

The Administrative Tribunal,

Considering the complaint filed by Mr J. M. R. against the International Atomic Energy Agency (IAEA) on 4 August 2005 and corrected on 31 August, the IAEA's reply of 28 November 2005, the complainant's rejoinder of 15 March 2006 and the Agency's surrejoinder of 13 April 2006;

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

Having examined the written submissions;

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

A. The complainant, who holds both Mexican and Austrian nationalities, was born in 1957. At the material time he held a fixed-term appointment at grade G.5 and worked in the Publishing Section of the Division of Conference and Document Services. Prior to his fixed-term appointment, which he obtained in April 2003, he held a series of short-term appointments.

On 25 June 2004 the complainant submitted a memorandum to the Director General appealing against a "decision" to transfer him from the Publishing Section to the Conference Services Section, which were both in the Division of Conference and Document Services. He alleged that the decision in question had been initially taken in March and that it was based on the "personal favouritism" shown by the Director of his Division towards another staff member. By a letter of 7 July the Acting Director General informed him that there had only been "a proposal" to transfer him, and that no administrative decision had resulted from that proposal; consequently no further action was required in response to his memorandum.

On 10 November 2004 the complainant lodged a complaint alleging harassment and misconduct on the part of three officials: the Director of the Division of Conference and Document Services, the Head of the Publishing Section and the Head of the Sales and Promotion Unit of that section.

By a memorandum of 18 November addressed to the Division of Personnel, the Director of the complainant's Division lodged a complaint, formally requesting that an investigation into the complainant's "recent behaviour" be undertaken to determine whether it constituted misconduct, and that the complainant be suspended from duty with immediate effect. The Director said he was concerned for the physical and psychological well-being of staff members who had reported that they had been harassed by the complainant. He added that he had documentary evidence to back up his allegations. By a memorandum of 24 November the Director of the Division of Personnel asked the Director of the complainant's Division to provide her with that documentary evidence; he did so the following day. In accordance with paragraph 2 of Appendix G to section 1 of part II of the IAEA's Administrative Manual, the Acting Director of the Division of Personnel asked the Director of the Office of Internal Oversight Services (OIOS) on 3 December to conduct an investigation into both complaints.

On 14 December 2004 the Director of the Division of Personnel notified the complainant that the OIOS would be undertaking a formal investigation into his complaint as well as the complaint filed against him by his Director. She also informed him that the Director General considered that there was *prima facie* evidence of misconduct by the complainant and that he had decided, pursuant to Staff Rule 11.01.4(A), to suspend him from duty with pay during the investigation, with immediate effect. She added that the suspension was not a disciplinary measure and that according to the Staff Rules the suspension should "normally" not exceed three months.

Between 18 December 2004 and 28 January 2005 the complainant provided the OIOS with further information concerning the allegations he had made and he also provided it with his comments on the allegations made against him.

The complainant wrote to the Director General on 11 February 2005, asking him, inter alia, to waive the

jurisdiction of the Joint Appeals Board and grant him leave to appeal directly to the Tribunal. The Director General replied to the complainant on 15 March that his request was rejected and that, since the investigation into misconduct was still ongoing, his suspension with pay would continue beyond the normal three-month period. On 24 March the complainant filed an appeal with the Joint Appeals Board against the decision to suspend him from duty.

In its report of 10 June 2005 the Board found that the Administration had been justified in considering that there was *prima facie* evidence of misconduct on the part of the complainant and that his suspension from duty was in accordance with the Staff Rules; furthermore, it was appropriate for the Administration to maintain his suspension until issues had been fully investigated. The Board recommended that the Director General uphold his decision of 15 March confirming the complainant's suspension and that he dismiss the appeal. The Director General decided to follow that recommendation and informed the complainant accordingly by a letter dated 21 June 2005. That is the decision the complainant impugns.

Meanwhile, on 31 May the OIOS's final investigation report had been submitted to the Director of the Division of Personnel. The latter in turn sent it to the complainant on 23 June, requesting him to provide his comments. The complainant replied on 4 July that he would "accept no charge[s] against [him]". In a letter dated 25 August 2005 the Director of Personnel informed the complainant that, following consideration of the final investigation report, the Deputy Director General in charge of the Department of Management had decided that four of the allegations made against the complainant would be submitted to the Joint Disciplinary Board "for consideration of the appropriate disciplinary measure to be imposed under the provisions of Staff Rule 11.01.2". In further letters of the same date, referring to the complainant's allegations of harassment against three other people in his division, the Director of Personnel informed the complainant that the Deputy Director General had decided to dismiss those allegations and to close the cases. The complainant was informed by a letter of 9 September 2005 that the Director General had decided that his suspension from duty with pay would continue until the disciplinary proceedings were completed.

By a letter of 1 March 2006 the Acting Director of the Division of Personnel informed the complainant that the Director General had decided to dismiss him for serious misconduct, in accordance with the recommendation of the Joint Disciplinary Board. His appointment was terminated as from 3 March 2006.

B. The complainant contends that his suspension from duty was in retaliation for the "complaint" he filed against the Director of his Division and other staff members. He says that the OIOS could not substantiate the alleged *prima facie* evidence used by the Agency to support his immediate suspension and that the suspension was therefore unlawful. The suspension was humiliating and had seriously damaged his reputation. He submits that the Agency's actions have breached several articles of the Universal Declaration of Human Rights.

He further contends that it is he who has been harassed for more than a year, adding that the OIOS's final investigation report was completed on 31 May 2005, but as of 1 August 2005 he had still not received the Director General's final decision on it. In addition, he objects to the fact that his comments were not included in the main text of the final report but only as an annex to it.

Referring to the Agency's policy concerning harassment as set out in SEC/NOT/1922 which states that "[c]onduct which constitutes [...] harassment will not be tolerated and will be dealt with in a manner consistent with the severity of the infraction, including appropriate administrative or disciplinary action", he believes that he is justified in demanding disciplinary action against those who have been mobbing him.

He asks the Tribunal to order his reinstatement, to order the retroactive classification of his post, and to extend his appointment to "long-term". He claims compensation for moral, material and professional damages for having been "kept too long as Temporary Assistance"; compensation for moral, physical and professional damages resulting from the mobbing he endured and from his unlawful suspension; and compensation on behalf of another staff member for the mobbing she had to endure. He requests appropriate administrative or disciplinary action against those who participated in the mobbing and a written apology from the Director General, and also claims costs.

C. In its reply the Agency contends that "the only receivable matter before the Tribunal is the complainant's initial suspension from duty with pay", and consequentially the "absence of any decision to terminate that suspension". The other matters to which he refers "by way of support for the remedies that he seeks" may only be seen as background information for the present complaint. It considers that there is no basis to claim compensation

on behalf of a third party, and that that claim is therefore not receivable before the Tribunal. It notes that the complainant has not exhausted the internal remedies open to him in relation to several of his claims and that these are therefore likewise not receivable. The only receivable claims are those related to his request for reinstatement, costs, and compensation for moral damages resulting from what he perceives to be his “unlawful suspension”.

The Agency submits that the complainant’s initial suspension from duty and the subsequent decision to continue that suspension were appropriate exercises of discretionary authority and were in accordance with Staff Rule 11.01.4(A). That rule states that the period of suspension should “normally” not exceed three months, but, the Agency contends that, given the nature of the allegations made by and against the complainant, this was not a “normal” case. Not only did the nature and number of allegations by all parties involved make the investigation time-consuming, but the non-cooperation of the complainant and other staff members hindered the investigation. Furthermore, it points out that the Director General showed due concern for the complainant’s rights during the investigation; indeed, the suspension from duty was with pay, and he sought status reports on the investigation and informed the complainant accordingly.

The Agency notes that although the complainant has argued that the OIOS’s final report is defective, he did not avail himself of the proper mechanisms for challenging it. It submits that the allegations made by and against the complainant were properly investigated, that he was afforded due process during the proceedings and that all findings were based on the evidence gathered.

D. In his rejoinder the complainant maintains all his claims and develops his pleas. He says that the “question at stake” concerns the decision to suspend him as well as the extension of that suspension. He expresses surprise that although the OIOS’s final investigation report was completed on 31 May 2005, it was not taken into account by the Joint Appeals Board during the appeal proceedings nor was it taken into account by the Director General in his final decision. The complainant points out that he was suspended for an unusually long time.

The complainant considers that the Agency has not provided any legal arguments to justify his initial suspension or the extension of it, and he puts forward three new pleas. Firstly, the decision to suspend him was “characterised” by bias. Secondly, the decision constitutes “an obvious attempt” on the part of the Agency “to hamper [his] right of appeal”. Thirdly, the decision to suspend him was illegal as was the decision to extend his suspension for an exaggerated length of time without valid reasons. He points out that in the final investigation report it was said that the OIOS “could not substantiate the alleged *prima facie* evidence used by the Agency to support the immediate suspension”, and contends that his suspension was clearly a hidden disciplinary sanction.

E. In its surrejoinder the Agency points out that the complainant has not addressed any of its arguments concerning the receivability of his claims. It maintains that the decision to suspend him with pay, and the subsequent decision to extend that suspension, were taken by the Director General in accordance with the Staff Rules. It denies that the decision to suspend the complainant arose from bias or personal animosity.

The Agency points out that the Joint Appeals Board was constituted to consider the complainant’s appeal against the decision to suspend him from duty. The issue to be considered by the Board was that of whether the Director General had correctly determined, pursuant to Staff Rule 11.01.4(A), that there was *prima facie* evidence of misconduct. That Board reports directly to the Director General. Under Appendix G referred to above, the Office of Internal Oversight Services is to provide its report into any alleged misconduct to the Director of the Division of Personnel, who in turn makes a recommendation on further action to the Deputy Director General in charge of the Department of Management. The investigation was undertaken not to determine the existence of the *prima facie* case of misconduct, but to determine all the facts. The Agency submits that it would have been prejudicial to the complainant if it had provided a copy of the OIOS investigation report to the Joint Appeals Board. It denies that it hindered the complainant in the exercise of his right of appeal. It points out that even though the investigation determined that there was no *prima facie* evidence of misconduct for certain allegations, this was not the case for all of them. Furthermore, as a matter of law there is a difference between *prima facie* evidence of a fact and the establishment of that fact for disciplinary purposes.

CONSIDERATIONS

1. The complainant was employed by the IAEA from 1 April 2003 until 3 March 2006 under a fixed-term appointment as Senior Publishing Clerk, at grade G.5. Prior to obtaining that appointment he had had a series of

short-term contracts over a number of years. He was suspended from duty, with pay, from 14 December 2004 until 3 March 2006, when he was dismissed for serious misconduct.

2. On 11 February 2005 the complainant sought review of the decision of 14 December 2004 to suspend him from duty pending investigation of his alleged misconduct. The Director General confirmed that decision on 15 March 2005. The complainant then appealed to the Joint Appeals Board which recommended, on 10 June 2005, that his appeal be dismissed. On 21 June the Director General informed the complainant that he accepted the Board's conclusions and recommendation. Thereafter, on 4 August 2005, the complainant filed his complaint with the Tribunal.

3. The complainant seeks various forms of relief for various different matters, including "[c]ompensation for moral, physical and professional damages for [his] unlawful suspension from duty". He also seeks oral proceedings.

4. Since filing his complaint, the complainant has obtained legal representation. His rejoinder concentrates entirely on the issue of his suspension from duty although it maintains the various claims for relief set out in the complaint. Apart from the decision suspending the complainant from duty, the matters set out in the complaint were not the subject of any prior claim and, hence, were not the subject of any internal appeal. It follows, as the IAEA contends, that the complaint is receivable only insofar as the complainant impugns the decision of 21 June 2005 dismissing his appeal and seeks relief with respect to his suspension from duty.

5. The events leading to the complainant's suspension began with a proposal that he be transferred from the Publishing Section to the Conference Services Section. The complainant was unhappy with the proposed job description of the new post and objected to the move. Eventually, the proposal was dropped. In the meantime, in June 2004, the complainant had attempted to appeal against the "decision" to transfer him. He was informed on 7 July that no such decision had been made.

6. The complainant formed the view that there was an ulterior motive behind the proposal to transfer him to the Conference Services Section, namely, to secure the promotion of the staff member nominated in the job description as the person with whom his work was to be coordinated. The complainant was of the view that that staff member was not qualified in the relevant area and that his promotion would amount to favouritism. He stated his view to that effect in the appeal he submitted on 25 June 2004. He later came to the conclusion that the staff member concerned was receiving favouritism because he was blackmailing the Director of the complainant's Division and another Officer who, according to the complainant, were having a relationship. According to him, that relationship had resulted in the "comet-like career" of that other Officer.

7. Relations had clearly deteriorated between the complainant and his immediate supervisor by the time that he had filed his "appeal" with respect to the proposed transfer to the Conference Services Section. The complainant eventually formed the view that his immediate supervisor wished to have him dismissed and that he had enlisted various other persons in his campaign to that end. The complainant refused to speak to one of the persons who, he believed, was involved in that campaign and, seemingly, spoke disparagingly to and of others. On 10 November 2004 the complainant lodged a complaint of misconduct against three officials: the Director of his Division, his direct supervisor and one other person, alleging harassment and, also, favouritism towards the staff member who was to coordinate the work of the new post in the Conference Services Section. As well, he claimed that he had been denied training courses, and discriminated against with respect to new computer software and hardware as he was still working with older versions.

8. After the complainant lodged his complaint of misconduct, the Director of his Division formally requested an investigation into the complainant's behaviour on the grounds of:

- (i) his refusal to carry out instructions;
- (ii) his allegations of misconduct against other staff members; and
- (iii) his "verbal and psychological harassment" of other staff members.

The Director stated that the harassment took "various forms, ranging from explicit threats to harm individuals [...], implicit threats [...], to totally unfounded allegations of various kinds of misconduct by certain staff members". He added that six staff members had reported intimidating incidents. He also asked that the complainant be suspended

from duty.

9. The two separate complaints of misconduct that had been filed were considered by the Director of the Division of Personnel who requested further details from the Director of the complainant's Division with respect to his allegations. The Director provided those details on 25 November, including, amongst other things, statements from staff members with respect to four incidents between 15 and 17 November 2004 which, according to them, involved threats or threatening behaviour. On 2 December the Acting Director of the Division of Personnel advised that there was *prima facie* evidence of misconduct on the part of the complainant and recommended that he be suspended from duty pending an investigation by the Office of Internal Oversight Services (OIOS). The Director General accepted that recommendation and the complainant was advised by letter of 14 December 2004 that both formal complaints would be sent to the OIOS and that he would be suspended from duty, with pay, pending the investigation.

10. On 12 January 2005 the OIOS informed the complainant and the three persons against whom he had lodged a complaint that it was conducting an investigation into the two formal complaints that had been filed and requested each of them to provide their written comments on the allegations made against them. In the course of his written comments, the complainant made further allegations. The OIOS proceeded to investigate those new allegations, as well as those in the two formal complaints.

11. On 11 February 2005, while the OIOS investigation was still under way, the complainant wrote to the Director General contesting the decision to suspend him from duty and asking him to waive the jurisdiction of the Joint Appeals Board so that he could proceed directly to this Tribunal. He was informed on 15 March that his request was refused and that his suspension would continue. The complainant then filed an appeal with the Joint Appeals Board.

12. The OIOS completed its investigation on 31 May 2005. So far as is presently relevant, it concluded that the complainant's allegations of misconduct were not substantiated and, although there was "written evidence of verbal abuse by [him] against his colleagues [...] there [was] no reliable evidence from independent sources to confirm the alleged death threats". In this last regard, it was said that "OIOS could not substantiate the alleged *prima facie* evidence [...] to support the immediate suspension [of the complainant]". Further, the OIOS reported that "[w]hile in suspension [the complainant] made serious allegations against three staff members [and] failed to provide any valid evidence for his serious allegations".

13. The OIOS report was not provided to the Joint Appeals Board which met on a number of occasions between 20 April and 20 May and issued its report on 10 June 2005. Relevantly, the Board concluded that there was *prima facie* evidence of misconduct on the part of the complainant and recommended that his appeal be dismissed. On 21 June 2005 the complainant was informed, without any reference to the OIOS report, that the Director General accepted the Board's recommendation. In the absence of a decision to the contrary, his suspension continued.

14. As already indicated, this complaint is receivable insofar as it impugns the decision of 21 June 2005 and seeks relief with respect to the complainant's suspension from duty. Because the effect of the decision of 21 June was that the complainant's suspension continued, it is necessary to say something of subsequent events. The complainant was provided with the OIOS report on 27 June and was asked for his comments. His final comments were provided on 21 July. The Deputy Director General in charge of the Department of Management then made determinations with respect to the complainant and each of the staff members against whom he had made a complaint. The complainant was informed on 25 August that various aspects of his behaviour, including his verbal abuse of a colleague and his false allegations of misconduct, would be referred to the Joint Disciplinary Board but that, otherwise, the case against him had been closed.

15. On 9 September 2005 the complainant was informed that, as the relevant procedures had been completed, the Director General had reviewed the question of his suspension and had decided that, as "*prima facie* evidence of [his] misconduct remain[ed]", his suspension with pay would continue until further notice. The Joint Disciplinary Board later reported that it was not satisfied that the complainant had made the abusive statement alleged against him but concluded that he had made false allegations with "reckless indifference" to their truth. The Board recommended his dismissal for serious misconduct.

16. Before turning to the argument advanced by and on behalf of the complainant with respect to his

suspension, it is convenient to note the terms of Staff Rule 11.01.4(A) which relevantly provides that:

“If the Director General considers that there is *prima facie* evidence of misconduct [...] he/she may suspend the staff member from duty [...] during investigation or pending completion of disciplinary proceedings, for a period which should normally not exceed three months.”

17. The procedures for investigation of reported misconduct are set out in Appendix G to section 1 of part II of the Administrative Manual. Those procedures begin with a review by the Director of the Division of Personnel and, if further investigation is required, reference to the OIOS which is to report back to the Division of Personnel. The Director of the Division of Personnel is to review the OIOS report when it is submitted and inform the staff member concerned of the allegations put forward and his or her right to respond. The Director will also request a written statement from the staff member. Upon receipt of that written statement, the Director of the Division of Personnel is to submit a recommendation – normally within the following four weeks – to the Deputy Director General in charge of the Department of Management. Thereafter, the Deputy Director General is to decide – normally within two weeks – what further action should be taken.

18. It is contended, by reference to the OIOS report and, also, the subsequent report of the Joint Disciplinary Board, that there was no *prima facie* evidence of misconduct to justify the Director General’s decision to suspend the complainant on 14 December 2004. That argument must be rejected. The phrase “*prima facie* evidence of misconduct” refers to material which a person determining the facts is entitled to regard as probative and which, if accepted, would establish misconduct. It does not refer, as the argument assumes, to evidence that is ultimately accepted as proof of misconduct.

19. It is also contended that the decision to suspend the complainant was the result of bias. In this regard it is put that the request made by the Director of the complainant’s Division for an investigation and for the complainant’s suspension was an act of retaliation. That is to be inferred, it is said, from the following facts:

- (i) the Director’s request was made one week after the complainant had filed his complaint of misconduct;
- (ii) the Director’s request was acceded to before the complainant received a reply to his own complaint; and
- (iii) the complainant was suspended before being given reasons for that decision.

20. It is reasonable to infer, as argued, that the Director of the complainant’s Division had known about the complaint of misconduct filed by the complainant before he requested an investigation and the complainant’s suspension. However, it is not reasonable to infer that his request was either an act of retaliation or was motivated by bias. As said in Judgment 1775, “evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances”. However, it will not be inferred if there is a credible alternative explanation. In the present case, the record shows that from June 2004, when the complainant attempted to appeal against the “decision” to transfer him to the Conference Services Section, his behaviour towards his colleagues became problematic with his colleagues reporting threatening incidents, albeit that the last of these was reported some days after the complainant lodged his complaint of misconduct. The reported incidents, if true, were of such a nature that it was reasonable to conclude that the Director’s request was, as then stated, necessary for “the effective and efficient operation of [the] Division, the good name of the Agency and [...] the well-being of individual staff members”. Accordingly, it should not be concluded either that the Director’s request was an act of retaliation or that it was motivated by bias.

21. Nor is bias to be inferred from the other matters relied upon. There is nothing in Appendix G that requires that a person lodging a complaint of misconduct be given a response before the complaint is referred to the OIOS. Moreover, it clearly appears that attempts were made to contact the complainant with respect to his complaint before his suspension. Further, at the time of his suspension, the complainant was provided with the Director’s formal complaint against him, from which the reasons for his suspension clearly emerged.

22. It is argued that an inference of bias is confirmed by “chronological coincidences”, namely:

- (i) the failure to provide the OIOS report of 31 May 2005 to the Joint Appeals Board before it submitted its report on 10 June 2005;
- (ii) the failure of the Director General to have regard to the OIOS report when making his decision of 21 June

2005 dismissing the complainant's appeal against his suspension; and

(iii) the failure to provide the OIOS report to the complainant until 27 June 2005.

These matters provide neither confirmation of nor a basis for an inference of bias. The OIOS report was not relevant to the question whether there was *prima facie* evidence of misconduct when the Director General made his decision on 14 December 2004 to suspend the complainant, that being the subject of the appeal before the Joint Appeals Board and, later, the Director General's decision to dismiss the appeal. Further, the OIOS report, which was a complex and lengthy document, had to be reviewed by the Director of the Division of Personnel, before being submitted to the complainant for his comments.

23. Two further arguments are advanced in the complaint. First, it is said that the impugned decision "constitutes an obvious attempt [...] to hamper the staff right of appeal". As the complainant did appeal against his suspension, the argument must be taken to refer to his attempt to appeal the "decision" to transfer him to the Conference Services Section. Presumably, it is intended to suggest that the decision to suspend the complainant was retaliation for that attempt. There is simply no basis for such a suggestion.

24. The final argument is that the decision to suspend the complainant from duty and also the decision to extend his suspension are "illegal because of the exaggerated extension of the suspension without valid reasons". In this respect, it is put that the complainant was suspended from 14 December 2004 to 3 March 2006. The complainant's suspension was continued from 9 September 2005 to 3 March 2006 by a separate decision taken after completion of the procedures set out in Appendix G and which was not the subject of the internal appeal and thus is not before the Tribunal. Accordingly, the argument is to be considered by reference to the period 14 December 2004 to 9 September 2005. Although the period was lengthy, that was no doubt because of the nature of the OIOS investigation (which, to a large extent, was complicated by the complainant's further allegations) and the necessity to comply with the procedures required by Appendix G.

25. As the material relied upon by the complainant is incapable of supporting the inferences upon which he relies, there is no necessity for oral proceedings. His application in that regard is refused.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet