

The Administrative Tribunal,

Considering the complaint filed by Mr A.M. K. against the World Intellectual Property Organization (WIPO) on 5 August 2006, the Organization's reply of 7 November, the letter of 17 November sent by the Organization's Legal Counsel to the Registrar of the Tribunal, the complainant's rejoinder of 15 December 2006 and WIPO's surrejoinder of 3 April 2007;

Considering the second complaint filed by the complainant against WIPO on 15 January 2007 and corrected on 10 March, the Organization's reply of 6 June, the complainant's rejoinder of 10 September and WIPO's surrejoinder of 19 October 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not 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, an Algerian national born in 1956, joined WIPO in April 1998 at grade P.5, as Deputy Director of the Cooperation for Development Bureau for Arab Countries. After several transfers he received a permanent appointment on 1 April 2005.

On 29 March 2005 WIPO published Vacancy Announcement No. D1764 with a view to filling the grade D.1 post of Director of the Economic Development Bureau for Arab Countries in the Economic Development Sector. The complainant applied for the post in May; his application was written in French. He was interviewed by the Appointment and Promotion Board on 2 September.

The complainant was informed by an e-mail of 10 October 2005 that his candidature had been rejected. When he asked for clarification of the reasons for this decision, he was told that the Board's deliberations were secret. On 18 November he lodged a first appeal with the Director General in which he requested a review of the decision to reject his candidature. As the Director General dismissed this appeal, the complainant referred the matter to the Appeal Board on 15 March 2006. In its report the Board acknowledged that the complainant had raised some valid points, but considered that there had been no flaws in the selection procedure. It recommended, however, that the Administration should inform the complainant of the reasons why he had not been selected for the post for which he had applied. By a letter of 19 May 2006, which constitutes the decision impugned in the first complaint, the Director of the Human Resources Management Department notified the complainant that the Director General had decided to dismiss his appeal.

In the meantime, on 14 December 2005, the Administration had published Information Circular 54/2005 announcing that on 15 November 2005 an external candidate had been appointed Director of the Economic Development Bureau for Arab Countries. On 30 January 2006 the complainant submitted a second appeal to the Director General in which he asked him to review the decision to appoint this candidate to the post in question. As this appeal was dismissed, he referred the matter to the Appeal Board on 14 June, alleging that the successful candidate did not meet one of the requirements stipulated in the vacancy announcement and that the selection procedure had been flawed in some respects. In its report of 4 September the Board found that there was no reason to cancel the appointment which had been made. However, it reiterated its recommendation that the complainant should be informed of the reasons for the rejection of his candidature. By a letter of 13 October 2006, which constitutes the decision impugned in the second complaint, the Director of the Human Resources Management Department informed the complainant that the Director General had dismissed his appeal.

B. In his first complaint, the complainant endeavours to show that the selection procedure which led to the rejection of his candidature was tainted with flaws and irregularities. He submits that, since the post for which he applied was at grade D.1, the Appointment and Promotion Board had no authority to advise the Director General,

but the Coordination Committee should have been consulted in accordance with Staff Regulation 4.8(a). In his view, since the recommendation of the Appointment and Promotion Board was issued by a body that was not competent, it cannot constitute the legal basis for any appointment and must be “withdrawn”.

The complainant further submits that, even if the Appointment and Promotion Board had been competent, its membership would not have complied with its Rules of Procedure or with Staff Regulation 4.9(b)* because an additional member – the Deputy Director General in charge of the Economic Development Sector – sat on the Board and, although he did not have the right to vote, he asked him questions during the interview.

Lastly, the complainant alleges that the Chairman of the Appointment and Promotion Board did not possess the requisite language skills to assess applications submitted in French, and that the principles of equal treatment and equal opportunity among candidates were thus breached. He adds that the members of the Board were not qualified to assess the candidates’ fluency in Arabic, even though the vacancy announcement stated that they must have an “excellent knowledge” of that language. In support of his argument he annexes to his submissions a series of documents containing some “biographical information” about the Board members.

The complainant asks the Tribunal to find that the decision to reject his candidature stemmed from a procedure tainted with the above-mentioned irregularities and flaws and consequently to set it aside. He also asks it to find that among the five shortlisted candidates he alone had the requisite 15 years’ experience with regard to the promotion of the use and protection of intellectual property, and that preference should therefore have been given to him.

In his second complaint the complainant challenges the decision to appoint the successful candidate to the post for which he had applied, and he asks the Tribunal to order the joinder of his two complaints, because the facts giving rise to each case are identical. He reiterates the pleas he entered in his first complaint.

The complainant also puts forward a number of other pleas concerning the irregularities tainting the above-mentioned decision. He submits that the successful candidate did not meet one of the requirements of the vacancy announcement, namely that of having “at least 15 years of wide experience both at headquarters and in the field of technical cooperation or external relations with regard to the promotion of the use and protection of intellectual property, preferably in the sphere of intergovernmental organizations or diplomatic service”. He contends that when she applied for the post the successful candidate had only three years’ experience in the relevant field of intellectual property. According to the Tribunal’s case law, the person appointed at the end of a selection procedure must have at least the qualifications stipulated in the vacancy notice. He therefore considers that WIPO has violated the principle of *tu patere legem quam ipse fecisti* as well as the basic rules relating to the methods of deliberation and of selecting and appointing candidates, which are set out in the Rules of Procedure of the Appointment and Promotion Board. The complainant stresses that he had more than 22 years of experience in the field in question, but he does not consider that this should give him “priority” for appointment to the post.

The complainant contends that the selection procedure was flawed because, despite the fact that the vacancy announcement expressly provided for consultation of the Coordination Committee, this did not take place. In his opinion, this omission can be explained by the adoption in September 2005 of an amendment to Staff Regulation 4.8(a) which gives the Director General the power to make appointments to a D.1 or D.2 grade post without having to consult the Committee beforehand. He submits that Office Instruction 26/2005 of 10 November 2005 announcing the adoption of that amendment is illegal, as it gave retroactive effect to the amendment by setting the date of its entry into force at 1 November 2005. In his view, the new version of the provision in question could not apply to the competition opened by Vacancy Announcement No. D1764. The complainant also points out that, although the successful candidate worked at WIPO from August 1998 to July 2001, on being reappointed in November 2005 she had to be regarded as becoming a staff member for the first time, in accordance with Staff Regulation 4.13, since more than 12 months had elapsed since her separation from service in July 2001. Her candidature should therefore have been submitted again to the Coordination Committee.

The complainant asks the Tribunal to find that the selection procedure is tainted with the irregularities outlined above and to declare it invalid. He also asks it to set aside the recommendation issued by the Appointment and Promotion Board, the decision dismissing his internal appeal and the appointment of the successful candidate to the post of Director of the Economic Development Bureau for Arab Countries. He claims one Swiss franc as symbolic compensation for the moral injury suffered, as well as an award of costs.

C. In its reply to the first complaint, the Organization submits that the complainant's pleas concerning the Appointment and Promotion Board's membership and method of functioning are time-barred, because he did not challenge the competence of this body when he was called to the interview, at the interview or during the six-week period for submitting an appeal which ran as from each of these dates. It explains that, during the interview, the complainant was fully aware that in accordance with "WIPO's usual practice" it had been decided that the Board should include a participant who did not have the right to vote, but who would be allowed to put questions to the candidates.

The Organization states that it acted in good faith and in keeping with its interests. Relying on the Tribunal's case law, it asserts that the complainant has not shown that the selection procedure was seriously flawed, or that the Director General – who had previously held the post to which the complainant aspired – abused the discretion that he enjoys in matters of recruitment. In this case, the Director General, exercising his discretion, set up an "ad hoc selection board" which constituted an "appropriate transitional mechanism" before the entry into force of the new version of Regulation 4.8(a) and which helped him to form an opinion with a view to making the disputed appointment. This body – the Appointment and Promotion Board – comprised experienced senior officials, and the presence of the Deputy Director General in charge of the Economic Development Sector was not prohibited by Regulation 4.9. Moreover, the presence of this official was fully justified, as he was going to be the immediate supervisor of the person appointed to the post advertised, and indeed it "enhanced the quality" of the Board's deliberations. Having carried out an overall assessment of the required qualifications, the Board recommended the selection of the candidate it considered to be best qualified.

Regarding the language skills of the Chairman and members of the Appointment and Promotion Board, WIPO asserts that the complainant's contentions are without substance, particularly because the Staff Regulations and Rules do not lay down any specific language requirements which must be met by the members of this Board.

At the Tribunal's request, the Organization forwarded a copy of the complaint to the successful candidate and invited her to submit comments. By a letter of 17 November 2006 the Legal Counsel of WIPO informed the Registrar that this person did not wish to submit any comments.

In its reply to the second complaint, the Organization states that it does not object to the complainant's request for joinder but emphasises that, while the facts giving rise to the two complaints are identical, the impugned decisions are different.

The Organization denies that the selection procedure was tainted with irregularities and maintains that, since an appointment is made at the Director General's discretion, this decision is subject to only limited review by the Tribunal. In this case the Appointment and Promotion Board carefully examined the candidatures. Unlike the complainant, who has a "strict and static view" of the selection criteria, the members of the Board based their recommendation on a "dynamic view of the candidates' qualifications and qualities as a whole". In response to the complainant's allegations that the successful candidate did not satisfy one of the qualifications required by the vacancy announcement, the Organization asserts that the candidate in question possessed wide professional experience and "other more significant qualifications which were needed for shouldering" the responsibilities of a director's post. In this regard WIPO points out that the purpose of a selection procedure is to identify the candidate whose profile best matches the job description and the qualifications required in the vacancy announcement, and it submits that the complainant has not shown that he was more suited to the duties of Director of the Economic Development Bureau for Arab Countries than the successful candidate. Furthermore, her appointment had the advantage of enabling the Organization to achieve equal numbers of male and female staff members and to comply with the principle of geographical distribution, since the successful candidate was Lebanese and at that time there was no other official possessing this nationality.

According to WIPO, the amendment of Regulation 4.8(a) was adopted in accordance with normal practice and caused the complainant no injury, since his candidature could not have been submitted directly to the Coordination Committee either before or after the adoption of this amendment. In addition, he has not proved that the new version of the paragraph in question was applied arbitrarily or abusively in order to prevent his appointment.

D. In the rejoinder pertaining to his first complaint, the complainant submits that WIPO's reply is irreceivable because, contrary to what is indicated on its first page, it is not signed by the Organization's Legal Counsel. In this connection he puts forward a number of claims with the aim of obtaining rulings in law from the Tribunal on the issue of the delegation of authority and of signature.

The complainant explains that his pleas are not time-barred because the periods of time for filing an appeal could not start to run as long as no administrative decision adversely affecting him had been taken.

On the merits he reiterates and enlarges on his pleas. The explanations he furnishes give rise to numerous claims also aimed at obtaining rulings in law from the Tribunal. For example, on the issue of the competence of the Appointment and Promotion Board, in essence the complainant asks the Tribunal to declare that the Administration committed an “abuse of process” by not consulting the Coordination Committee and that, by extending the sphere of competence of the Appointment and Promotion Board, WIPO in fact revised the Staff Regulations and infringed Staff Regulation 12.1(a) concerning amendments to the Regulations. In addition, he invites the Tribunal partially to set aside Office Instruction 26/2005 with respect to the date of the entry into force of the new version of Staff Regulation 4.8(a).

The complainant further considers that the Tribunal must find that the documents annexed to his complaint prove that the members of the Appointment and Promotion Board did not possess the requisite language skills to assess the candidatures, a factor which affected the validity of the selection procedure in various ways. He also requests that WIPO be ordered to produce the Board’s recommendation.

With respect to the participation of the Deputy Director General in charge of the Economic Development Sector in the above-mentioned Board, the complainant asks the Tribunal to declare that the practice on which the Organization relies cannot take precedence over a provision of the Staff Regulations or of the Board’s Rules of Procedure.

He adds that since 10 October 2005, and despite his repeated requests, the Organization has still not notified him of the reasons for the rejection of his candidature, notwithstanding the Appeal Board’s recommendation that this should be done and the firm case law on the matter. Since WIPO informed him that the successful candidate was selected because her profile most closely matched the qualifications required in the vacancy announcement, the complainant asks the Tribunal to find that this reason is not valid because the candidate in question did not meet one of the post’s requirements. In his opinion, the Tribunal must recognise that WIPO acted in breach of its duty of care. He asserts that the refusal to tell him why his candidature was rejected has caused him moral injury, for which he claims symbolic compensation of one franc.

In the rejoinder pertaining to his second complaint, the complainant reiterates his request for joinder and maintains his arguments.

E. In its surrejoinder concerning the first complaint WIPO indicates that the official who signed its reply in the absence of the Legal Counsel was “fully authorised” to do so. The signature in question was appended in compliance with Article 5(3) and (4) of the Rules of the Tribunal.

The Organization maintains its position on the merits. It points out with respect to the issue of divulging the reasons for the decision to reject the complainant’s candidature that the deliberations of the Appointment and Promotion Board are secret and that it must comply with its internal rules. Nevertheless, were the Tribunal to consider that it must disclose the content of these deliberations, it states that it is prepared to submit them for examination by the Tribunal, “provided that their disclosure is confined to the specific case of the complainant”. The Organization considers that the complainant’s candidature was treated fairly. The candidate most suited to the post advertised was chosen and the complainant has not proved that the Director General abused his discretion.

In its surrejoinder concerning the second complaint, WIPO reiterates its position and relies on the Tribunal’s case law. It states that in this case the Appointment and Promotion Board and the Director General carefully considered the selection criteria and did not disregard any of the required qualifications.

CONSIDERATIONS

1. The complainant, an Algerian national, joined WIPO on 1 April 1998 at grade P.5 as Deputy Director of the Cooperation for Development Bureau for Arab Countries.

On 29 March 2005 the Organization issued a vacancy announcement for the post of Director of the Economic Development Bureau for Arab Countries.

The complainant applied, was shortlisted along with four other candidates and was invited to an interview on 2 September 2005 with a body which was instructed to give an opinion as to the candidate to be selected for the post in question. On 10 October he was however informed that his candidature had been rejected. The appointment of another shortlisted candidate was announced by an information circular of 14 December 2005.

Having appealed in vain to the Director General against the rejection of his candidature and the appointment of the successful candidate, the complainant then referred each of the decisions to dismiss these appeals to the Appeal Board, in accordance with Staff Regulation 11.1.

In two separate complaints to the Tribunal he has in turn challenged the decisions of 19 May and 13 October 2006 by which the Director General, acting on the advice of the Appeal Board, confirmed the decision to reject his candidature and the decision to appoint the new Director of the Economic Development Bureau for Arab Countries, respectively.

Joinder of the complaints

2. The joinder of the two complaints has been requested by the complainant and accepted, with certain reservations, by the Organization. These complaints, which are directed against decisions taken in the same selection procedure and which are clearly linked, raise similar issues of fact and of law. They shall therefore be joined in order that they may form the subject of a single judgment.

Receivability

3. The complainant has impugned each of the disputed decisions within the time limit laid down in Article VII of the Statute of the Tribunal. In support of his claims, he may rely on the unlawfulness of any act related to the conduct of the selection procedure he is challenging. Contrary to the Organization's submissions, neither the fact that the complainant agreed to submit to that procedure, particularly by taking part in the interview, nor the fact that he did not appeal at the time against each of the various actions taken to define it, renders his pleadings before the Tribunal irreceivable.

Both complaints are therefore receivable in all respects.

The merits

4. Of the many pleas entered by the complainant in support of his complaints, the one which is decisive in the eyes of the Tribunal is that the successful candidate did not meet one of the conditions stipulated in the vacancy announcement. According to this announcement, one of the four qualifications which candidates had to possess was "at least 15 years of wide experience both at headquarters and in the field of technical cooperation or external relations with regard to the promotion of the use and protection of intellectual property, preferably in the sphere of intergovernmental organizations or diplomatic service".

It is clear from the evidence on file, and it is not disputed by the Organization, that the successful candidate did not satisfy the condition of at least 15 years of experience in this field of activities. In fact, apart from an earlier three-year stint at WIPO, she had mainly worked at the United Nations in fields other than intellectual property.

5. The Tribunal has consistently held that an international organisation which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications stipulated in the vacancy announcement (see for example Judgments 1158, 1646 and 2584.)

Such conduct, which is tantamount to modifying the criteria for appointment to the post during the selection process, incurs the Tribunal's censure on two counts. Firstly, it violates the principle of *tu patere legem quam ipse fecisti*, which forbids the Administration to ignore the rules it has itself defined. In this respect, a modification of the applicable criteria during the selection procedure more generally undermines the requirements of mutual trust and fairness which international organisations have a duty to observe in their relations with their staff. Secondly, the appointment body's alteration, after the procedure had begun, of the qualifications which were initially required in order to obtain the post, introduces a serious flaw into the selection process with respect to the principle of equal opportunity among candidates. Irrespective of the reasons for such action, it inevitably erodes the safeguards of objectivity and transparency which must be provided in order to comply with this essential principle, breach of

which vitiates any appointment based on a competition.

This exegesis of the Tribunal's case law certainly applies to the present case.

6. Although the Organization asserts that the successful candidate possessed the other qualifications required and had merits and qualities which fully warranted her appointment, this assessment of the overall strength of her candidature could not entitle the appointing authority to select an applicant who did not satisfy one of the conditions required in the vacancy announcement. In this connection, it may be noted that when the Appeal Board was consulted it mistakenly endorsed the Organization's line of argument.

Moreover, the fact that the appointment of the successful candidate, who happens to be Lebanese, conveniently enabled WIPO to achieve some of its management goals, such as that of increasing the proportion of women in senior management positions or that of the geographical distribution of its officials – which is encouraged by Staff Regulation 4.2 – is likewise irrelevant in this case. However legitimate these goals may be, they could not override the Organization's obligation to appoint to the post in question a candidate who possessed the required qualifications and experience initially stipulated. Geographical origin could be taken into consideration only if the opposing candidates were of equal merit.

7. The Organization's argument that the complainant did not in any case have a better profile for the vacant post than the successful candidate is inoperative, given that the point at issue is not whether the complainant should have been selected for the job but whether the successful candidate could lawfully be appointed to it.

8. Furthermore, it must be observed that the other applicants – even if they have not filed a complaint – were also eliminated improperly and that other potential candidates might have been dissuaded from applying because they did not meet the condition of having 15 years of experience as stipulated in the vacancy notice, though this was ultimately not applied to the successful candidate. Thus, the whole competition became a sham.

9. It follows that the decision to reject the complainant's application for the post of Director of the Economic Development Bureau for Arab Countries and the decision to appoint the new Director to this post were taken at the end of a flawed selection procedure and were therefore unlawful.

For this reason, and without there being any need to consider the other pleas and claims for rulings in law or to order the submission of additional evidence as requested by the complainant, the decisions of 19 May and 13 October 2006, confirming the two above-mentioned decisions, must be set aside, as must the decisions themselves.

10. In consequence thereof it shall be incumbent upon WIPO to hold a new selection procedure on terms which it shall determine in order to fill the post in question in a lawful manner.

The Organization may of course adopt all necessary measures to ensure continuity of service in the meantime.

It shall also ensure that the successful candidate is shielded from any injury which might result from the cancellation of her appointment, which she accepted in good faith.

11. The complainant's claim for compensation in respect of the moral injury he has suffered on account of the unlawfulness of the decisions set aside by this judgment is well founded. The Organization shall therefore be ordered to pay him the symbolic compensation in the amount of one Swiss franc which he claims.

12. As he succeeds, the complainant is entitled to costs, which the Tribunal sets at 1,000 Swiss francs.

DECISION

For the above reasons,

1. The decisions of the Director General of WIPO of 19 May 2006 and 13 October 2006 confirming the decisions not to retain the complainant's candidature and appointing the new Director of the Economic Development Bureau for Arab Countries are set aside, as are these decisions themselves.

2. WIPO shall hold a new selection procedure in order to fill the post in question in a lawful manner.

3. The Organization shall shield the successful candidate from any injury which may result from the cancellation of her appointment.
4. The Organization shall pay the complainant one Swiss franc in symbolic compensation for the moral injury suffered.
5. It shall also pay him costs in the amount of 1,000 Swiss francs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

* This paragraph reads as follows: “The Appointment and Promotion Board shall consist of a chairman and three members, whose grade shall be not lower than that of the vacant post, appointed by the Director General. [...] The Director of the Human Resources Management Division shall be a member of the Board *ex officio*, without the right to vote [...]”