

The Administrative Tribunal,

Considering the seventh complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 24 January 2006 and corrected on 15 February, the Organisation's reply of 22 May, the complainant's rejoinder of 20 June and the EPO's surrejoinder of 18 July 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. Facts relevant to this case are given in Judgments 1559, 1832, 1891, 2040, 2299 and 2412 delivered in the complainant's previous cases. The latter is employed as a Directorate Assistant in Directorate-General 2 (DG2) of the European Patent Office, the secretariat of the EPO. On several occasions he applied for posts as a technically qualified member of a board of appeal in Directorate-General 3 (DG3), but his applications were unsuccessful.

The complainant's staff report covering the period from 1 September 2000 to 31 December 2001 was established in June 2002; at that time he was a Principal Examiner. In the report he was given the overall rating "very good". In the section intended for the staff member's comments, he requested that a comment appearing in his previous reports and acknowledging that he was regarded as fit to serve as a member of a board of appeal be included in the 2000-2001 staff report. The reporting and countersigning officers refused to accede to this request on the grounds that DG2 was not competent to express an opinion on the complainant's fitness to serve in DG3. On 5 September 2002 the complainant initiated the conciliation procedure provided for in section D of the General Guidelines on Reporting. His report for 2000-2001 was not, however, amended in any way.

By letters dated 30 October and 11 November 2003 the complainant lodged an internal appeal in which he requested that the comment in question be added to his staff report. The matter was referred to the Appeals Committee which, in its report of 12 October 2005, unanimously recommended that his appeal be rejected. By a letter of 16 November 2005, which constitutes the impugned decision, the Director of Personnel Management and Systems notified the complainant that the President of the Office had decided to reject his appeal in accordance with the Committee's opinion.

B. The complainant states that all his staff reports established after 1 January 1990 had included a "favourable comment" acknowledging his fitness to serve as a member of a board of appeal. In this respect, he explains that in July 1996 he had lodged an internal appeal against the decision not to include such a comment in his staff report for 1994-95 and that, in 1997, he had thus obtained the addition of the comment in question. He therefore holds that the Administration's refusal to include such a comment in his staff report for 2000-2001 is inconsistent with the decision of 1997.

The complainant also submits that the decision to remove the "favourable comment" from his staff reports was taken following the delivery, on 31 January 2001, of Judgment 2040 on his fourth complaint, because in that judgment the Tribunal had found that the criteria for promotion were not decisive when selecting members of a board of appeal. However, he contends that the omission of that comment was unjustified, since the decision he impugned in his fourth complaint was tainted with the "fatal flaw" identified in Judgments 2244 and 2341, in that the Appeals Committee of the Administrative Council – the committee which had examined the three appeals he had lodged prior to filing his fourth complaint – had been incorrectly composed.

The complainant believes that the decision to remove from his staff reports the comment acknowledging his fitness to serve as a member of a board of appeal proves that he has been subjected to "systematic and ongoing discrimination" because, in his opinion, it is "unthinkable" that an application for this kind of post from an

examiner who, like him, has long demonstrated his abilities, should be continually rejected.

The complainant requests that the “favourable comment” which appeared in his previous staff reports be retained in his report for 2000-2001. In addition, he claims damages in the amount of 1,000 euros and costs amounting to 2,000 euros.

C. In its reply the Organisation draws attention to the fact that it is well settled that staff reports are subject to only limited review by the Tribunal. It states that the reporting officer enjoys wide discretion and is not bound by the comments made by his or her predecessors. In the instant case, the limits of that discretion have not been overstepped and there is nothing to suggest that the decision no longer to include in the complainant’s staff reports the comment acknowledging his fitness for membership of a board of appeal stemmed from a hostile attitude towards him. On the contrary, such a decision is in line with general practice and the reason given, namely that DG2 is not competent to assess an examiner’s fitness to work in DG3, is “legally unimpeachable”.

In the EPO’s opinion, the fact that the comment had appeared in the complainant’s staff reports for ten years does not establish any right to have it retained. Similarly, it takes the view that reference to the fact that the comment was reinstated in the report for 1994-95 is of no consequence for, at that time, the Administration had not yet realised that such a comment was out of place in a staff report.

Lastly, the EPO contends that Judgments 2244 and 2341 cannot have the effect of calling into question final decisions which are no longer open to challenge or previous judgments.

D. In his rejoinder the complainant endeavours to show that, in the instant case, the Organisation overstepped the limits of its discretion and that it infringed the principle of the protection of legitimate expectations especially when it made certain appointments to appeal boards in 1991 and 1994. He adds that, in deciding to remove from his staff reports the comment acknowledging his fitness to serve as a member of a board of appeal, the Organisation was seeking to destroy his chances of being appointed to such a post, although the quality of his work and his efficiency have never been denied to date.

E. In its surrejoinder the EPO maintains its position and observes that the complainant goes beyond the purview of his complaint in referring to earlier appointments.

## CONSIDERATIONS

1. The complainant, who is employed as a Directorate Assistant at grade A4(2) in DG2 of the European Patent Office, has submitted several unsuccessful applications for grade A5 posts as a technically qualified member of a board of appeal.

2. Although as from 1 January 1990 the complainant’s staff reports contained a comment acknowledging his fitness to serve as a member of a board of appeal, that comment was removed from his report covering the period from 1 September 2000 to 31 December 2001. On 18 July 2002 the complainant requested that the comment in question be retained in the latter staff report but, on 1 September 2003, the Vice-President of DG2 signed the report without amending its contents.

The reason given for the omission of the comment in question was that DG2 was not competent to express an opinion on the complainant’s fitness to serve in DG3.

In a letter from the Director of Personnel Management and Systems, dated 16 November 2005, the complainant was notified that the President of the Office had decided, in accordance with the opinion of the Appeals Committee, to reject the appeal he had lodged challenging the omission of the comment in question.

3. At the material time, Article 47, paragraph 1, of the Service Regulations for Permanent Employees of the European Patent Office read as follows:

“The ability, efficiency and conduct in the service of each permanent employee, with the exception of those in Grades A7 and A6, shall be the subject of a report made at least once every two years under the conditions established by the President of the Office.

The report shall be communicated to the employee concerned who shall be entitled to make any comments thereon which he considers relevant.”

A staff report may be challenged by means of a complaint satisfying the requirements of Article VII of the Statute of the Tribunal. However, a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence (see Judgments 806, under 15, and 1144, under 7). The Tribunal has made it clear that the person approving the report must allow the reporting officer wide discretion and that the staff member’s own comments, which are inserted in the report, may serve to remedy any error of judgement there may have been. Approval of the report may be refused if the reporting officer has made an obvious mistake of fact over some important point, if he has neglected some essential fact, if he has been grossly inconsistent, or if he can be shown to have been prejudiced (see Judgment 973, under 4).

4. Contrary to what seems to emerge from the submissions set forth in the complaint and, above all, in the rejoinder, the subject of the complaint is not the use the reporting officers made of their wide discretion. Indeed, the complainant was rated “very good” in all the sections of the staff report in issue and he does not claim that he ought to have been given the higher rating of “outstanding”. The question is whether the authors of the report were wrong not to express an opinion on the complainant’s fitness to be promoted to a post of member of a board of appeal.

In this respect, it should be emphasised that, as is pointed out in section A, paragraph 2, of the Guidelines on Reporting, the general aim of the reporting system is to ensure that the performance and abilities of individual staff members are fairly and objectively evaluated so that, with the passage of time, they have a reasonable chance of moving to more responsible work and securing promotion.

The staff report is therefore an important document, particularly for the use of promotion bodies, even when promotion entails a considerable change in the type of post occupied. But these bodies are not bound by the staff report when they compare the assessment of the performance and abilities of a candidate for promotion with the requirements of the post that he or she is hoping to obtain. The bodies responsible for making the appointment therefore also enjoy a wide discretion because they are best placed to determine the needs of the service in which the vacancy has occurred.

Hence it is not incumbent upon the authors of a staff report to make a specific assessment of the fitness of a staff member to carry out the duties which might be given to him in a service all of whose requirements they cannot claim to know. The authors of staff reports established in the Office therefore rightly refrain from making assessments in the form of a precise recommendation on promotion to a specific post.

5. The complaint is therefore clearly devoid of merit.

In light of the parties’ clear written submissions, the Tribunal does not consider it necessary to order the hearing requested by the complainant.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.