

**119th Session**

**Judgment No. 3412**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. C. against the International Atomic Energy Agency (IAEA) on 18 June 2012 and corrected on 14 September, the IAEA's reply dated 27 December 2012, the complainant's rejoinder of 5 April 2013 and the IAEA's surrejoinder of 11 July 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, 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 joined the IAEA in 1981. After having served in various positions, in January 2003 he was assigned to the post of Section Head of SGOB2, one of the sections of Division of Operations B (SGOB) in the Department of Safeguards. His section was responsible for, among other things, safeguards implementation in a geographic area which included the Islamic Republic of Iran.

In July 2005 the IAEA published a vacancy notice for the post of Director of SGOB. The complainant applied for the position and he and an external candidate, Mr N., were recommended by the selection panel. Ultimately, the Director General appointed Mr N. who, like the complainant, was a Belgian national.

In the exercise of his functions, the complainant was required to travel to the Islamic Republic of Iran on more than one occasion. Following one such trip, in a letter of 3 May 2006 the Permanent

Mission of the Islamic Republic of Iran to the IAEA made several allegations against him, asserted that he must face disciplinary measures in accordance with the relevant IAEA Staff Regulations and Staff Rules and requested that he be released permanently from all his responsibilities in connection with the implementation of the safeguards agreement in the Islamic Republic of Iran. The IAEA did not formally investigate the allegations.

With effect from 1 April 2007 the complainant was transferred to the post of Section Head of SGOB3, which covered the geographic area of Latin America and the United States of America.

In September 2010 the post of Director of SGOB fell vacant again when Mr N. was appointed Deputy Director General of the Department of Safeguards (DDG-SG). On 14 September Mr W. was assigned as Officer-in-Charge of SGOB. Later that month the IAEA published a vacancy notice for the post of Director of SGOB. The complainant applied, was placed on a shortlist and was interviewed by a selection panel in January 2011. On 26 January he met with Mr N. and was informed that his name was not included on the list of candidates who were to be invited for a second and final interview. Mr N. further explained that the complainant's nationality and his prior working relations with the Islamic Republic of Iran had affected his candidacy.

By a memorandum of 2 March 2011 the complainant notified the Administration that he had learned that Mr W. was to be recommended for the position of Director of SGOB. The complainant requested that the selection panel reconsider the decision it had taken to exclude him from the next step in the selection process and that it recommend him to the Director General for the disputed post. By an e-mail of 7 March the Administration announced that Mr W. had been appointed as Director of SGOB.

On 2 May 2011 the complainant requested the Director General to reverse the decision to appoint Mr W. to the contested post. In his response of 31 May the Director General stated that the selection process had been carried out under fair conditions and in accordance with the IAEA's Staff Regulations and Staff Rules and recruitment

practices. Thus, there was no reason to reverse the appointment decision or propose that the selection process be revisited.

On 16 June the complainant filed an internal appeal with the Joint Appeals Board (JAB) in which he challenged the Director General's decision. In its report of 29 February 2012 the JAB recommended that the Director General maintain his original decision. By a letter of 2 April 2012 the Director General dismissed the complainant's appeal. That is the impugned decision.

B. The complainant asserts that the selection process was tainted by errors of law. He acknowledges that the IAEA may consider nationality for the purposes of recruiting staff on a wide geographical basis, but before doing so it must first identify the best qualified candidates for the post in question in order to comply with the paramount consideration in recruitment and employment which, according to paragraph D of Article VII of the IAEA Statute and Staff Regulation 3.01, is to secure employees of the highest standards of efficiency, technical competence, and integrity. In his case, the selection panel committed an error of law by taking into account his nationality. Indeed, it did not carry out its sole function which was to identify the best qualified candidates and to recommend them to the Director General, the latter having the sole discretion to consider nationality if two equally qualified candidates were recommended. Moreover, the selection panel considered him ineligible for appointment to the contested post because he holds the same nationality (Belgian) as Mr N., the DDG-SG. In so doing, it committed a further error of law, because the purpose of geographical distribution is to increase the appointment of nationals from under-represented Member States across the IAEA as a whole, not within individual sections, divisions, or departments.

The complainant contends that the selection decision was taken with regard to political considerations, i.e. at the direction of the Islamic Republic of Iran and based on unproven allegations made against him by that Member State. He argues that these allegations resulted in prejudice and bias against him during the selection process. Referring to paragraph F of Article VII of the IAEA Statute, he states

that the Director General and the staff must not seek or receive instructions from any source external to the IAEA. Although the aforementioned allegations were never the subject of a formal investigation and thus are not proven, the selection panel unlawfully decided that he was not qualified for the post, in part, because of his working relations with the Iranian authorities.

The complainant accuses the IAEA of breaching the principles of equal treatment, good faith and fair dealing and of causing injury to his dignity.

The complainant seeks the disclosure of the report submitted to the Director General by the selection panel. He asks the Tribunal to set aside the impugned decision. He seeks material damages in an amount equivalent to what he would have earned had he been employed at grade D-1 from 1 April 2011 until 30 June 2014, including pension benefits and other emoluments, less the amounts he earned in the period from 1 April 2011 until his retirement from the IAEA at the end of June 2012, with interest from due dates. He also claims moral damages in the amount of 30,000 euros, and costs.

C. In its reply the IAEA asserts that the complainant was treated no differently than any of the other candidates for the contested position. In assessing the candidates' applications, it acted at all times in good faith, in accordance with established and fair procedures and, in particular, with the principles and procedures set out in the IAEA Statute, the Staff Regulations and Staff Rules and the IAEA Administrative Manual.

The selection panel, after assessing the candidates' performance during the interviews, concluded that some candidates had performed better than the complainant. The panel shared its assessment with the Director General, who decided, after consideration of other factors that were relevant in light of the requirements of paragraph D of Article VII of the IAEA Statute, Staff Regulation 3.01 and Staff Rule 3.03, that he would interview the three most suitable candidates before taking a final decision on the appointment. In the case of the complainant, his nationality and background *vis-à-vis* the Islamic Republic of Iran were deemed not to assist his candidature in that

these were considered to impact on his ability to perform the functions associated with the post in an effective manner.

The IAEA strongly denies that the appointment decision was based on political considerations and it disputes the complainant's allegations that it breached the principles of equal treatment, good faith and fair dealing.

D. In his rejoinder the complainant presses his pleas.

E. In its surrejoinder the IAEA maintains its position and emphasises that it was the complainant's performance in his interview during the selection process that led the selection panel to conclude that he was not among the three most suitable candidates.

#### CONSIDERATIONS

1. The complainant filed an internal appeal against the appointment of Mr W. to the position of Director of SGOB, for which the complainant had also applied. In the present complaint he impugns the Director General's decision, contained in the letter of 2 April 2012, to reject his internal appeal in accordance with the unanimous recommendation of the JAB.

2. The JAB found that the selection panel had followed the proper procedure for selection, that it had acted fully within the authority delegated to it by the Director General, and that there was "no indication that the interview panel did anything other than fully and properly to assess his candidacy". It noted that the complainant's previous success in being shortlisted when applying for this same position in 2005 had no bearing on the recent selection competition "[g]iven that the respective strengths of candidates may differ and that requirements may differ with time". The JAB also agreed with the Director General's comment that "the recruitment process cannot be compared to any previous recruitment, and must be assessed in light of the circumstances and requirements for this Vacancy". It concluded

that “the recruitment process conducted in relation to the [complainant’s] application for the post of Director of [SGOB] had been consistent with established [IAEA] rules and procedures” and therefore recommended that the Director General “maintain his original decision not to reverse the appointment decision in question”.

3. The complainant claims that he was discriminated against based on his nationality (as he held the same nationality as Mr N., the newly appointed DDG-SG) and on the basis of the comments and allegations made against him by the Iranian authorities which were never investigated.

4. The complainant’s performance review reports reflected the high quality of the work he was doing and the positive regard that the IAEA held for his contributions, so it would have been particularly important for him to challenge any decision which he felt had, or would have, a negative effect on his career. That the IAEA did not order an investigation into the allegations made by the Iranian authorities can be seen as evidence that it did not consider those allegations to be valid. However, transferring him from his work with the Islamic Republic of Iran could also be seen as responding to the pressure put on the IAEA by the Iranian authorities when the IAEA must be, and be seen as, independent. Regardless, the transfer is not under review by the Tribunal.

5. The Tribunal is of the opinion that the selection panel acted in compliance with paragraph D of Article VII of the IAEA Statute and Staff Regulation 3.01 which relevantly provide that the paramount consideration in the recruitment, promotion, and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Both provisions also add that, subject to this consideration, due regard shall be paid to the contributions of Member States to the IAEA and to the importance of recruiting the staff on as wide a geographical basis as possible. The Tribunal considers that the complainant has not shown that the selection panel erred in considering him as less qualified than the three candidates (from the six-candidate

shortlist) who were selected for further interviews with the Director General. Nor has he demonstrated that the decision not to include him in the further selection process following the initial interview was based, in a decisive way, on his nationality or on the remarks and allegations made against him by the Iranian authorities, rather than on his skills and qualifications compared to those of the other candidates. He has also not shown that the IAEA breached the principles of equal treatment, good faith or fair dealing. In light of the above, the Tribunal finds that the complaint is unfounded and, consequently, must be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ