

The Administrative Tribunal,

Considering the complaint filed by Mr F. S. against the Food and Agriculture Organization of the United Nations (FAO) on 14 February 2007 and corrected on 14 April, the FAO's reply of 14 August and the complainant's letter of 24 September 2007 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

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 Brazilian national born in 1965, joined the staff of the FAO on 18 January 2004 as an Animal Production Officer at grade P-4 in the Animal Production Service (AGAP) of the Animal Production and Health Division (AGA). His three-year fixed-term appointment was subject to a one-year probationary period.

Six months after his entry on duty, his immediate supervisor, Mr C., prepared his first probationary performance appraisal report, rating his performance as "satisfactory" and recommending that his appointment be confirmed. This report dated 3 August 2004 was signed without comment on the same day by the Division Director of AGA. On 19 October 2004 the Division Director asked the Service Chief of AGAP to prepare the complainant's second probationary performance appraisal report. In her appraisal report of 19 November 2004 the Service Chief noted *inter alia* that the complainant was "arrogan[t], bypassing hierarchy", and she identified "lack of respect of institutional and political processes ruling the International Civil Service" as one of the areas where improvement was needed. She rated his performance as "not satisfactory" and recommended termination of his appointment upon expiry of the probationary period. On 22 November 2004 Mr C. also prepared and signed a second appraisal report, in which he reiterated his "satisfactory" rating and again recommended confirmation of the complainant's appointment.

In a letter dated 29 November 2004 addressed to the Service Chief and copied to the Division Director, the complainant objected that his immediate supervisor should have participated in his second appraisal. The Division Director replied on 30 November 2004 that, in keeping with the Service Chief's appraisal, he recommended that the complainant be separated from service upon the expiry of his probationary period. On 9 December 2004 the complainant initiated the conciliation procedure provided for in Appendix E to Section 331 of the FAO Administrative Manual. By memorandum of 14 January 2005 from the Assistant Director-General in charge of the Administration and Finance Department, he was advised that the Director-General had decided to endorse the Division Director's recommendation. He was consequently separated from service on 17 January 2005.

That same day the complainant lodged an appeal with the Director-General against the decision to terminate his appointment at the end of his probationary period. He was notified by a letter of 18 March from the Assistant Director-General in charge of the Administration and Finance Department, writing on behalf of the Director-General, that his appeal had been rejected. On 10 June 2005 the complainant submitted an appeal to the Appeals Committee.

In its report of 3 March 2006 the Committee concluded that the challenged decision was flawed because his immediate supervisor, Mr C., had neither prepared the second appraisal report nor been invited to provide his comments on the decision to terminate the complainant's appointment. It found that this deliberate exclusion compromised the objectivity of the appraisal and it recommended *inter alia* that the complainant be reinstated with effect from 17 January 2005, or that he be given payment in lieu of the unserved period of his appointment. By a letter dated 16 October 2006, which constitutes the impugned decision, the Director-General informed the complainant that he had decided not to follow the Committee's recommendations. In his view, the applicable rules and the Tribunal's relevant case law had been overlooked by the Committee. The Service Chief was best placed to perform the complainant's second appraisal and the latter's unsatisfactory performance justified the termination of his appointment. The Director-General thus rejected the appeal.

B. The complainant alleges that the decision to terminate his appointment at the end of his probationary period is tainted with a procedural flaw in that the deliberate exclusion of his immediate supervisor, which contravened the assessment procedure set out in paragraph 305.5.241 of the Administrative Manual, casts doubt on the objectivity of his second appraisal. Recalling the case law, he emphasises that the structure of AGAP does not justify an exception to the principle that appraisal reports must be made in the first instance by immediate supervisors, nor did the FAO rely on such an exception during the internal proceedings. Even though the Division Director disagreed with the first appraisal made by the immediate supervisor, he could not ignore it and the Director-General should have taken it into account when reaching his decision. In the complainant's view, the Division Director appointed the Service Chief to write his second appraisal report in order to obtain an assessment that would fit the Division Director's preconceptions, without having to justify his negative opinion. This, he submits, constitutes a breach of due process. The criticisms made in the second appraisal report are unsubstantiated and none of them relates to the quality of his work.

The complainant adds that, as noted by the Appeals Committee, after his first appraisal he had no clear plan of work and was assigned to tasks other than those listed as core responsibilities in his terms of reference.

He asks the Tribunal to quash the impugned decision, to confirm his appointment and to reinstate him in his post or an equivalent post with retroactive effect from 17 January 2005 and to order the Organization to pay him compensation in an amount equivalent to the salary, benefits, "advantages", "prerogatives" and advancement opportunities which would have accrued from the termination of his appointment to the end of the three-year period stated in his contract. He also claims 25,000 United States dollars in moral damages and 5,000 dollars in costs.

C. In its reply the FAO recalls that, according to the case law, the decision to terminate an appointment at the end of a probationary period is a discretionary one. It contends that there is overwhelming evidence of the complainant's inappropriate conduct and poor performance. Furthermore, it submits that the Division Director was justified in deciding to have the complainant's second appraisal performed by the Service Chief who, the FAO notes, had already been asked to perform the first appraisal report, though she had delegated it to Mr C. The notion of "immediate supervisor" as provided for in paragraph 305.5.241 and described in the case law must be interpreted as the official who is best qualified to assess a probationer's performance. The Service Chief was indeed best placed to carry out the complainant's performance appraisal given that the Division Director had good reasons to doubt that Mr C. possessed the necessary competence and objectivity, in view of his own performance record and his close personal relationship with the complainant. Besides, Mr C. did not actually supervise the complainant's work in any significant way during the period in question.

The Organization argues that the complainant's due process rights were respected since he was warned on several occasions after his first appraisal that his inappropriate conduct and unsatisfactory performance raised serious concern. He was also afforded several opportunities to discuss these issues before his second appraisal report was signed and his comments were considered in the Division Director's recommendation.

CONSIDERATIONS

1. The complainant joined the FAO under a three-year fixed-term appointment on 18 January 2004. His appointment to the post of Animal Production Officer in AGAP was subject to a probationary period expiring on 17 January 2005. After six months of service his immediate supervisor, Mr C., prepared his first probationary performance appraisal report rating the complainant's performance as "satisfactory" and recommending confirmation of his appointment. The report was endorsed by the Division Director of AGA on 3 August 2004. On 19 October 2004 the Division Director requested the Service Chief of AGAP to prepare the complainant's second probationary performance appraisal. This second report rated the complainant's performance as "not satisfactory" and recommended termination of his appointment at the end of the probationary period; it was also endorsed by the Division Director. The complainant was consequently separated from service on 17 January 2005 on the grounds that he was not suitable for continued employment with the Organization. He filed an appeal with the Appeals Committee which recommended, *inter alia*, that the appeal be upheld and that he be reinstated with retroactive effect from 17 January 2005, or that he be given payment in lieu of the unserved period of his three-year fixed-term appointment. By a letter of 16 October 2006 the Director-General informed the complainant that he had decided to reject his appeal. The complainant impugns that decision before the Tribunal. His claims are set out under B, above.

2. The complainant contends that his second performance appraisal report was prepared in violation of the procedures established by the Administrative Manual and that, as a result, he was deprived of the objective appraisal to which he was entitled. He states in particular that his second performance appraisal was conducted in breach of the procedure established by paragraph 305.5.241 of the Manual because of the deliberate exclusion of his immediate supervisor from the appraisal process. Paragraph 305.5.241 provides inter alia:

“the one-year probationary period includes a plan of work and two review periods to be reported upon. The following schedule should be observed closely and may be varied only in agreement with the Director [of the Human Resources Management Division]:

(a) within three weeks after [entry of duty]: the immediate supervisor discusses the job description with the probationer and provides him or her with a plan of work embracing the duties to be performed or objectives and tasks to be completed within six months after EOD;

(b) six months after [entry of duty]: the immediate supervisor completes the Probationary Performance Appraisal Report [...] shows it to and discusses it with the probationer, who may request that his or her observations be attached to the report. The report, including any observations by the probationer, is sent to the division director for comments. [...]

(c) nine months after [entry of duty]: the immediate supervisor completes the [Probationary Performance Appraisal Report] for the second review period and includes his or her recommendation on the probationary period: namely confirmation of appointment, extension of probationary period or separation. The report is again shown to and discussed with the probationer, who may request that his or her observations be attached to the report. [...]

3. The FAO argues that the Division Director was fully justified in exercising his discretion to replace Mr C. for the assessment of the complainant’s performance, as he could not reasonably expect an objective appraisal from him because “the complainant was effectively [Mr C.’s] protégé”. The Organization claims that the meaning of “immediate supervisor” is non-specific and generic, and can change according to who is best placed to make a performance appraisal under the particular circumstances. In the present case, the Service Chief was “best placed to evaluate the complainant’s performance” because she was “more closely involved in the work of the complainant”.

4. The Appeals Committee based its recommendation on the findings that there was no clear plan of work for the complainant for the three months after the first probationary performance appraisal and that the deliberate exclusion of the complainant’s immediate supervisor, Mr C., from the preparation of his second performance appraisal was in contravention of the prescribed procedures as it compromised the objectivity of the appraisal. This constituted a substantive procedural flaw and the Committee recommended that the appeal be upheld. The Committee rejected the relevance of the *ubi maior minor cessat* principle – according to which the delegation of the second appraisal to the Service Chief was acceptable because it was consistent with the hierarchy of the Division – in view of the fact that rules and procedures were prescribed by the Administrative Manual.

5. In the Tribunal’s view, the replacement of Mr C., the immediate supervisor, with the Service Chief in the preparation of the complainant’s second performance appraisal was a violation of paragraph 305.5.241(c). The purpose of this provision is to ensure the objectivity of the appraisal process and has to be complied with irrespective of the Division Director’s opinion. The procedure requires that the immediate supervisor complete the appraisal report. The Organization’s reference to the *ubi maior minor cessat* principle is not applicable to this case in which there is a specific rule. As the complainant’s duties had not been substantially modified, there was no objective reason for a change of the supervisor assigned to him. Moreover, if the Organization’s argument were accepted, the Director would have the authority to change the appraiser whenever he disagreed with an appraisal, a situation that the rule seeks to avoid. Consequently, the appraisal procedure is flawed.

6. The Tribunal also finds that the complainant was not provided with a clear plan of work for the period following his first performance appraisal, as required by paragraph 305.5.241(b) which provides that “[a] further plan of work is established for four months by the immediate supervisor” at the end of the first period to be reported upon. In addition, he was not given a proper warning as to the fact that his appointment might not be confirmed due to unsatisfactory performance. The decision to terminate the complainant’s appointment was therefore unlawful and must be set aside.

7. The relief the complainant seeks includes reinstatement, compensation for material and moral injury, and legal costs. The Tribunal holds that reinstatement, which could only be as a probationer, would raise practical difficulties because of the time that has elapsed since the date of termination of the complainant's appointment (see Judgment 1386, under 26).

In view of the circumstances, it is not clear that the complainant's appointment would have been confirmed had the appraisal process been properly conducted. However, as a result of the Organization's improper actions, the complainant lost a valuable opportunity to have his appointment confirmed. The loss of that opportunity warrants an award of material damages in the amount of 30,000 United States dollars. Further, the Tribunal concludes that the Organization's conduct was an affront to the complainant's dignity and caused him stress for which he is entitled to moral damages in the amount of 20,000 dollars. The complainant is also entitled to his costs, which the Tribunal sets at 1,000 dollars.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The FAO shall pay the complainant material damages in the amount of 30,000 United States dollars.
3. It shall pay him moral damages in the amount of 20,000 dollars.
4. The FAO shall also pay the complainant 1,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet