The Administrative Tribunal,

Considering the complaint filed by Mr A.F.H. against the United Nations Industrial Development Organization (UNIDO) on 17 November 2004 and corrected on 26 November 2004, the Organization's reply of 2 March 2005, the complainant's rejoinder of 9 May and UNIDO's surrejoinder of 16 August 2005;

Considering Articles II, paragraph 5, and VII 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. The complainant, a German national born in 1944, joined UNIDO in January 1984 as a Legal Officer at grade P.3. He was promoted to grade P.4 in October 1987 and in March 1998 was appointed Officer-in-Charge of the Office of Legal Affairs (now Legal Services). In June 1999 he was promoted to grade P.5 as Chief of the Office of Legal Affairs, a position he held until his retirement on 31 May 2004.

The complainant's performance appraisal report for the period 1 January 2000 to 28 February 2002 was written by his supervisor – the Managing Director of Field Operations and Administration – as first reporting officer and co-signed by the Director-General as second reporting officer. His supervisor, who completed part III of the report on 3 October 2003, considered that the complainant had "an excellent knowledge and understanding of the legal issues relating to UNIDO's operations in various fields and its relationships with various agencies and persons including the Member-States and staff members", and that he had provided legal advice and undertaken various activities competently. Under the heading "Staff member's strength(s)", he noted the complainant's "excellent knowledge of legal matters" and his "competent and clear advice". However, under the heading "Area(s) where improvement is needed" he wrote: "Somewhat rigid and inflexible in his approach, creates inter-personal problems. Needs improvement."

The complainant objected to this last comment. In part IV of the report, which he completed on 21 May 2004, he denied any lack of flexibility in his work and expressed the view that "the comments of the first reporting officer show[ed] a misconception regarding the role of a legal adviser of a public international organization, whose function is to protect the interests of the Organization". That same day, he forwarded the report to the Director-General, via the latter's Personal Assistant, under cover of a routing slip on which he pointed out that since he disagreed with his supervisor's comments regarding an area where improvement was needed, a discussion between his supervisor, the Director-General and himself "would need to be held in accordance with part V of the report".

Part V of the report contains the comments of the second reporting officer. Next to the heading "General comments on staff member's performance", the report form states: "If staff member and supervisor disagree please discuss with them before completing this and next part". The Director-General indicated in part V that he agreed with the comments of the first reporting officer regarding the need for improvement, adding that the complainant's performance "would be greatly enhanced if he provided scenarios with different options showing opportunities and risks that affect the goals of the Organization". In part VI of the report, the Director-General gave his summary evaluation of the complainant's performance. Five possible ratings are shown on the report form: outstanding, very good, good, marginal or unsatisfactory. The Director-General rated the complainant's performance "good" and signed the report on 24 May 2004.

The complainant acknowledged receipt of the report by signing it on 19 August 2004. On 17 November 2004 he filed his complaint with the Tribunal, impugning the Director-General's "decision" of 24 May contained in his performance appraisal report.

B. Regarding the receivability of his complaint, the complainant submits that the general comments and summary rating provided by the Director-General on 24 May 2004 in parts V and VI of his performance appraisal

report, respectively, constitute a final decision within the meaning of Article VII(1) of the Statute of the Tribunal. He explains that Appendix M to UNIDO's Staff Rules establishes a rebuttal procedure for staff members who do not agree with a summary evaluation given in part VI which indicates that the performance needs improvement or is unsatisfactory. The rebuttal may cover one or all parts of the appraisal. Furthermore, Addendum 1 to Administrative Instruction No. 10 (Annex IV), published on 29 January 2001, states in particular that rebuttals may be submitted in respect of "a summary evaluation given in part VI [...] which indicates that the performance is marginal (rating 2) or is unsatisfactory (rating 1)". The complainant argues that since neither of these ratings was given to him by the Director-General, he could not avail himself of the rebuttal procedure. He concludes that "no means of internal redress was available to resist the flawed decision on [his] performance", and that the requirement, under the Statute of the Tribunal, that all internal means of redress be exhausted is therefore satisfied.

On the merits, the complainant submits that in the light of his job description the allegation that his approach was "somewhat rigid and inflexible" is unjustified. He considers that in assessing the performance of a legal adviser, the relevant consideration is whether the latter's opinion is legally sound and in accordance with the legal framework that the Organization has to respect, not whether it is seen as too rigid and inflexible by colleagues. Thus, a negative appraisal of his performance ought to have been based on evidence that the legal advice he gave in specific instances was wrong. In this case, he points out, no such evidence has been produced and, on the contrary, his supervisor stated in the appraisal report that he possessed an excellent knowledge of legal matters and that his advice was "competent and clear". He concludes that the assessment of his legal work against the notions of rigidity and inflexibility constituted "a flawed exercise of [...] discretionary power", in that it led to a mistaken conclusion as to the quality of his performance.

The complainant rejects the allegation that his approach created inter-personal problems. He considers that there must be room for disagreement between international civil servants on professional issues, without such disagreement being taken personally. He asserts that during the six years he spent as Legal Adviser, he was never asked to provide the "scenarios" and "innovative options" that are now found lacking; nor, he submits, was he ever informed that his recommendations were "often narrow and very specific", as indicated by the Director-General. He adds that, apart from the disputed appraisal report, which he received only after his retirement, no other appraisal was made of his performance during those six years, in spite of his written requests. He also draws attention to the fact that, contrary to the procedure indicated on the appraisal report form, no discussions with his reporting officers took place at the time when the report was written.

The complainant asks the Tribunal to declare his complaint receivable, to set aside the Director-General's "decision" of 24 May 2004, and to order the Organization to replace the appraisal report containing that decision with "a report containing a properly prepared evaluation based solely on [his] performance in accordance with [his] job description".

C. In its reply the Organization contends that the complaint is irreceivable on the grounds that the complainant has failed to exhaust the internal means of redress. It agrees that he could not avail himself of the rebuttal procedure provided for in Appendix M to the Staff Rules, because the summary evaluation of his performance was "good", and not "marginal" or "unsatisfactory". However, it considers that he could have initiated an internal appeal in accordance with Staff Rule 112.02(a) and Appendix K, by submitting a written request for review to the Director-General within 60 days following the notification of the contested "decision". The Organization emphasises that the procedures defined in Appendices K and M are not mutually exclusive.

In its arguments on the merits the Organization submits, with reference to the case law concerning challenges to performance appraisals, that the impugned decision is discretionary and may be set aside only on limited grounds. Citing Judgment 1136, it states that there is a "presumption [...] that [the] assessment is made in good faith in the interests of both organisation and staff member, and it will stand unless there is an obvious mistake of fact or failure to show the sort of objectivity that ought to govern reporting".

According to UNIDO, the appraisal of the complainant's performance was objectively balanced, and he has not demonstrated that it contained any obvious mistake of fact. It argues that even if it were assumed that the reporting officers had misconstrued the complainant's duties, the fact that the latter was able to comment in part IV of the report would suffice to remedy any error of judgement that might have occurred. Contrary to the view held by the complainant, it considers that the comments in the report concerning his lack of flexibility and his failure to propose options are properly based on his job description.

In response to the complainant's assertion that there is no evidence to support the disputed comments in his appraisal, the Organization produces a statement dated 24 February 2004 written by the complainant's supervisor in which the latter explains, by reference to a specific example, why he considered the complainant's approach to be inflexible.

Whilst acknowledging that the complainant is not claiming damages, UNIDO observes that it would be inappropriate to suppose that he suffered any injury warranting compensation, given that his appraisal report was generally quite positive and that his overall rating was "good". With regard to the absence of any discussion between the complainant and the reporting officers, it points out that he raised no objection in part IV of the report to the fact that his supervisor had not discussed his appraisal with him before completing part III. Concerning his request for a discussion with his supervisor and the Director-General, as required by part V of the report, UNIDO refers to Judgment 254, in which the Tribunal held that non-compliance with such requirements does not *ipso facto* invalidate a report. Lastly, it points out that the fact that performance appraisals for other periods are still outstanding is not relevant to the evaluation of the merits of the complainant's challenge to the performance appraisal at issue.

D. In his rejoinder the complainant asserts that it is "legally wrong" to suggest that he should have initiated an internal appeal, as that would have been tantamount to using an appeal as a rebuttal procedure. In his view, had the Organization intended the appeal procedure to apply to performance appraisals, this ought to have been clearly and explicitly indicated in both Appendix M and the appraisal report form. He reiterates his arguments on the merits, and provides a lengthy rebuttal of the arguments relied on by his supervisor in his statement of 24 February 2004, dismissing them as "not valid" and "unproven".

E. In its surrejoinder the Organization maintains its objection to the receivability of the complaint and likewise its position on the merits. It adds that the complaint should also be dismissed because the only remedy available to the complainant were he to succeed on the merits would be an award of damages, which he has not claimed.

CONSIDERATIONS

1. Prior to his retirement from UNIDO on 31 May 2004, the complainant received a performance appraisal report covering the period from 1 January 2000 to 28 February 2002, which his supervisor, as first reporting officer, had signed on 3 October 2003. The report contained a statement that improvement was needed with respect to the complainant's "rigid and inflexible" approach. In his own comments, which he added to the report on 21 May 2004, the complainant said that he saw no need for improvement. On that same date he forwarded the report to the Director-General. On the routing slip he expressed his disagreement with the first reporting officer's comments concerning the need for improvement, and pointed out to the Director-General's Personal Assistant that "a discussion between the Director-General, the supervisor and [him]self would need to he held in accordance with Part V of the report".

The second reporting officer, in this case the Director-General, agreed with the first reporting officer and commented in part V of the report that the complainant's "performance need[ed] improvement". Although no date is given in part V of the report, part VI containing the Director-General's summary evaluation is dated 24 May 2004 and shows the rating "good".

The complainant acknowledged receipt of the report by signing it on 19 August 2004. The box provided for that purpose contains the following declaration: "I am aware that I may submit a statement of explanation or rebuttal within one month of receipt of this report under the conditions stipulated in appendix M to the staff rules".

2. His next move was to file a complaint with the Tribunal, against the appraisal of 24 May 2004 by the Director-General, asking that the report in question be set aside and replaced with a new one.

Regarding the receivability of his complaint, he submits that he could not avail himself of the right to a rebuttal procedure mentioned at the end of the appraisal report and provided for in Appendix M to the Staff Rules. He bases his argument on the wording of Administrative Instruction No. 10, Annex IV, Addendum 1, of 29 January 2001.

Appendix M provides in paragraph (e) that a rebuttal may be submitted if the summary evaluation given in part VI

of a report indicates “that the performance needs improvement or is unsatisfactory”. The summary evaluation of the complainant’s performance was “good”. Thus, as he argues and the Organization accepts, the complainant could not avail himself of the rebuttal procedure.

Before turning to the further arguments of the complainant and the Organization as to receivability, it is necessary to note that the “decision” which the complainant wishes to challenge is the inclusion in his performance appraisal report of the statement that his performance needed improvement in the area identified. It is by no means clear that that was an administrative decision, as distinct from part of the reasoning process that led to the conclusion that his overall performance was “good”. However, that issue is not addressed in the pleadings and it is convenient to assume, for present purposes, conformably with the position adopted by the parties, that it is an “administrative decision”.

3. In its reply the Organization argues that the complainant had available to him the procedure of appeal to the Joint Appeals Board in accordance with Staff Rule 112.02(a) and Appendix K. The complainant disputes this view on the basis that Appendix M provides exhaustively with respect to performance appraisal reports and, accordingly, Staff Rule 112.02(a) must be interpreted as having no application. That argument must be rejected. Appendix M provides only with respect to performance appraisal reports in which the summary evaluation indicates that the performance needs improvement or is unsatisfactory. To the extent, if any, that a performance appraisal report otherwise embodies an administrative decision, Staff Rule 112.02(a) applies. Staff Rule 112.02(a) requires that:

“A serving or former staff member who wishes to appeal an administrative decision […] shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.”

The complainant did not file a request for review.

Staff Rule 112.02(b) states:

“(i) If the staff member wishes to make an appeal against the answer received from the Director-General, the staff member shall submit his or her appeal in writing to the Secretary of the Joint Appeals Board within 60 days from the date of receipt of the answer;

(ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Secretary of the Joint Appeals Board; alternatively, the staff member may, within the following 90 days, apply directly to the Administrative Tribunal of the International Labour Organization in accordance with the provisions of its Statute.”

As can be clearly understood from Rule 112.02(b)(ii), the appeal to the Tribunal could be filed directly only if the complainant had sent a letter requesting a review and had not received an answer; whereas, according to Rule 112.02(b)(i), if he had received an answer, he would then have been obliged to submit an appeal to the Secretary of the Joint Appeals Board. The complainant did not avail himself of these remedies.

Rule 112.03(b) states that:

“An application to the Tribunal shall not be receivable unless the applicant has previously submitted the dispute to the Joint Appeals Board under rule 112.01 and the Board has communicated its opinion to the Director-General, except where the circumstances described in rule 112.02(b)(ii) obtain.”

4. The case law of the Tribunal makes it abundantly clear that internal remedies must be exhausted before a complaint may be brought before the Tribunal (see for example Judgments 725 under 2, 1063, and 1301 under 8), except where staff regulations provide that decisions taken by the executive head of the organisation are not subject to the internal appeal procedure (see Judgment 565), which, as shown above, is not the case here.

5. On the assumption that the inclusion in the complainant’s performance appraisal report of the statement that his performance needed improvement involved an “administrative decision”, the complainant should have availed himself of the internal remedies, which he did not. He professes bad faith on the part of the Organization for not advising him that the appeal procedures were open to him. In a context in which it is clearly arguable that the only decision involved in a performance appraisal report is the summary evaluation, the argument as to bad faith must

be rejected.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.