The Administrative Tribunal,

Considering the complaint filed by Mr S. A. against the International Atomic Energy Agency (IAEA) on 17 November 2006 and corrected on 4 December 2006, the IAEA's reply of 13 March 2007, the complainant's rejoinder of 8 May, as supplemented on 15 June, and the Agency's surrejoinder of 19 July 2007;

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. In accordance with its Statute, in force since 29 July 1957, the IAEA has a policy which requires that its permanent staff be kept to a minimum. Commonly referred to as the "rotation policy", it results in staff members in the Professional category normally leaving the Agency's employment after five years, or if extensions are granted, after a maximum of seven years. Exceptions to the policy exist. On 31 January 1990 the IAEA issued staff notice SEC/NOT/1309 concerning the Agency's general policy for advancement from the General Service to the Professional category. This notice provided, inter alia, that in all cases of advancement from the General Service to the Professional category a three-year fixed-term contract would be granted. On 25 May 1993 the Agency issued SEC/NOT/1484, the purpose of which was to clarify the established policy on tenure of appointment and contract extensions of Professional staff. It stipulated that Professional category regular staff members i.e. staff members recruited to an established post on a competitive basis would initially be appointed for three years with the possibility of a subsequent two-year extension. There was no presumption of continued employment beyond the normal five-year tour of service but in prescribed circumstances contracts could be further extended for one, two or five years. A five-year extension was considered a "long-term contract" which was then subject to further extensions until retirement age. The notice also provided that for staff members in the General Service category appointed in accordance with SEC/NOT/1309, their service under a General Service contract would not be taken into account in calculating the maximum tour of service.

The complainant, an Indian national born in 1966, joined the IAEA on 21 February 1994 as a Computer Operator in the General Service category. After a series of short-term contracts he obtained a fixed-term temporary assistance appointment in July 1996. In October 1998 he accepted a two-year fixed-term appointment, with local status, which was subsequently extended for a period of three years.

As from 15 April 2001 he was appointed to the Professional category at grade P-2 for a period of three years. He was then entitled to the status and benefits of an internationally-recruited staff member. The Letter of Appointment stipulated that the appointment was subject to the Provisional Staff Regulations and the Staff Rules, "together with such amendments as may from time to time be made thereto". It also contained the following special condition: "This cancels and supersedes Letter of Extension dated 2000-03-14 with effect from 2001-04-15" in reference to the complainant's previous appointment in the General Service category. The complainant's subsequent Letter of Extension of 18 December 2002 which extended his Professional category appointment for a further two years, effective April 2004, specified that the extension of his appointment was subject to the provisions of the Staff Regulations and Staff Rules of the Agency, "together with such amendments as may from time to time be made thereto". It also stipulated that the extension should "not be deemed to carry any expectation of or right to another extension, renewal or conversion to another type of appointment".

By SEC/NOT/1966 issued on 1 October 2003, the Agency informed staff that revised Staff Rules, effective that same day, had been approved. Previous Staff Rules, Personnel Practices, administrative issuances and parts of the Administrative Manual that no longer conformed to the new Staff Rules were superseded and abolished as of 1 October 2003. The new Staff Rule 3.03.1(C), dealing with policy on tenure of appointment and contract extensions, stipulated that its provisions applied to Professional category staff previously employed in the General Service category. By SEC/NOT/2001, issued on 23 September 2004, staff members were informed that, following decisions of the Joint Advisory Panel on Professional Staff (Joint Advisory Panel), Staff Rule 3.03.1(C)(7) was revised.

Professional category staff who had previously been employed in the General Service category were now entitled, upon the expiration of their appointment in the Professional category, to return to a General Service post at the same grade and with the same contractual status that they held immediately prior to appointment in the Professional category.

On 27 September 2004 the Director of Information Technology recommended a final one-year extension of the complainant's appointment in the Professional category. By letter dated 9 May 2005 the Director of the Division of Personnel advised the complainant that the Director General had decided to offer him a final one-year extension of his appointment which would then expire on 14 April 2007.

In a letter of 7 June to the Director of the Division of Personnel the complainant asked for a reconsideration of his case. He wanted clarification of what he believed on the basis of SEC/NOT/2001 was his entitlement to return to a General Service post at the end of his Professional category appointment. He enquired whether a new appointment in the General Service category would include an increase in step level and allow him to retain his international status in order to "reduce the hardship for [his] family".

On 30 June the complainant wrote to the Director General requesting that he reverse the decision of 9 May and offer him either a five-year contract or, alternatively, a two-year non-final extension of his Professional appointment or, if this was not possible, the opportunity to return to a post in the General Service category.

The Director of the Division of Personnel replied to the complainant on 4 July 2005 stating that his appointment in the Professional category was subject to the rotation policy in accordance with Staff Rule 3.03.1(C)(7), but that he could return to a post in the General Service category under a contract identical to that which he held prior to his appointment in the Professional category. She added that she did not have the authority to reconsider the Director General's decision with respect to the complainant's contract extension.

On 27 July the Acting Director General replied to the complainant's letter, concluding that there was no basis upon which to reverse the decision to offer the complainant a final one-year extension.

By letter dated 19 August 2005 the complainant accepted the one-year final extension of his appointment. On 25 August he submitted an appeal to the Joint Appeals Board seeking the setting aside of the decision to offer him a final extension. In its report of 30 August 2006, the Board concluded that the Administration had acted in accordance with the relevant rules and guidelines and recommended that the Director General uphold the challenged decision. By letter dated 4 October 2006 the Director General informed the complainant that he had decided to endorse the Board's recommendation and provided the complainant with a copy of its report. That is the impugned decision.

Upon the expiry of his Professional category appointment the complainant returned to a post in the General Service category.

B. The complainant submits that, according to the case law, the Tribunal may set aside a decision that is based on an error of law. First, he argues that the impugned decision was based on the retroactive application of the rotation policy as amended with effect from 1 October 2003 and 23 September 2004, and in particular as set forth in the new Staff Rule 3.03.1(C)(7), which provided that the rotation policy now applied to General Service staff advancing to the Professional category. In his view, those amendments are only applicable to staff members who advanced from the General Service to the Professional category on or after 1 October 2003 and to staff members who advanced to the Professional category prior to 1 October 2003 but who accepted the terms of the amended policy in their subsequent contract extensions. He asserts that his appointment to the Professional category was effective in April 2001 and that at the time of his subsequent contract extensions his contract "did not contain the amendments to the Staff Rules".

Second, he contends that the rotation policy set forth in SEC/NOT/1484 did not apply in his case. He points out that the wording of SEC/NOT/1484 is ambiguous in that it does not state that General Service staff members advancing to the Professional category are subject to its terms. Relying on Judgment 1755, the complainant argues that pursuant to the *contra proferentem* rule, ambiguous terms in the Staff Regulations and Staff Rules are to be construed against the IAEA and in favour of the staff. He adds that the IAEA's Staff Mobility Policy and promotion from the General Service to the Professional category fall outside the regular recruitment process. Consequently, since he moved to the Professional category under the Staff Mobility Policy, he cannot be regarded

as a “regular Professional staff member” within the meaning of SEC/NOT/1484.

In a third plea the complainant states that he had an acquired right to be considered for a contract extension without reference to the IAEA’s rotation policy. Citing the case law he contends that the Agency’s practice of not applying the rotation policy to General Service employees advancing to the Professional category was so constant and consistent that it reflected a general rule.

Fourth, he claims breach of the principle of equal treatment. He submits that no other similarly situated staff members were subject to the rotation policy and that he does not stand in the same position, factually or legally, as other IAEA employees who, having been initially recruited in the Professional category, are subject to the rotation policy.

Fifth, the complainant also argues that the IAEA did not act in good faith. He contends that there is overwhelming evidence that it did not notify him that he would be subject to the rotation policy upon his advancement to the Professional category. He states that this breach of good faith is “all the more glaring” because the IAEA amended the rotation policy with effect from 1 October 2003 but applied the policy to him retroactively.

Lastly, he maintains that if the Tribunal finds that he was subject to the 2003 and 2004 amendments, there was, nevertheless, an error of law and breach of procedures. In January 2005, the standard form Proposal for Contract Extension of Professional Staff was changed to reflect the amendments to the Staff Rules. The new form no longer referred to SEC/NOT/1484. The recommendation for a final extension of the complainant’s contract was however made, and considered by the Joint Advisory Panel, on the old form.

He concludes that since the Joint Appeal Board’s report manifests errors of law and fact, the Director General’s decision, being based on the Board’s recommendations, contains the same errors.

The complainant asks the Tribunal to set aside the impugned decision and to order the IAEA to offer him a five-year contract extension with effect from 14 April 2006. Alternatively, he requests that it order the Director General to take a new decision without regard to the rotation policy. He claims material damages in the amount he would have earned if his contract in the Professional category had been extended in the period from 14 April 2007 to the date the Director General makes a new decision, plus interest. He also asks the Tribunal to direct the IAEA to make contributions to the United Nations Joint Staff Pension Fund equivalent to what it would have contributed on his behalf during that same period, less the actual amounts contributed by the Agency during that period. He also seeks moral damages and costs.

C. In its reply the Agency states that there has always been a rotation policy at the IAEA. If there was to be an exception to that policy for General Service staff advancing to the Professional category, such an exception would need to be clearly articulated in SEC/NOT/1309, but there is no such exception. In contrast, it was always known that the rotation policy applied to General Service staff advancing to the Professional category. How (and not whether) the rotation policy applied to these staff members was clarified in SEC/NOT/1484.

The Agency submits that it is clear in the complainant’s case that his tenure as a Professional staff member was considered in the context of the Agency’s rotation policy. His Letter of Appointment and Letters of Extension expressly referred to the possibility that his appointment in the Professional category might not be extended beyond five years or converted into another type of appointment. When he advanced to a Professional-level appointment on 15 April 2001 he became subject to the rotation policy as set out in SEC/NOT/1484.

The defendant argues that the concepts set forth in the revised Staff Regulations and Staff Rules promulgated by SEC/NOT/1966 were not new, particularly with respect to the applicability of the rotation policy to the complainant. Contrary to the view put forward by the complainant, the adoption of Staff Rule 3.03.1(C)(7) did not “amend the rotation policy by providing that the policy was now applicable to staff members advancing from the [General Service] to [the Professional] category”. The policy had always been applicable to those staff members. Furthermore, the complainant’s Letter of Appointment clearly incorporated by reference future changes to the Staff Regulations and Staff Rules. The rotation policy was expressly inserted into the Staff Rules on 1 October 2003, at which time the complainant was a Professional category staff member. Thus, the rotation policy was applicable to the complainant by 1 October 2003 at the latest.

Contrary to the complainant’s assertion, the rotation policy was not applied retroactively. Relying on the case law,

the IAEA argues that if the incorporation of the rotation policy into the complainant's contract took place on 1 October 2003, this was not a retrospective change to the terms of his contract or an abrogation of an acquired right. It was "prospective" because it had no relevance to any existing legal rights and status. The complainant had no "right" to avoid the application of the rotation policy that applied to every other Professional category staff member. His argument that the rotation policy could not apply to him because of the date of his appointment suggests that a staff member's rights and entitlements are fixed as at the date of appointment. The principle of non-retroactivity applies only to rights acquired by the complainant.

The IAEA explains that prior to 1 October 2003 a practice had developed within the Agency of making exceptions to the rotation policy for some staff members who had joined the Professional category from the General Service category. In some instances, offers of long-term appointments were made to individuals who had advanced to the Professional category if they satisfied specific criteria. However, this practice ceased on 1 October 2003 with the issuing of SEC/NOT/1966. According to the IAEA, the complainant did not acquire any rights under that practice because he did not satisfy the established criteria. Moreover, even if the practice had not been abolished and the complainant satisfied the established criteria he could not rely on this to assert any rights. As the Tribunal has confirmed, "the awarding of [long-term] contracts is exceptional and wholly discretionary and the fact that a contract is granted to one staff member creates no rights for any other staff member".

The Agency emphasises that the decision as to whether the complainant should be offered a long-term appointment (or a one or two-year extension) is a discretionary decision. Irrespective of previous practices with respect to the extension of appointments, there was no unequal treatment of the complainant as he had no reasonable expectation of an extension. It argues that there was no procedural irregularity and, in contrast to the complainant's assertion, the use of an "old" form with respect to his final one-year extension did not affect the validity of the extension. It also denies any bad faith.

D. In his rejoinder the complainant maintains his claims and arguments. He supplies what he considers evidence of his entitlement to the benefit of the IAEA's practice of exempting certain staff members from the terms of SEC/NOT/1484 and he provides examples of other staff members who were in the same situation and obtained a long-term contract. In particular, he provides a proposal made by his direct supervisor, dated 25 August 2004, for a (non-final) two-year contract extension. He claims that he was the only staff member "rotated out" and that he was forced to accept either a demotion or unemployment.

He argues that the "boilerplate clause" in his Letter of Appointment – which stipulates that it is subject to the Provisional Staff Regulations and Staff Rules "together with such amendments as may from time to time be made thereto" – does not defeat the principle of acquired rights. He considers that even if the Tribunal finds that he did not have an acquired right, he is entitled to "protection and relief". He also asserts that on the basis of good faith and the principle of non-retroactivity, Staff Rule 3.03.1(C)(7) should be narrowly interpreted as only applying to General Service staff promoted after 1 October 2003.

The complainant requests that the Tribunal order disclosure by the IAEA of complete copies of the Joint Advisory Panel meeting minutes for the years 1996 through 2003, or at the very least for the years 2000 through 2003. He considers that failure to disclose these documents would constitute a breach of administrative due process, warranting an additional award of moral damages.

E. In its surrejoinder the IAEA maintains its position and refutes the evidence supplied by the complainant. It contends that he did not satisfy the criteria to benefit from any exemptions to the terms of SEC/NOT/1484. Arguing that the complainant was provided with all excerpts from the minutes relevant to his case, it opposes his request for disclosure, claiming confidentiality and privilege with respect to the documents sought.

CONSIDERATIONS

1. The complainant challenges a decision not to extend his fixed-term appointment in the Professional category because of the Agency's rotation policy. His final extension of contract was for one year and indicated that the appointment would not be "extended, renewed or converted to another type of appointment".

The Director General having refused to reconsider his decision to grant him a one-year final extension, the complainant appealed to the Joint Appeals Board against the decision. The Board recommended that the decision

be upheld and the Director General endorsed this recommendation in a letter to the complainant dated 4 October 2006. The complainant brings a complaint against that decision.

2. After filing his complaint with the Tribunal, the complainant made a request to the Agency for copies of any documents of the Joint Advisory Panel that may be relevant to his case or that mention cases where General Service staff have moved to the Professional category. In particular, he requested the minutes of the Joint Advisory Panel meetings of May 2001 and May 2003. He explained that he was not asking for complete minutes and documents but just excerpts. This request was denied on the basis of confidentiality and privilege and also because the minutes specifically requested by the complainant were not relevant to his case. The Agency did provide the complainant with two brief summaries of the minutes of the meetings where his promotion was discussed.

3. In his rejoinder the complainant requests that the Tribunal order disclosure of complete copies of the minutes of the meetings of the Joint Advisory Panel for the years 1996 through 2003 or, alternatively, for the years 2000 through 2003.

Rotation policy

4. The complainant submits that the Director General's decision was flawed since it was based on the retroactive application of the new rotation policy. He takes the position that the new rotation policy only applies to staff members who advanced from the General Service to the Professional category on or after 1 October 2003 and to those who advanced prior to that date and who accepted the terms of the new policy in their contract extensions.

5. He further submits that since the rotation policy in SEC/NOT/1484 did not specifically state that it applied to those staff members moving from the General Service to the Professional category, it was not a term of his contract.

6. Turning to this latter submission, paragraph 2 of SEC/NOT/1484 provided that five years is the normal tour of service for members of the Professional staff. It also stipulated that it should be presumed that no further extensions of a contract would be granted except in certain circumstances as set out in paragraph 3. At paragraph 7, it provided that service under a General Service contract would not be counted in calculating the maximum tour of service in the case of a General Service staff member appointed to an advertised Professional post.

7. First, it must be observed that on the face of it the policy applied to all staff members. Of greater significance, however, is the specific reference at paragraph 7 to the manner in which the tour of service would be calculated for staff members moving from the General Service to the Professional category. There is no rational explanation for the inclusion of this provision unless the policy was intended to apply to staff members moving into the Professional category.

8. Second, the complainant's contract in the Professional category and its subsequent extension, both of which were entered into before the implementation in October 2003 of the new Staff Rules, provided that the appointment was subject to the relevant Staff Regulations and the Staff Rules, "together with such amendments as may from time to time be made thereto" and that it did not carry any expectation of or right to another extension, renewal or conversion to another type of appointment. Accordingly, as submitted by the Agency, the rotation policy was applicable to the complainant at the latest by October 2003.

9. As to the complainant's submission that the impugned decision contravenes the principle of non retroactivity, the Tribunal accepts the argument advanced by the Agency on this issue. In Judgment 2315, under 23, the Tribunal described a retroactive provision as follows:

"In general terms, a provision is retroactive if it effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely affects the procedures to be observed in the future with respect to such status, rights, liabilities or interests."

Further, under 25, the Tribunal stated:

"A change in the nature of the discretion to be exercised in determining whether to grant future rights by the extension or renewal of a contract cannot be said to effect a change in an existing legal interest, much less in an existing legal right or existing legal status. Accordingly, the seven year policy embodied in Administrative Directive 20 is not retroactive even if the seven year period is computed from a time prior to the proclamation of

that policy."

10. Based on the finding that the rotation policy applied to the complainant by at least October 2003, and having regard to the Tribunal's rulings cited above, the complainant's argument based on the retroactive application of the rotation policy must fail.

Acquired rights

11. It is well established that the party seeking to rely on an unwritten rule bears the onus of proving the substance of the rule. This applies equally to a party seeking to rely on an established practice.

12. Both the complainant and the Agency agree that there was a specific practice, prior to 1 October 2003, with regard to the granting of exceptional extensions of contracts to staff promoted from the General Service to the Professional category separate and apart from the exceptional extensions contemplated in SEC/NOT/1484. However, they do not agree on its substance.

13. The complainant alleges that the practice was not to apply the rotation policy, and to offer non-final contract extensions or long-term contracts if the quality of the staff member's work was of a high standard and the staff member was needed programmatically.

14. The Agency states that the practice was to offer long-term appointments to some, but not all, staff members who:

(a) had held a long-term appointment in the General Service category;

(b) had at least five years service in the Professional category, that is, the normal tour of duty in that category;

(c) were more than five years from retirement; and

(d) were recommended for long-term contracts by their supervisors.

15. The complainant contends that direct evidence of the substance of the practice is available in the Joint Advisory Panel meeting minutes. He bases this contention on comments made by a former Staff Council President regarding discussions which took place in the May 2001 meeting of the Joint Advisory Panel. He also contends that the former Staff Council President's version of events is supported by the summary of the Panel meetings in the "Report of the Thirty-Eighth Staff Council to the Forty-Fifth Ordinary Staff Assembly for the period 2001 – 2002", according to which the Director General had actually stated at previous Joint Advisory Panel meetings that it would be difficult to apply the rotation policy to long-serving General Service staff who had moved to the Professional category.

16. In the Tribunal's view, the evidence put forward by the complainant falls far short of proving the practice he maintains existed at the relevant time. Given that the Agency developed its practice on the basis of a number of criteria, it is enough to point out that the complainant has failed to meet the criterion that he was recommended for a non-final extension by his supervisor. In this regard, the complainant's evidence that he was indeed recommended by his direct supervisor in an unsigned and unfinished form is contradicted by the completed and signed form indicating that he was not recommended.

17. Based on the foregoing, it is not necessary to give further consideration to the complainant's argument regarding acquired rights.

Equal treatment

18. The Tribunal also finds that the impugned decision does not breach the principle of equal treatment. The principle of equal treatment requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently (Judgment 2313, under 5).

19. First, the complainant has merely alleged that because the individuals who were not subject to the rotation policy were, like him, General Service staff who had been promoted to the Professional category, they were similarly situated. However, having regard to Staff Rule 3.03.1(C)(4) which provides for extensions of fixed-term

appointments in the Professional and higher categories beyond the five-year tour of service in prescribed circumstances, and the nature of the practice prior to 1 October 2003 as outlined by the Agency, it is clear that when long-term contract extensions were being considered, there were considerations other than the fact that the staff member was formerly in the General Service category. The complainant has failed to demonstrate that he was in a similar situation.

20. Second, a decision to grant long-term contract extensions, either under the applicable Staff Rules or under the alleged practice prior to 1 October 2003, is discretionary in nature and exceptional. In the case of the Staff Rules, the exception is set out under Staff Rule 3.03.1(C)(4), while the practice as described by the Agency was itself an exception.

21. As pointed out in Judgment 2138, under 12, the complainant "can take no comfort from the case of another staff member in a somewhat similar situation who was given a long-term contract. As indicated, the awarding of such contracts is exceptional and wholly discretionary and the fact that a contract is granted to one staff member creates no rights for any other staff member." Accordingly, the plea must also fail.

Breach of good faith

22. The complainant submits that the Agency did not act in good faith in applying the rotation policy retroactively or in breach of an acquired right. Further, failure to notify him that the rotation policy would be applied to him also constitutes bad faith on the part of the Agency.

23. As the Tribunal has rejected the complainant's arguments on the retroactive application of the rotation policy and the breach of an acquired right, there is no need to address this submission any further.

24. The complainant states that he did not know that the rotation policy would be applied to him when he was promoted, and had he known he would not have taken the position.

25. The question as to whether the complainant knew that the rotation policy applied to him at the time he entered the Professional category is not material. The complainant is effectively arguing that he should have been informed of future changes to the Staff Regulations and Staff Rules. No precedent supports this position. A staff member must be kept informed of changes as they occur.

Contract Extension form

26. The complainant submits that the Joint Advisory Panel considered the extension of his contract under the former rotation policy found in SEC/NOT/1484, however that notice had at the time been expressly superseded. He points to the fact that the Proposal for Contract Extension of Professional Staff form submitted to the Panel referred to a one-year final extension in accordance with SEC/NOT/1484, paragraph 3.

27. From this, he submits that the use of the old form constitutes a procedural error. As well, the view of the Joint Appeals Board that the use of the old form did not affect the manner in which the Joint Advisory Panel considered the extension constitutes an error of law. To accept this argument in the absence of any evidence that the Panel faced with an old form would have unthinkingly applied the old policy would be to allow form to triumph over substance. This plea must also fail.

Disclosure of documents

28. Given that the request for the production of the Joint Advisory Panel minutes is based only on speculation that they may be material, the Tribunal rejects the request for disclosure. As stated in Judgment 2510, under 7, "the Tribunal has consistently held that it will not order the production of documents on the speculative basis that something might be found to further the complainant's case".

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.