

DECISION AB [NN]/2015
OF THE ADMINISTRATIVE BOARD
OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS
of [DD] [Month] 2015

**on general provisions for implementing Article 87(1) of the Conditions of Employment
of Other Servants of the European Union and implementing the first paragraph of
Article 44 of the Staff Regulations**

THE ADMINISTRATIVE BOARD OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Staff Regulations of Officials of the European Union ('Staff Regulations') and the Conditions of Employment of Other Servants of the European Union ('CEOS'), laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68¹, and in particular Article 110(2) of the Staff Regulations and Articles 87(1) and 92 of the CEOS,

Having regard to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators², and, in particular, Article 28(2) thereof,

Having regard to the Communication C(2014)6543 final of 26 September 2014 from Vice-President ŠEFČOVIČ to the Commission on the guidelines on the implementation of the Article 110(2) of the Staff Regulations with regard to the implementing rules applicable in the agencies, and in particular Point 2.B thereof,

Having regard to Decision AB 03/2010 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 6 May 2010 on the Rules of Procedure of the Administrative Board, and, in particular, Article 8 thereof,

Having regard to the agreement of the European Commission pursuant to Article 110 (2) of the Staff Regulations C(2015)1456 final of 4 March 2015,

After consulting the Staff Committee,

Whereas:

- 1) On 16 May 2014, the Commission informed the Agency for the Cooperation of Energy Regulators that it adopted Decision C(2014)2226 of 7 April 2014 on general provisions for implementing Article 87(1) of the CEOS and implementing the first paragraph of Article 44 of the Staff Regulations.
- 2) Article 110(2) of the Staff Regulations states that the implementing rules referred to in Recital 1 shall apply by analogy to the Agency for the Cooperation of Energy Regulators. By way of derogation, an agency may request the Commission's

¹ OJ L 56, 4.3.1968, p. 1, as last amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013, OJ L 287, 29.10.2013, p.15.

² OJ L 211 14.8.2009, p. 1.

agreement to the non-application of certain implementing rules. The Commission may, instead of accepting or rejecting the request, require the agency to submit for its agreement implementing rules which are different from those adopted by the Commission.

- 3) The appraisal system applicable to the staff of the Agency for the Cooperation of Energy Regulators is intended to provide regular and structured feedback in order to improve performance and contribute to future career development.
- 4) Under Article 43 of the Staff Regulations, applicable to contract staff by virtue of Article 87(1) of the CEOS, the annual report has to contain a statement as to whether the jobholder's performance has been satisfactory. Given the importance of this statement for the jobholder's career and remuneration, a procedural framework should be put in place.
- 5) Under Article 44 of the Staff Regulations, which applies by analogy to contract staff under Article 3a of the CEOS, in accordance with Article 92 of the CEOS, a staff member's advancement in step is subject to their performance having not been deemed unsatisfactory during their last annual report. An annex to this Decision should set out in more detail how to put this rule into practice.
- 6) For the sake of clarity and legal certainty, Decision AB 25/2011 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 22 September 2011 establishing the policy and procedure for the performance appraisal of staff, laying down general provisions for implementing Article 87(1) of the CEOS should be repealed at the end of the 2014 appraisal exercise³ and replaced by this Decision⁴,

HAS ADOPTED THIS DECISION:

Article 1 – Scope

These general provisions shall apply to members of the contract staff employed under Article 3a of the CEOS (hereinafter referred to as ‘staff members’) by the Agency for the Cooperation of Energy Regulators (hereinafter ‘the Agency’).

Article 2 – Annual appraisal exercise

1. Every year, a report covering the period from 1 January to 31 December of the previous year (hereinafter referred to as ‘the reporting period’) must be drawn up for each member of the contract staff engaged for a period of one year or more who has been in active employment for a continuous period of at least one month during the reporting period.
2. Each report shall include an individual qualitative appraisal of the staff member’s efficiency, ability and conduct in the service. It shall cover all the staff member’s professional activities.

³ Assessing the period from 01 January 2014 to 31 December 2014.

⁴ With regard to its provisions related to contract agents.

3. Each report shall also include a conclusion on whether the staff member's performance has been satisfactory. The conclusion that the jobholder's performance has been unsatisfactory shall be based on factual elements.

Article 3 – Respective roles and rank

1. The reporting officer shall be the staff member's direct superior and, as a general rule, the staff member's Head of Department on 1 December of the reporting period.

The Head of Agency as referred to in the act(s) establishing the agency (hereinafter 'Director') shall assume the role of reporting officer for staff members of whom he/she is the direct superior.

2. The appeal assessor shall be the direct superior of the reporting officer at the time of the superior's first intervention in the appraisal procedure as laid down in Article 6.

Where the Director acts as reporting officer, the appeal assessor shall be the Commission representative on the Administrative Board who is the most senior in the highest grade.

A staff member who has provided information under Article 22a(1) and (2) of the Staff Regulations, applicable to contract staff by virtue of Article 81 of the CEOS, may, at the time of his or her reasoned refusal to accept the report, provided for in Article 7(1), request that the Commission representative on the Administrative Board who is the most senior in the highest grade act as appeal assessor.

3. In exceptional cases, justified by the desire to act in the interests of the staff member or in the event of a change in the organisation chart of a service, the Director may derogate from paragraphs 1 and 2 above to take account of the specific context arising from the circumstances or the change respectively.
4. Subject to the agreement of his or her Director and after notifying the staff members concerned, the Head of Department may delegate the role of reporting officer to temporary staff members who manage and supervise the contract staff members and whom he or she considers capable of taking on this role. In that case, the Head of Department shall approve the appraisal report and the Head of Department's direct superior shall act as appeal assessor. The Head of Department may at any time withdraw the delegation of the role of reporting officer and perform that role himself/herself.

Heads of Department may, without relinquishing their role as reporting officer, delegate the preparatory work for the appraisal of staff members in their department to member of the temporary staff assigned to the department whom they consider, in the light of the duties he or she performs within the department and his/her abilities, to be capable of assuming that role.

5. Where a report needs to be drawn up and the reporting officer and/or appeal assessor, as defined in paragraphs 1 and 2 above, have in the meantime left the Agency definitively, the Director shall designate the most appropriate reporting officer and/or appeal assessor, taking into account the interests of the staff members concerned, and shall notify the staff members accordingly.
6. In the event of derogation from the provisions of paragraphs 1 and 2, staff members shall be told the name of the persons who are to act as reporting officer and appeal assessor.

Article 4 – Responsibilities in the case of an assessment of the staff member’s performance as unsatisfactory

1. A report concluding that the staff member’s performance has been unsatisfactory needs to be confirmed by a countersigning officer, except where the Director acts as reporting officer.
2. The countersigning officer shall be the direct superior of the reporting officer, except when the direct superior is the Director, in which case the countersigning officer shall be the Head of Department in the Agency who is the most senior in the highest grade. Article 3, paragraphs (3), (5) and (6), shall apply mutatis mutandis.
3. The appeal assessor shall be the Director carrying out this duty at the time of his first intervention in the appraisal procedure. In the event that the Director acts as reporting officer, the appeal assessor shall be the Commission representative on the Administrative Board who is the most senior in the highest grade.

Article 5 – Basis of the appraisal

The individual qualitative appraisal shall be based on the ability, efficiency and conduct in the service of the staff member, taking account of the context within which they have performed their duties. The individual qualitative appraisal shall not include a comparison with the performance of other staff members taken individually.

Article 6 – Appraisal procedure

1. The appraisal exercise shall be launched by the Agency entity in charge of human resources by publication of an administrative notice. It shall be administered by means of a secure electronic⁵ system.
2. For each staff member, the appraisal report is launched electronically⁶. Once the report has been launched, a request to produce a self-assessment is automatically sent to the staff member. Within eight working days of receiving this request, the staff member must submit a self-assessment, which will be entered in the appropriate

⁵ Where the Agency does not have an electronic based system, the procedure shall be carried out manually and the relevant provisions shall be applied mutatis mutandis.

⁶ See footnote 2.

heading of the report. The purpose of this self-assessment is to prepare for the dialogue provided for in paragraph 3.

If the staff member does not submit a self-assessment within that time, without having been prevented from doing so by a justified absence, the reporting officer may immediately proceed to the formal dialogue provided for in paragraph 3.

3. The reporting officer shall then hold a formal dialogue with the staff member. With the agreement of the staff member, the reporting officer may ask one or more other officials or members of the contract or temporary staff who have supervised the staff member's work to take part in the dialogue. If the reporting officer agrees, the staff member may arrange for another staff member within the meaning of the CEOS to assist him or her during the dialogue.

This dialogue shall constitute one of the reporting officer's basic management duties. In the course of this dialogue, the reporting officer shall, jointly with the staff member:

- (a) assess the staff member's performance during the reporting period. The reporting officer shall, jointly with the staff member, consider the latter's efficiency, the ability he or she has demonstrated and his or her conduct in the service during the reporting period;
 - (b) identify the staff member's training needs.
4. If the staff member does not act on the invitation to take part in the formal dialogue, without having been prevented from doing so by a justified absence, the reporting officer may immediately draw up an individual qualitative appraisal as provided for in paragraph 5.
 5. Within ten working days of the formal dialogue, the reporting officer shall draw up an individual qualitative appraisal of the staff member's efficiency, ability and conduct in the service. For this purpose, the staff member's justified absences may not be used to his or her disadvantage.
 6. In the cases referred to in Article 4(1) the report shall then be transmitted to the countersigning officer.

The countersigning officer shall verify whether the appraisal procedure has been respected and whether the report has been drafted in a coherent manner, in accordance with these general implementing provisions and consistent with the staff member's performance. He shall confirm, complete or modify the report.

7. In cases other than those referred to in Article 4(1) or after completion of the procedure provided for in paragraph 6, the report shall then be sent to the jobholder.
8. Within five working days of the date on which the staff member is invited to consult his or her report, he or she may accept the report with or without comments or refuse to accept the report, stating the reasons for refusal.

If the staff member does not refuse to accept the report within the deadline mentioned in the paragraph above, the report will be considered to have been accepted and become final.

Article 7 – Appeal procedure

1. A reasoned refusal by the staff member to accept the report in accordance with Article 6(8) shall automatically lead to the matter being referred to the appeal assessor. The staff member may withdraw his or her reasoned refusal to accept the report at any time.
2. At the request of the staff member, expressed in his or her reasoned refusal to accept the report, the appeal assessor shall hold a dialogue with the staff member within ten working days of the reasoned refusal. The staff member may be assisted during the dialogue by other servant within the meaning of the CEOS, with the exception of the reporting officer. The appeal assessor may ask other servant within the meaning of the CEOS, other than the reporting officer, to be present at the dialogue.
3. Within 20 working days of the reasoned refusal to accept the report and following the dialogue provided for in paragraph 2, the appeal assessor shall confirm the report or amend it, giving reasons.

In the case of a report assessing the staff member's performance as unsatisfactory, the appeal assessor shall consult the Agency entity in charge of human resources before taking his decision; the latter may in turn consult the Joint Committee.

The decision of the appeal assessor may not be based on facts which the staff member has not yet had an opportunity to comment upon in the course of the appraisal or the appeal procedure, unless he or she is given an opportunity to do so by the appeal assessor in good time.

4. The report shall become final by decision of the appeal assessor. The staff member shall be notified, by e-mail or other means, that the decision rendering the report final has been adopted, pursuant to this Article or Article 6, and that the report may be consulted in the electronic⁷ system. If the decision rendering the report final was adopted under this Article, the staff member shall at this point also have access to the appeal assessor's decision. Such notification constitutes communication within the meaning of Article 25 of the Staff Regulations. The period of three months in which to lodge a complaint, provided for in Article 90(2) of the Staff Regulations, starts to run on communication of the information.

Article 8 – Time limits

1. The time limits referred to in Articles 6 and 7 as they concern the staff member shall be calculated only from the time when the relevant decision has been notified to the

⁷ See footnote 2.

person concerned or, at the latest, when the latter, acting as a diligent member of staff, may be expected to be aware of the content of this decision and the reasons for it.

2. These time limits will be suspended, however, if and for as long as the staff member is unable to use the electronic⁸ system, for example because of a justified absence.

Article 9 – Final provisions

1. In addition to the general rules laid down above, specific rules governing certain aspects of the appraisal procedure are defined in Annex I. These provisions shall apply by way of derogation from Articles 1 to 8.
2. The consequences for the advancement in step of an appraisal report concluding that the staff member's performance level was unsatisfactory are set out in Annex II.
3. The 2014 appraisal exercise is the last to which Decision AB No 25/2011 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 22 September 2011 establishing the policy and procedure for the performance appraisal of staff, laying down general provisions for implementing Article 87(1) of the CEOS, shall apply. At the end of the 2014 appraisal exercise, it shall be repealed.
4. Commission Decision C(2014)2226 does not apply by analogy to the Agency for the Cooperation of Energy Regulators.
5. This Decision shall take effect on the date of its adoption and apply to reports established as of the 2015 appraisal exercise.

Done at Ljubljana, [DD] [Month] 2015.

For the Administrative Board:

Razvan Eugen Nicolescu

Chairman of the ACER Administrative Board

⁸ See footnote 2.

ANNEX I
SPECIAL CASES

1 – Specific situations

- 1.1. If, at the time when the appraisal exercise is launched, the staff member has left the service in application of Article 119 or Articles 47-50 of the CEOS, it is only necessary to draw up a report if the staff member submits an express request to that effect, in writing, to the appropriate reporting officer or to the Agency entity in charge of human resources, in the three weeks following the end of his or her employment at the latest. By derogation from Article 6(1) of these general implementing provisions, such a report may be drawn up on paper.
- 1.2. If, at the time when the appraisal exercise is launched, a decision has been taken leading to the termination of the employment of the staff member in application of Article 119 or Articles 47-50 of the CEOS and taking effect during the year covered by the exercise, the provisions of the preceding paragraph shall apply mutatis mutandis on the understanding that the staff member must make his or her request within three weeks following the launch of the exercise. If such a decision is withdrawn or cancelled, the appraisal procedure shall automatically resume for the staff member concerned, even if he or she has not requested that a report be drawn up.
- 1.3. Staff members who, at their own request, have been granted unpaid leave on personal grounds in accordance with Articles 17 and 91 of the CEOS shall receive a report covering the reporting period until the date on which the leave takes effect. Following their reinstatement a report shall be drawn up on such staff members covering the period from reinstatement until the end of the reporting period. If the period covered by these reports is too short for the staff member to be fully appraised during the reporting period concerned, the reporting officer will draft the report but make a note of this specific circumstance.
- 1.4. Where a staff member was unable to carry out his or her duties for an extended period by reason of illness, accident, parental leave or family leave, maternity leave or leave for military service, and as a result the period covered by the report was too short for the staff member to be fully appraised during the reporting period concerned, the reporting officer will draft the report but make a note of this specific circumstance.

2 – Mobility

If, during the reporting period but not less than four months after the period covered by the previous report or by the previous contribution included in the report,

- i. the staff member is moved to another post within the Agency, his or her direct superior will draft a contribution on the staff member's performance, which will be incorporated in the report;
- ii. the staff member leaves the Agency to take up employment as referred to in Article 3a of the CEOS, in the same grade of the same function group, his or her direct superior of the Agency of origin will draft a contribution on the staff member's performance, which will be incorporated in the report;
- iii. a member of the temporary staff leaves a post by virtue of which he or she would have been called upon to carry out the duties of reporting officer with respect to a staff member, he or she shall draw up a contribution on the staff member's performance, which will be incorporated in the report.

3 – Staff representatives

- 3.1. Reports on staff members who are assigned full-time or 50% part-time⁹ as staff representatives shall be drawn up by the Chair of the Staff Committee who shall act as the reporting officer. In the case of the Chair of the Staff Committee, the report shall be drawn up by another member of the Staff Committee as decided in writing and notified to the staff member by the Staff Committee and that member of the Staff Committee shall act as the reporting officer.
- 3.2. A report on a 50% part-time assignment shall be incorporated into the main report prepared pursuant to Article 6 of these general implementing provisions and the countersigning officer and appeal assessor shall be defined in accordance with Articles 3 and 4 of these general implementing provisions. The report shall cover the part of the staff member's activity which is devoted to staff representation activities.
- 3.3. If no assignment takes place or when staff members dedicate less than 50% of their time to staff representation activities, a relevant contribution to the report referred to in Article 6 of these general implementing provisions shall be drawn up only upon request by the staff member to the Staff Committee. That contribution shall be sent to the staff member's reporting officer pursuant to Article 6 of these general implementing provisions.

⁹ In cases of assignment established by a framework agreement.

ANNEX II - BLOCKING OF ADVANCEMENT IN STEP

1. In application of Article 92 and Article 20(4) of the CEOS, and also the first paragraph of Article 44 of the Staff Regulations, a staff member shall not advance to the next step in his grade if the last finalised report concluded that his performance was unsatisfactory.

In the cases referred to in point 3.2 of Annex I, the consequences mentioned in the preceding subparagraph shall apply if either of the two reports to be established assesses the staff member's performance as unsatisfactory.

2. If the advancement in step is blocked pursuant to point 1, the jobholder shall again become due for an advancement after one year, subject to the provisions of point 1.
3. Four years after his/her entry into the grade or his/her last advancement in step, the staff member shall reach the step regardless of the reports.