

The Administrative Tribunal,

Considering the complaint filed by Mrs J.R. B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 7 January 2005 and corrected on 11 February, UNESCO's reply of 20 May, the complainant's rejoinder sent on 3 October 2005 and the Organization's surrejoinder of 4 January 2006;

Considering Articles II, paragraph 5, and VII 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 Saint Lucian national born in 1961, joined UNESCO in November 1989 at grade P-1 under the Organization's Young Professional Programme. She was promoted to grade P-2 in November 1991 and at the material time she held post BFC-176 in the Bureau of Field Coordination (BFC).

On 28 March 2001 vacancy notice HRM/RCR/JD/01/33 was published for post BFC-015 at grade P-3 in the BFC. The complainant applied for this post on 27 April and was interviewed in September. Having received information following her interview, on 11 December 2001 she wrote to the Chief of the Recruitment Section of the Office of Human Resources Management (HRM) to enquire about the outcome of her candidature. That official replied the following day that another candidate had been selected for the post. In accordance with paragraph 7(a) of the Statutes of the Appeals Board which provides that a staff member who wishes to contest an administrative decision shall first protest against it in writing within a period of one month of the date of receipt of the decision contested, the complainant contested on 12 January 2002 the appointment of someone other than herself. On 26 February the Director of HRM informed the complainant that the Director-General rejected her protest. The complainant filed her notice of appeal against that decision on 25 March 2002.

The Organization contested the receivability of the appeal on the grounds that, according to paragraph 7(c) of the Statutes of the Appeals Board – which says that in the absence of a ruling the notice of appeal must be submitted within two months from the date of the protest – it was time-barred. The Director-General's ruling communicated to the complainant on 26 February 2002, being merely confirmatory, did not set off a new time limit for filing the appeal. However, in its Opinion dated 29 July 2004 the Appeals Board considered that paragraph 7(c) "is formulated in a complicated legal language" and so by a majority decided to allow the appeal "on an exceptional basis"; the Chairman of the Board disagreed on this point. On the merits, a majority of the Board found that Staff Regulation 4.4 (which provides that staff members "shall be given priority of consideration for vacant posts") had been breached and that the selection process had been vitiated by bias and prejudice as well as errors of fact and omissions. The Board unanimously expressed concern for the complainant's "situation and conditions of work" and thus recommended that the Administration look urgently into the matter. The Board also recommended that the Director-General consider transferring the complainant to post BFC-015, which had, in the meantime, become vacant again. In a letter dated 8 October 2004 the Director-General informed the complainant that he rejected all findings and recommendations of the Board, with the exception of the recommendation that the appropriate offices look into her "administrative situation". That is the impugned decision.

B. The complainant asserts that her appeal before the Appeals Board was receivable both *ratione temporis* and *ratione materiae*. She submits that although it was possible for her to file an appeal against the implied rejection of her protest, prior to the expiration of the applicable deadline, she was informed of the Director-General's express decision on 26 February 2002. She was within her rights to file an appeal against that decision and she did so within the one-month time limit provided for in paragraph 7(c). As far as receivability *ratione materiae* is concerned, she argues that as a staff member and candidate for the post she had the right to contest the selection outcome. She concludes that since her appeal was receivable, so is her complaint before the Tribunal.

On the merits, she contends that the selection procedure was flawed. In her view, the BFC and HRM had an

obligation, under the statutory provisions, to provide the Senior Personnel Advisory Board (SPAB) with her complete personnel file. Furthermore, the late completion of her performance report prevented a proper evaluation of her candidature by the SPAB in breach of the principle of equal treatment. She asserts that by failing to request her last performance report, as it is authorised to do under paragraph 6(b) of the Rules of Procedure of Personnel Advisory Boards, the SPAB showed a lack of impartiality in her regard.

She alleges bias on the part of her second-level supervisor, who, according to her, contributed to the delay in establishing her performance report and did everything possible to ensure that the selected candidate would be nominated. That, she says, was in breach of Staff Regulations 4.2 and 4.4.

The complainant asks the Tribunal to declare her complaint receivable both *ratione temporis* and *ratione materiae* and to declare the decision not to appoint her to post BFC-015 as tainted by procedural irregularities, by mistakes and concealment of essential facts, by lack of transparency in the selection process, by abuse of power, and by breach of Staff Regulations 4.2 and 4.4. She also asks the Tribunal to quash the decision and to instruct the Organization to look urgently into her work conditions and administrative situation as well as “to repair” the material and moral injury suffered by her and compensate her for all costs and damages.

C. In its reply UNESCO recounts in detail the selection process for the post in question. It points out that despite the fact that the complainant did not possess a postgraduate degree (as specified in the vacancy notice), she was nevertheless one of seven candidates retained for an interview with the Director of BFC. Following these interviews the Director forwarded a shortlist of three candidates (in order of preference) to the SPAB. The SPAB unanimously concurred with the list and recommended the top candidate to the Director-General, who followed that recommendation.

It asserts that it is the Tribunal’s consistent case law that the decision to appoint one candidate over another is discretionary and thus subject to only limited review.

The Organization denies that there was any bias against the complainant or that the selection process was procedurally flawed. Her allegation that everything had been done to ensure that the appointed candidate would be selected is not supported by any evidence. It submits that the complainant was placed on an equal footing with the six other pre-selected candidates interviewed by the Director of BFC. After the interviews the Director of BFC simply decided, in the exercise of his discretion, not to include the complainant as one of the shortlisted candidates. UNESCO points out that each of the shortlisted candidates had a postgraduate degree, as required in the vacancy notice.

It submits that the complainant never requested to be provided with her performance report during the selection process. Having done nothing to speed up the appraisal process she cannot afterwards question the good faith of the Director of BFC. In any event, the establishment of a performance report has nothing to do with a selection process, and the evaluation of candidates was done on the basis of information contained in their applications.

UNESCO argues that the complainant has not provided any proof to support her allegation that the SPAB was not impartial. Lack of impartiality on the part of such a body would be a serious matter and allegations of this sort should not be made or taken lightly. It points out that the Board was under no obligation to request the complainant’s “non-finalized last performance report”. She makes a mistake of law by concluding that the SPAB was obligated to request additional information on any candidate who was not put on the shortlist. Paragraph 6(b) of the Rules of Procedure of Personnel Advisory Boards says that the Board “may request” additional information, which is interpreted in law as a discretionary option. In any event, the SPAB had before it enough information on the complainant and the other candidates to reach an informed decision.

The defendant, which considers that the complainant’s claims should be rejected in their entirety, submits in particular, that her claim to instruct the Organization to look into her administrative situation falls outside the scope of the present complaint. Furthermore, it notes that under the Staff Regulations no appointment or promotion can be decided without a competitive process.

D. In her rejoinder the complainant contends that the Organization has made strong allegations, without supporting evidence, that she had never requested to be provided with her performance report before the end of the selection process and that she had done nothing to speed up the finalisation of her report. She argues that the report was “delayed 1 ½ years (after its due date) until after the appointment of the incumbent to the post BFC-015”. She

says this practice offends against the transparency required in competitions as well as the principle of equality of treatment. She submits that in the draft of her performance report her immediate supervisor “recommended her promotion to a P-3 post”, but that the comments to that effect were removed from the final version of the report.

E. In its surrejoinder UNESCO objects to the receivability of the complaint. It submits that the Appeals Board had noted that the complainant’s appeal was “strictly speaking” not receivable but that it nevertheless decided to hear the appeal. The Board should not have heard the appeal in this instance and it argues that it is “settled law” that the Tribunal should not entertain her complaint.

On the merits, it denies that the Director of BFC harboured any prejudice against her and points out that her consistently satisfactory performance reports show “the absence” of any bias on the part of her supervisor. It argues that there is no reason to believe that the SPAB would have recommended a different candidate even if her latest report had been available to it. The fact that the Board did not request further information concerning the complainant does not constitute a procedural flaw. There was no “inobservance” of Staff Regulation 4.4.

CONSIDERATIONS

1. The complainant challenges the decision of 8 October 2004 by which the Director-General of UNESCO rejected all findings and recommendations of the Appeals Board, with the exception of the recommendation that the appropriate offices look into her administrative situation. She asks the Tribunal, inter alia, to quash the decision not to appoint her to the post for which she applied and to order compensation for material and moral damages.

2. In its surrejoinder UNESCO raises the view of the minority of the Appeals Board, which the Director-General endorsed in the impugned decision, namely, that the complainant’s appeal was time-barred. It contends that, as a result, her complaint is irreceivable.

3. The sequence of events was enunciated by the Appeals Board as follows: date of notification of the impugned decision, 12 December 2001; letter of protest by the complainant, 12 January 2002; Director-General’s ruling, 26 February 2002; notice of appeal, 25 March 2002. The Board stated that “[t]aking into account that the notice of appeal was due on 12 and not on 25 March 2002, this appeal, strictly speaking, should not be admissible”. However, it decided to hear the case, considering that “it is a fact that paragraph 7(c) of the Statutes of the Appeals Board is formulated in a complicated legal language which often creates confusion among staff members as to whether they should wait or not, for the Director-General’s ruling before submitting their notice of appeal”.

4. Paragraph 7 of the Statutes of the Appeals Board relevantly provides:

“(a) A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Office of Human Resources Management, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters [...].

(b) The Director-General’s ruling on the protest under (a) above shall be communicated to the staff member by the Director of the Office of Human Resources Management within one month of the date of the protest if the staff member is stationed at Headquarters [...].

(c) If the staff member wishes to pursue his contestation, he shall address a notice of appeal in writing to the Secretary of the Appeals Board. The time-limit for the submission of a notice of appeal, to be counted from the date of receipt of the Director-General’s ruling (or, if no ruling was communicated to the staff member within the time-limit under (b) above, from the expiry of that time-limit), is one month in the case of a staff member stationed at Headquarters [...].”

The Tribunal finds no “complicated legal language” in that paragraph. The complainant’s timely letter of protest of 12 January 2002 set in motion the two time limits referred to in subparagraphs (b) and (c), above: if no decision is communicated within one month from the date of protest, then appeal must be filed within one month of the expiry of that time limit. It is possible to argue whether this is a good solution or not, but it certainly is clear. The application of the above provisions to the present case leads to the conclusion that the complainant’s appeal, filed on 25 March 2002, was indeed time-barred.

5. According to firm precedent (see in particular Judgments 775 and 2297), if an internal appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation by that body. The present complaint must therefore be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr James K. Hugessen, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

James K. Hugessen

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet