

SEVENTY-THIRD SESSION

In re PARY

Judgment 1179

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lazaro Pary against the World Intellectual Property Organization (WIPO) on 17 September 1991, WIPO's reply of 18 December 1991, the complainant's rejoinder of 24 January 1992 and the Organization's letter of 24 March 1992 informing the Registrar of the Tribunal that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 12(2) of the Rules of Court and Regulations 4.3(d) and 4.18 and Rule 11.1.1(b) of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence 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, a Bolivian who was born in 1939, was appointed to WIPO in 1980 as a grade G.2 clerk. He was promoted to G.3 in December 1983 and transferred in January 1986 to the Publications and Reproduction Section, where he has since served as clerk, operator of photocopying machines and "assembler". He got a permanent appointment in April 1989.

By a memorandum of 21 June 1990 his supervisor, the chief operator of the Section, assigned him for an "indeterminate" period to work on one of two "Kodak 300" duplicating machines. On 25 June he and the Head of the Section had a talk about his new job. By a memorandum of 20 September the Head of the Section confirmed the order to him to work on the Kodak machine.

In a memorandum of 26 September the Head of the Section told him that his having worked that very morning on a different machine showed he was still disregarding orders and he must work on one of the two machines "until further notice" and report any breakdown to the Head of the Section, not to the repairmen directly.

In a letter of 12 October to the Director of General Administrative Services the complainant protested that he was striving to comply despite technical mishaps and "constant unwarranted hostility". He asked for an independent enquiry, and the removal from his personal file of a "memorandum dated 25 June 1990" and he pressed an earlier application for transfer.

On 19 November 1990 three supervisors signed a "periodical report" in which they rated the quality and quantity of his work "satisfactory without reservation" and his conduct "satisfactory", but with the reservation that he did not "readily follow his supervisors' instructions". In keeping with Office Instruction No. 7/1982 on periodical reports he put written observations to the Director General on 21 December, asking to have the reservation deleted and the "damaging" memoranda removed from his file. He also drew attention to his long-standing application for transfer to a post where his services might "best be used". By a memorandum of 11 February 1991 the Director of General Administrative Services told him on the Director General's behalf that his letters of 12 October and 21 December 1991 would be put in his personal file along with the memoranda and the report he was objecting to; as for his application for transfer under Staff Regulation 4.3(d) there was no other post in which his services might be used.

The complainant appealed to the Appeal Board on 26 April 1991 under Rule 11.1.1(b). In its report of 19 June the Board recommended no further action on the memoranda and report and held that his application for transfer was outside its competence. By a memorandum of 28 June 1991, the decision under challenge, the Director General endorsed the Board's recommendation and confirmed the decision of 11 February 1991.

B. The complainant submits that the Organization is wrong to take him to task and compromise his career prospects on the strength of unproven charges which it has denied him the opportunity of answering. Neither the Administration nor the Appeal Board went into the substance of the dispute, which is about whether he obeyed

orders. As any enquiry by "an impartial and independent person" would show, the charges against him are groundless. Documents in his possession and evidence from the witnesses he wants to call will bear that out.

Though he has applied for over forty vacancies, WIPO has steadfastly refused to put him on a post matching his qualifications. In the eleven years he has served the Organization he has had no advancement. Since his work has always been satisfactory he has been victimised.

He asks the Tribunal to set the impugned decision aside, order the removal from his personal file of the memoranda he is objecting to and consideration of his application for transfer to an "appropriate" position, and award him one year's salary in moral damages and a sum in costs.

C. In its reply WIPO submits that its appraisal of the complainant's conduct shows no fatal flaw. He got three memoranda on the subject, his supervisors talked them over with him and, as he had asked, the Director of General Administrative Services looked into his case. The material rules do not provide for referring his comments to anyone but his secondlevel supervisor, the Director General and the members of the Appeal Board. The Board heard his account of the facts before reporting on the merits and found no evidence of breach of the rules.

The case law is that assessment of performance is at the Director General's discretion and the Tribunal will interfere only in limited circumstances, for example where it finds personal prejudice or disregard of an essential fact or a mistake of fact or of law. Mere allegations of discrimination and promises of evidence to come will not do: if the complainant does have material to back up his case why does he not produce it?

It is wrong to say that he has had no advancement. He was promoted to G.3 in 1983 and has had a within-grade salary increase every year. The Organization gave due consideration to each of his applications for transfer and indeed has already transferred him three times. Though he does not say what post would suit him better, the Appointment and Promotion Board has not found him qualified for any of the posts he has applied for.

D. In his rejoinder the complainant comments on the Organization's pleas, enlarges on his own and presses his claims. He maintains that his supervisors refused to discuss the memoranda with him on the grounds that that would have been tantamount to letting him challenge orders. There was nothing in the rules to preclude independent enquiry into the charges against him. Maintaining that the Director General overlooked essential facts, he refers to photocopies of his work which in his submission show that he did obey orders. He was never transferred, merely given other duties within the same section. As for the matter of his promotion, only when WIPO did away with grade G.2 did he reach G.3.

CONSIDERATIONS:

1. The complainant is employed by the World Intellectual Property Organization at grade G.3 as an operator of photocopying apparatus. In an internal appeal he challenged the contents of three memoranda dated 21 June and 20 and 26 September 1990 from two supervisors and a periodical report signed by three supervisors on 19 November 1990 stating a reservation about his conduct. He seeks the quashing of the Director General's decision of 28 June 1991 dismissing his appeal; the withdrawal of the three memoranda from his personal file; consideration of his application for transfer; and awards of moral damages and costs.

2. The appraisal of an official's performance and conduct is a discretionary decision that may be properly challenged only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of relevant facts, abuse of authority or drawing plainly mistaken conclusions from the evidence. The case law has also made plain - see for example Judgment 973 (in re Toti No. 2) - that the reporting officer must be allowed great freedom of expression and that the staff member's own comments may serve to remedy any error of judgment the reporting officer may have committed.

3. The complainant objects to the comment in his periodical report that he did not "readily follow his supervisors' instructions".

According to point 16 of Office Instruction No. 7/1982 a WIPO staff member is free to submit to the Director General written comments on a periodical report. The complainant exercised that right by addressing a long letter to the Director General on 21 December 1990 about the periodical report of 19 November and his letter was put, together with the report, in his personal file.

For its part the Appeal Board found no breach of the Staff Regulations or Rules by his supervisors nor any failure to comply with the prescribed procedure for writing his periodical report.

Under the circumstances there was no reason for the Director General to order, as the complainant had asked, an enquiry by "an impartial and independent person", nor indeed was he under any duty to do so.

Since the complainant has failed to establish the existence of any of the fatal flaws set out in 2 above, his objections to his periodical report are not sustained.

4. As for the three memoranda, which he describes as "damaging", there is no reason to have them struck from his personal file. First, they merely bear witness to his attitude at a particular time, and he had an opportunity of discussing them with the authors and to question what they said: there was therefore no breach of his right to a hearing. Secondly, and above all, they afforded the basis for the reservation about his conduct in his periodical report and were essential to an understanding of the context in which the report was written.

5. Regulation 4.3(d) provides that a staff member may make a request for transfer to another post. Again, transfer is at the discretion of the Director General, and the Tribunal will not interfere unless there is shown to be one of the fatal flaws set out in 2 above. The complainant wants the Tribunal to order the Organization to consider his application for transfer to a suitable post. That is not the sort of claim the Tribunal is competent to grant, and it is therefore irreceivable.

6. Since on the grounds set out above the impugned decision shows no flaw, the complainant's claims to moral damages and costs cannot but fail.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, the Right Honourable Sir William Douglas, Deputy Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
William Douglas
José Maria Ruda
A.B. Gardner