

The Administrative Tribunal,

Considering the ninth complaint filed by Mr Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 27 June 2000 and corrected on 22 August, the EPO's reply of 13 November, the complainant's rejoinder of 30 November, and the Organisation's letter of 15 December 2000 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1938, is a permanent employee of the European Patent Office, the EPO's secretariat. During the reporting period 1994-1995 he worked in Directorate-General 2 (DG2) as a "chief examiner" at grade A4 and was the coordinator of the group of examiners which dealt with mining.

In April 1996 he received his staff report for 1994-1995. He disagreed with some of the ratings and remarks that it contained, so on 2 May 1996 he filed a counterstatement to it. The reporting officer added final comments on 30 May and signed it. On 27 June the complainant requested a conciliation procedure in accordance with Section D of the General Guidelines on Reporting since the signed version of his staff report still contained comments that he considered to be inaccurate. A hearing with a mediator was held on 26 February 1997.

On 13 March the reporting officer sent the mediator a draft staff report which had been amended to reflect the agreement reached during the hearing. Some of the disputed comments had been either deleted or amended and some of the markings were upgraded from "good" to "very good". This draft was sent to the complainant for signature along with an annex to the staff report, dated 20 March 1997, which listed the changes that had been made. Subsequently, the complainant added a paragraph at the end of the annex. Both the reporting officer and the countersigning officer refused to sign the annex and the amended staff report unless the complainant withdrew that paragraph. The complainant refused.

As provided for in Section D, paragraph 6, of the General Guidelines on Reporting, the mediator, at the complainant's request, drew up a report - dated 19 January 1998 - for the Vice-President of DG2 stating the different viewpoints of those involved in the conciliation procedure. On 21 January the Vice-President recommended that the President of the Office sign the complainant's unamended staff report, namely the version of May 1996. On 22 January the President endorsed that version of the report.

In a letter dated 12 February 1998 the complainant requested the President to amend the staff report in respect of the issues dealt with in the conciliation procedure. The President refused to do so and referred the letter to the Appeals Committee. In its opinion, dated 31 January 2000, the Committee recommended that the complainant's staff report be reviewed in the light of its findings and that the quality of the complainant's work should be rated "very good", as had been decided during the conciliation proceedings. On 20 March 2000 the President informed the complainant that he had decided to upgrade the ratings in Part I.1 ("Quality") and Part V ("Overall rating") of the staff report but not to change the rating in Part III ("Attitude to work and dealings with others"). On 21 March 2000 the complainant asked the President to review his decision regarding Part III. By a letter of 3 May 2000 which is the decision the complainant impugns, the President confirmed his earlier decision. The amended staff report was sent to the complainant with this letter.

B. The complainant argues that there was no "investigation of the facts" during either the conciliation or the appeal

procedures. He contends that the contested comments on his report are baseless, are motivated by a personal conflict he has had with the reporting and countersigning officers, and are discriminatory. They are also libellous and should be removed. He alleges that, throughout his career at the ECO, he has been "kept from exercising influence in terms of realising formal management functions".

The complainant asks the Tribunal to order the ECO: (1) to remove offending remarks under Parts III and V of his 1994-1995 staff report and to upgrade his rating under Part III to "very good"; (2) to complete Part IV on "Management ability", reflecting the success of the group of examiners dealing with mining and his contribution as its coordinator; (3) to promote him to grade A4(2) as from 1 May 1998; and (4) to award him damages in the amount of one year's salary for "continued discrimination". He also asks that the EPO be fined 10,000,000 euros for maintaining a "fraudulent reporting and promoting system", and that this be paid to the charitable organisation "SOS-Kinderdorf".

C. In its reply the EPO submits that the complaint is irreceivable. The President's decision of 20 March 2000, which the complainant received no later than 21 March, was a "final decision" within the meaning of Article VII of the Tribunal's Statute. The President's letter of 3 May, which the complainant impugns, was merely confirmation of that final decision. The complaint, therefore, was filed after the expiry of the ninety-day deadline imposed by the Tribunal's Statute. Additionally, apart from the first one, all his claims are irreceivable because they were not addressed in his appeal; consequently, he has not exhausted the internal means of redress.

Subsidiarily, the ECO argues that the complaint is unfounded. The decision to alter a staff report is discretionary and can only be challenged on limited grounds. The reporting and countersigning officers were justified in not signing the annex to the staff report because the complainant had altered it by adding a paragraph following the hearing of 26 February 1997. The final decision to amend or not to amend a staff report rests with the President of the Office; in the complainant's case the President had agreed to certain amendments and not to others, as was his right to do so.

D. In his rejoinder the complainant submits that his complaint is indeed receivable. The decision could not be considered final until he received the amended staff report, which was sent to him with the President's letter of 3 May 2000.

He reiterates that no evidence has been presented to justify the ratings, which he contests, on his staff report. Not only has his right to a factual staff report been breached, but this breach could have negative consequences on his chances for future promotions.

## CONSIDERATIONS

1. On 12 February 1998 the complainant initiated an internal appeal in respect of his staff report for 1994-1995. The Appeals Committee gave its opinion on 31 January 2000.
2. By a letter dated 20 March 2000 the President, referring to the internal appeal and the recommendation of the Appeals Committee, informed the complainant that, after examining the documentation, he had decided to amend the staff report as set out in the letter.
3. By a reply dated 21 March 2000 the complainant asked the President to improve the rating under Part III of the report, delete the "libellous vocabulary" or undertake a "fair investigation".
4. By a letter of 3 May 2000, the President expressly confirmed his decision of 20 March 2000. This is the decision impugned.
5. The decision of 20 March 2000 is the final decision on the complainant's appeal within the meaning of Article VII of the Statute of the Tribunal. The decision of 3 May 2000 was merely confirmatory and did not initiate any new limitation period.
6. Under Article VII of the Statute of the Tribunal, to be receivable, a complaint must be filed within ninety days after the complainant has been notified of the final decision. The complainant had received the final decision by 21 March 2000. This complaint was filed on 27 June 2000, that is to say, outside the time limit for appealing. It is,

therefore, irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet