110th Session **Judgment No. 2959**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. K. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 18 February 2009, the Organisation's reply of 6 May, the complainant's rejoinder of 15 May and the OPCW's surrejoinder of 23 July 2009;

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, a national of Ghana born in 1946, joined the OPCW on 17 April 2001 as Deputy Legal Adviser at grade P-5 under a three-year fixed-term contract. He served as Acting Legal Adviser, a D-2 post, on several occasions. His contract was renewed several times up to 16 April 2009, when he separated from service.

By an e-mail of 3 September 2007 the Human Resources Branch informed staff members of the arrival of the new Chief of Cabinet of

the Office of the Director-General, Mr E. The complainant wrote to the Director-General on 26 October requesting him to review the decision to appoint Mr E. on the grounds that no formal competition had been held. The Director-General replied on 13 November that he could not accede to his request, which he considered to be misconceived insofar as the e-mail of 3 September did not convey an "administrative decision" within the meaning of the Tribunal's case law. He stated that there had been "some degree of competition", but acknowledged that he had not followed the formal recruitment procedures. He explained that his decision was motivated by what, in the exercise of his discretionary authority, he considered to be in the interest of the OPCW in the light of relevant practical considerations. The complainant filed an appeal with the Appeals Council, which was received on 5 December 2007.

In its report of 29 January 2009 the Appeals Council held that the impugned decision breached Staff Regulation 4.3, which provides that "[s]o far as practicable, selection shall be made on a competitive basis" and that "[s]election and appointment of candidates shall also be done in a manner that ensures transparency of the process". However, it considered that the breach was mitigated by the existence of a well-established practice of filling the post of Chief of Cabinet without holding a competition. It nevertheless recommended that the applicable rules be revised, in order to avoid possible inconsistencies concerning future appointments, so as to indicate clearly whether certain posts are excluded from the provisions set forth in the Staff Regulations and Interim Staff Rules. The Council also observed that the complainant's length of service was approaching seven years and that, in view of the Organisation's seven-year limitation of service, he could not reasonably have expected to compete for the post and to be selected. It therefore recommended rejecting his claim for material damages.

By letter of 13 February 2009 the Director-General informed the complainant that he had decided to endorse the Appeals Council's recommendations not to award him financial compensation and not to review the appointment of Mr E. That is the impugned decision.

B. The complainant contests the decision to appoint the Chief of Cabinet without holding a formal competition. He alleges that the Director-General acted in violation of the rules governing appointment and promotion, and in breach of his right to compete for the post, which was one grade higher than his own post.

In support of his contention, he relies on Staff Regulation 4.3, which provides that selection and appointment of candidates must be made on a competitive basis "so far as practicable" and that the process should be transparent. He adds that, according to Administrative Directive AD/PER/29/Rev.2 of 22 March 2006 on recruitment procedures, all vacancy notices must be posted on the bulletin boards of the Organisation. Administrative Directive AD/PER/37/Rev.1 of 1 August 2006 on promotion procedures further provides that a staff member holding a fixed-term contract may apply for a vacant post at a higher grade, in accordance with the requirements of the vacancy notice, and that such application should be processed in accordance with the Directive on recruitment procedures. The Directive on promotion procedures also requires that all vacant posts be posted on the internal bulletin boards of the Organisation and that vacancies open for external recruitment be posted on its website. The complainant stresses that in this case, despite those requirements, no vacancy notice was posted on the Organisation's bulletin boards or website. In addition, the recruitment process leading to the appointment of the Chief of Cabinet was not transparent as no information was given as to the identity, qualifications and experience of the candidates, or the criteria used to select the candidate deemed most suitable for the post. He adds that no information was given as to whether any internal candidates had been considered for the post and whether he was one of those candidates.

The complainant submits that the Appeals Council's finding that a violation of the Staff Regulations can be mitigated by a practice was an error of law. He contends that the OPCW has failed to comply with the *patere legem quam ipse fecisti* principle, according to which an authority is bound by its own rules for so long as such rules have not

been amended or abrogated. Referring to the Tribunal's case law, he submits that the practice of an organisation cannot be elevated to the status of law in order to override written rules or to deny staff members their written rights. Relying on Judgement No. 914 of the United Nations Administrative Tribunal, he also argues that he should be awarded compensation for the violation of his right to compete for a D-1 post.

The complainant asks the Tribunal to set aside the impugned decision as well as the appointment of Mr E. and/or to award him compensation equivalent to 18 months' salary or any other amount it considers appropriate. He also claims costs.

C. In its reply the OPCW emphasises that it has not contended that a breach of a Staff Regulation may be mitigated by a practice; that was the position of the Appeals Council. In its view, the appointment of the Chief of Cabinet was not made in violation of the Staff Regulations and Interim Staff Rules. Moreover, the Administrative Directives on recruitment procedures and promotion procedures were not applicable. It therefore considers the principle *patere legem quam ipse fecisti* to be inapplicable.

The Organisation indicates that the Director-General enjoys a margin of discretion concerning appointments, particularly with regard to the decision whether or not to conduct a competitive process for the appointment of his Chief of Cabinet. It is contrary to the principle of the hierarchy of rules to consider that the discretionary authority vested in the Director-General under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter "the Chemical Weapons Convention") and the Staff Regulations could be fettered by an Administrative Directive. Indeed, Article VIII, paragraph 44, of the Chemical Weapons Convention, which provides that the Director-General shall be responsible to the Conference of the States Parties and the Executive Council for the appointment of staff, contains no reference to a competitive process. Moreover, Staff Regulation 4.3 provides for competition "so far as practicable". The OPCW contends that it was deemed impracticable, due to the nature of

the position, to have a formal competitive recruitment process. It adds that, according to the Tribunal's case law, where the applicable rules provide for discretion concerning the conducting of a competitive selection process, an appointment will not normally be set aside unless the decision to exercise that discretion was unreasonable. In this case, the Director-General decided to proceed by direct appointment because the appointee would have to assume a strategic post, to work closely with him and to support him in the delivery of his policy objectives. The appointment of the Chief of Cabinet was made on the basis of the exigencies of service and in the best interests of the Organisation. According to the defendant, the standard competitive procedure would not necessarily have provided an adequate assessment of the underlying managerial and diplomatic skills necessary to discharge the role successfully and effectively. In these circumstances, the decision not to hold a competition was reasonable.

The OPCW asserts that it is a well-established practice that the Chief of Cabinet is appointed without advertising the position and that the complainant was aware of this. Moreover, he knew that the position was vacant but did not express any interest in it. Neither did he advise, in his capacity as Deputy Legal Adviser, the Director-General to advertise the position and to conduct a competitive recruitment process. In any event, it asserts that the practice is in conformity with the applicable rules.

Concerning the claim for compensation, the defendant submits that the circumstances of the present case differ from those considered in Judgement No. 914 by the United Nations Administrative Tribunal. The Director-General did not base the exercise of his discretion on urgency but rather on the nature and responsibilities of the position. Consequently, there is no basis to rely on the award made by the United Nations Administrative Tribunal.

D. In his rejoinder the complainant maintains his pleas. He stresses that the Director-General is bound to observe the Directives he has promulgated and revised, and in particular those providing that staff members are entitled to be considered when vacant posts at a higher

grade are filled. The complainant indicates that the evaluations of his performance by the Legal Adviser and the Director-General do not show any failure in his performance and that the Organisation cannot criticise him for not having advised the Director-General to advertise the post of Chief of Cabinet. In his view, it would have been improper to bypass the Legal Adviser, who was his supervisor, and to provide unsolicited legal advice to the Director-General.

E. In its surrejoinder the Organisation reiterates its position.

CONSIDERATIONS

1. The complainant impugns the decision, dated 13 February 2009, of the Director-General of the OPCW, which stated inter alia:

> "[a]fter careful consideration of the issue raised in your letter dated 26 October 2007, and following the recommendations of the Appeals Council as set out at paragraphs 31 and 32 of its report, I hereby reconfirm the decision not to grant your request to review the decision to appoint [Mr E.] as Chief of Cabinet, as communicated to you by letter dated 13 November 2007."

Paragraphs 31 and 32 of the Council's report, dated 29 January 2009, state:

> "31. The […] Council does not recommend setting aside the selection of Mr. [E.] for the Chief of Cabinet post for the reasons discussed above.
>
> 32. The […] Council does not believe that the [complainant] was materially harmed and therefore recommends that his request for financial compensation be denied."

2. In its report the Appeals Council considered that Staff Regulation 4.3, which provides for a competitive recruitment process, had been breached, but that the breach was mitigated by past practice. In recommending that the selection of Mr E. should not be set aside, it noted that by that time he had been Chief of Cabinet for over one year and that he should not lose his job as a result of having accepted the

offer of the Director-General. The Council also recommended that the relevant Administrative Directive should be revised so as to indicate clearly whether the provisions set forth in the Staff Regulations and Interim Staff Rules are to be applied or not to certain posts, such as that of Chief of Cabinet. Lastly, it took into account the fact that, at the time when Mr E. was appointed, the complainant's length of service was approaching the maximum permitted under the seven-year tenure policy.

3. The Tribunal considers that there is a cause of action as the decision to appoint Mr E. directly as Chief of Cabinet affected the complainant's right to compete for that position. According to the Tribunal's case law, the rights of employees of international organisations to impugn decisions regarding appointments do not depend on their chances of successful appointment (see Judgments 1549, under 9, and 1272, under 12).

4. The main issue raised by this case is whether or not the Director-General has the authority to appoint his Chief of Cabinet without following a competitive selection procedure. The Organisation points out that:

> "the unique nature of the position of the Chief of Cabinet and the responsibilities to be performed by the post holder are such that it was not practicable to select the Chief of Cabinet through a formal competitive process"

and that:

> "the well established [practice] of selecting Chiefs of Cabinet without a formal competitive process was lawful and procedurally correct [and is] in compliance with Article VIII, paragraph 44, of the [Chemical Weapons Convention] and the Staff Regulations, including Regulation 4.3 which provides for selection on a competitive basis *so far as practicable*." (Original emphasis.)

The Organisation also argues that the complainant was aware of another instance, during his term of employment as Deputy Legal Adviser and sometimes Acting Legal Adviser, when the position of Chief of Cabinet was filled by a direct appointment of the Director-

General, yet he never advised the Organisation that he believed the practice to be unlawful due to the non-observance of the standard procedure for filling a vacancy.

5. Article VIII, paragraph 44, of the Chemical Weapons Convention provides:

> "[t]he Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. […]"

Staff Regulation 4.3 provides:

> "[s]election of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis. Selection and appointment of candidates shall also be done in a manner that ensures transparency of the process […]."

6. The Tribunal is of the opinion that the impugned decision violated the complainant's right to compete for a post, as Regulation 4.3 provides no explicit and specific exemption from the requirement that selection be made on a competitive basis for the post of Chief of Cabinet, and the "impracticability" of the competitive selection process cannot be based on the post itself. Furthermore, the Director-General did not provide any reasons why he considered a competition as not practicable in the appointing of Mr E. to the vacant post. This demonstrates a lack of transparency in the appointment. The decision violated provisions which are designed to ensure a certain level of transparency and competition for all posts. Specifically, Article 11 of Administrative Directive AD/PER/29/Rev.2 and Articles 8 and 10 of Administrative Directive AD/PER/37/Rev.1 respectively provide that vacancy notices shall be posted, that when vacancies are open to external candidates such notices shall be posted both internally and externally, and that full regard shall be given to internal candidates in the competitive selection process. Contrary to the Organisation's arguments, the above-mentioned directives are not

inconsistent with the authority of the Director-General. Rather, they serve to reinforce the necessity for transparency in the appointment process.

7. As mentioned above, the expression "so far as practicable" cannot be interpreted to mean that for certain specific posts a competitive selection process can automatically be considered as not practicable (*ubi lex voluit dixit, ubi noluit tacuit*). In Judgment 2620, referring to the same expression "so far as practicable", the Tribunal held that:

> "those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable."

Again, the Tribunal notes that the "impracticability" cannot refer to particular posts (as in that case the exception to the general rule should be explicitly expressed), but instead must relate to particular situations such as a "need to fill a vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments" (see Judgment 2620, under 9). In the present case, the Organisation relies on the unique nature of the position of the Chief of Cabinet and "the responsibilities to be performed by the post holder" as justification for the need for the Director-General to select the appointee to this position without holding a competition. However, as observed by the Appeals Council, there is nothing to prevent the Director-General from contacting particular employees he finds suitable and encouraging them to apply for the position, thereby maintaining transparency in the competitive selection process, and appointing a fully qualified candidate to the post.

Furthermore, the existence of an established practice of directly appointing the Chief of Cabinet is not relevant, as a practice which is in violation of a rule cannot have the effect of modifying the rule itself, and the fact that employees may be aware of such a practice does not prevent them from exercising their right to impugn a

decision based on that practice whenever it affects them. Likewise, the Organisation's assertion that the complainant as Deputy or Acting Legal Adviser never commented on the legality of the said practice, is irrelevant. It is enough to observe that the complainant, uncontestedly, was never asked for his opinion on the subject.

8. It follows that the decision of 13 February 2009 dismissing the complainant's appeal must be set aside, as must the earlier decision appointing Mr E. to the post of Chief of Cabinet. However, that must be without prejudice to his rights (see Judgment 2620, under 12, and decision, under point 2).

9. As there is no evidence that the complainant's candidature for the post of Chief of Cabinet would have had any real prospect of success, there is no basis for an award of material damages for the loss of a valuable opportunity. However, he is entitled to 3,000 euros in moral damages for the violation of his right to compete for a post. He is also entitled to costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 13 February 2009 is set aside.
2. Without prejudice to the rights of Mr E., his appointment to the post of Chief of Cabinet is set aside.
3. The OPCW shall pay the complainant 3,000 euros in moral damages.
4. It shall pay the complainant 750 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge,

and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet