

The Administrative Tribunal,

Considering the sixth complaint filed by Mr S.G. G. against the World Intellectual Property Organization (WIPO) on 27 September 2006 and corrected on 17 November 2006, the Organization's reply of 1 March 2007, the complainant's rejoinder of 4 May and WIPO's surrejoinder of 2 August 2007;

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, an Italian national born in 1948, joined WIPO in 1974 as a messenger-chauffeur at grade G.3. In May 2000 he was transferred to the Division of Protocol and on 29 June 2001 to the Security Coordination Section. He then held grade G.7. He was appointed Head of that section on 22 July 2002 and promoted to grade P.3 with effect from 1 January 2005.

In a periodical report of 12 December 2005 signed by the complainant's supervisor, his conduct and the quality and quantity of his work were rated unsatisfactory. The complainant, acting through his lawyer, requested an explanation from the Director of the Human Resources Management Department in letters of 15 December 2005 and 9 January 2006, but this was not forthcoming. On 25 January he wrote directly to the Director General, asking him to set aside the report of 12 December 2005, to remove it from his file and to issue a new report "expressing satisfaction in all areas". On 3 March 2006 the Director of the Human Resources Management Department informed the complainant on behalf of the Director General that, since he had provided no evidence to show why his assessment should prevail over that of his supervisor, his appeal had been rejected. By a letter of 3 April the complainant lodged an appeal with the Appeal Board seeking the same redress.

The Appeal Board issued its report on 15 May 2006. It found no evidence that the periodical report was based on a factual error or a flawed procedure and concluded that the appeal was without merit. On 22 May the complainant requested the Board to reconsider its findings because, according to him, they were predicated on facts which were not mentioned in his submissions or those of the Organization and on which he had been unable to express an opinion. By a letter of 26 June 2006 the complainant was notified of the Director General's decision to dismiss his appeal. That is the impugned decision.

B. The complainant contends that the periodical report of December 2005 is unfounded and arbitrary. In his opinion, Staff Regulation 4.18 and Office Instruction 7/1982 of 30 April 1982 concerning periodical reports have been flouted, because they stipulate that a periodical report must be signed by the staff member's superiors, whereas his report had been signed by only one superior. He maintains that, contrary to the Organization's practice, this report was drawn up without any prior discussion or correspondence and that he did not receive any comments from the Organization until 3 March 2006. He also stresses that in his previous periodical reports his work had been rated satisfactory without reservation. The complainant submits that the report of December 2005 demonstrates "the obvious determination of certain senior officials of WIPO's Administration to get rid of [him]". He asserts that he has suffered harassment since May 2005, when a contractor, a private security firm, complained about him. This harassment, which he describes in detail, allegedly continued without the Administration doing anything to stop it and led to the drawing up of an unfavourable periodical report. The complainant outlines what he sees as the wider background to the dispute and alleges that his supervisor is upsetting the efficient running of the section for which he is responsible with her "pettifoggery" and constant interference. He again denounces the Organization's inertia regarding this situation.

Moreover, the complainant challenges all the Appeal Board's findings, since in his opinion it followed exactly the same line as the Administration. He takes the Board to task for not respecting his "procedural rights" by denying him an opportunity to respond to allegations not contained in the written submissions and which underpinned the

Board's findings. He states that these were allegations that he had adamantly refused to speak to his supervisor at a meeting on 14 December 2005 and had suddenly left that meeting without acknowledging receipt of the periodical report of 12 December 2005, but saying that he wished to send it to his lawyer for inclusion in written submissions to the Tribunal. He contends that since the Board's findings were flawed, they could not serve as a basis for the Director General's decision, which must therefore be set aside.

The complainant asks the Tribunal to set aside the Director General's decision of 26 June 2006, to send the case back to the latter so that he may order the cancellation of the periodical report of 12 December 2005, its removal from his file and its replacement with a "satisfactory" report. He also requests 100,000 United States dollars as compensation for moral injury and 20,000 dollars for the costs of proceedings before the Tribunal and the Appeal Board.

C. In its reply WIPO states that the periodical report is not tainted with any formal flaw, since it was signed in accordance with Office Instruction 7/1982 by the complainant's supervisor whose superior, being the Director General, was not required to append his signature. It emphasises that the Tribunal's case law clearly establishes that periodical reports are drawn up at the discretion of an organisation and adds that in this case the burden of proof is on the complainant. It submits that the complainant supplied no evidence in support of his request that his own assessment should be substituted for that of his supervisor and that the periodical report which he is challenging should be replaced with a report that he has written himself. The Organization asserts that, on the contrary, there are numerous factors supporting the supervisor's assessment and it details these factors in its reply. It also stresses that the complainant's periodical reports record a number of problems. WIPO rebuts the complainant's allegations of "pettifoggery" and harassment on the grounds that they are unfounded. It submits that some are under investigation and that the complainant abused the authority of his position.

The Organization asserts that, contrary to the complainant's submissions, his supervisor did try to have an exchange of views with him, as is evidenced by some e-mails and a memorandum all dated 14 December 2005, and that subsequently no exchange of views was possible, since the complainant went on annual leave followed by sick leave. As the complainant made no effort to seize the opportunity to discuss the report with his supervisor, it considers that he did not exhaust internal means of redress in this respect. WIPO takes the view that the complainant acted overhastily by having his lawyer contact the Director of the Human Resources Management Department directly on 15 December 2005 and 9 January 2006, rather than getting in touch himself with his supervisor. Moreover, the complainant did receive a reply to the letter of 25 January 2006 which he himself had sent to the Director General.

With respect to the Appeal Board's alleged procedural error of not giving the complainant a chance to challenge its account of the circumstances surrounding the presentation of the periodical report, the Organization submits that he had ample time and opportunity to challenge the Board's findings. It argues that the complainant has no grounds for relying on a procedural error, since he did in fact "deny the circumstances" in question in his submissions before the Appeal Board.

D. In his rejoinder the complainant presses his pleas. He draws attention to the fact that after having been suspended by a decision of 7 March 2006, he was dismissed on 28 February 2007, which in his opinion confirms his contention that the Organization wanted to "get rid" of him.

E. In its surrejoinder WIPO maintains its position. In support thereof it produces numerous examples of correspondence with the complainant, in order to demonstrate that the principle of giving an official prior notification of a negative assessment was "scrupulously observed". It underlines with regard to the complainant's suspension and dismissal that these are separate matters which are currently being considered by the Appeal Board, and that they have no bearing on the present complaint.

## CONSIDERATIONS

1. In his sixth complaint the complainant challenges the decision of 26 June 2006 by which the Director General of WIPO dismissed the appeal he had lodged with the Appeal Board against his last periodical report.
2. The complainant received an unsatisfactory periodical report dated 12 December 2005 and asked the Director General to cancel it. As this request was refused, on 3 April 2006 the complainant lodged an internal

appeal with the Appeal Board, which on 15 May concluded that it should be dismissed as being without merit. By a letter of 22 May the complainant asked the Board to reconsider its position for, in his opinion, his most elementary procedural rights – the right to due process and the right to be heard – had been violated.

On 26 June 2006 the Director General informed the complainant that he had decided to accept the Appeal Board's findings and to dismiss his appeal.

3. The complainant's claims are set out under B above. He puts forward procedural and substantive arguments in support of his complaint.

4. In particular, he contends that the Appeal Board violated his procedural rights by not allowing him to express an opinion on facts which "did not by any means emerge from the file and which had not been alleged by either of the parties". According to him, the Board's report indicates that he refused to speak to his supervisor at a meeting on 14 December 2005 and that he suddenly left the meeting without acknowledging receipt of the periodical report of 12 December 2005, but saying that he wished to send the report to his lawyer so that the latter could produce it in proceedings pending before the Tribunal.

5. The Tribunal has consistently held that "a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a procedural or formal flaw, a mistake of fact or of law, the overlooking of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence" (see Judgment 1144, under 7).

6. In the present case, in order to establish that the Administration complied with the provisions of Office Instruction 7/1982 of 30 April 1982, which stipulate, inter alia, that "the [periodical] report should create an occasion for an exchange of views between the staff member and his or her superiors", the Board relied on the fact that his supervisor sent him two e-mails in order to organise a meeting to present him with the periodical report and discuss it with him, that a meeting took place between the complainant and his supervisor on 14 December 2005, and that when the periodical report was presented to the complainant he refused to sign it, saying that he intended to send it to his lawyer for inclusion in written submissions to the Tribunal, and immediately left the meeting.

7. The Tribunal finds that the file contains no evidence that the complainant had an opportunity to express an opinion on the Appeal Board's above-mentioned assertions which, it seems, were given considerable weight in justifying the decision taken. It deduces from this that the complainant was not afforded due process, insofar as he was unable to give his version of events and, if necessary, to produce supporting evidence.

8. It follows that the Director General's decision, being based on an Appeal Board's report which is tainted with a procedural flaw, must be set aside, because it is tainted with the same flaw, that is to say a breach of the complainant's right to be heard. The case must be sent back to the Organization for a decision to be taken in a manner which complies with the applicable rules.

9. In view of the circumstances of the case, the complainant should be awarded 2,000 United States dollars as compensation for the moral injury suffered as a consequence of the unlawful decision taken with respect to him.

10. The complainant is also entitled to 1,000 dollars in costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is sent back to the Organization, which must take a new decision as stated in consideration 8, above.

3. The Organization shall pay the complainant 2,000 United States dollars as compensation for the moral injury suffered.

4. It shall also pay him 1,000 dollars in costs.

5. All remaining claims are dismissed.

In witness of this judgment, adopted on 9 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.