

The Administrative Tribunal,

Considering the tenth complaint filed by Mr W.E. B. against the European Patent Organisation (EPO) on 14 May 2002 and corrected on 14 June, the EPO's reply of 6 September, the complainant's rejoinder of 7 October, and the Organisation's surrejoinder of 20 December 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to 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. Some facts relevant to this case are set out in Judgment 2044 delivered on 12 July 2001. The complainant is a permanent employee of the European Patent Office, the EPO's secretariat. By a letter of 9 August 2000 the Director of Personnel Management informed him that the President of the Office had decided to promote him to grade A4(2) with effect from 1 April 2000. In a letter of 22 September the complainant stated that since his staff report for the reporting period 1994-95 had recently been amended he had therefore met the requirements for promotion to grade A4(2) as of 1 May 1998. He requested that the President make his promotion retroactive to that date; in the event that his request could not be granted he asked that his letter be considered as introducing an internal appeal. On 10 November the Director of Personnel Development informed the complainant that his request had been denied and therefore registered as an internal appeal under the reference RI/72/00.

In its opinion dated 20 March 2002 the Appeals Committee considered that a decision on promotion is discretionary and is challengeable only under certain conditions. It found that neither the Promotion Board, which had re-examined the complainant's promotion, nor the President could be criticised for taking into consideration both the markings and the remarks made on the complainant's staff reports in determining whether he could be promoted prior to 1 April 2000. Although his overall performance was ranked "very good" comments made on the 1994-95 report qualified that marking. Finding the decision not to promote the complainant prior to 1 April 2000 well-founded, the Committee unanimously recommended rejecting the appeal. On 22 April 2002 the Principal Director of Personnel informed the complainant that the President had endorsed the Committee's recommendation. That is the impugned decision.

B. The complainant contends that the guidelines for promotion to grade A4(2) were amended by the President in 2000, in order to require that all remarks on staff reports be taken into account and not just the markings. Prior to that amendment a staff member was eligible for promotion to grade A4(2) upon reaching the age of 55, having "very good" performance over the previous five years, and having spent at least one year in the highest step at grade A4. The complainant argues that he met those conditions at the end of April 1998, therefore his promotion should have taken effect in May.

The complainant asks the Tribunal to order that his promotion to grade A4(2) be made retroactive to 1 May 1998.

C. The EPO replies that the President's decision is a discretionary one and is therefore subject to only limited review. Furthermore, it submits that staff reports should be seen as "an integral whole" in which both the markings and the comments "are essential elements for the purpose of a better individual assessment". The complainant has put forward no argument which would justify the review of the decision not to promote him at an earlier date.

The Organisation submits that the Promotion Board was entitled to look at the remarks on the staff report, and was also entitled to postpone the complainant's promotion to 1 April 2000 on the basis that, in his staff report for the period 1994-95, although his overall performance rating was "very good" comments were made to qualify this

rating as "falling just within" that range. It adds that it "is very likely" that the Board would not have recommended the complainant's promotion in 1998 even if it had not taken the comments into account. It further adds that the Board would have been justified in not recommending the complainant's promotion until 2002, based upon qualifying comments in some of his staff reports before 1997, but that it decided not to take these into account.

D. In his rejoinder the complainant dismisses as speculative the EPO's argument that it was unlikely that the Board would have recommended him for promotion in 1998 even without taking into account remarks made on his staff reports. In his opinion, had the Board had his corrected report for 1994-95 before it, then he would have been promoted to grade A4(2) "right then". He points out that the guidelines in force in 1998 did not call for a review of comments made on the reports, but only the markings. Furthermore, guidelines, once issued, remove the discretionary element of a decision because they must be followed.

He adds that if remarks are to be considered then some sort of "catalogue of remarks" will be necessary so that a staff member is aware of how a remark alters the effect of a marking.

E. In its surrejoinder the Organisation submits that there were never "amended" guidelines published in 2000; the complainant's argument is based on a wrong assumption and should be rejected. Furthermore, it is all markings on the staff report that are taken into account, not just the marking on overall performance. However, on two separate reports the complainant had received one "good" marking even though the marking on his overall performance was "very good". Therefore, he did not belong "to the most deserving cases" prior to the date that his promotion was granted.

## CONSIDERATIONS

1. The complainant, a German national, has been employed by the European Patent Office, the EPO's secretariat, since 1 November 1980. By the end of April 1998 he had completed 12 months' service at grade A4, step 11. By a letter dated 9 August 2000, the complainant was informed that he was promoted to grade A4(2) with effect from 1 April 2000.

2. By a letter of 22 September 2000 to the Director of Personnel Management, the complainant requested that his promotion to grade A4(2) be made effective from 1 May 1998 and, in the event that his request was not granted, asked that his letter be treated as an internal appeal. His request was denied and, in due course, the Appeals Committee unanimously recommended that his appeal be rejected. The President of the Office accepted that recommendation. The complainant now challenges that decision. It is not in issue that the complaint is receivable.

3. Pursuant to Article 49(1)(d) of the Service Regulations a permanent employee may obtain a higher grade by a decision of the appointing authority "by promotion to a post in the next higher grade in the same category". Article 49(7) provides in part:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them."

Article 49(10) relevantly provides:

"The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications [...].

[...]

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

4. Promotion guidelines were issued by the President to the Chairmen of the Promotion Boards for the year 1998. The guidelines relevant to grade A4(2) provided that:

"It is my intention to promote to A4(2) from among staff having a record of at least 'very good' over a period of at

least 5 years who have spent at least one full year in the final step of A4 and who are aged around 55 years, with variations upwards and downwards possible in the light of other circumstances, in particular that of performance."

Promotion guidelines were also issued in 2000, the year in which the complainant was promoted to grade A4(2). However, nothing turns on those later guidelines, there being no relevant difference between them and the 1998 guidelines relating to promotion from grade A4 to grade A4(2). Moreover, it is the complainant's contention that, by May 1998, he satisfied the guidelines then in force.

5. It is not in issue that, by 1 May 1998, the complainant had spent one full year in the final step of grade A4 and was then aged 60. However, there was then a question as to whether he had a "very good" record for five years. Save for the period 1994-95, his overall rating in staff reports for the reporting periods commencing 1992-93 was "very good". For the 1994-95 reporting period his overall rating was initially marked "good". That report was the subject of an appeal within the EPO and, as a result of mediatory proceedings, the complainant's overall rating was altered to "very good". Despite that alteration, the mark against the performance indicator "Attitude/Dealings with others" remained as "good" and certain comments to which he had taken objection, remained. In particular, a comment that it was expected that he would continue "to strive for improved working relationships with those that have professional contact with him" remained on his staff record. The comments were the subject of his ninth complaint to the Tribunal but, in Judgment 2044 delivered on 12 July 2001, the complaint was dismissed as irreceivable, being out of time.

6. The complainant's overall rating for the 1994-95 reporting period was not, in fact, altered until 20 March 2000. That date is of significance. Until then, the complainant did not, in fact, satisfy the guidelines for promotion to grade A4(2). However, the fact that his overall rating for 1994-95 had been changed required that the question of his promotion be determined having regard to the amended rating. So much is apparently conceded by the Director of Personnel Development. Further, in response to the complainant's request that his promotion take effect from 1 May 1998, that Director informed him by a letter of 10 November 2000, that "the Promotion Board did indeed take into consideration [his] staff report for 1994/95 as amended in [...] March 2000" but that "nevertheless [the Promotion Board] came to the conclusion that [his] promotion should take effect as from 1 April 2000".

7. In its report, the Promotion Board stated that at a meeting of 8 December 2000 it had carefully examined the complainant's 1994-95 staff report; it observed that "[t]he remarks with the overall rating of 'very good' show, in the opinion of the Board [...], that the rating is not unqualifiedly 'very good'" and reported that it saw no reason to backdate the complainant's promotion. What, if any, other matters it took into account are not known. In the internal appeal proceedings, the EPO defended its claim that the complainant's promotion should not take effect earlier than 1 April 2000 on the basis that a "decision to promote an employee lies within the exclusive discretion of the President" and contended that "[t]he Promotion Board [...] concluded correctly [...] that the overall rating was not to be qualified as being unambiguously 'very good'".

8. In its opinion recommending the rejection of the complainant's appeal, the Appeals Committee correctly noted that a promotion decision is a discretionary decision which can be challenged only on limited grounds. It then found that the decision not to backdate the promotion was not "flawed within the discretionary limitations". In this regard, it was said that the President and the Promotion Board were entitled to "not only look at the overall rating mark, but also at the accompanying commentating remarks". Thereafter, the Committee concluded that the decision not to backdate the complainant's promotion was "rightfully taken after determining whether an unconditional 'very good' had been given [in his 1994-95 staff report]".

9. It is well settled that a promotion decision is a discretionary decision which can only be challenged on limited grounds. Moreover, it is settled that mere satisfaction of necessary criteria does not ordinarily confer a right to promotion. Indeed, the terms of the relevant statutory provisions and guidelines make it plain that satisfaction of the 1998 criteria did not confer any such right on the complainant. Thus, for example, the relevant guidelines made it plain that promotion to grade A4(2) "should in principle be restricted to the most deserving cases" and that promotion would be "from among staff" satisfying the specific criteria. To the extent that the complainant contends that he was automatically entitled to promotion on satisfying the requirements of the 1998 guidelines, that contention must be rejected.

10. Once it is accepted that satisfaction of the criteria specified in the 1998 guidelines did not entitle the complainant to automatic promotion to grade A4(2), it follows that the President and the Promotion Board were entitled to have regard, in determining whether to backdate the complainant's promotion, to all matters pertaining to

his work performance. And in that process the President and the Board were entitled to have regard to his staff reports, even though the 1998 guidelines made no reference to such reports. Guidelines issued by the President are subordinate to the Service Regulations, and Article 49(7) of those regulations makes it clear that promotion is to be granted "after consideration of [the relevant persons'] ability and of reports on them". To the extent that the complainant contends that the comments contained in his 1994-95 report could not properly be considered by the President or the Promotion Board, that contention must also be rejected.

11. One other matter should be noted with respect to the comments appearing on the complainant's 1994-95 staff report. It is his contention that those remarks should not have been taken into account: in his complaint, the remarks are described as "blurred and awkward"; in his rejoinder, they are said to be "contradictory to each other" and "simply vague". Whether or not these descriptions are justified, the remarks formed part of the relevant 1994-95 staff report and, necessarily, had to be taken into account in the context of the altered overall ranking of "very good". There is nothing to suggest that the remarks were considered by the President or the Promotion Board other than in that context. Accordingly, the complainant's contention that they should not have been taken into consideration must also be rejected.

12. To say that the complainant's contentions - that he was entitled to promotion upon satisfying the criteria specified in the 1998 guidelines and that the remarks on his 1994-95 staff report should not have been taken into account - must be rejected is not to say that his complaint should be dismissed even though the decision is reviewable only on limited grounds. One ground upon which a discretionary decision may be reviewed is mistake of law or mistake of fact.

13. Although the decision as to the complainant's promotion and the date on which it would take effect may properly be said to be discretionary, the President's discretion was not as broad as it might have been had the question of his promotion arisen in the normal course of events. That is because, once the complainant's 1994-95 staff report was amended, the principle of equality required that he be treated in the same manner as any other person who had, in fact, or would have, satisfied the guidelines in 1998. Clearly, such a person's name would have been submitted to the Promotion Board for consideration in 1998, and if not then promoted, would again have been submitted in 1999, in accordance with Article 49(10).

14. Given the alteration of the complainant's 1994-95 staff report, the principle of equality required the Promotion Board to consider whether, had his name been put forward in 1998, he would then have been promoted to grade A4(2) and, if not, whether he would have been promoted in 1999. In the absence of reasons, it cannot be determined whether or not the Board proceeded in this manner. However, the principle of equality also required that the complainant's internal appeal be determined on the same basis and not simply on the basis that the decision with respect to his promotion was a discretionary one in respect of which the Promotion Board was entitled to have regard to the comments attached to the complainant's 1994-95 staff report. Failure to consider what would have occurred if his name had been submitted for promotion in 1998, or again in 1999, breached the principle of equality and is, thus, properly characterised as a mistake of law.

15. In his rejoinder the complainant contends, by reference to the guidelines in force in 1998, that "the promotion board would have promoted [him] to [...] grade [A4(2)] right then, had they had before them the corrected staff report for the period 1994/95". There is no material to indicate that the complainant is correct in this assertion. Nor is there material to support the contention the EPO made in its reply, that "it is very likely" that the complainant would not have been promoted in 1998 even if the contested remarks had been ignored. Moreover, the question whether he would have been promoted in 1998 and, if not, whether he would have been promoted in 1999, is one that depends not only on consideration of the merits of those who were in fact promoted, but on the merits of those, if any, who were not, as well as the general practice then prevailing with respect to promotion to grade A4(2).

16. Because the Appeals Committee did not consider the very question which the principle of equality requires, its recommendation is fundamentally flawed. As the President decided to accept the recommendation, his decision is similarly flawed. That is not to say that that question, if asked by the Promotion Board, was or would now be answered in favour of the complainant. This notwithstanding, the complainant was entitled to have that question considered by the Appeals Committee and, subsequently, by the President.

For the above reasons,

1. The complaint is upheld.
2. The decision of the President to accept the recommendation of the Appeals Committee is set aside.
3. The matter is remitted to the President for determination of the complainant's internal appeal by ascertaining whether the complainant would have been recommended for promotion earlier than 1 April 2000 if his 1994-95 staff report had always been in its present form.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet