

G.

v.

ITER Organization

123rd Session

Judgment No. 3767

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. K. G. against the ITER International Fusion Energy Organization (ITER Organization) on 15 January 2014, the ITER Organization's reply of 30 April, the complainant's rejoinder of 29 July and the ITER Organization's surrejoinder of 4 November 2014;

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 may be summed up as follows:

The complainant challenges the decision to delay the grant of a periodic step advancement based on his 2012 performance appraisal report.

The complainant joined the ITER Organization in 2008 under a five-year fixed-term contract. As he obtained a "needs to improve" rating in his 2011 performance appraisal report, a Performance Improvement Plan (PIP) was put in place for him in April 2012. In December 2012, when the complainant had completed the PIP, his supervisors wrote a final progress review in which they stated that he had achieved the PIP objectives and that "his performance at present [was] fully satisfactory".

The complainant's annual performance appraisal report for 2012 was drawn up in April 2013. He again obtained the rating "needs to improve". In his comments on the report, the complainant said that he was surprised to have obtained that rating, in view of the positive appraisal that he had received in December 2012 at the end of the PIP. His supervisors signed the report on 14 April 2013.

On 12 July 2013 a memorandum containing the list of staff members who had been granted promotions, advancements and awards for the year 2012 was published. As the complainant's name did not appear on the list, on 17 July he lodged an appeal with the Director-General challenging the decision to approve his 2012 performance appraisal report which, in his view, was implicitly announced by that memorandum. On 22 July the Administration replied that his appeal was time-barred, because he had not challenged his performance appraisal report, which had been "finalized" on 14 April 2013, within the prescribed two-month deadline.

On 26 July 2013 the complainant received a letter dated 12 July 2013 in which the Director-General informed him that he had decided to accept the proposal of the Promotion and Advancement Board – which was based on his 2012 performance appraisal report – to delay by one year the granting of the periodic step advancement. On 8 August 2013 the complainant lodged a second appeal challenging the Director-General's decision of 12 July. He emphasised that he had received no response to his comments on the 2012 performance appraisal report and requested that his rating be modified to "meets requirements" and that the Promotion and Advancement Board revise its recommendation accordingly. The Director-General rejected this appeal on 30 August 2013 on the grounds that the decision of 12 July 2013 had been taken in accordance with the applicable rules.

By letter of 4 September 2013 the complainant requested mediation with respect to the Director-General's decision to endorse his 2012 performance appraisal and not to grant him a periodic step advancement. In his report of 12 October 2013 the Mediator found that there was an apparent inconsistency between the final progress review on the complainant's PIP and his 2012 performance appraisal report. He recommended that the complainant's supervisors should be asked to

explain this apparent inconsistency and to indicate precisely what information was given to the complainant regarding the unsatisfactory aspects of his performance in the course of the reporting period, and that, in light of their response, the Director-General should consider whether the contested performance appraisal report should be modified.

The supervisors sent an explanatory note to the Human Resources Division on 23 October 2013, which was subsequently sent to the complainant as well. By a letter of 23 October 2013 the complainant was informed that, based on all relevant information, and especially the clarification provided by the complainant's supervisors, the Director-General had decided to confirm his initial decision to endorse the proposal of the Promotion and Advancement Board to delay the grant of a periodic step advancement. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order the ITER Organization to change the rating in his 2012 performance appraisal report and other records to "meets requirements", and to order that it "correct" all other decisions that are affected by performance ratings accordingly. He claims damages for any losses caused by the 2012 performance appraisal report, moral damages, as well as costs in the amount of 5,000 euros.

The ITER Organization submits that the complaint is irreceivable to the extent that the complainant seeks to challenge his 2012 performance appraisal report, as he did not lodge an appeal against it in due time. To the extent that he challenges the decision to delay his periodic step advancement, it asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. This complaint is concerned with two internal appeals against decisions of the Director-General. The complainant lodged the first appeal on 17 July 2013, which stated as follows in the first paragraph:

"In accordance with Article 26 of the ITER Staff Regulations, I wish to appeal against your decision approving my 2012 annual performance appraisal. The decision was implicitly announced by your memorandum to staff of 12 July 2013 [...]."

2. The right to lodge an internal appeal is provided in Article 26.1 of the Staff Regulations of the ITER Organization. Article 26.1(a) states that an internal administrative appeal is a procedure whereby a staff member who considers that he has suffered an infringement of his rights as laid down in these regulations submits a reasoned request. Article 26.1(b) requires the appeal to be filed within two months of the challenged decision. Article 26.1(c) states that when the Director-General does not respond in writing to a written claim within thirty calendar days the two-month period for filing the appeal under Article 26.1(b) shall run from the thirtieth day, and, concomitantly, Article 26.1(d) mandates the Director-General to acknowledge an appeal and to reply to it within thirty calendar days from the date of receipt.

3. The Organization contends that the complainant's first appeal is irreceivable because it was brought out of time. This, according to the Organization, is because the decision on the complainant's 2012 performance appraisal was made final on 14 April 2013 and the deadline for lodging the appeal was 14 June 2013. The complainant however insists that the date from which time ran for this appeal was 12 July 2013. He states that this was the date on which his 2012 performance appraisal was made final because the Director-General implicitly adopted it by sending a memorandum to all staff members regarding promotions, advancements and awards for the year 2012. It is therefore necessary to determine the event by which a performance appraisal is finalized under the relevant procedure.

4. Article 20.1 of the Staff Regulations of the ITER Organization states as follows:

“The work of all staff members, apart from the Director-General, shall be evaluated once a year in accordance with the process and schedule established on an annual basis by the Director-General.

Reports shall comment on the relative proficiency of staff members and shall provide the opportunity to congratulate staff members or, on the contrary, warn them of shortcomings with a view to an improvement in their service.”

Article 20.4 of the said Staff Regulations states as follows:

“The employee is permitted to comment on the evaluation for inclusion in his personnel record. The detailed reporting procedure shall be established by the Director-General.”

5. The Director-General detailed the reporting procedures for the 2012 appraisals in the Employee Development Policy of ITER Staff Members, which was approved on 6 February 2013. The procedure for the annual performance appraisal was set out in paragraph II of that Employee Development Policy. Paragraph II.1 requires line managers to draw up a report of each staff member on the basis of an annual performance interview with each member. The procedure then continues to finalization as follows in paragraphs II.2 and II.3:

“II.2. **A staff member** shall be shown and given the opportunity to discuss with his/her line manager the report made on him/her during the annual performance interview. He/she shall thereafter sign the report, electronically, signifying that he/she has read it. A paper copy of this report, signed by the line manager and the staff member, may be transmitted to the Human Resources Division.

II.3. **If a staff member wishes to comment on** his/her performance report, he/she shall report his/her contestation on the electronic form before signature. He/she has then a maximum time-period of eight working days after having signed the report to submit to his/her line manager and the superior, a concise written comment detailing his/her objections and the facts and conclusions on which these are based.”

The process accordingly is finalized with the staff member’s written comments detailing her or his objections when the relevant officers then sign off on the report. The Employee Development Policy then continues, in paragraph III, to provide for the award of advancement, promotions and merit financial awards, while paragraph IV provides for the decision-making process.

6. After the prior procedure, which the complainant does not challenge, ended, he received a copy of his 2012 performance appraisal report on 13 April 2013, and, according to him, he made his comments in objection and signed the report on that same day. The report confirms these things. It also shows that the complainant’s Section Leader and his Head of Division signed the report electronically on 14 April 2013.

It further shows that the Office of the Director-General took note of the report on that same date. There is no provision which required the line managers to comment further on the report or for the Director-General to have signified approval of it in order to finalize the complainant's 2012 performance appraisal process. The complainant should have appealed his 2012 performance appraisal by 14 June 2013. His assertion to the effect that that performance appraisal process was finalized by the Director-General's memorandum to staff of 12 July 2013, which announced advancement, promotion and financial merit awards, is therefore in error. Accordingly, the claim in the complaint which seeks to challenge the complainant's 2012 performance appraisal is irreceivable as it was lodged out of time.

7. The complainant lodged the second appeal on 8 August 2013. By it, he challenged the Director-General's decision of 12 July 2013 which informed him that he had endorsed the proposal of the Promotion and Advancement Board to delay by one year his periodic step advancement. The Director-General stated in that letter that the step advancement was delayed "considering [his] performance reported at 'needs to improve' for the 2012 year". This was the rating which the complainant was given in his 2012 performance appraisal report. While the Director-General rejected his internal appeal on 30 August 2013 on the grounds that the decision of 12 July 2013 had been taken in accordance with the applicable rules, the complainant insists that that rating was unfair. He therefore seeks an order to modify it to a rating of "meets requirements". He also asks that the Promotion and Advancement Board revise its recommendation accordingly.

8. The decision to delay the grant of the step advancement was taken pursuant to paragraph IV of the Employment Development Policy of 6 February 2013. This paragraph permits the Director-General, acting on the advice of the Promotion and Advancement Board which he appoints, to determine which staff members are to be granted periodic step advancement. The said paragraph also makes this a final administrative decision appealable under Article 26 of the Staff Regulations within two months. The complainant appealed the decision within that time limit.

Paragraph III.1.1 of the Policy states that advancement is the process by which a step increase within a grade is granted. It provides that “[o]ne step advancement shall be granted to staff members in the case their performance has been rated as at least meets requirements for three consecutive years”. It further provides that “[o]ne step advancement may be granted to staff members whose performance has been rated as at least above requirements for the year concerned”.

9. The complainant did not satisfy these provisions as his 2012 appraisal report did not rate him as at least “meets requirements”, and that appraisal is immune from challenge. Accordingly, his claim to set aside the decision to withhold his step increase fails.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2016, Mr Giuseppe Barbagallo, Vice-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 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ