

NINETY-EIGHTH SESSION

Judgment No. 2378

The Administrative Tribunal,

Considering the third complaint filed by Mr A. F. against the International Atomic Energy Agency (IAEA) on 20 October 2003, the IAEA's reply of 10 February 2004, the complainant's rejoinder of 10 March, and the Agency's surrejoinder of 28 June 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 is a retired staff member of the IAEA. Some facts relevant to this case may be found in Judgment 2325 delivered on 14 July 2004 on the complainant's first complaint.

The complainant, who had filed three internal appeals, was sent at his request a copy of the Joint Appeals Board's report of 11 March 2003. Under a covering memorandum dated 25 March the Head of the Staff Administration Section explained to him that in accordance with Administrative Manual Part II, Section 8, Paragraph 16, some information found in attachments to the report had been classified as "privileged information" and therefore had been removed from his copy of the report. On 1 April the complainant wrote to the Director General to request a copy of attachment 17 of the report (stating that this attachment had been referred to several times in the Board's report) as well as all other privileged information related to his case. The Director General rejected his request on 14 April.

On 22 April the complainant lodged an appeal against this decision with the Joint Appeals Board. In its report dated 15 August 2003 the Board considered that the attachment in question contained information concerning the evaluation of the complainant and other applicants for a post which had not been awarded to the complainant. However, the complainant had been given an accurate description of its contents in paragraph 32 of the report dated 11 March 2003. Consequently, it recommended that the Director General uphold his decision not to provide the complainant with a copy of attachment 17. In a letter of 9 September 2003 the Director General informed the complainant that he had decided to follow the Board's recommendation. That is the impugned decision.

B. The complainant says that the missing attachment contains a memorandum from the Acting Director of the Division of Personnel to the Director General dated 11 April 2001 as well as the fact sheets used by the selection committee to justify the grounds on which the selection decision was based. He argues that the Agency committed a breach of procedure when it refused to provide him with a copy of the Board's "full report". He alleges that the removed attachment contains documents showing that there was a deviation from the content of the vacancy notice during the selection process; he believes that the outcome of the competition was manipulated in favour of the selected candidate. These documents, therefore, are "crucial" to revealing how and why the terms of reference of the vacancy notice were breached during the selection process.

He contends that Administrative Manual Part II, Section 8, Paragraph 4, prohibits the "full report" of the Joint Appeals Board from being classified as privileged information. Thus, by refusing to provide him with the attachment on the grounds that it is privileged information the IAEA has breached its own rule. He understands that the attachment in question may contain information regarding the other candidates, but he says that it would be easy for the Agency to block out the names of these candidates. In fact, this method has already been used by the IAEA in his copy of the 15 August 2003 report.

He asks the Tribunal to quash the impugned decision and to order the Agency to provide him with the documents in question. He also claims moral damages and costs.

C. In its reply the IAEA contends that attachment 17 was properly classified as privileged information under the Agency's statutory provisions and withheld from the complainant. It notes that the decision to withhold the

information is consistent with the Tribunal's case law. It further notes that the Tribunal has held that a complainant is not entitled to consult records of discussions by a selection board, so that members of such boards may feel free to discuss the candidates without being at risk that their views could be divulged.

The Agency submits that the Board's report of 11 March 2003 provided the complainant with an accurate description of the contents of the document. He had also been made aware of his own position in relation to the evaluation and selection process. Additionally, the Agency's actions did not deprive him of the possibility of defending his interests by filing a complaint with the Tribunal against the Director General's decision not to select him for the post for which he had applied.

D. In his rejoinder the complainant accuses the IAEA of providing the Tribunal with an adulterated version of the Joint Appeals Board report dated 11 March 2003. He argues that this constitutes a breach of good faith and shows a lack of responsibility, transparency and duty of care. Furthermore, the Agency has only addressed his request for attachment 17, but he has also asked for the disclosure of "all other documents like the fact sheets and the working papers containing evaluation of the candidates used by the selection committee".

He says that the IAEA "delayed the appeal process intentionally" by taking more than four months from the date he filed his appeal to issue the report of the Appeals Board, which he describes as "stalling tactics" with a view to paralysing his efforts to submit his first complaint. He criticises the comments made by the Agency concerning his right to appeal before the Tribunal.

E. In its surrejoinder the IAEA denies the complainant's allegations, stating that these do not relate to the substance of the case. It points out the complainant has an "unmasked" copy of the document he alleges was altered, and it says he raised the issue for the sole reason of imputing bad faith. It reiterates that documents were lawfully withheld. The complainant has not demonstrated that there are any additional relevant documents other than attachment 17 to the Board's report, nor has he established that he has any entitlement to such documents, which by their very nature are privileged information within the terms of the Administrative Manual. It suggests that the complainant has misinterpreted the Agency's comments concerning his right to appeal.

CONSIDERATIONS

1. The complainant impugns the decision of the Director General, by which the latter accepted a recommendation of the Joint Appeals Board dated 15 August 2003 to dismiss his appeal against a decision not to make an attachment to a report of the Board dated 11 March 2003 available to him. In that report the Board had recommended that the complainant's appeal against his non-appointment to the position of Senior Safeguards Analyst should not be granted.

2. The complainant describes the requested material in his brief as follows:

"an inter-office Memorandum from the Acting Director, Division of Personnel to the Director General dated 11 April 2001 and the fact sheets, including documentation containing the evaluation, used by the selection committee to justify the grounds on which the decision was based."

3. The Agency pleads that the requested material is clearly privileged and should not be disclosed. In the course of its analysis of the file, the Tribunal has exercised its authority to call for the material in question and has examined it in confidence. The Tribunal has determined that it does indeed, as its description indicates, contain personal information and assessments of other candidates in the competition in which the complainant had been unsuccessful. As it is in principle confidential and privileged, it should not be disclosed.

4. The complainant, however, cites Administrative Manual Part II, Section 8, Paragraph 4:

"Information relating to legal, personnel or other advice rendered by the competent persons or bodies to the responsible officers in the course of considerations leading to an administrative decision, or relating to advice in appeals cases between either party and its advisers, shall also be classified Privileged Information. However, the administrative decision itself and the **grounds on which it is based**, and in case of appeals the **full report** of the Joint Appeals Board, may not be classified Privileged Information." (emphasis added)

5. Since the documents he is seeking were an attachment to the recommendation of the Joint Appeals Board,

the complainant argues that he has a right to see them. The complainant is wrong. While it might have been imprudent of the Board to have included confidential materials in an attachment to its report, it is clear that it could not and did not intend that such materials should form an integral part of the report. That, no doubt is why they were made an attachment rather than being incorporated into the report. Indeed, even if the Board had included the materials in the body of the report itself, it would have been in breach of the Agency's duty of confidentiality to the other applicants concerned, some of whom were staff members, and the Agency would have been under a duty not to disclose such personal information.

6. Since the Tribunal has, in any event, already decided that "there is nothing to suggest that the privileged information which the complainant requested is of a kind that might reveal procedural or other irregularity in the selection process" (see Judgment 2325, under 4), the complaint must be dismissed.

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 Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet