The Administrative Tribunal,

Considering the complaint filed by Mrs S.A.K. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 9 June 2005, the OPCW's reply of 20 September, the complainant's rejoinder of 8 November and the Organisation's surrejoinder of 13 December 2005;

Considering the applications to intervene filed by:

M.A.	M.H.	S.O.
B.A.	D.P.H.	A.O.
S.A.	M.H.	T.P.
R.A.	S.K.J.	C.P.
R.D.A.	A.K.	G.M.H.P.
M.J.A.	A.K.	J.P.C.
P.A.A.	K.J.K.	E.J.P.
C.H.A.	M.S.K.	U.D.P.
D.B.	K.S.K.	F.A.P.-D.-C.
N.B.	L.K.	P.P.
S.K.B.	F.K.	M.A.R.
F.B.	Z.K.	J.R.
G.B.	M.J.L.	Y.R.
C.L.B.	M.L.	V.R.
H.A.B.	D.N.L.	V.R.
Y.B.	L.L.	M.S.
M.F.C.	H.L.L.	S.S.
R.A.S.C.	Y.L.	A.T.S.
M.C.	K.L.	W.C.S.
T.P.C.	M.M.	A.-M.S.
P.C.	N.M.	B.S.
I.C.	O.M.	L.S.
P.A.C.C.	J.M.	I.S.

R.P.D.	B.M.	C.T.
W.D.R.	M.M.	J.T.
J.D.	S.M.	M.V.
I.D.	I.M.	C.W.
R.D.	Z.N.	B.W.
M.E.M.B.	S.N.	W.W.
Z.F.	O.G.N.	J.Y.
L.G.	G.H.N.	J.F.Z.
Z.H.	S.O.	

Considering the OPCW's comments of 4 April 2006 on the applications to intervene;

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 German citizen, was born in 1950. She joined the OPCW on 2 June 1997 under a fixed-term contract as an inspector in the Inspectorate Division at grade P-4.

Administrative Directive AD/PER/12, dated 27 February 2001, concerning working hours and arrangements for replacement days for inspectors, provided, inter alia, that:

"When four hours or more of official inspection activities are performed by such staff members on inspection on any given day of a weekend or of an OPCW official holiday, they shall be entitled to one replacement day for each day so worked."

In practice, however, inspectors carrying out Chemical Weapons Destruction Facilities (CWDF) inspections were being granted one replacement day for each Saturday, Sunday and OPCW official holiday that fell during the inspection period, regardless of whether "official inspection activities" had been performed on those days.

On 23 March 2004 the Acting Director of the Inspectorate Division issued a memorandum concerning replacement days for CWDF inspections. He stated therein that an analysis of "replacement day request forms" had shown that directive AD/PER/12 had "not been correctly followed for several years". Furthermore, an analysis done of shift schedules at different CWDFs had revealed that "each inspector works an average of one additional day per 7-day week". In order to ensure an acceptable application of directive AD/PER/12 he said that the following rule should be applied with immediate effect:

"each inspector returning from a CWDF inspection is entitled to one replacement day per week (7 days) worked, plus any official holidays spent on mission".

On 20 April 2004 the complainant asked the Acting Director of Inspectorate to reconsider the "newly implemented" calculation of replacement days for CWDF inspections. The Acting Director replied the same day that the decision contained in his memorandum would stand.

In a letter sent to the Director-General on 19 May the complainant sought a review of the Acting Director's decision of 23 March to change the way in which replacement days were to be calculated for CWDF inspection missions. She argued that as there had been no change made to either directive AD/PER/12 or to inspectors' working conditions, there was no rationale for changing the way in which replacement days were calculated. Moreover, she considered that the Organisation had been correctly implementing AD/PER/12 by granting one compensatory day for each Saturday, Sunday and OPCW official holiday that fell during the inspection period. The

Director-General replied by a memorandum of 15 June 2004, stating that it would not be correct to grant a replacement day "on an automatic basis" for each Saturday, Sunday or official OPCW holiday as implied by the complainant. She filed an appeal with the Appeals Council on 14 July 2004, requesting a return to the "long-established" previous practice.

The Appeals Council submitted its report to the Director-General on 7 March 2005. It recommended upholding the complainant's appeal and reinstating the previous practice of granting "one replacement day for every Saturday, Sunday and official holiday spent on a long CWDF mission", stating that this was "without prejudice to the Organisation's right to replace both the directive and the practice with a new directive". It also stated that "[r]eplacement days that should have been granted in the past should be reimbursed".

By a letter of 6 April 2005, the Head of the Human Resources Branch informed the complainant, on behalf of the Director-General, that the past practice referred to by the Appeals Council could not be reinstated as it was not fully consistent with the wording of Administrative Directive AD/PER/12. She said that that directive was under revision and an interim solution would be implemented which would apply to the complainant and all other staff members concerned. Henceforth, the hours spent on official inspection activities would be recorded, and replacement days would be granted on the basis of "actual hours" spent performing such activities on a Saturday, Sunday or official OPCW holiday. Replacement days would be granted only when staff had performed four hours or more of "official inspection activities", and the number of weekdays where none had been performed would be deducted from the replacement days accumulated. This calculation was to be carried out retroactively from 23 March 2004. If it came to light that the staff members concerned had been granted fewer replacement days than they had a right to, the balance of replacement days would be granted retroactively, but no action would be taken by the Organisation to recoup replacement days that had been inappropriately granted in the past. That is the decision the complainant impugns.

A revised directive, AD/PER/12/Rev.1, was issued on 27 April 2005 and took effect on 4 May 2005. It provided that, for CWDF missions, one replacement day would be granted for "each full week spent on inspection mission" and one for any OPCW official holiday falling within the inspection mission period.

B. The complainant contends that the decision to change the way replacement days were calculated, as contained in the memorandum of 23 March 2004, was unlawful for several reasons. First, the Acting Director of Inspectorate introduced the changed calculation method without proper authority. In the complainant's opinion, a memorandum could not supersede either an Administrative Directive or the established practice by which the directive was implemented. Moreover, neither the staff members concerned nor the Staff Council were consulted. She contends that the rules governing the granting of replacement days had been implemented correctly since 1997 and that there was no need to change them.

Secondly, she submits that the revised calculation does not take into account that inspectors are on call to perform "official inspection activities" at any time while on the territory of an inspected State Party. In fact, it is her understanding that an inspection team member is on official duty as long as the inspection team is outside OPCW headquarters. While she accepts the restrictions that are part of each inspection mission, she believes she is entitled to "fair compensation" for irregular working hours and restricted freedom, and had obtained as much – up to March 2004.

Thirdly, the revised way of calculating replacement days violates the principle of equal treatment given that it applied only to CWDF inspections. She points out that inspectors performing any other type of inspection are still granted one replacement day for each Saturday, Sunday or official OPCW holiday occurring during their mission, including travel time.

The complainant seeks the quashing of "the decision to grant only one replacement day for each week spent on CWDF missions since 23 March 2004". She asks the Tribunal to order the OPCW to grant her retrospectively all the replacement days that she would have received since 23 March 2004 if the "regime" of granting one day for every Saturday, Sunday or OPCW official holiday had remained in force, adding that it amounted so far to 12 days. In the event that her situation changes and she can no longer be granted replacement days as such, she asks for financial compensation instead, based on a daily aliquot of her salary. She also claims costs.

C. In its reply the Organisation contends that the complainant has not taken account of all relevant facts and that the complaint shows no cause of action. With regard to her main claim, it asserts that there is no existing decision

"to grant only one replacement day for each week spent on CWDF missions since 23 March 2004". By his decision of 6 April 2005 the Director-General set aside the decision of 23 March 2004. As is clear from the decision of 6 April 2005, the Director-General did not endorse the new practice introduced by the Acting Director. Instead, he decided to follow the letter and spirit of AD/PER/12 by reverting to the "four hours per day" requirement specified in the directive. Similarly, the complainant's claims for replacement days or compensation in lieu have also become moot, as the Director-General, by the impugned decision, decided that a calculation of such replacement days should be carried out retroactively from 23 March 2004, and that any discrepancies should be corrected in favour of the staff member.

On the merits, the OPCW states that the complainant's arguments challenging the legality of the decision to change the number of replacement days are "unconvincing" and based on errors of law and fact. It explains that replacement days for inspectors were not intended to be granted automatically, and the purpose of the change of practice challenged by the complainant was precisely to bring the Organisation's practice back into line "with the legal stipulations in the Organisation's rules". Contrary to the complainant's arguments, the Acting Director of Inspectorate had the authority to change a practice established by his predecessors; he was replacing an erroneous practice with one that he considered to be in conformity with directive AD/PER/12. Furthermore, all legal consequences of the Acting Director's decision have been put right as a result of the Director-General's decision to set aside the decision of 23 March 2004 and to reimburse any replacement days that a staff member may have been deprived of since its implementation.

In reply to her other arguments, the Organisation says that it does recognise that inspectors are in a special situation while on mission, and that is precisely why they are granted replacement days. It considers her argument regarding lack of equal treatment to be without object, pointing out that she herself recognises that there is a difference between CWDF missions and other types of mission.

D. In her rejoinder the complainant asserts that she still has a cause of action. In her opinion, certain illegal aspects of the Acting Director of Inspectorate's decision of 23 March 2004 have not been remedied.

She contends that it is not possible to use shift schedules to determine hours of "official inspection activities", as inspectors are generally involved in such activities throughout the inspection period. She believes that she was "wrongfully denied" the "just" number of replacement days during the period from 23 March 2004 to 4 May 2005.

E. In its surrejoinder the Organisation submits that the complainant has not demonstrated what illegalities purportedly still exist in the way replacement days are calculated. It argues that inspectors cannot be considered to be performing "official inspection activities" 24 hours a day, and holds to its view that it is appropriate to use shift schedules as a basis for calculating replacement days. These are "work plans" setting out the hours "spent or to be spent" performing "official inspection activities".

It also submits that the complainant has provided no evidence to support her contention that she was not awarded the correct number of replacement days for the period from 24 March 2004 to 6 April 2005. It points out that the calculation carried out after 6 April 2005 revealed that she was not entitled to any replacement days for the period in question, although she might conceivably have been awarded some if the previous practice had still applied.

CONSIDERATIONS

1. The complainant has been employed by the OPCW since 1997 as an inspector, at grade P-4.

2. Until 23 March 2004, Chemical Weapons Destruction Facilities (CWDF) inspectors, like all other inspectors, were granted one replacement day for each Saturday, Sunday or official OPCW holiday falling within the period of their inspection missions. On that date, the Acting Director of the Inspectorate Division issued a memorandum providing, with immediate effect, that:

"each inspector returning from a CWDF inspection is entitled to one replacement day per week (7 days) worked, plus any official holidays spent on mission."

3. The memorandum of 23 March 2004 was apparently issued because the Acting Director of Inspectorate perceived an inconsistency between the practice with regard to replacement days and the terms of Administrative Directive AD/PER/12. That directive has since been revised to accord with the memorandum but, until it was

revised on 27 April 2005, it provided for one replacement day for each Saturday, Sunday or official OPCW holiday on which "four hours or more of official inspection activities [were] performed" subject to deduction of one day for each weekday "on which official inspection activities [were] not performed". The directive also provided that "[o]fficial travel during inspections [should] be regarded as a part of official inspection activities".

4. On 20 April 2004 the complainant asked the Acting Director of Inspectorate to reconsider "the newly implemented calculation of replacement days". Her request was refused and, on 19 May, she requested the Director-General to review "the administrative decision of the Acting Director of the Inspectorate [...] to change the calculation of replacement days in regard to CWDF inspection missions". Apparently, the complainant had either completed or undertaken a CWDF mission after 23 March 2004 and her request for review was treated as though she had requested the review of a decision to grant her replacement days in conformity with the internal memorandum of 23 March 2004 instead of the earlier practice. The Director-General replied on 15 June stating that, in light of AD/PER/12, it would not be correct to grant a replacement day, on an automatic basis, for each Saturday, Sunday or official OPCW holiday "as was apparently being done previously". The complainant thereafter filed an appeal with the OPCW Appeals Council.

5. The Appeals Council held, contrary to the contentions of the complainant, that the directive did not provide for the granting of a replacement day for every Saturday, Sunday or official OPCW holiday falling within an inspection mission. It also held that the granting of replacement days in accordance with the internal memorandum of 23 March 2004 was inconsistent with AD/PER/12. However, because the earlier practice had become "well established", it recommended that the appeal be upheld, the previous practice reinstated and the replacement days that should have been granted in accordance with that practice reimbursed.

6. The Director-General did not accept the recommendation of the Appeals Council. Instead, the complainant was informed on 6 April 2005 that her replacement day entitlements would be recalculated on the basis of one day for each Saturday, Sunday or official OPCW holiday on which she had performed four or more hours of official inspection activities subject to a deduction for each weekday on which official inspection activities were not performed. She was also informed that if a recalculation revealed a discrepancy, no action would be taken to recover days wrongly granted. That decision is the subject of the present complaint.

7. The complainant's primary argument is that AD/PER/12, when properly construed, requires that a replacement day be granted for each Saturday, Sunday or official OPCW holiday falling during an inspection period. In this regard, she refers to paragraph 6 of AD/PER/12 which defines an "inspection period" as "any single period of official inspection activities [...] beginning when an inspection team leaves The Hague and ending when it returns to The Hague".

8. The expression "official inspection activities" is not defined in AD/PER/12. However, as a matter of ordinary language, it indicates the actual performance of duty rather than mere presence or availability. That meaning is reinforced by the fact that the directive provides for the calculation of replacement day entitlements by reference to whether or not official inspection activities are performed on a particular weekday or for a particular number of hours on a Saturday, Sunday or official OPCW holiday. And that meaning is entirely consistent with the definition of "inspection period" in paragraph 6 of AD/PER/12. That definition merely indicates that inspection activities must be performed in the relevant period for it to be an "inspection period".

9. It follows that the directive did not, in terms, provide for the calculation of replacement days by reference to each Saturday, Sunday or official OPCW holiday on which an inspector was on an inspection mission. However, the complainant points out that a CWDF inspector can be called upon to perform duties at any time regardless of his or her roster and that his or her liberty is severely constrained in that, ordinarily, he or she can only leave his or her assigned accommodation under escort. She contends that a CWDF inspector is, by virtue of that constant availability and those constraints, performing official inspection activities at all times during an inspection mission. In support of this argument, the complainant relies on the judgment of the European Court of Justice in Case C-151/02. In that case it was held that, for the purposes of Council Directive 93/104/EC, a doctor's on-call duty, when required to be present in a hospital, must be regarded as working time even if the doctor is permitted to rest during periods when not required to perform duties. That decision was based on the terms of the Council Directive there considered and does not have direct relevance to the present case.

10. The difficulty with the argument that, because of their constant availability and the constraints on their liberty, CWDF inspectors are continuously performing inspection activities, is that it deprives the words "perform"

and “activities” of all meaning. Those words clearly signify that entitlement to replacement days is dependent on the actual discharge of duties associated with an inspection for a period or periods totalling four or more hours, and not merely on the inspector’s availability. And that is so even though the inspector’s personal liberty is constrained in the manner indicated. Accordingly, the argument based on availability and the restriction of personal liberty must be rejected.

11. The complainant contends that the time spent performing duties associated with an inspection outside her roster was not and could not be taken into account in the calculation conducted by the Organisation following the Director-General’s decision of 6 April 2005. In this respect, she contends that the only materials from which that calculation could have been made were the inspection shift schedules which did not record the time spent outside rostered hours in the performance of official duties and, moreover, did not record travelling time to and from The Hague. This is disputed by the defendant. Moreover, the Organisation contends that the question whether the complainant’s replacement day entitlements were correctly calculated following the decision of 6 April 2005 cannot properly be the subject of the complaint. It is not necessary to pursue that question for the complainant has presented no material to suggest that she was entitled to any replacement day or days in addition to those revealed by the recalculation directed by the Director-General.

12. One other matter may be noted. As the practice of granting a replacement day for each Saturday, Sunday or official OPCW holiday falling during an inspection period is inconsistent with the terms of AD/PER/12, that practice cannot be elevated to the status of law so as to entitle the complainant to additional replacement days, as was seemingly thought by the Appeals Council. (See Judgments 486, 554, 1390 and 2411.)

13. The complainant also contends that the decision of the Director-General of 6 April 2005 infringes the principle of equality in that it resulted in CWDF inspectors being treated differently from other inspectors. Certainly, the immediate result of the internal memorandum of 23 March 2004 was that CWDF inspectors were treated differently from other inspectors to the extent that the latter continued to benefit from the previous practice of granting a replacement day for each Saturday, Sunday and official OPCW holiday falling during the course of an inspection mission. It is not clear whether that practice has since been discontinued. However and as already indicated, until April 2005, AD/PER/12 made the same provision with respect to replacement day entitlements for all inspectors, whether CWDF inspectors or otherwise. If between March 2004 and April 2005, the practice resulted in other inspectors receiving leave day entitlements by reference to the number of Saturdays, Sundays and official OPCW holidays falling during an inspection mission regardless of whether duties were then performed for four or more hours, that practice was contrary to and, thus, not authorised by AD/PER/12. It is well settled that the principle of equality requires the equal application of the relevant law, not its equal misapplication. Accordingly, the complainant’s argument based on unequal treatment must also be rejected. As the complaint must be dismissed, it is not necessary to consider whether all the applications to intervene are receivable.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, 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.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.