the administrative circular defining the procedures governing the career evolution of staff members, whilst taking into account numerical and budgetary restrictions.

4. In accordance with the procedure governing promotions to career path G, the complainant's supervisor transmitted his assessment of the complainant's performance, which was rated “above expectations”, to the Division Leader, whose responsibility it is to accept or not the opinion of the supervisor. In line with established practice in the Organization, the Division Leader forwarded the complainant's appraisal report to the Divisional Advancement Board – a body composed of senior staff members within the Division which examines each case against the applicable criteria. The complainant's case was given medium priority by the Board in comparison with other candidates from his Division.

5. Having received the Board's report, and having made his own assessment that the complainant did not rank among “[t]he best career path F staff” in his Division, the Division Leader decided not to put forward the complainant for promotion in the 2002 exercise, but he did support the award of a periodic step, which the complainant received as from 1 July 2002. Contrary to the complainant's initial statements, he and the Division Leader did discuss on several occasions the motives and the reasons, later put in writing, for his non-promotion; this he confirmed in his submissions to the Joint Advisory Appeals Board.

6. As is clearly shown by the steps taken by the Organization, the decision not to promote the complainant to career path G was exclusively based on a comparison of the level of his functions and his performance with the criteria for promotion and the qualifications of other staff members proposed for promotion. The charges of prejudice, abuse of authority and failure to consider the facts are mere assertions by the complainant which are not supported by the evidence. The allegation of breach of due process is based solely on the fact that the Organization was represented before the JAAB by the Division Leader, which, in the circumstances, was not irregular.

7. The Tribunal has repeatedly stressed that a promotion decision is a discretionary decision which can only be challenged on limited grounds (see Judgment 2221, under 9). Yet the exercise of discretion is subject to restrictions in law and the Tribunal will to that extent review the decision (see Judgment 1223, under 20).

Given the discretionary nature of the impugned decision, the Organization may only be censured if it can be proven that the decision was based on mistakes of fact or of law, or on an abuse of authority, or that essential facts were overlooked or blatantly wrong conclusions drawn from the evidence (see Judgment 2173, under 7).

8. In view of the above considerations, the Tribunal finds that the Organization did not err, in fact or in law, in exercising its discretion to decide not to promote the complainant to career path G.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

 * A Large Ion Collider Experiment.

 ** Time Projection Chamber.

 *** The Alice Detectors Group.