

The Administrative Tribunal,

Considering the second complaint filed by Ms E. M.-C. against the International Atomic Energy Agency (IAEA) on 18 October 2005 and corrected on 22 December 2005, the IAEA's reply of 13 April 2006, the complainant's rejoinder of 23 June and the Agency's surrejoinder dated 29 September 2006;

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. Facts concerning the complainant's employment history with the IAEA may be found in Judgment 2588, also delivered this day. Suffice it to recall that the complainant was working within the Division of Nuclear Installation Safety.

On 26 July 2002 the Acting Director of the Division of Personnel asked the Director of the Office of Internal Oversight Services (OIOS) to conduct an investigation into allegations made by one of the complainant's colleagues, Ms R., who had reported to the Head of the Safety Assessment Section that she felt harassed by the complainant. In the course of this investigation, a number of irregularities were discovered concerning the use of two web server accounts assigned to a staff member who had recently returned from maternity leave. It appeared that the accounts had been accessed from the complainant's and her husband's computers, sometimes simultaneously. On 2 May 2003, after having allowed the parties concerned to comment at various stages of the investigation, the OIOS issued its Final Investigation Report on the harassment allegations. It concluded that the allegations were supported by the complainant's "pattern of behaviour". It also noted that the complainant's spouse was assisting the complainant in performing functions assigned to her, and to this end accessed confidential files. On 19 May the Director of the Division of Personnel sent the complainant a copy of the Final Investigation Report, asking for her comments thereon. The complainant provided comments on 20 June in which she contested the OIOS's conclusions.

On 18 June 2003 the Head of the Safety Assessment Section sent a memorandum to the Director of the Division of Personnel alleging, with respect to a website she had helped to develop, that the complainant had breached confidentiality by giving the highest-level access to somebody designated as an Agency staff member, Mr M., when, in fact, he was not one. It appeared that a software company in Austria had the same name. The website in question contained a database of information about nuclear events, known as the "Nuclear Events Web based System" (NEWS). On 1 August 2003 the Director of the Division of Personnel asked the Director of the OIOS to investigate these allegations. On 19 March 2004 the OIOS issued its Final Investigation Report on the allegations of breach of confidentiality; it concluded that the complainant's actions constituted misconduct under Staff Rule 11.01.1. The complainant was invited to provide her comments on the report and did so on 4 June.

By a memorandum dated 16 August 2004 the Acting Deputy Director General in charge of Management referred "the case of the alleged misconduct" to the Joint Disciplinary Board. The Board was asked to consider whether the complainant had maintained the standards of conduct required of Agency staff in accordance with the Standards of Conduct for the International Civil Service and to identify an appropriate disciplinary measure to be imposed under the provisions of Staff Rule 11.01.2. On 11 October 2004 the complainant was informed that the Joint Disciplinary Board had been convened and she was provided with a copy of the file that had been submitted to the Board. She was also informed of the composition of the Board and of her right to be heard.

The Board issued its report on 11 March 2005. Regarding the first allegation, the allegation of harassment, the Board could not find any "hard evidence" that the complainant had harassed another staff member and therefore had difficulty in agreeing with the conclusions presented in the OIOS's report of 2 May 2003. In the Board's view,

fault could be found on both sides so it would be “unsafe” to blame only one party. As for the second allegation, the allegation of breach of confidentiality, the Board considered that the complainant was wrong in giving her husband the possibility of accessing confidential information. However, it was of the opinion that “this was not a major concern” since he was also an Agency staff member. On the question of access given to an individual who was not a staff member, Mr M., the Board found this to be “very disturbing” and “potentially a very grave situation”. It considered that a more cautious approach should have been taken, but that since the access was only to a test website “no lasting damage” could have occurred. The Board also found it “very disturbing” that there appeared to be no review by senior staff of the data transferred from the test database to the “finished product”. It recommended that both cases of alleged misconduct against the complainant be dismissed.

On 2 August 2005 the Acting Director of the Division of Personnel informed the complainant on the Director General’s behalf that the latter had decided to follow the Board’s recommendation that no disciplinary measure be imposed against her in relation to the allegation of harassment. Concerning the breaches of confidentiality, however, the Director General had decided that she should be censured for misconduct, although the Board had made no recommendation on the issue of her giving unauthorised access to her husband. Regarding the issue of giving high-level access to Mr M. he considered the Board’s reasoning to be flawed. In his view, the failure by a manager to detect misconduct did not mean that misconduct had not occurred. The Acting Director of the Division of Personnel indicated that the letter constituted a written censure as provided for in Staff Rule 11.01.2(A) and that a copy would be placed in her personnel file. That is the impugned decision.

B. The complainant argues that her right to due process was seriously breached: she had a right to be given notice of any charges of misconduct, to be heard and to present a defence. Furthermore, the terms of reference of the OIOS require investigations to be carried out expeditiously and with respect for the rights of staff members. When one of them is charged with misconduct, the presumption of innocence is to be maintained throughout the proceedings and the burden of proof lies with the Agency. The complainant contends that the Director General abused his discretion by not providing sufficiently detailed reasons as to why he departed from the recommendations of the Joint Disciplinary Board. In addition, he wrongly concluded that the Board had made no recommendation on the issue of alleged access to confidential information given to her husband.

She submits that the OIOS’s investigations were fundamentally flawed. The first investigation went on for over three years, she was not allowed to be present during witness interviews and the investigation was expanded beyond the scope of the terms of reference. Furthermore, in the course of the second investigation she had asked to be accompanied by a staff representative when she was interviewed, but this request was denied on the basis that staff do not have a right to assistance during “fact-finding” interviews. She argues that this is “in direct contravention of the freedom of association”.

The complainant contends that the disciplinary process was conducted “in such a[n] egregious manner that it suffered from lack of good faith” and caused her unnecessary personal distress.

She asks the Tribunal to quash the impugned decision and to order the Agency to withdraw the written censure and have it expunged from her personnel file. She claims moral damages in the amount of 20,000 euros as well as costs.

C. In its reply the Agency submits that the Director General’s decision to censure the complainant for misconduct was an appropriate exercise of his authority under Staff Regulation 11.01. Furthermore, this decision was taken after the complainant’s case had been reviewed by a Joint Disciplinary Board in accordance with Staff Rule 11.01.2(B). It argues that there was sufficient and reliable evidence of misconduct to justify the Director General’s determination that it was in the interest of the Agency to impose a written censure on the complainant, and it points out that a written censure is the least severe of the disciplinary measures set out in Staff Rule 11.01.2(A). The censure was in line with the principle of proportionality, and the letter from the Acting Director of the Division of Personnel set out the Director General’s reasons for disagreeing with the Board’s conclusions and recommendations, as well as the grounds for his decision to impose the disciplinary measure.

It denies that the investigations carried out by the OIOS were fundamentally flawed and it submits that the complainant’s rights were respected during the course of the investigations. She had access to all evidence gathered and was given the opportunity to comment on both investigation reports at several stages of the proceedings. Furthermore, there was no finding by the Joint Disciplinary Board that the investigations or the reports of the OIOS were defective in any way. The Agency asserts that there can be no doubt that the complainant had the opportunity

to state her case, present her own evidence, and be assisted by a staff representative before the Board. She was afforded all appropriate safeguards.

Contrary to the complainant's assertions, the Joint Disciplinary Board did find that giving her husband unauthorised access to the database was wrong. Furthermore, the Director General had concluded that the Board's reasoning was flawed regarding the other breach of confidentiality. The failure of senior management to detect misconduct does not provide an excuse for it. Given that the complainant had failed in her duty of discretion and that her misconduct had been properly established, the Director General was entitled to impose the appropriate disciplinary measure.

D. In her rejoinder the complainant requests that this complaint be joined with her first complaint, since, she says, both cases involve mobbing and abuse of authority. She contends that the misconduct proceedings were initiated as part of a campaign by certain staff members to see her removed from the Division or dismissed from the Agency altogether.

Concerning the two web server accounts, she alleges that misleading statements were provided during the investigation. She submits that these accounts were not confidential and for a time during 2001-2002 she was responsible for providing technical support to a database on which one of the accounts was found. She contends that some of the evidence uncovered during the Joint Disciplinary Board's consideration of her case was "exculpatory", and that the fact that she did not have access to that information until it was produced with the Agency's reply to her complaint constitutes a further breach of her right to due process. She also submits that the web server account assigned to Mr M. was "manipulated" to appear as though it had been created by her, when in fact it had been created by Ms R.

E. In its surrejoinder the Agency says that it would not object to the joinder of the complaints by the Tribunal although it does not agree that they are linked.

It observes that the rejoinder does not address the substance of the reply and does not raise any matter that casts doubt on the correctness of the disciplinary measure. It adds that the complainant has not demonstrated that she was denied due process. It otherwise presses its arguments.

CONSIDERATIONS

1. The complainant, whose employment history at the IAEA is recounted in Judgment 2588, also delivered this day, requests the Tribunal to quash a decision of the Agency's Director General of which she was notified on 2 August 2005 and in which she was censured, firstly, for having given her husband, who is likewise an Agency staff member, access to confidential computer files and, secondly, for having given a non-staff member "highest-level" access to the NEWS database concerning nuclear events. She requests the joinder of her second complaint with that which she filed against the decision of 14 June 2005 concerning the extension of her appointment and the refusal to appoint her to a vacant post. However, for the reasons stated in Judgment 2588, the Tribunal does not consider it appropriate to order such joinder.

2. In July 2002, following a series of incidents involving the complainant and another Agency staff member, Ms R., who complained of harassment by the complainant, the Division of Personnel asked the OIOS to investigate Ms R.'s allegations. In the course of the investigation the OIOS received information to the effect that two web server accounts assigned to a staff member who had returned from maternity leave had been accessed, apparently in an unauthorised manner, from the complainant's computer and that of her husband. On 2 May 2003 the OIOS issued its Final Investigation Report concluding that the complainant's "pattern of behaviour" supported Ms R.'s allegations and that the complainant's husband, who could access confidential files of the Division of Nuclear Installation Safety, was assisting the complainant with the performance of certain functions assigned to her in that Division. The complainant formally contested the report's conclusions.

3. On 1 August 2003 the Division of Personnel asked the OIOS to investigate another case which had been brought to its attention by the Head of the Safety Assessment Section in an interoffice memorandum of 18 June 2003: a check on authorised usernames for access to the NEWS database had revealed that a Mr M., who had been given the highest access level, was listed as being a staff member, whereas the name was apparently that of an Austrian software company. In a second Final Investigation Report dated 19 March 2004 the OIOS concluded that

the complainant herself had created the user account in question on 10 September 2001, without informing anyone, and that she had supplied conflicting explanations of the circumstances in which she had done so, eventually declaring that it was not she who had given access to Mr M. Drawing attention to the dangers of giving a person outside the Agency the same level of access as that of the Administrator of the NEWS database – the purpose of which is to provide authoritative information on the occurrence of nuclear events – the OIOS concluded that the complainant’s actions constituted misconduct under Staff Rule 11.01.1. On 4 June 2004 the complainant also contested the whole of this report.

4. In these circumstances all the allegations of misconduct by the complainant were referred to the Joint Disciplinary Board on 16 August 2004, and on 11 March 2005 the Board issued its report in which it recommended that the charges against the complainant be dropped. As far as the allegation of harassment was concerned, it found that there was no hard evidence that the complainant had really harassed Ms. R.: both parties, who had great difficulty in working together because of their personalities, were at fault. With regard to the accessing of two web server accounts from the computer of the complainant’s spouse, the Board considered that even if the complainant had been wrong to provide such access, that should not be held against her as her husband was an Agency staff member. Moreover, another Board had rejected the case of misconduct brought against him on the basis of the same facts. Lastly, in respect of the access given to Mr M., the Joint Disciplinary Board considered this to be a “very disturbing” matter, but the co-ordinator of the NEWS website had stated that Mr M. could not make any changes to the database and had not introduced any information into it. The Board was also surprised that Mr M.’s account had not been discovered until April 2003 whereas the rights of access had been given in September 2001.

5. In the impugned decision, the Director General followed the Joint Disciplinary Board’s recommendation concerning the allegation of harassment. On the other hand, he took issue with the Board’s reasoning in respect of the two other allegations and imposed a written censure on the complainant, this being the least severe disciplinary measure provided for in Staff Rule 11.01.2 (A).

6. The complainant describes at length the disagreements she had with Ms R. and with some of her colleagues and supervisors, as well as the conditions in which the OIOS investigation of the allegations of harassment which had been made against her was conducted. As the Agency has dropped the charge of harassment, the Tribunal will confine its examination to the facts relied upon by the Agency in support of the disciplinary measure forming the subject of this case.

7. The complainant firstly submits that the procedure followed by the OIOS in order to arrive at the conclusions which led to the initiation of the disciplinary proceedings was tainted with several flaws: she was wrongly denied the right to be assisted by a staff member as recommended by the Staff Council, and she was not present when witnesses were interviewed. It is, however, clear that the rules relating to due process, in particular, which must be respected scrupulously during the actual disciplinary proceedings, as the Tribunal points out in the judgments to which the complainant refers (see, for example, Judgment 2475), do not apply during the investigation of matters brought before an internal auditing body such as the OIOS. The terms of reference of the OIOS do specify that investigations shall respect the rights of staff members, but in this connection they establish precise rules which have been followed in this case. According to the said terms of reference, a staff member who is the subject of an investigation shall be informed of the investigation and given the opportunity to review its findings and to respond to them before a final report is prepared. As far as internal audit reports are concerned, these provisions are both necessary and sufficient, and they have been complied with. No general principle obliges the Agency to make provision for staff members under investigation to be assisted by a staff representative when they are interviewed at this stage of the proceedings. The OIOS followed a procedure consistent with its terms of reference. The actual proceedings before the Joint Disciplinary Board are not specifically called into question, and indeed the Board’s recommendation gives full satisfaction to the complainant.

8. Secondly, the complainant contends that the reasons provided for the impugned decision are not sufficiently detailed, given that the Director General decided to depart from the Joint Disciplinary Board’s recommendation, and she relies on the Tribunal’s well-established precedent according to which, “where a final decision refuses, to a staff member’s detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated” (see Judgment 2339, under 5). In the instant case the Tribunal finds that the letter of 2 August 2005 sets out in a precise albeit concise manner the factual reasons why the Joint Disciplinary Board’s recommendations were not followed.

9. As to the merits of the case, the Tribunal will determine the accuracy of the facts on which the Agency

relied in holding that the complainant had breached the rules of confidentiality by which she was bound, by considering first the issue of access to certain accounts from her husband's computer and then the issue of Mr M.'s access to the NEWS database.

10. In its surrejoinder the Agency acknowledged that the complainant was authorised as part of her duties to work on two web server accounts assigned to one of her colleagues. During the period between October 2000 and November 2002 these accounts were accessed many times from the complainant's computer, which was not, it seems, in any way surprising, but also on numerous occasions from the computer of the complainant's husband, which was located in another office. On 12 occasions the connections were almost simultaneous. The Agency therefore believed, on the basis of the investigations conducted by the OIOS, that the complainant had, without authorisation, given her husband the possibility of accessing confidential information and had thereby engaged in misconduct justifying a disciplinary measure. The complainant submits that the information in question was not at all confidential, as several staff members testified; that her husband had simply allowed her to use his computer – without accessing the accounts himself – because it contained tools she needed for her duties, whereas her own computer did not; and that, moreover, proceedings against him concerning this matter had culminated in a recommendation from the Joint Disciplinary Board that the case should be dropped, a recommendation which the Director General decided to follow.

11. On the basis of this recommendation, the complainant contends that the matter is *res judicata*, but this argument obviously fails: the Joint Disciplinary Board is not a judicial body, and although it concluded that there was insufficient evidence that the complainant had breached Staff Rule 11.01.1(B)(5), it also found that it was “unable to understand” how one person had been able to access the accounts in question almost simultaneously from two computers, that it was also necessary to take into consideration the fact that the information accessed was not of a confidential nature and that there was not any malevolent intent in accessing the data. Not only does this recommendation lack the authority of *res judicata*, but it also tends to bear out the Agency's submission that the complainant's husband did access some data.

12. While from the perusal of some statements it appears unlikely that the data were confidential, what is clear is that one of the accounts could be accessed only by certain persons and that the complainant's husband was not one of the persons to whom this restricted access had been granted. Even if it is assumed that the complainant did use the two computers, which were located in different offices, sometimes almost simultaneously, it was common knowledge that her husband helped her with certain tasks and that the software tools which had not been installed on her computer could quite well have been installed had she so requested. The complainant's husband claims that he gave her access to his computer because some of the tools she needed for her work, such as “FTP, Telnet, FrontPage, Adobe Acrobat, Adobe Photoshop”, were installed on it, but the submissions show, and this point is not seriously disputed, that Telnet was available to all users, that the complainant had been provided with Adobe Photoshop in November 2000, that she had not requested the installation of FTP or Adobe Acrobat and that it had been agreed that FrontPage was not necessary. The Tribunal finds no evidence in the file to support the conclusion that the complainant was the only person who accessed the accounts from her husband's computer. As she had given someone with another computer the possibility of accessing information reserved for a small number of users, the complainant violated the rules of confidentiality applying to her and to all the staff members of an international organisation whose mission calls for particular vigilance. The Director General therefore had good reason to consider that this action justified a disciplinary measure.

13. The creation of an account enabling Mr M. to access the NEWS database is a “very disturbing” matter, as the Joint Disciplinary Board observed, especially because of the conflicting information given by the complainant as to her responsibility for creating this account. It is plain from the findings of the OIOS that the records of the NEWS database show that the complainant started to create user accounts in October 2000 and was the only person to set up such accounts until 29 January 2003; she created the account in Mr M.'s name on 10 September 2001 indicating that he was an Agency staff member with the highest possible access level to the database. The various explanations provided by the complainant during the investigations conducted by the OIOS make her subsequent denials hard to believe. Even though the access thus authorised does not appear to have been used to make any changes to the database and was deleted as soon as the complainant's supervisor discovered it, that is to say in April 2003, the fact remains that giving a person outside the Agency high-level access to an Agency database and describing that person as a staff member, even if such access was only an experiment, justified a disciplinary measure, irrespective of the responsibilities of the complainant's supervisors in respect of the failure to delete the account. The complainant objects to the fact that she was not allowed any opportunity to cross-examine Mr M., who had been contacted by telephone by the OIOS. But the Agency acknowledges that no weight should be given

to this evidence, which the Tribunal will discard. The Tribunal will likewise reject the complainant's allegations that Ms R. created the account in question in order to discredit her, since there is no evidence to support these assertions.

14. Since the evidence on file does not disclose any lack of good faith on the part of the Agency's managers, who imposed on the complainant the least severe disciplinary measure provided for in the Staff Rules, the claim to the quashing of the impugned decision must be rejected. The same applies to the complainant's claim for compensation, even though the Tribunal deplors the excessive duration of the procedure which, after two OIOS investigations and a recommendation from the Joint Disciplinary Board of 11 March 2005, ended with a decision dated 2 August 2005.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, 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

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet