

R. (No. 3)

v.

IAEA

133rd Session

Judgment No. 4466

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 26 February 2018 and corrected on 9 May, the IAEA's reply of 20 August 2018, the complainant's rejoinder of 19 January 2019, the IAEA's surrejoinder of 15 May, the complainant's further submissions of 31 July and the IAEA's final comments thereon of 11 November 2019;

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 issue a first formal written warning of unsatisfactory performance and to initiate the procedure for addressing unsatisfactory performance.

The complainant joined the IAEA in 2013. At the material time, he was a Nuclear Support Systems Analyst within the Nuclear Support Systems Group (NSSG) under the direct supervision of Mr K.

During a meeting held on 6 December 2016, the complainant received an Inter-Office Memorandum (IOM) dated 2 December 2016 containing a first formal written warning for unsatisfactory performance. In the IOM, Mr K. explained that he was initiating action under Staff Rule 3.06.4, which deals with unsatisfactory performance, and he detailed areas for expected improvement and the path forward.

On 9 January 2017 the complainant wrote to the Director, Division of Human Resources, requesting that the written warning of 2 December 2016 be set aside and removed from his personnel file. On 31 January 2017 he requested the Director General to review the decision to initiate the procedure for addressing unsatisfactory performance.

By an IOM of 7 February 2017 the Director, Division of Human Resources, replied to the IOM of 9 January and informed the complainant that the written warning of 2 December 2016 was just one of a series of steps foreseen in the procedure. She stated that its goal was to assist the staff member to succeed in his role and she encouraged the complainant to engage in active discussion with his supervisor to resolve performance issues. The complainant responded on 10 February that he wished to maintain his request for review dated 31 January 2017.

By a letter of 24 February 2017 the Director General rejected the complainant's request for review as irreceivable, on the ground that no administrative decision had yet been taken with regard to his performance. In March the complainant appealed against the 24 February 2017 decision.

In its report of 30 October 2017, the Joint Appeals Board (JAB) recommended dismissing the complainant's appeal as irreceivable, because it was not directed against an administrative decision for the purposes of Staff Rule 12.01.1(c)(1).

By a letter of 21 November 2017 the Director General informed the complainant of his decision to follow the recommendation of the JAB to dismiss his appeal as irreceivable on the ground that the initiation of the unsatisfactory performance procedure did not constitute a challengeable administrative decision. That is the impugned decision.

The complainant separated from service on 31 May 2018 following the decision not to renew his fixed-term appointment. He challenged that decision in his sixth complaint before the Tribunal, which the Tribunal dismissed as unfounded in Judgment 4346, delivered in public on 7 December 2020.

In his present complaint, the complainant asks the Tribunal to quash the unsatisfactory performance procedure initiated on 2 December 2016 and to remove the first formal written warning from his personnel file. He claims material damages in the amount of two years' salary, moral damages in the amount of 100,000 euros, and exemplary damages in the amount of 30,000 euros. The complainant also seeks 2,000 euros in costs, with interest on all sums awarded. In his rejoinder, the complainant

alleges that the IAEA failed to disclose certain documents and asks the Tribunal to take this into account while assessing the exemplary damages.

The IAEA asks the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, as entirely unfounded. It states that it has already provided the complainant with the relevant documents and information.

CONSIDERATIONS

1. By his request for review, dated 31 January 2017, the complainant commenced the proceedings underlying this complaint. In it, he contested the initiation of the unsatisfactory performance procedure pursuant to Staff Rule 3.06.4 and the issuance of a first formal written warning dated 2 December 2016, which he received at a meeting on 6 December 2016.

2. In his request for review, the complainant referred to his letter, dated 9 January 2017, to the Director, Division of Human Resources, requesting that the warning letter be set aside and be removed from his personnel file. He also noted that he had stated in that letter that he had addressed the allegations it contained “demonstrating by probative evidence the groundlessness of all the adduced charges of underperformance” and proving that his former first-level supervisor, Mr K., by his own neglect, had repeatedly failed to discharge his duty to comply with Staff Rule 3.06.4(a) prior to issuing the formal written warning under Staff Rule 3.06.4(b). The complainant further alleged that Mr K. had breached confidentiality, contrary to Part II, section 3, Annex V of the IAEA’s Administrative Manual, by distributing the written warning to another staff member. The complainant requested the Director General “to reconsider the administrative decision to initiate a procedure against [him] for addressing unsatisfactory performance”.

3. By letter dated 24 February 2017, the Director General rejected the request for review as irreceivable on the basis that it did not contest an administrative decision. He encouraged the complainant to continue to engage in discussions with his current supervisor, Mr H., on matters relating to his performance as those discussions would assist him to succeed in his position. The complainant appealed to the JAB.

4. In his appeal, the complainant centrally sought to challenge the managerial and procedural steps which culminated in the unsatisfactory performance procedure. He alleged that the decision to initiate the procedure was procedurally flawed in that the steps taken towards it breached Staff Rule 3.06.4; that the IAEA breached its duty of care towards him; that the decision to initiate the procedure was made arbitrarily and that he was thereby subjected to unequal treatment and bias by Mr K. He submitted that the Director General's conclusion that his request for review was irreceivable did not accord with the Tribunal's case law which "clearly [states] that any act by an officer of an Organisation which has a legal effect constitutes a challengeable decision".

5. In the impugned decision, in accepting the JAB's recommendation to maintain the original decision to dismiss the complainant's request for review as irreceivable, the Director General relevantly stated as follows:

"In particular, the Board noted that the jurisprudence of the Tribunal establishes that any act by an officer of an Organisation which has a legal effect constitutes a challengeable decision. However, the Board stated that 'that does not mean that the initiation of the unsatisfactory performance procedure is itself such an act. Rather, it is the initiation of a procedure.' The Board likened your matter to Judgment No.468, in which the Tribunal stated that '[the complainant] is asking for the Tribunal to annul something which is only one step in a complex procedure and of which only the final outcome is subject to appeal.' In this respect, the Board held that the initiation of the unsatisfactory performance procedure did not constitute a challengeable administrative decision and that your appeal was therefore irreceivable. I agree with that conclusion.

[...]

[...] I dismiss your appeal with regards to the initiation of the unsatisfactory performance procedure."

6. In contesting that decision in the present complaint, the complainant insists that the formal written warning initiating the unsatisfactory performance procedure against him constitutes a challengeable administrative decision. The procedure under Staff Rule 3.06.4 involves a series of steps intended to remedy unsatisfactory performance. Under Staff Rule 3.06.4(f), those steps may culminate in a decision to reassign the staff member to other duties at the same grade; withhold the next step increment; extend the staff member's contract

for a shorter period; reassign the staff member to duties at a lower level, with or without a consequent reduction in pay; non-extension of contract or the termination of the staff member's appointment.

7. In consideration 8 of Judgment 3967 the Tribunal held that the warning letter issued in that case (which was similar to that issued to the complainant in the present case) was not an act that could be challenged before the Tribunal as it is merely a step in the process that culminates in a staff report. Based on this case law, the complaint is irreceivable in accordance with Article VII, paragraph 1, of the Tribunal's Statute. It will therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ