

**TIPS AND INFORMATION NEWSLETTER  
FROM LAURENCE C. FAUTH, ESQ.**

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**Duty to Act Independently and Impartially**

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If you are considering challenging a decision, for example not to extend a contract, taken by the Executive Head of your organization which is based on the recommendation of an advisory body, whether it be an appeal panel, personnel advisory panel, or selection and promotion board, consider these points regarding the organization's duty to ensure independence and impartiality of the advisory body.

In Judgment No. 2667 (104<sup>th</sup> ILOAT Session), the Tribunal explained the right to due process in respect of decisions taken after consideration and recommendations given by an advisory body:

*5. Every official has the right to due process before the authority responsible for taking a decision concerning him or her. This right presupposes, on the one hand, that the said authority is properly constituted, that is to say that its members have been appointed in accordance with the rules governing its composition and, on the other hand, that those members are impartial. The purpose of the second requirement is to ensure that administrative bodies dealing with disputes give fair treatment to the officials who turn to them, in other words that they display no bias, that they act in good faith throughout the proceedings and that they uphold the rights of the defence, especially the right to equal treatment and the right to a hearing in all its aspects, so as not to give any official cause to believe that his or her case has been prejudged.*

*The duty to act independently and impartially is incumbent not only on the authority competent for issuing the final formal decision in proceedings, but also on bodies responsible for giving an advisory opinion or for making a recommendation to this authority, a fortiori where the recommendation is a formal part of the decision-making process (see Judgment 2315, under 27).*

*The above requirements apply to any joint appeals committee set up within an organisation, even if its opinions are not binding on the executive head of the organisation in question.*

In this case, the Tribunal addressed the allegation of the staff member that two members of the appeal body constituted to hear the appeal of the denial of her request to be granted international status were biased and prejudiced against her. The appeal body had rejected the

bias contention on the grounds its members had been properly and lawfully elected. The Tribunal rejected that reasoning and explained that the mere fact that the formal rules on appointment or election of the appeal panel were correctly followed does not guarantee that the members were in fact independent and impartial. The Tribunal then proceeded to assess whether the evidence of bias and prejudice “were likely *per se* to prevent them from being completely impartial when expressing an opinion on an issue of the kind raised” by the staff member. The staff member cited the fact that one of the panel members was the subordinate of the other, that both members were seeking to advance their careers and therefore had an interest in siding with the administration and not the staff member, and that one of the members was also on the Appointment and Promotion Board. The Tribunal did not find any of these facts precluded the members from being impartial.

The Tribunal did not offer much guidance on what type of behaviour or evidence will prove bias. In another case from the 104<sup>th</sup> session, Judgment No. 2671, the Tribunal shed some light at least with respect to when a member of an appeals body may be disqualified. In that case, the Tribunal found that one of the members had in advance of considering the appeal expressed a confirmed view of the merits of the appeal, and set aside the decision, sending the case back for a renewed appeal process. Tribunal also explained that bias can be shown as well where a member of an advisory body expresses open hostility or is prejudiced against the staff member, which can be concluded on reasonable grounds:

*the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise. In this last regard, it is necessary only to observe that staff confidence in internal appeal procedures is essential to the workings of all international organisations and to preventing disputes from going outside those organisations.*

In general, most organizations will disqualify an appeals body member if the staff member asserts a timely objection without the staff member having to show very much by way of bias, and this is appropriate. The case is of course different where a decision is taken on the recommendation of an advisory body on, for example, selection and appointment, promotion, or contract extensions since the staff member is generally not given information about the constitution of such bodies until the launching of an appeal. Finally, if the formal rules on appointment or election of the advisory body are not followed, that is enough for the Tribunal to set aside the decision. Relief, however, will normally be limited to a renewed procedure starting from where the flaw arose, moral damages and legal costs. If the decision at issue involves termination of service or failure to renew a contract, the Tribunal may also award reinstatement with back pay or in lieu of reinstatement exclusively monetary damages (material and moral).

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