

NINETY-FOURTH SESSION

Judgment No. 2173

The Administrative Tribunal,

Considering the second complaint filed by Mr A.M. against the European Organization for Nuclear Research (CERN) on 10 April 2002, CERN's reply of 15 July, the complainant's rejoinder of 18 August and the Organization's surrejoinder of 11 October 2002;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant is an Italian citizen and was born in 1941. He entered the service of CERN in 1968 as an electronics engineer, and obtained an indefinite contract in 1974. He was promoted to grade 11 in July 1992 when, with the introduction of the "Merit-Oriented Advancement Scheme" (MOAS), he was classified in career path VIII. That scheme stayed in force until it was replaced on 1 September 2001 by the "Merit Advancement and Promotion Scheme" (MAPS), consisting of a new career structure and salary grid as well as a new advancement and promotion system. It was announced to staff in a document of 11 July 2001, which indicated how they would be assimilated into the new scheme. There were to be seven career paths (A to G), and career path F was to replace the previous career path VIII.

The version of Article R II 2.06 of the Staff Regulations in force prior to 1 September 2001 provided, in part, that:

"The Director-General may, at his discretion, extend the career of a particularly meritorious member of the personnel to the exceptional advancement grade of his career path [...]"

In 2000 the complainant had reached the top step of grade 11. He noted from his July 2001 pay slip that, against his expectations, promotion had not occurred and on 16 August wrote to the Director-General seeking a review of the decision not to promote him to grade 12 - the exceptional advancement grade in career path VIII. A review was carried out, but the decision was upheld in a letter of 15 October 2001 from the Director of Administration. The complainant filed an internal appeal on 10 December, arguing that the decision not to promote him was unfair and discriminatory.

Prior to that, on 12 October 2001, he had filed a first internal appeal against the decision to assimilate him into career path F, position p0, in the new career structure introduced on 1 September 2001. He took up that issue in another complaint he filed with the Tribunal on 7 February 2002.

In a letter of 28 January 2002 the Director of Administration told the complainant that, depending on its outcome, his appeal against non-promotion to grade 12 could have implications for the one filed in October 2001 because his personal situation might have to be adjusted retroactively from 1 July 2001. He said the Administration was therefore suspending the earlier one until the result of his appeal regarding grade 12 was known, and was taking steps to convene a meeting of the Joint Advisory Appeals Board as soon as possible, and the Chairman would advise the complainant of the Board's composition.

The procedure subsequently went ahead and on 20 August 2002 the complainant was notified of the Director-

General's final decision refusing his promotion to grade 12.

B. The complainant is challenging the implied rejection of the appeal filed on 10 December 2001. His main plea is that having reached the top step of grade 11 he was expecting promotion to grade 12 as recognition for the successful nature of his work since he was last promoted. It appears to the complainant that his direct supervisor was happy with his performance while recognition of his merits was denied at higher management level without any reasons being put forward.

He is claiming promotion to the "grade 12 exceptional advancement zone" from 1 July 2001 as a result of "the year 2000 review procedure".

C. The Organization claims that the filing of the complaint was premature and that it is therefore irreceivable. The complainant filed it without waiting for the outcome of the internal appeal procedure. He had not exhausted the internal means of redress and there was no final decision for him to impugn. There was no implicit rejection of his appeal. The Organization took the required action to convene the Board, and it cannot be said that it failed to act within 60 days. CERN wrote to the complainant on 5 April 2002 to inform him of the Board's composition, even though it was not until 24 April that the letter reached the complainant. The complainant twice notified the Organization about his objection to one of the Board's members. The hearing was scheduled for 16 July 2002. Without seeking to deny the complainant the right to challenge decisions that affect his employment conditions, it argues that the appeals he has filed demonstrate a desire to generate work for the Organization, which amounts to abuse of procedure.

Subsidiarily, CERN argues that the complaint is devoid of merit. It explains that an extension of the complainant's career into the exceptional advancement grade of his career path would have required both a proposal on the part of his division leader and consultation of the Senior Staff Advancement Committee by the Director-General. Such advancement also presupposes that his performance could be considered "particularly meritorious". There was comparative evaluation of staff who had reached the top step of grade 11, but the complainant was not selected for promotion. It holds that due process was respected and there is no evidence of unequal treatment or of "supervisory fault".

D. In his rejoinder the complainant takes up the matter of receivability. He does not contest the fact that the Administration may have taken steps to convene the Board. Rather, his contention is that he was not informed of those developments. He opines that his complaint could have been avoided if CERN had respected the statutory time limits. If a letter was sent to him in early April 2002, he sees no reason why it would not have reached him in a matter of days. In any event, he states that he had the right to defend his case before the Board and attended the hearing of 16 July, although at the time of filing his rejoinder he had yet to receive a final decision on his case. He presses his request for hearings before the Tribunal.

E. In its surrejoinder the Organization maintains its objection to receivability. The complainant's attitude shows bad faith: at no stage did he enquire about the status of his appeal. Any delay that occurred was justified, being partially attributable to the fact that one member of the Joint Advisory Appeals Board was unavailable and had to be replaced. The Organization has reason to believe that the complainant deliberately avoided taking receipt of the letter dated 5 April 2002, because of his intention to file a complaint with the Tribunal in the meantime. The hearing before the Board took place on 16 July. In its report of 23 July the Board recommended rejecting his claim to advancement into grade 12. The Director-General endorsed that opinion in a final decision communicated to the complainant on 20 August 2002. It expresses the opinion that the complainant's action in filing two internal appeals immediately followed by two appeals with the Tribunal constitutes procedural harassment and abuse of procedure.

On the merits, the Organization says the reasons for his non-promotion to grade 12 were given to the complainant on various occasions. It sees no justification for oral proceedings.

CONSIDERATIONS

1. The complainant joined CERN as an electronics engineer in 1968 and was given an indefinite appointment in 1974. CERN having introduced a scheme for "merit-oriented advancement", known as MOAS, he was promoted in 1992 to grade 11 and put in career path VIII. He reached the highest step of grade 11 in the course of 2000. On

11 July 2001 CERN informed its staff that a new "Merit Advancement and Promotion Scheme" (MAPS), which included a new salary scale, would apply from 1 September 2001. At that date, staff members - apart from a few exceptions - would maintain the level of pay they had reached at 31 August 2001 following the 2001 advancement exercise implemented under the MOAS scheme.

2. Hoping for advancement under the new scheme, the complainant asked twice for promotion. Having been unsuccessful, he filed two internal appeals.

3. First, on 16 August 2001 he asked the Director-General to reconsider the decision constituted by his payslip for July 2001 not to grant him grade 12 from 1 July, in other words, not to extend his career to the exceptional advancement grade of career path VIII. The Director of Administration having rejected his request on the Director-General's behalf on 15 October, the complainant appealed against that decision on 10 December 2001. On 28 January 2002 he was informed that his appeal would be referred, under Article R VI 1.08 of the Staff Regulations, to the Joint Advisory Appeals Board, which was to be convened "as soon as possible". Assuming an implied rejection of his appeal, he filed a complaint with the Tribunal on 10 April 2002. The Board met and, in its report of 23 July, recommended rejection of the appeal. On 20 August 2002 the Director of Administration informed the complainant that the Director-General endorsed the Board's recommendation.

4. Secondly, the complainant had been told by a letter of 15 August 2001 from the Leader of the Human Resources Division that as from 1 September he would come under the new career structure at the same level of pay as before. His career path would now be F and his salary position p0. The complainant challenged that decision on 12 October 2001. The Director of Administration replied on 15 November 2001 that the Joint Advisory Appeals Board would be consulted, though the process would take some time. A letter of 28 January 2002 informed the complainant that the proceedings for that appeal were suspended pending settlement of his other appeal, filed on 10 December 2001. Deeming that his appeal of 12 October 2001 had been rejected, the complainant filed a complaint with the Tribunal, which was registered on 7 February 2002, claiming Fc6 as his position in the new salary scale because it corresponded to the salary level immediately above the one he had reached under the old system.

5. This judgment deals with the complaint he filed on 10 April 2002 objecting to the lawfulness of the refusal to promote him to the exceptional advancement grade of career path VIII as from 1 July 2001, i.e. before the new career structure was introduced. As CERN aptly pointed out when it informed the complainant of its decision to stay proceedings for the appeal filed on 12 October 2001 against the position assigned to him under the new pay scale, the outcome of the dispute about his advancement to grade 12 under the MOAS could have implications for that position: if his claims were to succeed on that point, he would be promoted with retroactive effect from 1 July 2001 to grade 12, and that would necessarily affect his position in the new salary scale. That dispute must therefore be settled first.

6. CERN alleges abuse of process, stating that the complainant acted in bad faith and created unnecessary work both for the Organization and the Joint Advisory Appeals Board by filing two separate appeals. The Tribunal will not entertain these allegations but will turn to the merits.

7. Up to 1 September 2001, under the MOAS, the Director-General was able to extend the career of a particularly meritorious member of staff to the exceptional advancement grade of his career path on the proposal of his division leader and after consultation of the Senior Staff Advancement Committee. The selection criteria for exceptional advancement to grade 12 are as follows:

"Staff strongly supported by their Division and Sector and confirmed broadly on a CERN-wide basis, who have performed throughout their career with the highest availability and integrity and who have exercised high competence and responsibility required by Career Path VIII."

It is clear from the evidence, particularly the unanimous findings set out in the report of the Joint Advisory Appeals Board, that, although the complainant's competence and standard of work were acknowledged and his appraisal reports were consistently good, those responsible in his division and sector did not see fit to propose him for exceptional advancement, which is granted to very few. Such promotion being discretionary, the Organization may refuse it without incurring censure unless the refusal was based on mistakes of fact or of law, which have not been alleged in this case, or on an abuse of authority, which has not been established, or unless essential facts were overlooked or blatantly wrong conclusions drawn from the evidence. The Tribunal finds no obvious error in

CERN's appraisal of whether an exceptional advancement to grade 12 was warranted in the complainant's case.

The conclusion is that the complaint must be dismissed, there being no need to entertain CERN's objection to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet