

The Administrative Tribunal,

Considering the complaint filed by Mr P.G. against the European Patent Organisation (EPO) on 20 April 2005, the Organisation's reply of 12 August, the complainant's rejoinder of 1 October and the EPO's surrejoinder of 16 December 2005;

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. The complainant, an Italian national, was born in 1965. He joined the staff of the European Patent Office – the EPO's secretariat – in 1988 at grade B2. At the material time he was an Administrative Employee in Directorate-General 2 and held grade B3.

In his staff report for the period from 1 January 1998 to 31 May 1999 the complainant obtained the rating "good" for both "productivity" and "attitude to work"; his overall rating was also "good". In his comments on that report the complainant claimed that he should have obtained the rating "very good" for both productivity and attitude to work, and that consequently his overall rating should also have been "very good". The reporting officers maintained the initial ratings and on 6 August 1999 the complainant requested conciliation proceedings in accordance with Section D of the General Guidelines on Reporting. At the conclusion of those proceedings, amendments to the complainant's staff report were proposed. In particular it was proposed that the report should indicate that both his productivity and overall rating were "at the upper limit of good". The proposed changes were recorded in the mediator's report. However, as indicated therein, the complainant was not satisfied with the proposals, and the matter was referred to the President of the Office for a final decision. The President endorsed the staff report on 11 June 2001, subject to the amendments proposed in the mediator's report.

The complainant signed the amended staff report on 6 September 2001 and by letter of the same date lodged an internal appeal, alleging that there had been flaws in the reporting procedure. He requested, inter alia, that his ratings for "productivity" and "attitude to work", as well as the overall rating, be changed to "very good". The Appeals Committee issued its report on 15 January 2003. It recommended that the disputed staff report be annulled on formal grounds, pointing out in particular that one of the two reporting officers held the same grade as the complainant and therefore could not act as reporting officer. It also recommended that the rating for the complainant's productivity be reviewed in the light of figures he had presented at the hearing, and that in other respects the appeal be dismissed. By a letter of 21 March 2003, the Principal Director of Personnel notified the complainant of the President's decision on his internal appeal. He said that the complainant's staff report for 1998-99 would be set aside and that the productivity rating would be re-examined on the basis of the figures he had submitted.

Following that re-examination, the reporting officer drew up a new report which was given to the complainant on 20 August 2003. He again rated the complainant's productivity as "good". The complainant added a comment on the report, noting that the President's decision of 21 March had not been sufficiently taken into account. The reporting officer maintained his position, and on 16 March 2004 the complainant indicated that he wished the matter to be treated further in accordance with Section D of the General Guidelines on Reporting. However, after an initial meeting with the mediator, he asked the latter to forward the new report directly to the Vice-President of Directorate-General 4 (DG4) for decision, since he felt that the conciliation procedure provided for in Section D would serve no purpose. On 2 September 2004 the Vice-President of DG4 endorsed the staff report on behalf of the President. The complainant signed the completed report on 29 October 2004.

By a letter of 22 November 2004 the complainant lodged an internal appeal against the President's decision of 2 September 2004 to endorse the report, claiming that it was inconsistent with the previous decision of 21 March

2003. He requested that the report be redrafted by a different reporting officer. By letter of 21 January 2005 the Acting Director of Employment Law informed the complainant that on grounds of “procedural economy” the President had decided not to refer the matter to the Appeals Committee again. He stated that the President had taken a final decision to dismiss his appeal and that he was therefore free to appeal to the Tribunal. That is the impugned decision.

B. The complainant contends that the decision of 21 January 2005 to dismiss his internal appeal was tainted by procedural flaws and constituted abuse of procedure. Citing Article 113(3) of the Service Regulations for Permanent Employees of the European Patent Office, he argues that he had a right to be heard by the Appeals Committee and was denied that right. He adds that subsequent to the decision of 21 March 2003, by which his initial staff report was annulled, a “completely new procedure” began, which meant he had the right to appeal again and, in particular, to be heard by the Appeals Committee before a final decision was taken on his second internal appeal. To deny him the right of appeal on the ground of “procedural economy” constituted an abuse of authority. Moreover, the President’s decision rejecting his appeal was unsubstantiated.

He raises objections concerning the amended report. He submits, firstly, that by the decision of 21 March 2003, the President clearly set aside his initial staff report, and it should therefore have been rewritten. However, the “new” staff report is essentially identical to the initial one; the changes made were only “cosmetic” and did not constitute a genuine review of the substance of the report.

Secondly, he recalls that the Appeals Committee recommended annulling his initial report on formal grounds, particularly because another staff member had contributed to the staff report as a reporting officer, without having such status. The complainant submits that the new report is tainted by the same “illegitimate collaboration” of other officials who were either at the same grade as him, or held a lower grade. Consequently, it is not clear to what extent the report reflects the reporting officer’s own thinking and judgement. The complainant therefore questions the reporting officer’s “fairness, objectivity and independence”.

Thirdly, he takes issue with the rating for productivity in the new report, particularly because it had remained unchanged despite the new data that was examined. The reporting officer had merely changed the period that the rating covered from “four months” to “four to five months”. The complainant raises doubts about the data used by the reporting officer in assessing his productivity.

Lastly, he alleges that there was a fifteen-month delay in producing the new report. In his opinion, the delay resulted from “malfunctioning” within the administration.

The complainant asks the Tribunal to quash the decision of 21 January 2005 by which the President “refused” his internal appeal, and likewise that of 2 September 2004 by which his new staff report for 1998-99 was maintained. He wants the EPO to “follow” the President’s decision of 21 March 2003; declare the new staff report null and void; draw up another staff report in accordance with the Appeals Committee’s recommendations of 15 January 2003; respect the General Guidelines on Reporting; and entrust the drawing up of the new staff report to a different reporting officer. He claims a total of 40,000 euros in moral damages and 6,000 euros in costs.

C. In its reply the EPO contends that the President’s decision to uphold the revised report was made in line with the applicable provisions and was a proper exercise of his discretionary power. It seeks an order that the complainant must bear his own costs.

It submits that, contrary to the complainant’s assertions, the President did not deprive the complainant of his legal rights. It was for reasons of procedural economy that the complainant’s case was not re-submitted to the Appeals Committee. The initial staff report had already been the subject of an internal appeal procedure and, in principle, the staff report currently being challenged complies with the President’s final decision on his first internal appeal.

With regard to the revised staff report, the EPO submits that the reporting officer fully complied with the President’s instruction to review the complainant’s productivity rating. The reporting officer was required to give an overall assessment covering the whole of the reporting period, and not just the last four or five months when the complainant had increased his productivity. He considered that an above-average marking for the whole period was not warranted, and for that reason he stood by his previous assessment and ratings. The Organisation adds that staff reports constitute discretionary decisions which are subject to only limited review.

The EPO rejects the complainant's assertions regarding the reporting officer's reasons for seeking advice from other officials. It points out that the Appeals Committee found that a reporting officer was entitled to consult staff in positions of responsibility in a department as big as the complainant's. The Committee had recommended the annulment of the complainant's initial report, because an official who was of the same rank as the complainant, and who may have been in competition with him for future promotion, had acted as a reporting officer.

Regarding the allegation of procedural delay, the EPO opines that the complainant too contributed to the delay. The reporting officer had to remind him that his staff report had been countersigned and could be collected. The complainant was subsequently repeatedly asked to sign the report, but nearly six months elapsed before he did so.

D. In his rejoinder the complainant develops his pleas. He maintains that not all the grounds and reasons that led to the annulment of the first report have been taken into account.

E. In its surrejoinder the Organisation contends that the Appeals Committee's recommendation to annul the report cannot be interpreted as an indication that the marking given was not correct.

## CONSIDERATIONS

1. The complainant, who disagreed with certain ratings given to him in his staff report for the period 1998-99, requested conciliation proceedings under Section D of the General Guidelines on Reporting. The outcome of those proceedings was that the contested ratings were maintained. On 11 June 2001 the President of the Office endorsed the report, subject to certain amendments that were proposed in the mediator's report. The complainant challenged that decision before the Appeals Committee, which recommended in January 2003 that the staff report in question be annulled on formal grounds and that a new one be prepared, taking into account the productivity figures submitted by the complainant during the hearing.

By a decision of 21 March 2003 the President accepted this recommendation. It was specified that on the basis of the figures submitted by the complainant during the appeals proceedings his productivity rating would be re-examined. A new report was duly prepared. Since the new report contained the same ratings as the one which had been annulled, the complainant again requested conciliation proceedings. However, in June 2004 he made it known to the Organisation that he did not think that a further conciliation meeting under Section D(4) of the General Guidelines on Reporting would be "useful", given that the new report was "essentially identical" to the initial one. On 2 September 2004 the new report was endorsed by the Vice-President of DG4 on behalf of the President.

The complainant then initiated a second appeal, challenging his new staff report. This appeal was dismissed by the President, who decided, on grounds of procedural economy, not to refer the matter to the Appeals Committee but instead to allow the complainant to appeal directly to the Tribunal. That decision, which was conveyed to the complainant in a letter of 21 January 2005 from the Acting Director of Employment Law, is the subject of the complaint.

2. The complainant asserts that by depriving him of his right of internal appeal the President has abused his authority and his decision is tainted with a procedural flaw. The complainant chiefly wants the decisions of 21 January 2005 and 2 September 2004 to be quashed, the decision of 21 March 2003 to be "followed", and a new (third) staff report for the period 1998-99 to be drawn up. He also claims moral damages and costs. In his pleadings, he admits that the persons who wrongly participated in the first evaluation process and whose participation led to the annulment of the initial staff report did not take part in the preparation of the new report. However, he argues that the first and second reports were substantially the same, with only "cosmetic" changes. He stresses that "[t]he now contested staff report is not new, in fact it is substantially and essentially identical, both in the wording and its meaning". He raises "doubts about the competency of the reporting officer", for allegedly "mak[ing] his own" the opinion of others.

3. The President's decision to dismiss the complainant's appeal with respect to the new staff report without referring it to the Appeals Committee, though unusual, is understandable in a context in which the initial report was set aside "on formal grounds" and the new report was completed apparently in conformity with the recommendations of the Appeals Committee. That being so, the complainant's pleas concerning the course taken by the President must be rejected.

4. The Tribunal will not set aside the evaluation of reporting officers unless there is an obvious mistake of fact or failure to show the sort of objectivity that ought to govern reporting (see Judgment 1136, under 6). No such circumstances are present here. The complainant compares the previous version of the report to the latest one at some length, criticising the alterations and stressing the likenesses, but besides his not sharing the views of the reporting officer, it is difficult to see how those criticisms can afford grounds to question the validity of the report.

5. The complainant further claims that there were “intolerable and unbearable” delays, “solely imputable to the malfunctioning of the administration”, that there was breach of procedure and that the efforts of the persons involved were “blatantly ineffective and inefficient except for being detrimental to [him]”. From his own account of events, however, while there appear to have been some delays, particularly in the conciliation proceedings and in the preparation of his new staff report, he does not seem to have been at all collaborative in helping the process go along.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet