

**116th Session**

**Judgment No. 3266**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. P. against the World Intellectual Property Organization (WIPO) on 1 July 2011 and corrected on 18 October 2011, WIPO's reply of 19 January 2012, the complainant's rejoinder of 25 April, and WIPO's surrejoinder dated 12 July 2012;

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 oral proceedings;

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

A. The complainant joined WIPO in July 2000 as part of an inter-agency transfer from the United Nations High Commissioner for Refugees (UNHCR) as Senior Human Resources Officer at grade P-4. The complainant was seconded to UNHCR between March 2002 and May 2003, and he returned to WIPO in June 2003. In May 2010 he was transferred to act as Senior Counsellor in the Office of the Deputy Director General for the Global Issues Sector and where he currently holds the grade P-4.

On 17 September 2007 the Assistant Director General, the complainant's then supervisor, sent a memorandum to the Director of Human Resources Management Department (HRMD) strongly recommending the complainant's promotion on merit from grade P-4 to P-5. On 4 October the Secretary of the Promotion Advisory Board acknowledged receipt of the request and asked for an updated Personal History form to assist the Board. The updated form was sent on 11 October 2007.

On 29 August 2008 the complainant sent a memorandum to the Assistant Director General pointing out that, since December 2006, he had been working as his "Office Manager" performing various and diverse tasks without a job description. He requested that steps be taken, in line with Staff Regulations and Staff Rules and the practice within the common UN system, to ensure that a job description be promptly developed and classified. In October 2008 the Assistant Director General forwarded the complainant's request to the Director of HRMD and the complainant met with an external classifier to discuss the scope of his functions and responsibilities in April 2009. On 20 May the complainant's supervisor was informed that the Director General had approved the recommendations made at the 75th session of the Classification Committee, among which was the confirmation of the complainant's post at its P-4 grade. On 20 June the complainant requested a review of the Director General's decision to maintain the classification of his post at the P-4 level. He was informed by a memorandum of 21 July 2009 that the Director General had denied his request for review.

In the meantime, on 8 October 2008, the new Director General signed Office Instruction No. 31/2008 concerning Promotion Advisory Boards, which advised staff members that the current Promotion Advisory Boards were disbanded with immediate effect. This was followed by Office Instruction No. 46/2008, dated 31 December 2008, in which staff members were informed that the guidelines on the promotion of staff in Office Instruction No. 8/2006 were discontinued. By Office Instruction No. 48/2009, dated 12 August 2009, an ad hoc Panel was established to review the

outstanding and remaining requests for promotion on merit. The Panel was to “review these outstanding requests with due regard to the relevant Guidelines, as they relate to promotion on merit, that were applicable at the time that the individual requests were submitted”.

By a letter of 18 January 2010 the complainant was informed by the Director of HRMD that recommendations had been made by the ad hoc Panel and approved by the Director General, and that the Panel had not recommended the grant of a promotion on merit in his case. On 11 March 2010 the complainant requested the Director General to review this decision. He was informed on 4 May 2010 that the Director General had decided to deny his request.

On 13 July 2010 the complainant submitted his appeal against this decision. In its report of 7 February 2011, the Appeal Board found that some of the complainant’s claims for relief were time-barred, except insofar as they could be considered as a natural consequence of the annulment of the contested decision. On the merits, the Board found that the Director General should have ascertained the reason why the ad hoc Panel disagreed with the supervisor’s assessment, and the reason should also have been specified in the Panel’s report. It concluded that, in approving the recommendation without ascertaining that reason, the Director General had not given due regard to the essential fact that the supervisor had confirmed the exceptional nature of the complainant’s contribution to the Organization. It also found that the 28-month delay between the request for promotion on merit of September 2007 and the decision of January 2010 clearly affected the complainant’s rights. Lastly, it found that there had been no violation of the principle of equal treatment, that the correct procedure and criteria had been followed by the ad hoc Panel, and that there was no evidence that the recommendations of the Panel or the decision of the Director General had been motivated by personal prejudice. The Board recommended, inter alia, that the Director General allow the complainant’s appeal and make arrangements for the request for promotion on merit to be reconsidered by an ad hoc Panel with a different membership from that of 7 December 2009. It recommended that the Director General instruct the ad hoc Panel to take into account

all the information submitted in 2007 in support of the request for promotion, as well as the criteria adopted by the Promotion Advisory Board at its 21st session. Lastly, it recommended that the Director General decide, should the promotion on merit be found justified, that such promotion should take effect on the date when the promotions following the 21st session of the Promotion Advisory Board of June 2008 took effect.

In a letter of 15 April 2011 the Director of HRMD informed the complainant that the Director General had decided not to adopt all of the Appeal Board's recommendations. In particular, the Director General underlined that the ad hoc Panel did not find the complainant's performance not exceptional, but rather, its finding was that the request for promotion submitted by the supervisor lacked clear justification that the complainant had discharged his responsibilities in an exceptional manner, as required by Office Instruction No. 8/2006. Therefore, contrary to the Appeal Board's finding, the reason for the Panel's negative recommendation in the complainant's case was clearly mentioned in its report: the lack of justification to support his request for promotion on merit. However, the complainant was informed that the Director General had decided to personally review all the documents that were submitted to the Panel in 2009 in order to ascertain the reason that led the Panel not to recommend his promotion on merit and to determine whether there were grounds to reconsider his initial decision. By a letter of 31 May 2011 the Director General informed the complainant that, after having carefully reviewed all the documentation on the complainant's performance, he had not found evidence to support or justify the grant of a promotion on merit under the applicable guidelines. He found that all the documentation provided, except one, related to the period prior to him joining WIPO. The Director General therefore informed the complainant that he maintained his previous decision not to grant the complainant a promotion on merit. That is the impugned decision.

B. The complainant argues that the Director General abused his authority and discretion by failing to grant him a promotion on merit or to reclassify his post to a grade commensurate with his skills,

training, experience, and the actual work he was performing in a more than satisfactory manner since he joined WIPO in 2000. In particular, the complainant asserts that the Director General, by simply stating that he “did not find” any evidence justifying the complainant’s promotion, despite the conclusions of the Appeal Board that the supervisor’s letter was *prima facie* evidence of exceptional performance, failed in his duty to provide reasons for rejecting the Board’s recommendations. In his view, the Appeal Board was correct in its findings and conclusions that there existed at the time of the application for promotion *prima facie* evidence of his exceptional performance and, as the Director General has not offered any rebuttal evidence to sustain his rejection of these findings, the complainant respectfully submits that the Tribunal, in the interest of economy and fairness, should grant him promotion and not remit the case back to a new ad hoc Panel.

Moreover, at the time the recommendation for promotion was made, the complainant fulfilled all the criteria required for a promotion, and the Assistant Director General was fully within his discretion to recommend him. The subsequent denial of promotion should therefore be vitiated as arbitrary and capricious. At that time, in September 2007, there was no provision in the guidelines requiring “exceptional performance” and the relevant criteria were to be found in Staff Regulation 4.3(b) which provides as follows: “Any staff member shall be entitled to promotion as a result of the reclassification of the post to which he is assigned, provided he has the required qualifications and his performance is satisfactory”. He refers to a promise which had been made to him upon his recruitment in 2000 that he would be promoted from grade P-4 to grade P-5 within the next six months, and to the fact that for the 13 years of his service the standards for promotion have been “an ever-moving target to his continuous detriment”.

The complainant also submits that his non-promotion was either the result of unequal treatment or personal prejudice. While he has finally been provided with terms of reference, he does not have a duly approved job description. His grade was confirmed at P-4 grade while

all other staff in similar postings were graded at P-5 at least. He has been set apart from his colleagues and, in the absence of any explanations to the contrary, it must be assumed that this treatment was meant to treat him differently from those situated in the same position of fact and law.

Further, the complainant argues that the impugned decision is tainted with several procedural irregularities. In his view, the Organization violated form and procedure by incorrectly citing as the reasons for his non-promotion the discontinuation of the Promotion Advisory Board in October 2008 and the subsequent request for reclassification of his post made by his supervisor also in October 2008. The request for promotion on merit had been made in September 2007, over a year before the Promotion Advisory Board was discontinued, and the request for reclassification was only submitted in April 2009 to the Classification Committee. WIPO's failure to process the request for promotion on merit within a reasonable time caused the complainant financial and moral injury, for which he is entitled to claim compensation.

Lastly, the complainant argues that WIPO used a "new criteria" to review the request for promotion on merit and he asserts that there are no clear guidelines in place to support recommendations for promotion on merit, as those that exist are "so lacking as to be rendered useless".

He asks the Tribunal to quash the impugned decision of 31 May 2011 and to order his retroactive promotion to grade P-5 as from 17 September 2007. He claims moral damages in an amount not less than 100,000 Swiss francs, as well as costs, with interest.

C. In its reply WIPO submits that his second complaint constitutes an abuse of the Tribunal's filing deadline. It transpires from exchanges with the Registrar and the date on the complainant's brief, that the complainant's original submission merely consisted of the complaint form, and was not accompanied by any brief, nor by any appendices, contrary to Article 6(1) of the Tribunal's Rules. While WIPO recognises that the Tribunal's Rules expressly provide for the

“correction” of complaints, it contends that this procedure should be limited to enabling complainants to correct their timely-filed submissions, rather than to allow the belated introduction of an entire brief, which is the very essence of the complaint and would allow complainants to circumvent the clear filing deadline prescribed by Article VII, paragraph 2, of the Tribunal’s Statute. It therefore considers the complainant’s brief, including the supporting documents, irreceivable.

Moreover, it argues that the complaint is partly irreceivable. The complainant’s attempts to broaden the scope of the complaint by including a challenge to the classification of his post undertaken in 2009 is both beyond the scope of this complaint and it is time-barred. While the complainant makes no distinction throughout his complaint between the issue of the reclassification of his post and his promotion on merit, WIPO stresses that these are two distinct and separate matters. The complainant was informed by the Director General that the grade of his current post had been confirmed at its P-4 level in July 2009. As noted by the Appeal Board, since the complainant did not appeal against that decision, he is not in a position to make any arguments in relation to this issue now.

WIPO draws the Tribunal’s attention to the fact that, in his rejoinder in the internal appeal proceedings, the complainant added for the first time a list of specific requests for relief, including a claim for moral damages which is now further increased on appeal to the Tribunal. WIPO objects to this unauthorised expansion of relief requested. WIPO also considers that the complainant has not provided any explanation in support of his request for oral proceedings.

On the merits, while WIPO does not deny that the complainant has made a positive contribution to the Organization over the past ten years, it is clear from the Tribunal’s case law that there is no right to promotion which can be derived from his performance records. It is also clear from the case law that a decision to promote is discretionary and subject only to limited review. In its view, the complainant has failed to prove that the discretionary decision of the Director General not to grant him a promotion on merit was taken on unlawful grounds

or otherwise tainted with abuse of authority, mistakes of fact and law or procedural irregularities.

The Organization notes that the complainant's assertions that the Panel used a "new criteria", based on a statement allegedly made to him by his supervisor, is not supported by any evidence. Moreover, as the complainant's request for promotion on merit was submitted in September 2007, the relevant guidelines were those contained in Office Instruction No. 8/2006. Therefore, the complainant is mistaken when he contends that "there was no provision within the promotion guidelines outlining 'exceptional performance' as a prerequisite to promotion" at the time his supervisor requested the complainant's promotion. It also points out that, pursuant to those guidelines, it is for the supervisors concerned and not the Administration, to substantiate their request for the promotion on merit of staff working under their supervision. Further, in the event that the Tribunal were inclined to remit the case to the Director General, WIPO respectfully requests that it be limited to the information and material that was submitted to the ad hoc Panel in 2007.

WIPO points out the request for a promotion on merit was subsequently overtaken by a request by the same supervisor for the reclassification of the complainant's post in October 2008. Since both requests are assessed according to different criteria and following different procedures, the Organization's consistent practice has been to process one request at a time in order to prevent the Promotion Advisory Board from considering, during the same session, two requests for promotion in relation to the same staff member, one based on merit and the other following a post reclassification. As a request for promotion can only be granted in exceptional circumstances, the request for the reclassification of the complainant's post was dealt with first, at the Classification Committee's session in April 2009. The Director General approved its recommendation to confirm the complainant's post at grade P-4 in May 2009. It is therefore incorrect for the complainant to assert that WIPO failed to process the request for promotion on merit within a reasonable time, as that request was put on hold by the subsequent reclassification request.

Bearing in mind that the promotion request was not granted, the complainant has suffered no loss from not having known earlier of the outcome of his request. WIPO also points out that, in the event that his claim to retroactive promotion is upheld, it would not be backdated to September 2007, as this is the date of submission of the request for promotion on merit and it is unrealistic to assume that a decision could be taken as soon as the request is submitted.

WIPO emphasises that the Appeal Board did not recommend that the complainant be promoted, nor did the Director General reject all the recommendations of the Board. As is clear from the letter of 15 April 2011 from the former Director of HRMD, the Director General adopted part of the recommendations and explained in detail why he was not in a position to adopt the recommendations in their entirety. The Director General therefore fully discharged his duty to explain the reasons for his decision.

Lastly, WIPO argues that the complainant's claims of unequal treatment and personal prejudice are completely unsubstantiated.

D. In his rejoinder the complainant presses his pleas. In his view, WIPO's argument on the abuse of the filing deadline is "excessively formalistic". He adds that there are a number of circumstances surrounding his case which, when taken together, point towards a disguised punishment for his active participation in staff union activities.

E. In its surrejoinder WIPO maintains its position in full.

#### CONSIDERATIONS

1. The complainant commenced employment with WIPO in July 2000. In September 2007, his supervisor recommended him for promotion from the P-4 to the P-5 level. Events concerning this recommendation in the period immediately following, need not be detailed. Of significance is that the Director General established an ad hoc Panel in August 2009 to review outstanding and remaining requests for promotion on merit. The Panel was to apply the

guidelines set out in Office Instruction No. 8/2006. One person whose suitability for promotion was considered by the Panel was the complainant. Ultimately it recommended that he not be promoted. The Director General decided to accept this recommendation. The complainant sought a review of this decision. This led to a decision of the Director General to decline the request for review, communicated to the complainant by letter dated 4 May 2010 from the Director of Human Resources Management Department (HRMD).

2. The complainant lodged an internal appeal from the decision of 4 May 2010. He did so by memorandum dated 13 July 2010 to the Chair of the WIPO Appeal Board. The subject matter of the appeal was identified as “the denial of my promotion on merit” as requested by his supervisor in September 2007. On 15 February 2011 the Appeal Board sent a 13-page document to the Director General containing its conclusions and recommendations together with its reasons. Its recommendations were:

- “(a) allow the Appeal;
- (b) make arrangements for the request for the Appellant’s promotion on merit to be considered by an *ad hoc* panel with a different membership from that of December 7, 2009, and to be the subject of a recommendation to the Director General;
- (c) instruct the ad hoc panel to take account–
  - (i) of the information and material submitted in support of the request for the Appellant’s promotion in 2007, and
  - (ii) of the criteria adopted, and of the kinds of cases in which promotion on Merit was recommended or not recommended, at the 21st session of the Promotion Advisory Board held on June 26, 2008;
- (d) decide, should the promotion on merit of the Appellant be found justified, that such promotion should take effect on the date when the promotions following the 21st session took effect.”

3. The response to the Appeal Board’s recommendations was in two letters. The first, dated 15 April 2011, was from the Director of HRMD, responding on behalf of the Director General. This letter

discussed the Appeal Board's recommendations and reasoning and indicated that the Director General had decided not to adopt the Board's recommendations in their entirety. However the letter informed the complainant that the Director General had decided to personally review all documents that were submitted to, and examined by, the Panel to ascertain the reason that led the Panel not to recommend the complainant's promotion on merit, so as to find out whether there were any grounds for the Director General to reconsider his decision.

4. The second letter, dated 31 May 2011, was from the Director General. He said he had reviewed all the documentation that had been submitted to, and examined by, the Panel in 2009. He indicated that he had not found any evidence which would be able to support or justify the grant of a promotion on merit under the applicable guidelines. He noted that all the documentation provided, except one, although generally reporting a good performance, related to the period "prior to you joining WIPO". The penultimate paragraph read:

"In view of the above and in the absence of any detailed justifications that you had discharged your responsibilities **in an exceptional manner**, I regret to inform you that I agree with the recommendation of the Ad Hoc Panel not to grant you a promotion on merit. My previous decision is therefore maintained." (Emphasis added.)

5. It is necessary to deal with two procedural arguments raised by WIPO. The first argument is founded on a submission that the complaint is irreceivable. WIPO pointed to the fact that while the complaint form was filed within the time specified by Article VII, paragraph 2, of the Tribunal's Statute, the brief and supporting documentation were filed after that time and as a correction of the complaint at the request of the Registrar pursuant to Article 6(2) of the Rules. It is sufficient to note that Judgment 3225, consideration 5, establishes that this sequence of events does not render the complaint irreceivable. It is only necessary that the complaint form is filed within the specified time limit.

6. The second procedural argument concerned the subject matter of the proceedings before the Tribunal. WIPO argued, with some justification, that the complaint sought to raise for consideration and adjudication the fact that the complainant's position was not reclassified. The decision challenged in the internal appeal was a decision not to promote the complainant. That led to the impugned decision which again, was a decision not to promote the complainant. The issue before the Tribunal is whether the decision not to promote the complainant is vitiated by error that might justify relief in the Tribunal.

7. In his brief, the complainant advanced a number of arguments seeking to impugn the decision of the Director General of 31 May 2011. They may, in a summary way, be described as follows. The first was that the Director General failed to give reasons or adequate reasons for rejecting the recommendations of the Appeal Board. The second was that at the time his promotion was recommended, the applicable provisions (in the Staff Regulations and Staff Rules) did not impose the test actually deployed by the Director General. The third was that the complainant had been subjected to unequal treatment and personal prejudice. The fourth concerned the time taken to resolve the question of whether the complainant should be promoted and challenged reliance on pending reclassification as a basis for the time taken. The fifth concerned a lack of clear guidelines founding a recommendation to promote. The last challenged WIPO's failure to acquire information necessary to properly assess whether promotion should be recommended.

8. WIPO sought to rebut each argument in its reply. Positions were maintained in the complainant's rejoinder and WIPO's surrejoinder.

9. It is at least arguable that the reasons given by the Director General in the letter sent by the Director of HRMD on 15 April 2011 did not adequately explain why the recommendations of the Appeal Board were rejected. However, the ultimate decision of the Director

General to maintain his earlier decision not to grant the complainant a promotion is fundamentally flawed. For this reason alone it should be set aside and he would have to consider again whether to reject the Appeal Board's recommendations and follow the procedural path, as he did in April and May 2011, of deciding himself whether the complainant should be granted a promotion.

10. It is convenient to set out the relevant parts of Office Instruction No. 8/2006 entitled "Guidelines on the promotion of staff" which the Panel, by operation of Office Instruction No. 48/2009, establishing an ad hoc Panel to review the outstanding and remaining requests for promotion on merit, was obliged to apply in reviewing, amongst others, the request for promotion of the complainant. Office Instruction No. 8/2006 contained five sections headed General, Basis for Promotions, Criteria for Promotion, Promotion Advisory Boards (PAB), and Review. For present purposes, only the first three sections are relevant. Within them were to be found the criteria for assessing whether a staff member should be promoted. Under the heading "General", the following appeared:

"2. All staff members who are eligible for promotion will be considered in a periodical comparative exercise. 'Promotion' shall mean the advancement of a staff member to a post of higher grade following a reclassification of the post to which the staff member is assigned or, **exceptionally**, as a result of promotion on merit. A promotion that results from a reassignment following a competition is not covered by these guidelines." (Emphasis added.)

Also under this heading was the requirement that promotions must take full account of budgetary allocations.

11. Under the heading "Basis for Promotions" was a subheading "Promotion on merit". The following appeared under that subheading:

"9. Without prejudice to the recruitment of new talent, staff may *exceptionally* be considered for promotion on merit to one grade higher than that of his or her post, subject to the promotion criteria outlined in section III. No promotion on merit shall be made to a higher category. A promotion on merit, within the meaning of this Office Instruction, may take place not more than once during the service of a staff member in WIPO."

The word “exceptionally” was italicised in the original text, doubtless to create emphasis.

12. Under the heading “Criteria for Promotion” there were four subheadings. They are “Professional performance and competencies”, “Individual competencies”, “Seniority” and “Other”. Under the first subheading the following appeared:

“Professional performance and competencies

13. A staff member may be considered for promotion if his or her supervisor(s) and the Program Manager consider that the staff member has discharged his or her present responsibilities to their full satisfaction as stated in the annual periodical report; and on the basis of detailed justifications to be submitted in writing by them to the Director, Human Resources Management Department (HRMD). Furthermore, the staff member should be considered capable of effectively discharging responsibilities at a level equal to that for which he or she is being considered.

14. Additional criteria include the range of relevant and progressive experience the staff member has acquired in his or her line of work as well as any relevant advanced training and/or other qualifications acquired after entry into the present grade.”

Reference was then made under this subheading to linguistic proficiency. Under the subheading “Individual competencies”, a range of personal skills and qualities were set out.

13. At no point in the guidelines was there either expressly or impliedly a requirement that the individual who was being considered for promotion had to, in order to secure promotion, have performed their work or discharge their responsibilities in an exceptional manner.

14. It is true that twice in the Guidelines (in the passages set out earlier) the word “exceptionally” appeared. However, its use served the purpose of stating that promotion on merit would not be a usual or ordinary feature of employment within WIPO. That would doubtless be achieved by applying some rigour in the assessment process when applying the specified criteria. It would also be achieved if, as a practical matter (and as contemplated by paragraph 13 of

the Guidelines quoted above), a person was to be considered for promotion only if recommended by a supervisor and that supervisors exercise restraint in making such recommendations.

15. In the present case, the application of a test or standard that the complainant had to have discharged his responsibilities in an exceptional manner before he was promoted informed the decision-making of the Panel and the Appeal Board. Critically, for present purposes, it was also the test or standard used by the Director General in deciding, effectively, that the complainant should not be promoted, as is apparent from the passage from his letter of 31 May 2011 set out earlier. It was a test or standard that misstated, and almost certainly overstated (in the sense that was too demanding), the criteria in the Guidelines.

16. This error, by itself, justifies an order setting aside the impugned decision. While the complainant's challenge to the test or standard used was put differently, the ultimate issue is whether the Director General applied the correct test or standard. He did not. The complainant is also entitled to moral damages of 5,000 Swiss francs and to 4,000 francs in costs.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. WIPO shall pay the complainant 5,000 Swiss francs as moral damages.
3. It shall also pay him 4,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet