

The Administrative Tribunal,

Considering the complaint filed by Ms M. J. against the World Health Organization (WHO) on 21 February 2002, the WHO's reply of 5 June, the complainant's rejoinder of 25 July and the Organization's surrejoinder of 4 October 2002;

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 the hearing of witnesses;

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

A. The complainant, who was born in 1952 and has Cameroonian and Swiss nationality, joined the WHO in August 1980 as a Clerk-Stenographer at grade G.3. She remained with the Organization under a series of contracts for the next 18 years, obtaining a career service appointment in 1994. From 17 December 1996 to 20 June 1998 she was on leave without pay. During and after the expiry of her leave she worked periodically under short-term contracts. On 1 December 1999 she began a two-year fixed-term appointment as Protocol Assistant at grade G.5, in the Governing Bodies Department (GBS) of the External Relations and Governing Bodies Cluster (EGB).

In accordance with Staff Rule 420.4 her appointment was subject to a one-year period of probation. The complainant's performance appraisal for the one-year period of probation, ending 30 November 2000, was largely unfavourable. She disagreed with the conclusions reached by her immediate supervisor and the appraisal procedure proved difficult to finalise. As a temporary measure, the complainant's second-level supervisor extended her probationary period for two months and assigned her to the Word Processing Centre (WPC). The performance appraisal report was finalised on 29 January 2001, the complainant having submitted final observations in a memorandum of 26 January.

With effect from 1 February 2001, the complainant was assigned to her current post as Secretary in the External Cooperation and Partnerships Department (ECP) and her probationary period was extended for a further six months.

On 2 February 2001 the complainant filed an internal appeal with the Headquarters Board of Appeal challenging her performance appraisal report for the probationary period, the decision to extend her probationary period and the decision to transfer her from her post as Protocol Assistant in GBS. In its report of 14 September 2001 the Board recommended that the performance appraisal report be quashed and a brief note inserted in the complainant's personal file explaining the absence of the report, which was not to be replaced; that the decision to extend the complainant's probationary period be quashed and that she be confirmed in her current post as from 1 December 2000 with full payment of her within-grade salary increase from that date; and that she be awarded costs.

By a letter of 28 November 2001, the Director-General informed the complainant that she rejected the recommendations of the Board in their entirety. That is the impugned decision.

B. The complainant challenges her performance appraisal report, her transfer to WPC and the extension of her period of probation.

She identifies three defects in the appraisal report. First, it was tainted by mistakes and omissions of fact and by erroneous conclusions. It contained general allegations of unsatisfactory performance which were not supported by proper explanations or specific examples. On 4 December 2000 she had submitted a detailed memorandum

contesting the comments written by her immediate supervisor, which she considered to be inaccurate and unsubstantiated, but this was not taken into consideration.

Secondly, relying on the Tribunal's case law the complainant asserts that her performance appraisal report was tainted by personal prejudice on the part of her immediate supervisor. She considers that relations between herself and her supervisor deteriorated following an incident in October 2000 involving a misplaced boat ticket, for which her supervisor attempted to blame her. When the complainant submitted a note for the file denying responsibility for this incident, her supervisor threatened retaliation; this, according to the complainant, accounts for the negative appraisal as well as various other forms of degrading treatment by her supervisor. The complainant also points out that her supervisor failed to indicate, during the course of the year in question, that she was dissatisfied with her performance, in breach of Staff Rule 530.2.

Thirdly, her appraisal report was procedurally flawed. Her immediate and second-level supervisors both failed to observe the sequence of actions prescribed in paragraph E of the instructions for the completion of performance appraisal reports. In addition, her immediate supervisor not only failed to provide the complainant with a copy of her appraisal when she requested it, but also denied the complainant the right to rebut it by failing to respond to her memorandum of 4 December 2000.

With regard to her transfer to WPC, which she describes as a "wrongful ousting" from her previous post, the complainant considers that the decision was procedurally irregular insofar as she was neither notified of it nor consulted prior to its implementation; such failure, she says, amounts to a breach of "a fundamental right of due process". When she returned to work on 13 November 2000 following a period of sick leave, she found that her personal belongings had been cleared from her desk and placed in a box in the corner of her office. Her supervisors thus "failed to treat [her] with the dignity and respect she was owed as an international civil servant".

She asserts that the decision to transfer her to WPC was clearly based on prejudice and bad faith, since in twenty years of service in the Organization her performance appraisals had invariably been satisfactory. The sudden reversal of that trend could only be explained by a personal bias on the part of her supervisors.

Regarding the extension of her probationary period the complainant points out that having been granted a career service appointment in 1994, which was valid until 2012, she clearly satisfied the requirements of Staff Rule 420.4. She submits that the period of probation is intended to establish an employee's suitability for work in the Organization, and not for a particular post. Since her suitability for work in the Organization was not in doubt, the extension of her probationary period was unwarranted and irregular.

The complainant seeks redress as follows: quashing of the impugned performance appraisal report, to be replaced in the complainant's personal file either by a new appraisal report or by a note explaining its absence; termination of her probationary period with effect from 1 December 2000 with full retroactive payment of her within-grade salary increases from that date; a disciplinary investigation into the conduct and actions of her former immediate and second-level supervisors; 50,000 Swiss francs in moral damages; costs; interest from 1 December 2000 at an annual rate of 10 per cent on all sums awarded, until full payment of same; and such other relief as the Tribunal shall deem just, necessary and equitable. She also requests the hearing of witnesses and asks the Tribunal to order the WHO to produce various documents relating to the impugned performance appraisal, the decision to transfer her from her post and the decision to extend her probationary period.

C. In its reply, the WHO emphasises the discretionary nature of the decision to extend the period of probation and points out that the Tribunal will exercise only a limited review over such decisions in the absence of a formal or procedural flaw.

Rejecting the allegation that the complainant's appraisal report was flawed, it provides examples of what each supervisor considered to be unsatisfactory performance. Neither the Staff Rules, nor the Staff Regulations nor the Manual stipulates any requirement as to the length or level of detail of an appraisal report, and the complainant's immediate supervisor did provide examples in support of her comments on the accuracy of the complainant's work.

The WHO asserts that there is no evidence to support the complainant's allegation that her performance appraisal report was tainted by personal prejudice. It dismisses the boat ticket incident as a misunderstanding to which the complainant overreacted and produces a statement in which her immediate supervisor testifies that she was not motivated by personal prejudice. It considers the case law cited by the complainant to be irrelevant, since it

concerns the non-renewal of an appointment and not the extension of a probation period on the basis of a performance review.

As for the procedural flaws, the Organization provides its own account of the chronology of events and asserts that the complainant's supervisors fully complied with the instructions governing appraisal reports. The complainant was given a copy of her draft appraisal, though not immediately after her request but two days later; she acknowledged receipt of both the draft appraisal and the final version. The Organization also points out that the Board's findings concerning the sequence of events surrounding the completion of the appraisal report are contradictory and erroneous.

With regard to the alleged denial of the complainant's "right of rebuttal", the WHO observes that she had several meetings with her supervisors to discuss the appraisal. In addition, she was able to submit comments which now form part of the appraisal. It therefore considers that the complainant's right of reply was "fully respected".

The WHO disputes the complainant's account of her temporary transfer to WPC and asserts that she was informed of it by telephone prior to returning to work on 13 November 2000. She was assigned to WPC in response to her own request not to return to her post.

The WHO considers that it is not clear from the complainant's brief whether in challenging her transfer from her post in GBS she is referring to her assignment to WPC or to her subsequent assignment to a post in ECP. It nevertheless submits that insofar as the complainant challenges the decision to reassign her to a post in ECP, which in any case was a valid exercise of discretionary authority, her claims are irreceivable since she failed to challenge that decision in her internal appeal.

The WHO asks the Tribunal to reject the complainant's requests for oral hearings and for the production of further documents.

D. In her rejoinder the complainant rejects the allegation that her performance was unsatisfactory, pointing out that no negative comments concerning her performance were recorded in writing and that the appraisal does not indicate how her performance was lacking. No meeting ever took place between herself and her second-level supervisor to discuss her performance and she never asked to be transferred from GBS. Neither was she informed of that transfer by telephone prior to 13 November 2000.

The complainant confirms that it is her transfer to WPC that is impugned, and not her assignment to ECP. She acknowledges that she has not appealed internally against the decision to assign her to a post in ECP, but argues on the basis of Judgment 2067 that she is entitled to invoke it as part of an accumulation of events in support of her allegation of harassment. Indeed, she concludes by asserting that she was the victim of "harassment and discrimination" which "manifested itself in the form of a substantively and procedurally irregular appraisal report, an improper transfer [...] and an irregular extension of her probationary period".

E. In its surrejoinder the WHO reiterates that it properly exercised its discretionary authority. The complainant was in fact neither transferred nor reassigned within the meaning of the Staff Rules, but provisionally assigned duties other than the duties of her post, in accordance with Staff Rule 565.4.

CONSIDERATIONS

1. The complainant first began working with the defendant Organization in 1980. After a brief separation, she was appointed to a G.5 post in November 1999, with a one-year probationary period.

2. Problems developed between the complainant and her immediate and second-level supervisors. The complainant appealed against her performance appraisal report for the probationary period, which was unsatisfactory. She also challenged the extension of her probationary period and her transfer to another post, which resulted from the appraisal. She is now challenging a final decision rejecting her internal appeal. She alleges incomplete consideration of the facts, personal prejudice, discrimination on the part of her supervisors and failure to follow the procedure prescribed in the Staff Rules and Staff Regulations. Among her several claims she is requesting that the appraisal report be quashed, that her probationary period be terminated retroactively from 1 December 2000 and that disciplinary measures be taken against her supervisors. She also claims moral damages.

3. The Organization states that the complainant's performance was not satisfactory during her probationary period. It decided to extend her probation in another post. Her appointment to that post was eventually confirmed. The Organization holds the view that her criticisms are unfounded, her reassignment was a valid exercise of discretionary authority and the appraisal process complied with the procedural requirements.

4. The complainant's internal appeal resulted in a favourable recommendation from the Headquarters Board of Appeal but the Director-General refused to endorse it and dismissed her appeal. That is the impugned decision.

5. The Board concluded that there was a personality clash between the complainant and her immediate supervisor. Things had apparently come to a head in October 2000, just prior to the preparation of the disputed appraisal report. The Board was faced with conflicting versions both as to the dispute and as to the circumstances in which the report had been prepared.

6. The Board essentially accepted the complainant's version of the key events and concluded that "the conflicting statements in themselves clearly indicated a strong clash of personality between the [complainant] and her first level supervisor". However, it noted the following:

"[...] the conflicting statements made by both parties, as well as the confused and verbose nature of the documents presented by the [complainant], had made it extremely difficult for them to work out exactly how the appraisal had been prepared, when the various sections had been completed and if there had been proper and full discussion of them beforehand."

7. Notwithstanding this, the Board determined that there had been serious procedural flaws in the preparation of the report. It also found that "the appraisal report had not been completed correctly and in a proper frame of mind".

8. As a result, the Board concluded that the appraisal report was invalid. It thus recommended that the appraisal report be quashed and that a brief note be placed in the complainant's personal file explaining its absence.

9. The Board also recommended that the decision to extend the complainant's period of probation be quashed and that she be confirmed in her current post as from 1 December 2000, with full payment of her within-grade salary increases from that date. The Board recommended that there be no further compensation but that the complainant be fully reimbursed of her actual legal fees and costs.

10. Because the Board's report is based upon the findings of fact which it made on questions relating particularly to the chronology of the events leading to the disputed appraisal report, and because the impugned decision specifically disagreed with those findings, it was incumbent on the Director-General to explain in some detail why she felt the Board had erred. There is no serious dispute that if the Board was right in its view of the facts, there was no error in its finding that the prescribed procedure had not been followed. In fact, the sum total of the comments in the impugned decision concerning the Board's findings is as follows: "some of the considerations of the Board, upon which its conclusions are based, do not reconcile with the chronology of events".

11. The following is what appears to be the relevant portion of the Board's chronology to which this Delphic comment refers:

"On 13 November 2000, on her return to work, the [complainant] was informed that she had been transferred from her post to a post in the GBS Word Processing Centre. The [complainant] completed Section 1 of the appraisal report containing her self-evaluation on 17 November 2000. On 28 November, the [complainant] and [her supervisor] met to discuss the probationary appraisal report. [The supervisor] prepared a written appraisal which was typed into the report form prior to that meeting, but refused to give a copy to the [complainant].

On 30 November, at the request of the Staff Association, the [complainant] was provided with a copy of [the supervisor's] appraisal and requested to submit her comments by 4 December.

On 4 December, the [complainant] wrote a 10-page memorandum to [her supervisor], with copy to [her second-level supervisor], [the personnel officer in the cluster's Management Support Unit], the Staff Association and the Ombudsperson, in which she contested her appraisal and requested information and clarification on a number of issues."

12. The Board's findings were as follows:

"From the documents presented by the [complainant] the Board noted that the [complainant] apparently did not complete Section 1 of the Probationary Appraisal Report, her self-evaluation, as the first step in the process before the report was discussed with her supervisor. Instead, [the supervisor] drafted written comments without prior discussion on a form on which the [complainant] had not completed her self-evaluation. When this draft text was discussed by the [complainant] and [the supervisor] on 28 November 2000, the latter refused to give her a copy of her written draft. The Board considered that [the supervisor's] refusal to provide a copy of the written draft was inappropriate."

13. The Board noted that the complainant completed and signed Part 1 of the report on 17 November 2000. The supervisor's written draft was copied into the final report word for word and signed by her on 21 December 2000.

14. The Board noted that this sequence of events was contrary to paragraph E of the instructions for the completion of performance appraisal reports. It also ran contrary to the general principle which was that the appraisal report was designed to "encourage a dialogue between supervisor and staff member".

15. It further noted that the immediate supervisor's comments (Part 5) were signed and dated 21 December 2000. The second-level supervisor's comments (Part 7) were signed and dated 22 December 2000, which suggested that the complainant had not been given the opportunity to complete Part 6 of the form before it was transmitted to her second-level supervisor. This was borne out by the fact that a meeting to discuss the report at which the complainant, the President of the Staff Association, a personnel officer from the cluster's Management Support Unit and her second-level supervisor were present, was held only on 24 January 2001. The complainant's comments, which the Organization said completed the appraisal procedure, were added only after Part 7 had been filled in by her second-level supervisor.

16. There is simply no significant discrepancy between the Board's considerations and the chronology of events. Perhaps the Director-General is referring to paragraph 9 of the Board's report where it found that the complainant apparently did not complete her self-evaluation as the first step in the process before the report was discussed with her supervisor. The chronology indicates that the complainant filled out Part 1 on 17 November 2000 and met with her supervisor on 28 November, at which point the complainant discovered that her supervisor had already drafted her evaluation. It is irrelevant, however, whether the complainant actually filled out Part 1 before her supervisor filled out the other sections, since her supervisor ought to have considered the complainant's self-evaluation before drafting her own, especially in light of the fact that the "draft" was copied verbatim into the final appraisal report. Absolutely nothing turns on this minor discrepancy.

17. The evidence suggests, and the Board found, that the appraisal process violated the Staff Rules. As mentioned above, the "draft" version of the complainant's supervisor's report was copied verbatim into the final report, without considering or answering the complainant's memorandum of 4 December 2000. The WHO states that the supervisor considered the complainant's memorandum in order to finalise her part of the appraisal report; however, since the final report is an exact replica of the draft, this contention is devoid of substance.

18. In addition, although the Organization implies in its reply that the complainant's second-level supervisor completed Part 7 in mid-January, it is clear that this part was signed on 22 December. The evidence indicates that the complainant's supervisor sent the complainant the final appraisal on 21 December. The complainant responded, in a memorandum dated 22 December, that she had no further comments since the final copy was the same as the draft and because she was still waiting for a response to her memorandum of 4 December.

19. The WHO argues that there was no procedural flaw in the appraisal process, since the complainant was provided with the final copy and chose not to comment. However, such a reading of the events would render the process meaningless. As the Board pointed out, the purpose of the whole exercise is "to encourage a dialogue between supervisor and staff member".

20. As such, even if her supervisor appeared to follow the proper procedure by sending her the appraisal report on 21 December, before the second-level supervisor had signed it, in order for the procedure to be meaningful, the second-level supervisor should not have written her comments until the complainant's supervisor had answered the memorandum of 4 December. The process is not a dialogue if one party does not listen to another. In this case, the complainant's supervisor did not consider the complainant's comments when preparing the evaluation.

21. The evidence thus supports the complainant's allegation that the proper procedure was not followed. The Board's assessment of the facts was a reasonable interpretation of the evidence. As well, its recommendations are reasonable solutions to the dispute. The decision to extend the probationary period was based on a flawed appraisal and the complainant should have been confirmed in her post.

22. As for the complainant's request that a disciplinary investigation be undertaken of her immediate and second-level supervisors, the Tribunal will not make any such order. In any event, the Board found that there was not enough evidence to support the complainant's allegations of prejudice and that is the end of the matter.

23. Since the complaint is allowed, the complainant shall have her period of probation ended retroactively as of 1 December 2000 and shall be confirmed in her present post as of that date; she shall receive all within-grade salary increases with effect therefrom. She is also entitled to moral damages which the Tribunal fixes in the amount of 3,000 Swiss francs and to costs of 1,500 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant's performance evaluation report for the period ending 30 November 2000 is annulled and is to be removed from her personal file and replaced by a reference to the present judgment.
3. The complainant's period of probation is to be ended retroactively with effect from 1 December 2000 and she is to receive all within-grade salary increases due since that date.
4. The Organization shall pay the complainant moral damages in the amount of 3,000 Swiss francs.
5. It shall pay her 1,500 francs in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet