

119th Session

Judgment No. 3414

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. N. against the International Atomic Energy Agency (IAEA) on 12 April 2012 and corrected on 5 June, the IAEA's reply of 12 September, the complainant's rejoinder of 10 December 2012 and the IAEA's surrejoinder of 21 March 2013;

Considering Articles II, paragraph 5, and VII 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, who was Unit Head of the Division of Concepts and Planning, Process Design Section, in the Department of Safeguards (SGCP-CPD), was elected in November 2006 as President of the Staff Council and the Director General released him, on a full-time basis, from his regular duties. On or about that time, his name was removed from the e-mail distribution list for SGCP-CPD. The complainant was re-elected as Staff Council President for the years 2008, 2009, 2010 and 2011, and was still serving in that capacity at the time the IAEA submitted its reply in the present case (12 September 2012).

In the meantime, beginning in September 2009, the complainant made several requests to have his e-mail address placed back on the e-mail distribution list for SGCP-CPD. Having received no reply, by way of a letter of 8 June 2010 to the Director General he asked that

the implied administrative decision rejecting his requests be reversed and that his name once again be included in the list. He stated that he considered the rejection of his request to be a denial of his right of association and his right to represent the staff members who had elected him as their Staff Council representative. Having received no reply to this request, on 12 July 2010 he wrote to the Secretary of the Joint Appeals Board (JAB) and asked that the JAB be convened to consider his case.

An exchange ensued between the complainant and the Administration in an attempt to resolve the issue. Despite an apparent agreement between the parties in March 2011 that the complainant's e-mail could, subject to certain conditions, again be placed on the list, this did not occur.

In its report of 20 December 2011 the JAB recommended that the Director General should dismiss the appeal for the reasons put forward by the Administration. In a letter to the complainant of 23 January 2012, the Director General explained that the complainant was no longer a staff member in the Department of Safeguards. As an IAEA staff member, he was subject to the IAEA's Information Security Policy (Part II, Section 19, of the IAEA Administrative Manual), paragraph B1.6 of which provides that staff members shall have access to classified information on a need-to-know basis only, and a staff member has a need to know when the information is required for the carrying out of her or his responsibilities. The complainant was not currently performing responsibilities that gave rise to a "need to know" the classified information distributed within SGCP-CPD. Thus, the Director General dismissed the complainant's appeal. That is the impugned decision.

B. The complainant submits that his inclusion on the e-mail distribution list for SGCP-CPD will not adversely impact the work of his Division due to confidentiality risks. He points out that in 1998 he signed a confidentiality undertaking for staff members. In addition, documents with a confidential status cannot be transmitted through an electronic mailing list. E-mails sent to entire distribution lists contain

general information and work related information that is not classified. Furthermore, granting his request would not have contravened the IAEA's Staff Rules. Indeed, during the internal appeal proceedings the Administration informed the JAB that there were no Staff Rules which governed the matter.

In respect to freedom of association, he states that he has not been directly deprived of freedom of expression, nor has any censure been exerted on his communications. Nevertheless, in his view, there has been a subtle undermining of his right to freedom of association owing to the fact that he was released from his IAEA duties on a full-time basis. If a staff representative is released on a less than full-time basis, the representative is still required to perform some of her or his normal duties and, consequently, remains in contact with her or his working unit. In the complainant's case, by removing him from the SGCP-CPD e-mail distribution list after releasing him from his duties, the IAEA blocked his access to some of his sources of information and, accordingly, prevented him from performing part of his duties as Staff Council President. Moreover, as he has been deprived of routine information originating from his former Unit where he is due to return to work when he ceases to act as Staff Council President, the complainant will not be able to perform his duties as satisfactorily as possible and, consequently, might lose his last chance – bearing in mind his age – of obtaining a promotion. The complainant submits that he should be provided, at all times, with at least routine information and not be disadvantaged on the grounds of his participation in staff representation activities.

The complainant contends that the IAEA's actions in this matter have affected the continuity of the staff representation by discouraging potential candidates from seeking election as Staff Council President because they are concerned that their return to normal work after participation in such activities could be impaired.

The complainant asserts that, in being cut off from his work environment, he is being treated differently from his colleagues and, in that sense, his is being discriminated against. He acknowledges that, in his capacity as Staff Council President, he is not in the same

position as his colleagues, but he argues that the rules the IAEA has applied to him are not appropriate and adapted to his case and, consequently, they have a discriminatory effect.

Lastly, the complainant contends that he has suffered substantial moral injury for a number of years as a result of the IAEA's unreasonable delay regarding this matter.

The complainant asks the Tribunal to set aside the impugned decision, to order the IAEA to restore his name on the SGCP-CPD distribution list or, subsidiarily, to order compensation in an amount it deems appropriate. He also claims moral damages and costs.

C. In its reply the IAEA argues that the Tribunal lacks competence *ratione materiae* to consider the complainant's claims. He has failed to indicate the applicable Staff Regulations and Staff Rules, or the terms of his appointment, that safeguard his "right" to be included in any e-mail distribution list, or which have been violated by the IAEA's failure to so include him. Also, his complaint is irreceivable; his claim is highly speculative and he cannot have suffered any actual harm in connection with the performance of his future duties in the Department of Safeguards. Referring to the case law and to a decision of the former United Nations Administrative Tribunal, the IAEA characterizes the complainant's complaint as "frivolous".

On the merits, the IAEA submits that it protects the right to freedom of association by way of its internal rules. It has established a Staff Association for the purpose of safeguarding the rights and promoting the interests and welfare of all staff members. It has further protected the right to freedom of association by the release of its Staff Council President from her or his duties on a 100 per cent basis.

The IAEA asserts that the complainant has not demonstrated that he has suffered any detriment or discrimination as a consequence of his role as President of the Staff Council. Indeed, he has failed to show that he has suffered any actual harm. He has not indicated what duties he has been unable to perform due to his non-inclusion in the e-mail distribution list for SGCP-CPD. The IAEA challenges the complainant's allegation that any of its actions or inactions would

directly or implicitly impair his return to his normal duties, or likewise impair the return to duty of any other staff member considering running for the position of Staff Council President. It states that it is not certain that he will return to the same post that he held at the time of his release from the Department of Safeguards.

The IAEA contends that there has been no unequal or discriminatory treatment of the complainant. As a result of his election as President of the Staff Council he was released full time from his duties as Unit Head of SGCP-CPD. He was not involved in the day-to-day work of the Unit and thus did not have a legitimate interest in being included in the information channels that served the staff of that Unit. He was not hampered in exercising his functions as Staff Council President, nor was he prevented from obtaining the information necessary for this role or from engaging in communications with the Administration or other staff members or initiating or participating in discussions and debates.

With respect to the complainant's allegations regarding the delay in addressing his request, the IAEA asserts that vigorous efforts were made by the Administration to reach an informal agreement with him regarding the inclusion of his name on the SGCP-CPD e-mail distribution list for limited purposes. It contends that it acted properly and in good faith in all of its administrative actions *vis-à-vis* the complainant.

D. In his rejoinder the complainant presses his pleas. He contends that his complaint is receivable and points it out that international administrative tribunals have always applied, apart from the concerned staff member's contract and the applicable Staff Regulations and Staff Rules, many other sources of international civil service law. Furthermore, the Tribunal has never considered that actual harm is necessary to establish the receivability of a complaint. In addition, he objects to the IAEA's characterization of his complaint as "frivolous".

E. In its surrejoinder the IAEA maintains its position in full.

CONSIDERATIONS

1. The complainant commenced working for the IAEA in 1987. On 29 January 2002 he was informed that he had been selected for the post of Unit Head, Division of Concepts and Planning, Department of Safeguards (SGCP-CPD) with effect from 1 February 2002. This occurred in circumstances where the complainant had been elected, in December 2001, as President of the IAEA Staff Council. In 2002 he assumed that role full-time which accorded with what had been the practice for some considerable time in the IAEA. He resumed his duties as Unit Head in 2003 through to 2006. In November 2006, the complainant was again elected President of the Staff Council and was also re-elected in succeeding years.

2. A number of issues have arisen since 2006 about the rights, in the loosest sense of the word, of the complainant as an official of the IAEA but one who is filling, full-time, the position of President of the Staff Council. The present complaint concerns the complainant's access to e-mails circulated within the IAEA. Put simply, the complainant's e-mail address was removed from an e-mail distribution list of certain IAEA employees (employees in SGCP-CPD of which there are 13) and the complainant wishes to have his e-mail address reinstated to that list.

3. This particular issue about the e-mail distribution list came to a head when the complainant wrote to the Administration by e-mail on 3 June 2010, in effect requesting his name be placed back on the distribution list by 9 June 2010 and foreshadowing an appeal if it was not. The complainant attached a draft appeal to this e-mail. The complainant did not receive a favourable response and, on 8 June 2010, sought a review by the Director General of what the complainant characterised as an implied negative decision concerning his request. On 12 July having received no response to his request for a review, the complainant appealed to the JAB. Thereafter attempts were made to resolve the matter. This included what appears to be a conditional offer from the Administration on 1 February 2011 to place the

complainant on the SGCP-CPD distribution list on the basis that he would not “attend section meetings that are convened by use [of] this list”. By an e-mail dated 1 March 2011 the complainant accepted this offer though expressed misgivings about the condition. However, as a matter of fact, his name was not reinstated to the list.

In due course, the appeal was considered by the JAB. Its recommendation was that the “position of the Administration” be upheld. In its reasons the JAB observed that it was the prerogative of management to decide under what circumstances information could be shared. The JAB’s report led to a decision of the Director General in a letter dated 23 January 2012 to dismiss the complainant’s appeal. He observed that the complainant was no longer a staff member in the Department of Safeguards. He also observed that under the IAEA’s Information Security Policy staff members could have access to classified information on a need-to-know basis only, which was when the information was required for the carrying out of the staff member’s responsibilities. The Director General then observed that as the complainant was not a staff member in the Department of Safeguards, he was not then performing duties that would have given rise to a “need-to-know” the classified information that was distributed within SGCP-CPD.

Other relevant matters of detail will be discussed when addressing the issues raised in the proceedings.

4. The first issue is a challenge to the competence of the Tribunal by the IAEA. The IAEA contends that the competence of the Tribunal is clearly and exhaustively defined in Article II of the Tribunal’s Statute. The IAEA contends that the complaint does not concern the complainant’s terms of appointment nor does it concern the application of Staff Regulations or Rules, the two matters addressed by that Article. However it has long been recognised that all officials of international organisations have a right to associate and an implied contractual term in the appointment of each that the relevant organisation will not infringe that right (see, for example, Judgment 496, consideration 6). Moreover the principle of freedom of association is

infringed if a person is subject to detriment or disability because of her or his activities within a staff association or the Staff Council (see, for example, Judgments 2704, consideration 6, and 3084, consideration 19). In the present case the complainant does contend he is being discriminated against and this has arisen by virtue of him occupying the office of President of the Staff Council. This plea is sufficient to engage the jurisdiction of the Tribunal. It is, of course, another question whether this plea can be made on the facts. But the Tribunal is competent to hear the complaint and rejects the IAEA's contention that it is not.

5. The second issue is also a threshold issue. The IAEA argues that the complaint is frivolous and should, for that reason, be dismissed at the outset. It cites two authorities in support of this approach. One is Judgment 2730 where, at consideration 4, the Tribunal held that it did "not have to tolerate the initiation of proceedings before it that are manifestly frivolous, wrongful or vexatious". However in that matter the Tribunal, while very critical of the way the complainant articulated his case in the pleas, did not proceed to characterise the entire complaint as frivolous, wrongful or vexatious nor did it refrain from considering the merits of the complaint entirely. It did consider an aspect of the case and rejected it on its merits. The other authority is a decision of the former United Nations Administrative Tribunal (UNAT) in Judgment 497. However, as UNAT noted in its reasons, the Statute governing that Tribunal provided for the declaration that an application is frivolous and noted that created a proper mechanism for preventing abuse of the appellate procedure by vexatious litigants. This Tribunal's Statute provides no such express mechanism. In any event to reach a conclusion that a particular complaint is frivolous, wrongful or vexatious would require an analysis of the substance of the case to sustain a conclusion that it was devoid of merit. In some senses, other than in the most obvious and egregious case, the Tribunal cannot avoid (assuming it can otherwise) looking at the merits of any complaint even if, at the end of the day, the Tribunal concludes that it is without substance. In those circumstances issues may arise about costs. Also, the issue raised by

the complainant is, potentially, one of substance and it would be inappropriate, as the IAEA apparently invites the Tribunal to do, to dismiss the complaint at the outset as frivolous or vexatious. This aspect of the IAEA's pleas is rejected.

6. The complainant's second period as President of the Staff Council commenced with his election on 27 November 2006. On 1 December 2006 he requested to be released on a full-time basis from his regular duties. This accorded with a provision in the IAEA's Administrative Manual which provided that "[t]he newly elected President is obliged to request full time release from his/her normal post and must move to the established office of the Staff Council". The Director General approved the complainant's request and this was communicated to him on 24 April 2007. While precisely when is not clear, a new Unit Head in SGCP-CPD was appointed to fill the vacant post left by the complainant. Thus from early 2007 the complainant had been released from his normal post and this has remained the position for the succeeding years.

7. The essence of the complainant's case is that either there had been a breach of his right to freedom of association or discrimination or both. It is convenient to commence by recalling that the complainant bears the burden of proving that the right has been violated or that he had been discriminated against by the IAEA. In so far as an elected representative alleges breach of the right to freedom of association, it is incumbent on the complainant to prove the breach (see Judgment 2585, consideration 11).

8. Communication between officials or groups of officials of an international organisation is essential for the effective functioning of the organisation. With the advent of e-mail, one practical and common means of communication within a group involves the creation of e-mail distribution lists so that information contained in an e-mail can be given routinely to all officials who have or may have a common interest in knowing that information by virtue of membership in that group. There is no reason to doubt that in the ordinary course the

identity of officials who will receive such information by being on a particular distribution list, is a matter to be determined by the administration of the organisation by officials who have a leadership role within the group or by others. As a generalisation, no individual official has a right to assert that she or he is entitled to particular information simply by virtue of her or his own assessment of the position occupied by the official in the organisation's structure and the correlative need for information in the face of a decision by another official that the information will not be provided. This is the starting point in considering the complainant's complaint.

9. The first general basis on which the complainant challenges the impugned decision is that the fact that he is not on the SGCP-CPD distribution list involves a breach of his right of freedom of association and possibly the violation of the right of freedom of association of other officials of the IAEA. Reference is made in the complainant's brief to authorities concerning freedom of association including those that uphold the concept that an organisation cannot prevent, censor or curtail reasonable and appropriate communication between members of a staff association (see, for example, Judgments 496, consideration 37, and 911, consideration 9). The complainant seeks to illustrate the violation of this right in several ways. The first is that he is prevented from performing part of his duties as President of the Staff Council because he has been cut off from his work environment and sources of information, including social ones, have "dried out". To the extent that the complainant illustrates the adverse consequences, he relies on missing out on information sent to staff in his work area (such as a two-day retreat outside Vienna), the promotion of his colleagues and news of the death of a close colleague. He also asserts that what has happened to him may be a disincentive for others to seek office in the Staff Council. However these consequences are, with one qualification, a mixture of mere assertion and consequences that do not truly bear upon or arise from the discharge of his duties as President of the Staff Council. The qualification is that the complainant has provided a statement dated 4 June 2012 from the 1st Vice-President of the Staff Council. Her concern is that she would be reluctant to seek election as

President if that meant she “was considered only a ‘staff member’ and not associated [with] any Department”. However the issue in this matter concerns, not the fact that the complainant is only a “staff member”, but rather one of the many potential practical consequences of him being so. His status while President of the Staff Council derives from the operation of the provision of the Administrative Manual quoted earlier which required him to seek to be released from the duties of the position he held. The complainant has not challenged that provision nor has he sought to argue that he remains nominally the Unit Head of SGCP-CPD. Accordingly the reservation of the 1st Vice-President is based on a more fundamental question not raised in these proceedings.

10. There is, of course, the possibility that the IAEA’s approach is an indirect attack on the complainant because he is the President of the Staff Council. That is to say, the IAEA is victimising him because of the office he holds. However, having identified that is a possibility, the Tribunal cannot conclude, on the evidence, that this is so. What appears to have happened is that the complainant felt personally aggrieved by the decision to remove him from the distribution list which, of itself, has not been shown to have been a decision actuated by any improper or inappropriate motive. It is for this reason of personal grievance that he has pursued the issue both by way of internal appeal and complaint to this Tribunal.

11. The second general basis on which the complainant challenges the impugned decision is that it violates the principle of equality. The complainant accepts that the alleged violation does not arise because he is in a similar situation to other officials but is not regulated by the same rules. Rather he accepts he is in dissimilar situation and appears to argue that the rules covering his position are not appropriate or adapted and thus have a discriminatory effect or disproportionate impact and he cites Judgment 2704, consideration 7. The Tribunal is prepared to assume, for present purposes, that entirely informal arrangements (such as who is on a distribution list) can be treated as “rules” for the purposes of the application of this principle.

However the complainant does not have a demonstrable need to obtain the information that he would otherwise have received if he was on the SGCP-CPD distribution list. His exclusion from the distribution list is not demonstrably inappropriate. To the extent that the complainant argues that not getting the information compromises his ability to return to the position he formerly held, namely Unit Head in SGCP-CPD, this argument involves an unsupported assumption and unproved assertion. The assumption is that he will or even may return to his former position. Certainly no legal basis for this to occur has been identified by the complainant. He, in fact, concedes in his rejoinder that the position is ambiguous while pointing to what happened to an earlier President of the Staff Council who had served in the office for 13 years (his job was held for him). Moreover and more fundamentally the complainant reached his mandatory retirement age on 20 January 2014 in circumstances where his last term as President of the Staff Council ended on 30 December 2013. The assertion is that his capacity to take up the position will be compromised by his present inability to obtain e-mail addresses of existing members of the SGCP-CPD. The complainant has not established any violation of the principle of equality.

12. In the result, the complaint should be dismissed. While the subject matter of the complaint was not of high principle, the complaint was not vexatious or frivolous and the IAEA's request for "nominal costs" is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2014,
Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M.

Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL M. MOORE

DRAŽEN PETROVIĆ