

The Administrative Tribunal,

Considering the complaint filed by Ms C. D. against the International Telecommunication Union (ITU) on 28 September 2005, the Union's reply of 9 December 2005, the complainant's rejoinder of 17 March 2006 and the ITU's surrejoinder of 20 April 2006;

Considering Article II, paragraph 5, 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, who has dual French and Swiss nationality, was born in 1947. She began work with the ITU on 24 April 1979 and resigned with effect from 31 January 2006. At the material time she held grade G.6.

Service Order No. 99, entitled "Personal Promotion", was issued on 17 September 1998. The annex to that service order lays down the following:

"I. CRITERIA

1 As conditions for the granting of a personal promotion, it shall be required that:

a) the staff member has completed at least

[...]

– **20 years** (General Service category)

of continuous service in ITU [...];

b) the staff member has not been promoted during the last

[...]

– **15 years** (General Service category)

c) the staff member has spent more than

[...]

– **3 years** (General Service category)

at the top step of his/her grade.

d) no promotion prospects exist for the staff member in the occupational area to which his/her post belongs, for a period of two years following the date on which he/she meets criteria a), b) and c) above [...];

e) the staff member has shown a superior level of performance, in both quantitative and qualitative terms;

f) the staff member has shown evidence of self-development (capacity for maintaining state-of-the-art expertise in his/her domain of activities, enhancement/updating or acquisition of general and technical skills required not only for the full accomplishment of the tasks of his/her post but also for the enlargement of his/her career

prospects).

2 It is clearly understood that a staff member will be considered eligible for personal promotion only if he/she meets all the aforesaid criteria.”

This personal promotion scheme was to apply only to staff members in grades G.1 to G.6 inclusive and in grades P.1 to P.4 inclusive. The total number of staff members receiving such promotion was at no time to be “greater than 5% of the posts in each category (i.e. 5% of General Service posts and 5% of Professional posts)”. Paragraphs 4 and 5 of section III of the annex, which is headed “Procedure”, are worded as follows:

“4 The Personnel Department shall maintain an up-to-date list of staff members who, **as at the 1st of January of each year**, meet the criteria relating [to] length of service i.e. criteria 1 a) to 1 c) above. When a staff member meets these criteria, the Personnel Department shall inform the head of the unit accordingly. Both shall verify that the staff member meets criteria 1 d) to 1 f) and so certify in a report.

5 Once a year, the Personnel Department shall submit the list of candidates for personal promotion to the Appointment and Promotion Board, which shall formulate a recommendation to the Secretary-General. The final decision shall be taken by the Secretary-General, having regard to the 5% limit [...].”

Pursuant to the above-mentioned service order the applicant’s candidature for a personal promotion with effect from 1 January 2003 was submitted to the Appointment and Promotion Board, which, at a meeting held on 23 March 2004, recommended that such promotion be granted.

Service Order No. 04/19, issued on 22 December 2004, announced the immediate suspension of the personal promotion scheme in view of the Union’s severe financial situation. Nevertheless, in this service order the Secretary-General stipulated the following:

“Personal promotions recommended by the Appointment and Promotion Board for staff members having been declared eligible for a personal promotion effective 1 January 2003 and 1 January 2004 are being reviewed by the Personnel and Social Protection Department and will be granted, as appropriate, once this review has been finalised.”

On 14 January 2005 the complainant lodged an appeal with the Appeal Board against the Administration’s tardiness in taking a decision on her case. In its report of 24 March 2005 the Board recommended that the Secretary-General provide the complainant with explanations.

In the meantime, in a letter of 4 March 2005, the complainant had been notified of the Secretary-General’s decision not to grant her a personal promotion on the grounds that she “[did] not meet the last criterion stipulated under f) above as [she] ha[d] not shown evidence of any self-development efforts with a view to promotion or career development”.

By a memorandum of 21 March the complainant requested that the Secretary-General reconsider his decision, but she was informed in a letter of 30 March that her request had been rejected.

On 28 April the complainant lodged a second appeal with the Appeal Board. Referring to the procedure laid down in the annex to Service Order No. 99, she explained that her candidature for a personal promotion had been forwarded to the Appointment and Promotion Board because she satisfied the above-mentioned criteria a) to c), and that the report drawn up by the Personnel Department and the head of her unit had certified that she also met criteria d) to f). As the Appointment and Promotion Board had issued a favourable recommendation on her case it remained only for the Secretary-General to take the final decision “having regard to the 5% limit”. As in the decision of 4 March she had been informed that her candidature had been rejected because she did not fulfil criterion f), the complainant considered that “the whole procedure ha[d] been revised and rewritten”.

In its report of 5 July 2005 the Appeal Board acknowledged that the Secretary-General had discretion in matters of personal promotion, but considered that he could not ignore the Appointment and Promotion Board’s recommendation since that would be tantamount to “altering the procedures he ha[d] himself prescribed”. In its recommendation the Appeal Board indicated that the Secretary-General should request a “review of the reports [drawn up by the Personnel Department and the head of unit] which are submitted to him for a final decision”.

This review should be carried out by the Appointment and Promotion Board in order to “remove the obstacles relating to the fact that the assessments differed”, as emphasised by the Secretary-General. By a letter of 27 July 2005, which constitutes the impugned decision, the complainant was notified of the Secretary-General’s final decision, namely that he was maintaining the decision of 4 March 2005.

B. The complainant avers that the annex to Service Order No. 99 provides for a four-stage procedure: a list of staff members satisfying the above-mentioned criteria a) to c) is established; the Personnel Department and head of unit check and certify in a report that the staff member satisfies criteria d) to f); the Appointment and Promotion Board issues its recommendation and, lastly, the Secretary-General takes a decision “on the basis of [that] recommendation”. She asserts that the procedure followed in her case was flawed because there had been an “additional stage” consisting in “a revision and rewriting of the whole process so as to provide a basis for the Secretary-General’s decision, in place of the recommendation” of the said Board. The procedure has thus been “interfered with by a sort of secret board”.

The complainant submits that no clear reasons have been provided for the impugned decision. In her opinion, a “vague, laconic and, what is more, unsubstantiated statement taking up less than one and a half lines is obviously insufficient”.

Furthermore, the complainant states that, given the positive comments made in her most recent performance report and also in previous reports which, in her words, were all “excellent”, the Union drew plainly erroneous conclusions concerning her case.

The complainant emphasises that although she has a university degree – which in her opinion should logically exempt her from having to attend training courses for General Service staff – she has undergone “further training in other areas”. She accuses the Union of having failed to take essential facts into consideration.

The complainant criticises the “excessively protracted” decision-taking process which, in her view, was “deliberate”.

Lastly, she claims that the decision she is challenging is not final since, contrary to the requirements of Staff Regulation 4.9 f)*, it was not referred to the ITU Council.

The complainant asks the Tribunal: to quash the decision of 4 March 2005; to order her promotion as from 1 January 2003 as well as “backpayment to that date of allowances, contributions and salary, plus annual interest of 8 per cent”; and to award her compensation for moral injury. She also claims costs.

C. In its reply the ITU denies that there was an additional stage in the process leading to the impugned decision. It explains that the Secretary-General considered that he was not obliged to follow the recommendation of the Appointment and Promotion Board, for he was of the view that the complainant plainly did not meet one of the criteria governing the granting of personal promotions and that, consequently, the Board had not strictly applied the criteria listed in the annex to the service order. It draws attention to the fact that a decision taken at the Secretary-General’s discretion cannot be termed flawed simply because it is not in line with an advisory body’s recommendation.

Regarding the issue of whether sufficient reasons were given, the ITU submits that the decision of 27 July 2005 sets forth the reasons which led the Secretary-General not to follow the Appeal Board’s recommendation, and that the complainant did not at any time in the internal appeal procedure challenge the substantive reasons on which the initial decision of 4 March 2005 rested. According to the Union, “however succinct they might be”, the reasons in question “are nonetheless clear [...] so that they certainly make it possible for the Tribunal to rule on this dispute and for the complainant to defend her rights”.

The Union admits that the procedure was protracted, but asserts that its length was caused by objective reasons – which were elucidated during the internal appeal process and which stemmed chiefly from discussions about the future of the personal promotion scheme – and that it did not adversely affect the complainant.

As far as the application of Regulation 4.9 f) is concerned, the ITU submits that it was under no obligation to submit decisions regarding personal promotion to the Council.

Lastly, the Union strives to demonstrate the irrelevance of the arguments adduced by the complainant in support of

her pleas that the conclusions drawn from her file were erroneous and that essential facts were omitted.

D. In her rejoinder the complainant maintains her position and expands on her arguments.

She finds the ITU's approach to the Secretary-General's exercise of his discretion in the established procedure "surprising to say the least".

She contends that if the Appointment and Promotion Board had really examined candidatures as casually as the Union suggests, the Secretary-General would have been apprised of this without delay and he would have been at liberty to remedy this situation in a timely manner.

She comments that unlike some of her colleagues she was not allowed to consult the report intended for the Appointment and Promotion Board.

Given that only one of 20 candidates received a personal promotion in the 2003 and 2004 promotion exercises, the complainant has the impression that a "preconceived opinion lay at the root of the whole 'process' which led to the (almost) wholesale rejection of the recommendations". She comments that it was not until 2003, when financial problems loomed, that it was decided to call into question the personal promotion scheme which had been operating smoothly since 1998. In her opinion, an attempt was made to achieve savings at the expense of candidates who were already due for promotion.

As for the issue of the length of the procedure, she considers that it is "completely illogical to say that decision-taking on promotions which were already due could have been held up by discussions regarding the advisability of abolishing the scheme in respect of future promotions".

The complainant endeavours to demonstrate that she did satisfy the above-mentioned criterion f).

E. In its surrejoinder the Union recognises that the fact that just one person obtained personal promotion in the 2003 and 2004 promotion exercises was linked to the serious financial crisis prevailing as from the end of 2002. It submits that it was not, however, a matter of calling the scheme into question, but of strictly applying Service Order No. 99 in the manner originally intended.

The ITU explains that, contrary to the complainant's allegations, the promotions to which she refers were by no means "due", since the staff members who were candidates for personal promotion in 2003 and 2004 were merely eligible, inasmuch as they fulfilled only the "technical" conditions contained in the annex to Service Order No. 99. The Appointment and Promotion Board had displayed a "certain lack of rigour" by confining itself to a "routine" examination of the files, as it would have done in "normal" circumstances when it did not have to consider the financial crisis facing the Union.

CONSIDERATIONS

1. The complainant joined the ITU on 24 April 1979. She holds a Master of Arts degree. She reached step 11, the highest in grade G.6, in 1992. At the material time she was working in the Pensions and Insurance Service of the Personnel Administration Division. On four occasions between 1990 and 2000 she unsuccessfully applied for posts at a higher grade.

2. The Union requests that the Tribunal join the present complaint with the complaints filed by seven other staff members, which also concern the rejection of candidatures for a personal promotion (see Judgment 2607, also delivered this day).

The complainant states that she learnt that these complaints had been filed after she had referred her case to the Tribunal. While she assumes that the arguments adduced in the said complaints are "more or less the same as [her] own, apart from some minor differences", she emphasises that she has been treated differently throughout the procedure. In addition, the issues of law raised in her case and in the seven other complaints are not absolutely identical. In these circumstances, the joinder requested by the Union is not justified.

3. Service Order No. 99 on personal promotion was issued on 17 September 1998 following the Council's adoption of resolution 1106 in which it announced its decision to implement a personal promotion scheme to "give

staff in occupational groups with limited career opportunities the possibility of being treated on an equal footing with staff members having more frequent promotion opportunities”.

In order to receive personal promotion staff members must satisfy the criteria a) to f) listed in section I, paragraph 1, of the annex to Service Order No. 99, which are quoted under A above. According to section I, paragraph 2, all the criteria for promotion must be met.

4. Personal promotion comes at the end of a procedure the rules of which are established in section III of the annex to the service order. Under this procedure, the Personnel Department maintains an up-to-date list of staff members who, on 1 January of each year, meet the three criteria relating to length of service, to wit criteria a) to c). When a person satisfies these criteria the Personnel Department informs the head of the unit accordingly. Both verify and certify in a report that this person also meets the other three criteria. Once a year the Personnel Department submits the list of candidates to the Appointment and Promotion Board. The Board formulates a recommendation to the Secretary-General, with whom the final decision lies.

5. Paragraph 3 d) of section II of the annex to Service Order No. 99 reads: “at no time may the total number of staff members who have received a personal promotion [...] be greater than 5% of the posts in each category”. When this ceiling has been exceeded “preference shall be given on the basis of seniority in ITU” (section III, paragraph 6, of the annex *in fine*). Candidates who have not been granted a personal promotion for this reason are placed on a “personal promotion list” and their case is re-examined the following year subject to certain conditions (section III, paragraph 7).

6. On 23 March 2004 the Appointment and Promotion Board recommended the complainant’s personal promotion effective 1 January 2003. This recommendation was based on a report dated 11 March 2004 signed by the Head of the Personnel Administration Division and the Chief of the Personnel Department.

7. By Service Order No. 04/19 of 22 December 2004, the Secretary-General suspended the personal promotion scheme with immediate effect “[i]n view of the [...] severe financial situation” of the ITU. Paragraph 3 of the new service order reads as follows:

“Personal promotions recommended by the Appointment and Promotion Board for staff members having been declared eligible for a personal promotion effective 1 January 2003 and 1 January 2004 are being reviewed by the Personnel and Social Protection Department and will be granted, as appropriate, once this review has been finalised.”

8. The complainant was informed in a letter of 4 March 2005 that her candidature for a personal promotion had been examined “having regard to the provisions of Service Order No. 99 of 17 September 1998 and within the framework of Service Order No. 04/19 of 22 December 2004”, and that it had been decided not to follow the Appointment and Promotion Board’s recommendation of 23 March 2004. The reason given was that she did not meet criterion f) laid down in section I, paragraph 1, of the annex to Service Order No. 99.

When the Secretary-General was asked to reconsider his appraisal, he confirmed this decision and the complainant was informed accordingly in a letter of 30 March 2005.

9. The complainant filed an internal appeal against this decision on 28 April 2005. She took the Secretary-General to task mainly for having departed unduly from the Appointment and Promotion Board’s recommendation.

On 5 July 2005 the Appeal Board transmitted to the Secretary-General its report on the appeals filed by the complainant and by other staff members whose candidature for a personal promotion had likewise been turned down. Having drawn attention to the fact that the Secretary-General must exercise his discretion “within the limits of the rules in force”, the Appeal Board found that the Secretary-General should “rightly consider that the joint reports of the Personnel Department and the head of the unit contain a correct assessment of the appellants’ performance”. The Appeal Board therefore recommended that the Secretary-General request a “review of the reports which are submitted to him for a final decision”. This review was to be carried out by the Appointment and Promotion Board in close consultation with the Personnel Department and the heads of unit concerned in order to “remove the obstacles relating to the fact that the assessments differed”, as emphasised by the Secretary-General.

The complainant was informed by a letter of 27 July 2005 that the Secretary-General was nevertheless maintaining his decision not to grant her a personal promotion; it was also pointed out that she had never challenged the

substantive reasons given for not granting her such promotion.

10. The complainant only seeks the quashing of the decision of 4 March 2005, and not that of 27 July 2005. However, the submissions in the complaint and the rejoinder lead the Tribunal to consider that the complainant is also requesting the quashing of the decision of 27 July 2005 insofar as it confirms the decision of 4 March 2005.

11. The complainant submits that the procedure has been excessively long, that insufficient reasons were given for the impugned decision and that the Secretary-General breached the terms of the annex to Service Order No. 99 by ignoring the Appointment and Promotion Board's recommendation and relying instead, in a "confidential" or "secretive" manner, on the assessment of third parties whom she has been unable to identify.

12. The refusal to grant the complainant a personal promotion is not based on the fact that the 5 per cent ceiling provided for in section II, paragraph 3 d), of the annex to Service Order No. 99 had been exceeded.

13. The complainant clearly satisfied the three criteria a) to c), relating to length of service, and it is not disputed that she satisfied criteria d) and e). Her candidature for a personal promotion was rejected solely on the grounds that she did not satisfy criterion f), as she had not "shown evidence of any self-development efforts with a view to promotion or career development".

14. A question therefore arises as to whether the reasons given for the decision of 4 March were sufficient in the light of the Tribunal's case law.

That decision was plainly a decision adversely affecting the complainant. The obligation to state the reasons for such a decision is a general principle of international civil service law (see Judgments 1911, under 6, and 2124, under 3).

The scope of this obligation varies according to the actual circumstances of each case and the nature of the decisions in question. A mere reference to the applicable rule, the reproduction of its text and an indication of whether or not it applies to the case under consideration may suffice in some circumstances. Where the applicable rules confer discretion on the authority responsible for taking the decision, it is all the more necessary to comply with the obligation to specify the reasons for the decision.

In all cases, the reasons given in support of the decision must be set forth in such a manner as to enable the persons concerned objectively to challenge the decision before an appeal body and to enable the latter to rule on the dispute in full knowledge of the facts (see Judgment 1369, under 28).

15. According to Service Order No. 99, the final decision on personal promotion lies with the Secretary-General and to that end he must be allowed a certain margin of discretion (see Judgment 1973, under 5). This discretion must not, however, be confused with arbitrariness and the person exercising it must take account of essential facts. If this person intends to depart from the recommendation or opinion formulated for him by an advisory body established for the purpose of enlightening him as to the decision to be taken, it is incumbent upon this person to indicate, even briefly, why his appraisal of the pertinent facts leads him to conclusions which differ from those reached by the said body.

At all events, the Secretary-General's discretion does not permit him, without valid reasons, to ignore completely such an opinion or recommendation, particularly when it is the recommendation from the Appointment and Promotion Board which must be submitted to him before he takes his decision and which itself rests on a joint report drawn up by the Personnel Department and the head of the unit. Indeed, the purpose of this report, which is drawn up by the bodies best placed objectively to judge the abilities and performance of candidates for a personal promotion, is to certify that they meet the criteria d) to f) listed in section I, paragraph 1, of the annex to Service Order No. 99.

16. One of the three questions replied to in the joint report intended for the Appointment and Promotion Board was whether the complainant satisfied criterion f). This question was worded as follows:

"c) **Has the staff member shown evidence of self-development** (capacity for maintaining state-of-the-art expertise in his/her domain of activities, enhancement/updating or acquisition of general and technical skills required not only for the full accomplishment of the tasks of his/her post but also for the enlargement of his/her career prospects)? If so, please give examples."

The two signatories of the report replied to this question in the affirmative.

17. The Secretary-General disregarded this opinion – on which the Appointment and Promotion Board had based its recommendation – without indicating even briefly why it was deemed to be unfounded. The decision of 27 July 2005 contains only general considerations regarding the discretion enjoyed by the Secretary-General and it specifies that the Appointment and Promotion Board’s recommendation does not “bind him”.

Thus the refusal to follow the recommendation given to the Secretary-General under the procedure laid down in section III of the annex to Service Order No. 99 was insufficiently substantiated in the light of the case law. The decisions under challenge must therefore be quashed, and the Tribunal need not examine the complainant’s other pleas.

It shall be incumbent upon the Secretary-General again to express an opinion on the complainant’s candidature in the light of all the circumstances and to take a new decision on her case.

18. The complaint is allowed and the complainant should therefore be granted compensation of 3,500 Swiss francs for all the injuries she has suffered as a result of the unlawful nature of the impugned decision.

The complainant is also entitled to costs, which the Tribunal sets at 2,500 francs.

DECISION

For the above reasons,

1. The decisions of 4 March and 27 July 2005 are quashed.
2. The case is referred back to the Secretary-General of the ITU in order that he may take a new decision in accordance with 17 above.
3. The ITU shall pay the complainant 3,500 Swiss francs in compensation for all the injuries she has suffered as a result of the unlawful nature of the impugned decision.
4. It shall also pay her 2,500 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

* Regulation 4.9(f) stipulates that “[t]he Secretary-General shall report to the next regular session of the Council whenever he proposes to take an appointment or promotion decision which is contrary to the advice of the

Appointment and Promotion Board. The final decision shall be taken subject to the Council's agreement. The effect of that decision shall be retroactive in the case of promotions.”

Updated by PFR. Approved by CC. Last update: 15 February 2007.