

The Administrative Tribunal,

Considering the second complaint filed by Mrs M. d. R. C. e S. d. V. against the World Meteorological Organization (WMO) on 11 December 2006, the Organization's reply of 12 April 2007, the complainant's rejoinder of 29 June and WMO's surrejoinder of 3 October 2007;

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 hearings;

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 Judgment 2742, also delivered this day. Suffice it to recall that the complainant, who was born in 1959 and has dual Portuguese and Italian nationality, served as Chief of WMO's Internal Audit and Investigation Service, at grade P.5, from 1 June 2003 until 1 February 2006, when she was reassigned to the post of Chief of the new Internal Audit Service. In July 2006 she was temporarily transferred to the post of Special Advisor in the Resource Management Department, in which she remained until her dismissal in November 2006.

On 30 September 2005 the Secretary-General sent a memorandum to the complainant asking her to prepare her performance appraisal report for the period 1 January 2004 to 30 September 2005 and inviting her to discuss it with him on 12 October 2005. This meeting took place as scheduled, but the complainant subsequently objected to the fact that it had also been attended by the Assistant Secretary-General. Consequently, a second meeting was held on 28 November between the Secretary-General and the complainant alone. On 6 December the Secretary-General completed part III of the report containing his summary of the appraisal interviews. Next, on 21 December, the complainant added her detailed comments under part IV. Finally, both she and the Secretary-General signed the report on 4 January 2006. Neither indicated that they wished to have the report referred to the Review Board, which they could have done by ticking a box on the report form.

By a memorandum of 2 March 2006 the complainant requested that the Secretary-General reconsider the appraisal on the grounds that the procedure followed was irregular and that the report did not reflect all her duties, skills and responsibilities. The Secretary-General replied on 17 March that he considered the appraisal as being completed. He noted that all comments previously provided in writing had been attached to the report.

On 13 April the complainant lodged an appeal with the Joint Appeals Board requesting that the disputed appraisal report be invalidated and replaced with a new one, that the Secretary-General recognise that she had been performing the duties of the new post of Director of the Internal Oversight Office – for which she had applied without success – since June 2004 and that he issue her a letter of commendation. In its report dated 21 September 2006 the Joint Appeals Board recommended that the appraisal report be referred to the Review Board, since that was the first step in the rebuttal procedure provided for in the Guidelines to Performance Appraisal in WMO attached to Service Note No. 19/2005.

On 4 October 2006 the Secretary-General wrote to inform the complainant that, in accordance with the recommendation of the Joint Appeals Board, he agreed to refer her appraisal report to the Review Board if she so wished. That is the impugned decision.

B. The complainant submits that the Secretary-General failed to comply with the procedure governing performance appraisals. In particular, she points out that no criteria were defined prior to the disputed appraisal and that the attendance of the Assistant Secretary-General during the appraisal interview was contrary to Staff Rule 145.2 and Standing Instruction 4.5.5.

She also contends that her appraisal report is tainted with bias and prejudice on the part of the Secretary-General. In her opinion, the appraisal reflects the latter's desire to retaliate against her for having challenged his authority by

pursuing her fraud investigation.

The complainant seeks the setting aside of the disputed performance appraisal report and its removal from her personal file; acknowledgement, by the Secretary-General, of the fact that she has fulfilled all the responsibilities and duties of the post of Director of the Internal Oversight Office since June 2004; a letter of commendation and a certificate of work in respect of her work in connection with the fraud investigation; official recognition of the fact that she has suffered harassment through her performance appraisal “due to her role as whistleblower”; moral damages in the amount of 45,000 Swiss francs, and costs. She also requests witness hearings and an order for the production of various documents.

C. In its reply WMO contends that the complaint is irreceivable for failure to exhaust internal remedies. It explains that under the performance appraisal system set out in Service Note No. 19/2005, where there is disagreement between the staff member and the supervisor as to the content of the report, either party can request that the report be referred to the Review Board, which will then make a recommendation. Only decisions taken following the recommendation of the Review Board can be appealed before the Joint Appeals Board. In the present case, not only did the complainant omit to request referral to the Review Board at the time when she signed her appraisal report, but she also refused to do so subsequently when the Secretary-General gave her that option in his letter of 4 October. Consequently, the complainant is not challenging a final decision on her appraisal report and her complaint is irreceivable pursuant to Article VII(1) of the Tribunal’s Statute. The defendant adds that some of the complainant’s claims were not raised before the Joint Appeals Board and are therefore irreceivable.

On the merits the Organization rejects the argument that the appraisal is tainted with procedural flaws. It points out that the Secretary-General often invites another senior manager to attend the performance appraisal interviews of officials who report directly to him and that, in any case, a second interview was held between her and the Secretary-General alone. Besides, the complainant has not shown how the presence of the Assistant Secretary-General affected the Secretary-General’s opinion of her performance. It also denies the allegations of bias and prejudice on the part of the Secretary-General, noting that he did not in fact make any negative comment concerning her investigation work in the disputed appraisal report. It further points out that the evidence produced by the complainant contradicts her allegation that there were no criteria against which to evaluate her performance.

D. In her rejoinder the complainant asserts that she did exhaust internal remedies before filing her complaint and that the Secretary-General had no right to refer her appraisal report back to the Review Board. She submits that his insistence on having the case referred back to the Board is simply an attempt to prevent her appeal from being heard in accordance with due process. She develops her arguments on the merits.

E. In its surrejoinder WMO maintains its position in full, whilst deploring the attempts by the complainant and her lawyers to exert political pressure on the Organization, particularly by pursuing a media campaign and legal actions in the United States and Switzerland.

CONSIDERATIONS

1. The complaint, the second between the same parties presently before the Tribunal for decision, challenges a decision of the Secretary-General, dated 4 October 2006, to refer the complainant’s performance appraisal report for the period 1 January 2004 to 30 September 2005 to the Review Board if she so wished. Instead of proceeding to the Review Board, the complainant filed a second complaint by which she seeks, amongst other things, an order declaring her appraisal report invalid, damages and costs.

2. The Secretary-General completed the appraisal report in question on 6 December 2005 following meetings between him and the complainant on 12 October and 28 November 2005. The Assistant Secretary-General attended the first meeting although he had no supervisory role in relation to the complainant and had only joined the WMO Secretariat in August 2005. The complainant completed her part of the report on 21 December 2005, making detailed comments with respect to certain of the Secretary-General’s remarks. Those comments were appended to the report which was later placed in her personal file. Neither the Secretary-General nor the complainant completed that part of the form indicating a wish to have the appraisal referred to the Review Board.

3. On 2 March 2006 the complainant requested the Secretary-General to reconsider her performance appraisal report. He replied on 17 March stating that he considered the report completed. The complainant then filed an

internal appeal with the Joint Appeals Board in which she sought, amongst other relief, to have the report declared invalid. The Appeals Board referred to the Guidelines to Performance Appraisal, revised in September 2005, which require, as a first step, that the report be submitted to the Review Board and, if the matter is not then resolved, that it proceed through the normal grievance mechanisms. On this basis, the Joint Appeals Board held that the appeal was premature. However, it noted that there was no time limit for the referral of a performance appraisal report to the Review Board and recommended that it be then referred.

4. Although the complainant did not ask that her performance appraisal be referred to the Review Board and did not accept the Secretary-General's offer to refer it, she contends that her complaint is receivable. In particular, she contends that, as she lodged an appeal with the Joint Appeals Board, she has exhausted all internal remedies as required by Article VII of the Tribunal's Statute. In the alternative, she argues that, in accordance with the Tribunal's case law, she is entitled to bring a complaint to the Tribunal even though she has not exhausted internal remedies.

5. WMO Service Note No. 19/2005 introduced a streamlined system for performance appraisal under which the Review Board only reviews appraisal reports "indicating an unresolved disagreement [...] or signs that the process was not followed correctly and fairly". Paragraph 3 indicates that the Review Board, on its own motion, or a staff member or supervisor can initiate a review. Paragraph 7 relevantly provides that the rebuttal procedures remained unchanged and that:

"as a first step in the rebuttal process the [performance appraisal report] is submitted to the [...] Review Board. [...] the next step [...] is to initiate action through the existing general grievance mechanisms in place in the Secretariat."

As no step had been taken to refer the complainant's performance appraisal to the Review Board, the Joint Appeals Board was correct to hold that the complainant's appeal was premature. Accordingly, the complainant has not exhausted internal remedies.

6. The case law allows that "the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants' rights" (Judgment 2039). It is contended that the decision of the Secretary-General, whereby he agreed to refer the complainant's performance appraisal to the Review Board if she so wished, is in effect an obstruction of justice, by reason of the fact that she was summarily dismissed shortly afterwards. It is also contended that, given its composition, the Board will not exercise an independent judgment in her case. These arguments must be rejected. There is no reason to assume that, had the complainant wished to challenge her performance appraisal in accordance with the prescribed procedures, the Review Board would not have been appropriately constituted and would not otherwise have had proper regard to the requirements of due process. Nor is there any basis for thinking that that situation was altered by her summary dismissal.

7. It was said in Judgment 1301, in relation to performance appraisal reports, that "[t]he requirement that a complainant go through any internal procedure is not just a formality" and that, in consequence, there is an "obligation to make due efforts under the rules to challenge the [appraisal]". The underlying reason for the case law that allows a complaint to be brought if the requirement to exhaust internal procedures would paralyse the complainant's rights was explained in Judgment 1674. It was said in that case that the "internal procedure must be deemed exhausted when the complainant has done his utmost to get things going yet no decision is likely reasonably soon".

8. In the present case, the complainant took no steps to initiate the review procedures and declined to avail herself of them when the Secretary-General indicated his willingness to refer her appraisal report to the Review Board. Accordingly, there is no basis on which it can be deemed that internal remedies were exhausted.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

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

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.