

The Administrative Tribunal,

Considering the third complaint filed by Mr H. F. against the International Atomic Energy Agency (IAEA) on 26 September 2005 and corrected on 18 October 2005, the IAEA's reply of 31 January 2006, the complainant's rejoinder of 13 March and the Agency's surrejoinder of 11 April 2006;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are to be found in Judgments 2552 and 2553 delivered on 12 July 2006, in which the Tribunal ruled on the complainant's first and second complaints. Suffice it to recall that the complainant, who is a United States national, was appointed to the post of Head of the Arabic Translation Section of the IAEA, at grade P.5, in 1997. At the material time he was temporarily assigned to the post of Senior Arabic Analyst in the Iraq Nuclear Verification Office. The complainant retired in February 2006.

On 7 January 2004 the Director of the Division of Personnel forwarded to the complainant the final report of the Office of Internal Oversight Services (OIOS) on his alleged involvement in two hit-and-run car accidents in 2000 and 2001. The complainant provided the Division of Personnel with his comments on the allegations on 21 January 2004. By a memorandum of 2 August the Acting Director of the Division of Personnel reported on that matter to the Deputy Director General in charge of the Department of Management as well as on the complainant's conduct associated with complaints of misconduct he had made against certain staff members. She recommended that both matters be submitted to the Joint Disciplinary Board, which would consider the appropriate disciplinary measure to be imposed on the complainant. The Deputy Director General approved that recommendation on 27 August; the case was subsequently referred to the Board and a copy of the memorandum of 2 August provided to the complainant.

Meanwhile, in a letter of 4 August 2004 addressed to the Director General, which was primarily a request for review of two decisions of the Deputy Director General in charge of the Department of Management, the complainant, referring to the above-mentioned investigation, asserted that although more than six months had elapsed since he had submitted his comments on the final report of the OIOS, there had been no reaction from the Administration. The Director General replied to this request for review on 19 August 2004, without mentioning the steps that had been taken since the investigation.

The complainant wrote to the Director General again on 12 July 2005, asserting that contrary to the requirements of Appendix G to section 1 of part II of the IAEA's Administrative Manual on the procedures to be followed in the event of reported misconduct, the Division of Personnel had still not submitted its recommendation to the Deputy Director General in charge of the Department of Management concerning his alleged involvement in two "traffic incidents"; instead it had "concoct[ed] a 'super-case'" comprising, on the one hand, the matter of the two "traffic incidents", and on the other, "a cluster of haphazardly collected unrelated 'offences' [he] supposedly committed". He therefore asked the Director General to request that the Division of Personnel submit the said recommendation without further delay. Concerning the allegations of misconduct made against him, he stated that the Division of Personnel had failed to comply with Appendix G because the Director of the Division had not solicited his comments prior to submitting her recommendation to the Deputy Director General in charge of the Department of Management. He consequently asked the Director General to request that the Division of Personnel inform him through the proper channel specified in Appendix G, that is to say through the Director of the Division of Personnel, of any allegations of misconduct on his part presently investigated by the Joint Disciplinary Board. He would thus be able to provide his comments on the allegations before the matter was submitted to the Deputy Director General in charge of the Department of Management.

Having not yet received a reply to his memorandum of 12 July 2005 the complainant lodged a complaint with the Tribunal on 26 September, challenging the Administration's "implicit decision" to "endorse the unreasonable delay in bringing the process of Appendix G to its conclusion [concerning his] alleged involvement in the two traffic incidents", and the "implicit decision" to endorse the Division of Personnel's violation of the rules laid down in Appendix G regarding the procedure to be followed with respect to his alleged misconduct.

B. The complainant submits that the IAEA has violated the provisions of the Staff Regulations and Staff Rules on two occasions. Firstly, there was an unreasonable delay in dealing with his alleged involvement in two "traffic incidents". Recalling the provisions of Appendix G, he contends that the Director of the Division of Personnel should have submitted her recommendation on the matter to the Deputy Director General in charge of the Department of Management within four weeks of receiving the staff member's comments on the OIOS report. The Deputy Director General should then have decided, within two weeks of receiving the said recommendation, whether the case should be closed or disciplinary measures imposed. He maintains that to date no decision has been taken on the matter, despite the fact that he complained to the Director General on 4 August 2004 and almost a year later in July 2005 about the absence of such a decision. He submits that because disciplinary measures may be imposed on him at the conclusion of the procedure set out in Appendix G, the Agency's long delay in settling the matter has caused him "unnecessary anguish and distress".

Secondly, he asserts that the Director of the Division of Personnel did not request his comments regarding the allegation of misconduct raised against him, as required under Appendix G. In support of his assertion he points out that, by a memorandum of 2 August 2004, the Acting Director of the Division of Personnel reported to the Deputy Director General in charge of the Department of Management that the complainant had made no comments on the said allegation and recommended that the matter be submitted to the Joint Disciplinary Board. Considering that the Deputy Director General, who endorsed that recommendation, might have decided not to refer the matter to the Joint Disciplinary Board had he been made aware of his comments, the complainant asked the Director General in July 2005 to request that the Division of Personnel submit his comments on the said allegation to the Deputy Director General in charge of the Department of Management. However, the Director General "ignored" his memorandum of 12 July, and the lack of a reply constitutes an "implicit decision" to endorse the Division of Personnel's violation of Appendix G. The complainant also asserts that because of the Division of Personnel's failure to act in accordance with Appendix G, he "had, and ha[s] still, to endure the disgrace and humiliation of being questioned and investigated by the Joint Disciplinary Board". He consequently claims moral damages and costs.

C. The IAEA confines its reply to the issue of receivability. Recalling Article VII(1) and (3) of the Statute of the Tribunal, the Agency contends that the complaint is irreceivable because the complainant has neither challenged a final decision nor exhausted internal remedies. Indeed, the complainant did not file an appeal with the Joint Appeals Board, nor did he request that the Director General waive the jurisdiction of the Joint Appeals Board before he lodged a complaint with the Tribunal, as required by Staff Rule 12.02.1. Referring to the Tribunal's case law, the Agency points out that only in exceptional circumstances may the requirement to exhaust the internal remedies be set aside, and only in cases where on the evidence the organisation seems unlikely to reach a decision within a reasonable time. It submits that since the complainant has not exhausted internal remedies, he is in no position to show that the internal appeal proceedings are unlikely to end within a reasonable time.

Subsidiarily, the Agency observes that the Director General replied on 12 October 2005 to the complainant's memorandum of 12 July 2005. It denies that the Director General was dilatory in not responding to that memorandum until three months later. Indeed, the complainant had asked the Director General to take action on matters which had been outstanding since mid-2004 and which were therefore arguably time-barred. Lastly, it points out that a proper reading of the letter of 4 August 2004 reveals that the complainant referred to the delay in dealing with his alleged involvement in the car accidents only in passing.

D. In his rejoinder the complainant contends, regarding the issue of receivability, that the requirements of Article VII(3) of the Statute are fulfilled since the Director General failed to take a decision upon his claims within sixty days from their notification to him by the memorandum of 12 July 2005.

He further states that the Acting Director of the Division of Personnel informed him, by a letter of 21 February 2006, that the Joint Disciplinary Board had recommended that the charges against him be dismissed and that the Director General had decided to endorse that recommendation. It has thus become pointless for him to pursue two of the "requests" he made in the memorandum of 12 July 2005, namely that the procedure described in Appendix G

be brought to its conclusion by the Division of Personnel with regard to his alleged involvement in two “traffic incidents”, and that the allegations of misconduct on his part be referred to him for comments by the proper channels. He nevertheless maintains that the Division of Personnel’s failure to observe applicable rules and regulations has caused him “disgrace and humiliation”, and therefore maintains his claim for costs and moral damages.

E. In its surrejoinder the Agency reiterates that the complaint is irreceivable. It rejects the complainant’s argument that the recommendation of the Joint Disciplinary Board, according to which the charges of misconduct against the complainant should be dismissed, supports his case. It further points out that the Board did not find that the Agency had acted improperly, it solely held that the complainant was not guilty of any misconduct. The Agency therefore argues that there can be no basis for the award of moral damages and costs.

## CONSIDERATIONS

1. The complainant is a former employee of the IAEA, having retired in February 2006. He was the subject of an investigation by the Office of Internal Oversight Services (OIOS) in respect of his alleged involvement in two traffic accidents. The final OIOS report was referred to him on 7 January 2004 and he provided his comments on the report on 21 January.

2. On 4 August 2004 the complainant wrote to the Director General with respect to various matters, including complaints that he had made against other staff members, and pointed out that, although six months had passed since he submitted his comments on the OIOS report, “there ha[d] been no reaction from the Administration to [his] comments”. Although the complainant did not then know, the Acting Director of the Division of Personnel had written to the Deputy Director General in charge of the Department of Management on 2 August 2004 recommending that the Joint Disciplinary Board be convened to consider disciplinary measures against him with respect to his conduct associated with the traffic accidents and, also, with respect to his allegations of misconduct against other staff members. The matter was referred to the Joint Disciplinary Board on 27 August 2004.

3. The Director General replied on 19 August 2004 to the complainant’s letter of 4 August declining to review his decisions with respect to the complainant’s allegations of misconduct against other staff members but making no reference to the OIOS report with respect to the traffic accidents.

4. A memorandum was sent by the complainant to the Director General on 12 July 2005 asking that the Director of the Division of Personnel submit without further delay her recommendation with respect to the “traffic incidents” and that, so far as concerns his allegations of misconduct against other staff members, the Director of the Division of Personnel be requested to forward any comments that he, the complainant, might wish to make to the Deputy Director General in charge of the Department of Management before a decision was taken as to the course of action to be followed. The terms of the memorandum make it clear that the complainant then knew that a recommendation had been made on 27 August 2004 that his conduct associated with the traffic accidents and his allegations against other staff members be referred to the Joint Disciplinary Board and that that recommendation had been accepted.

5. The complainant asserts that the Director General did not reply to his memorandum of 12 July 2005 and that his failure to do so is an “implicit decision [...] to endorse the unreasonable delay in bringing the process of Appendix G to its conclusion [concerning his] alleged involvement in the two traffic incidents” and, also, an “implicit decision” to endorse the failure of the Administration to seek his comments with respect to his allegations against other staff members before recommending that the matter be referred to the Joint Disciplinary Board. The Board eventually recommended in favour of the complainant in respect of the “traffic incidents” and his alleged misconduct; the Director General followed that recommendation. Accordingly, the complainant no longer maintains in his rejoinder all the claims initially made. However, the alleged failure to reply to his memorandum of 12 July 2005 is the subject of the complaint by which the complainant seeks moral damages and costs.

6. Contrary to the assertions of the complainant, the Director General replied on 12 October 2005 to his memorandum of 12 July. So far as concerns the traffic accidents, he referred the complainant to the recommendation of 2 August 2004; and so far as concerns the other matters he pointed out that his comments had been sought, although not by the Director of the Division of Personnel who had been the subject of one of his complaints.

7. The complainant did not file an internal appeal. Instead he filed this complaint with the Tribunal on 26 September 2005. The IAEA contends that the complaint is irreceivable because the complainant had not exhausted internal remedies before filing his complaint. In his rejoinder the complainant asserts that his complaint is receivable by virtue of Article VII(3) of the Tribunal's Statute which relevantly allows that "[w]here the Administration fails to take a decision upon any claim [...] within sixty days [...] the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision".

8. As Article VII(1) of the Statute makes clear, a complaint is only receivable if it impugns a decision. If a claim is made, the failure to respond within a specified time or, if no time is specified, a reasonable time will ordinarily be construed as a decision rejecting that claim. However, not every communication in which a complaint is made about a course of action or inaction constitutes a claim, whether for the purposes of Article VII(3) or otherwise; and if no claim is made, the failure to reply does not constitute a decision.

9. For a communication to constitute a claim, it must seek a decision on something that can be granted in some meaningful way. In the present case, the complainant's request in July 2005 that the Director General ask that a recommendation with respect to his alleged involvement in the traffic accidents be submitted without further delay was no longer capable of meaningful acceptance or rejection as the recommendation had already been made. So, too, the request that the complainant's comments be sought before a decision was made as to the course to be followed with respect to his conduct associated with complaints of misconduct on the part of other staff members was no longer capable of meaningful acceptance as a decision had already been made to refer that issue to the Joint Disciplinary Board.

10. In substance, if not in form, the complainant's memorandum of 12 July 2005 was merely criticism of an action and a decision that had already been taken. It was not a claim for the purposes of Article VII(3) of the Tribunal's Statute, and as it did not constitute a claim, the failure to reply within sixty days does not constitute a decision for the purposes of Article VII(1). Accordingly, the complaint is irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet