

against the Judgement and not to obtain an interpretation of what has been decided with binding force. The Tribunal is therefore unable to grant the request for interpretation of Judgement No. 120.

VI. For the foregoing reasons, the application is rejected.

(Signatures)

Suzanne BASTID
Vice-President, presiding

R. VENKATARAMAN
President

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

New York, 30 October 1970

Judgement No. 138

(Original: English)

Case No. 136:
Peynado

Against: The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a probationary appointment.

Request for the rescission of the decision terminating the appointment.—Discretionary power of the Secretary-General to terminate appointments other than permanent or fixed-term appointments.—Conditions for exercising this power.—Distinction between termination arising at the end of the probationary service and termination arising during the period of probation.—Procedure before the Appointment and Promotion Board for providing safeguards for a fair review of the suitability of the probationer for the grant of a permanent appointment.—Where the Board has reached its conclusions in the light of inadequate or erroneous information and the Secretary-General has relied on these conclusions for the termination of the appointment, the fact that there was a review by the Board does not secure that the Secretary-General's decision is valid.—The Board relied on a periodic report which had been contested by the Applicant and regarding which the Respondent had not followed the procedure applicable to such cases.—The recommendation of the Board and the Secretary-General's decision are defective.

Misuse by the Respondent of information presented confidentially to the Joint Appeals Board.—Duty of the Tribunal to draw the attention of the Administration to a number of unsatisfactory features of the case.—Recommendation for permanent appointment approved by the Secretary-General then changed to a recommendation for extension of the probationary period.—Refusal by the Respondent to afford the Applicant an opportunity for oral rebuttal.—Retroactive reappraisal of the Applicant's earlier performance.—Insufficient supervision of the Applicant's work during the probationary period.

The Respondent not having requested a remand of the case for correction of the procedure prescribed in Administrative Instruction ST/AI/115, the Tribunal decides, on the merits of the case, that the Applicant has been denied the protection afforded by the said Instruction and thereby deprived of a fair and reasonable procedure before termination of his appointment.—Rescinding the decision terminating the Applicant's

appointment would provide no relief.—Award to the Applicant of compensation equivalent to three months' net base salary.

Request for the correction of the Applicant's Official Status file.—Rejected.—Claim for costs.—Rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francisco A. Forteza;

Whereas, on 6 August 1970, Federico A. Peynado, a former staff member of the United Nations, filed an application the pleas of which requested the Tribunal to order the following measures:

“(a) Rescission of the decision by the Secretary-General of the United Nations to terminate the Applicant's probationary appointment with effect of 9 October 1968, communicated to the Applicant by letter of 10 September 1968 from the Acting Director of Personnel, United Nations.

“(b) Granting to the Applicant of a permanent appointment in accordance with Staff Rules 104.12 (a) and 104.13 (a), with effect from 10 October 1968, with retroactive payment of salary and related allowances.

“(c) In the event that the Secretary-General should decide to avail himself of the option given to him under article 9 (1) of the Statute of the Tribunal, payment of compensation for the injury sustained by the Applicant in the amount of five years' net base salary.

“(d) Correction of the Applicant's official status file and of other files by expunging from them any erroneous and irregular references to the Applicant's alleged failure to meet the high standards of efficiency, competence and integrity established in the Charter for United Nations staff members, and payment to the Applicant of two years' net base salary for the injury sustained by him as the result of the erroneous and irregular insertion of such references into the files in question.

“(e) Correction of the Applicant's official status file and of other files by expunging from them any erroneous and irregular references to the Applicant's alleged unsuitability as an international civil servant, and payment to the Applicant of two years' net base salary for the injury sustained by him as the result of the erroneous and irregular insertion of such references into the files in question.

“(f) Reimbursement of the Applicant for costs incurred by him in the preparation of this Application and of his preceding submissions to the Joint Appeals Board, the amount of such costs to be communicated by the Applicant to the Tribunal within the time limit provided by the Statute of the Tribunal for the submission of this Application.”

Whereas the Respondent filed his answer on 15 September 1970;

Whereas the Applicant filed written observations on 6 October 1970;

Whereas, on 15 October 1970, the Respondent submitted additional information requested by the Tribunal under article 17 of its Rules;

Whereas, on 16 October 1970, the Executive Secretary informed the parties that the Tribunal had found that the procedure prescribed in Administrative Instruction ST/AI/115 had not been followed with regard to the Applicant's last periodic report and that the Tribunal would decide on the substance of the case

if no request for a remand for institution or correction of the required procedure was made by the Secretary-General within the time-limit prescribed under article 18, paragraph 2, of the Rules;

Whereas, in a memorandum dated 20 October 1970, the Respondent informed the Tribunal that no request for remand was made for correction of the procedure relating to the Applicant's last periodic report;

Whereas, on 21 October 1970, the Applicant submitted observations on the Respondent's memorandum dated 20 October 1970;

Whereas the facts in the case are as follows;

The Applicant entered the service of the United Nations on 25 August 1965 as an Administrative Officer in the Technical Assistance Recruitment Service (TARS), Office of Personnel, at the P-3 level under a probationary appointment. In the periodic report covering the period 25 August 1965-17 June 1966, the Applicant was rated as "an efficient staff member giving complete satisfaction". In the next periodic report, covering the period 17 June 1966-1 May 1967 and dated 5 May 1967, he was recommended for a permanent appointment by his supervisor and rated as "an efficient staff member giving complete satisfaction" by the Chief of TARS. Accordingly, the Office of Personnel recommended to the Secretary-General that the Applicant be granted a permanent appointment. This recommendation was reported to the Appointment and Promotion Committee in accordance with Staff Rule 104.13 (c) (i). The Committee took note of the recommendation on 27 June 1967 and passed it on to the Appointment and Promotion Board. The Board in turn took note of the recommendation on 29 June 1967 and transmitted it to the Secretary-General, who approved it on 1 July 1967. It appears, however, that the Applicant was not informed of this decision. On 4 August 1967, the Chief of TARS informed the Applicant as follows:

"I wish to confirm the interview which we had yesterday, in the course of which I had to inform you that, to my great regret, I could not maintain the recommendation which I had previously made that you should be granted a permanent appointment by the Secretary-General. I proposed to the Director of Personnel, who was in agreement, that this recommendation should be changed to a recommendation that your probationary period, which began on 25 August 1965, should be extended for one year. This proposal, in accordance with the provisions of the Staff Rules, will be submitted to the Appointment and Promotion Board for its advice before being transmitted to the Secretary-General for decision.

"When, on 5 May 1967, I signed your periodic report as the Second Reporting Officer and indicated that your work had always given satisfaction, I had not yet had an opportunity to collaborate directly with you. The comments of the First Reporting Officer, while they were rather good, indicated that you had worked under the immediate direction of this official, who was responsible for Latin American and Caribbean questions.

"During these past three months which normally should represent the conclusion of your probationary period, I have been led to review your work closely and without an intermediary. The tasks entrusted to you during these past months were similar to those of other administrative officers who work with no supervision except that of the Chief or Deputy Chief of the Division. I unfortunately found that you were still not able to perform the duties of a TARS administrative officer without very detailed supervision. . . ."

On 25 August 1967, the Applicant addressed to the Director of Personnel a memorandum in which he contended that before 5 May 1967, when the second periodic report was signed, he had worked under the direct supervision of the Chief of TARS on a number of occasions; that the work performed under the direct supervision of the Chief of TARS was therefore covered by the periodic report; that a comparison of the Applicant's administrative experience in TARS would show that he was at a disadvantage if one considered the number of years of service and the respective grades; and that if during the last three months of his probationary appointment he had not been able to discharge his functions at an independent level as stated by the Chief of TARS, he could not understand why on 3 July 1967 he had been assigned by the Chief of TARS to be responsible for the OPEX section, "the most difficult" in TARS, during the absence on home leave of the officer in charge of that section. The memorandum concluded as follows:

"Since I sincerely believe that there [was] no change [in] the level of my professional performance or of my conduct as a UN Staff Member after the 5 May 1967 date on which my second periodic report and recommendation for my permanent appointment were signed by all the competent authorities, I would respectfully request:

"(a) That you inform me, if possible, of the recommendation made by the Appointment and Promotion Board after the recommendation for my permanent appointment was submitted to that body in May 1967.

"(b) That you repeal the action taken by [the Chief of TARS] as notified to me by his memorandum of 4 August 1967.

"(c) In the event you would be unable to grant this request, I would be most grateful to you if you could inform the Appointment and Promotion Board that I would like to be heard by them and in accordance to the rule 'Testis unus, testis nullus' I would wish that in addition to [the Chief of TARS], the Board would invite all the officers that have had the opportunity to supervise my work during my probationary appointment to testify regarding my professional and personal conduct during my probation period.

" . . . "

The Applicant also expressed his desire to appear before the Appointment and Promotion Board in a memorandum sent on the same day to the Secretary of the Board. On 7 September 1967, the Acting Director of Personnel addressed to the Applicant the following reply:

"You have asked for a decision in writing on each of the three requests in your memorandum of 25 August 1967 to the Director of Personnel. You first ask (a) for information on the recommendation made by the Appointment and Promotion Board when the proposal for your permanent appointment was submitted to it in May 1967. The answer to this is that, correctly speaking, no proposal was submitted to the Board. In accordance with Staff Rule 104.13 (c) (i) the submission was made to the Secretary-General and merely reported to the Board, which accordingly noted and transmitted the report. As you know from the memorandum to you of [the Chief of TARS], the Secretary-General subsequently decided against conferring a permanent appointment at this time. As I explained to you orally, this decision does not amount to a denial of a permanent appointment but only to a determination instead to submit the matter to the judg-

ment of the Appointment and Promotion bodies available in accordance with Staff Rules 104.13 (c) (iii) and 104.14 (f) (ii) (A).

"You then request (b) revocation of the above actions, as notified to you by [the Chief of TARS] in his memorandum of 4 August 1967. This is not within the authority of the Director of Personnel, since the decision was taken by the Secretary-General as stated above. Moreover, in as much as no final decision is thus taken against you by the referral to the Appointment and Promotion machinery, and since the referral itself affords you due process, it would not seem appropriate to return to the Secretary-General to ask him to cancel the decision which he has now taken.

"Your para (c) concerns your desire to be heard by the Appointment and Promotion Committee, a desire which I note you have now expressed by separate memorandum directly to the Chairman."

On 19 September 1967 the Appointment and Promotion Committee, having heard the testimony of the Chief of TARS and having decided not to interview the Applicant, reported to the Appointment and Promotion Board its endorsement of the Office of Personnel's recommendation, made with prior approval of the Secretary-General, that the Applicant's probationary appointment be extended for one year under the provisions of Staff Rule 104.12 (a). Accordingly the Appointment and Promotion Board recommended to the Secretary-General that the Applicant's probationary appointment be extended for one year and, on 2 October 1967, the Director of Personnel informed the Applicant that the Secretary-General had accepted that recommendation. On 14 October 1967 the Applicant, alleging that he had been denied due process in the procedure before the Appointment and Promotion Board, requested a review of the Secretary-General's decision under Staff Rule 111.3 (a). This decision having been re-affirmed, on 27 October 1967, by the Director of Personnel on behalf of the Secretary-General, the Applicant filed an appeal with the Joint Appeals Board. In his statement of appeal dated 29 November 1967, sixth to eighth paragraphs, he asserted that during the first half of the month of July 1967, he had had with the Chief of TARS an "incident" of a personal nature as a result of which the Chief of TARS had "drastically changed in his attitude" towards him. In the ninth paragraph the Applicant referred to the Chief of TAR's communication to him of 4 August 1967, and, in his conclusions, he stated:

"the facts of the case show that the measure taken against me is based not on reasons related to the service but on personal vengeance for reasons which are foreign to it."

On 12 March 1968 the Respondent filed an answer to the appeal, concluding as follows:

"18. There is, however, one aspect of the case which Respondent believes should be seriously considered by the Joint Appeals Board. The United Nations is very nearly unique in providing machinery by which its staff members may, without cost to themselves, challenge its administrative actions and decisions. In fact, the United Nations even provides counsel at its own expense to represent the Appellant in such proceedings. Such provisions impose upon the staff member an obligation not to abuse the appellate machinery and, even more, an obligation not to misuse the rights to attack unjustifiably their colleagues and supervisors. Such attacks, which appear in

documentation widely distributed within the UN, can injure the reputation of innocent staff members, and such injury may be a direct consequence of staff members having conscientiously fulfilled their duties as supervisors. Respondent submits that this danger is present in this case and, therefore, expresses the hope that should the Joint Appeals Board share this concern generally, and in this case in particular, the Board will, as well as expressly declaring the appeal to be frivolous, include in its report to the Secretary-General its views on this important question."

Two memoranda concerning the alleged incident were attached to the Respondent's answer to the appeal, one from the Chief of TARS and one from the Acting Director of Personnel. In his memorandum, dated 16 January 1968, the Chief of TARS stated that he was unaware of and did not recall any incident and protested "against the groundless and vague accusations levelled by Mr. Peynado at me not as a supervisor but as a private person, in the memorandum dated 29 November 1967"; he concluded:

"As a supervisor, I did what I believed to be my duty but without malice. Although the right of a staff member to fight for what he considers his due must not be impaired, and such will continue to be as it always has been my deep conviction, this cannot be interpreted as a licence to assault the personality and integrity of supervisors. These also have a right to be protected against wanton abuse and it would not be so if such gratuitous slander and venom as displayed in this case were allowed to go unchallenged."

In his memorandum, dated 29 January 1968, the Acting Director of Personnel wrote:

"...

"First, whether intentionally or not, Appellant implies that following the 'incident' of early July (sixth paragraph of his brief of 29 November 1967) he informed me orally of the incident (eighth paragraph) and subsequently on 4 August (ninth paragraph) received notice from his Chief of the intention to extend his probation. Such an order of events might, of course, give substance to the incident and add weight to Appellant's concern as being aroused by the incident independently of the notice then received; the significance of the 'incident', that is, would be greater if mentioned before an administrative action taken against the Appellant, less if remembered and reported only subsequently. The order of events was not as suggested by the order of the paragraphs. Some three weeks elapsed after the 4 August notice; only on 23 August did Appellant call on me in my office for the first time, handing me a paper in the form of his 25 August memorandum now appended to his appeal.

"Second, it was only then that Appellant chose to describe to me what may very well have greatly troubled his spirit but what nevertheless seems to me to have scarcely amounted to even an exchange of language with his Chief. The account occasioned me some concern at the time, not for its substance but for the possibility that a personality clash could have influenced the decision subsequently taken. At that moment, however, I confined myself to explaining to him the procedures for extending probation, which his memorandum showed he misunderstood, and suggested he retain his paper for reconsideration. He nevertheless returned on 25 August to make formal service on me of the same paper. At that time I therefore took the occasion

to interrogate him more precisely as to the alleged incident. I will have no objection to describing his account in detail, but for the present I content myself with observing: (1) that I found it trivial in substance and his reaction heavy and humourless; (2) that I then examined his general situation in TARS with his immediate supervisor and so satisfied myself that the alleged altercation, if it could have been such, was not the source of Appellant's difficulties; and (3) that a third interview with Appellant convinced me that I could place no confidence in his attitude toward his service.

“...”

On 16 April 1968 the Appellant withdrew his appeal and, on 18 April 1968, the Joint Appeals Board declared the proceedings closed. On 22 May 1968 the Chief of Staff Services, Office of Personnel, sent to the Applicant the following memorandum:

“Allegations Regarding your Chief of Service.”

“1. In the sixth, seventh and eighth paragraphs of a submission by you to the Joint Appeals Board, dated 29 November 1967, you made serious allegations regarding the personal character of your Chief of Service. ... In the thirty-third paragraph of your appeal, you suggested that you were subject to personal vengeance.

“2. In a memorandum of 16 April 1968 addressed to the Chairman and members of the Joint Appeals Board, you stated ‘I have, therefore, decided to withdraw my appeal and, on further reflection, ask that the arguments advanced on this basis be withdrawn and should be disregarded’.

“3. In withdrawing your appeal, however, you do not specifically withdraw the allegations you have made against your Chief, nor do you give any evidence of understanding the very serious nature of such allegations, for which you offer no retraction or apology.

“4. In these circumstances, without in any way questioning your basic right of appeal or passing upon the substance of your appeal, it is necessary to repeat, for your attention, certain observations addressed to the Joint Appeals Board by the representative of the Secretary-General, since these observations have a validity with respect to the charges you have made quite independent of the validity of the arguments you advanced, but could not be acted on by reason of your withdrawal.”

Paragraph 5 of the memorandum reproduced the full text of paragraph 18, quoted above, of the Respondent's answer in the proceedings before the Joint Appeals Board, and the memorandum concluded:

“6. A copy of this memorandum will be placed on your Official Status file.”

The Applicant's services during his third year of probation were evaluated in a periodic report dated 11 and 14 June 1968. He received from the first reporting officer an average or above-average rating on all items except items 4 (Judgement) and 8 (Quality of work accomplished) on which he was rated below average. The second reporting officer, who was the Chief of TARS, rated the Applicant as “a staff member who maintains only a minimum standard”. In taking note of the report, the Acting Director of Personnel commented in writing:

“I too have on more than one occasion had grounds to question judgment and to say so to the staff member.”

The Applicant signed the report on 24 June 1968 and appended to it this statement:

"I do not agree with para. 4 and 8 at Section I as well as to Section II and III. As a matter of fact [the Chief of TARS] and myself having had a personal incident before this report he is at the same time a judge and a party consequently I am afraid his appraisal cannot be fully impartial."

In a memorandum dated 9 August 1968, the Deputy Chief of Staff Services, Office of Personnel, transmitted to the Chairman of the Appointment and Promotion Committee the following recommendation of the Office of Personnel with regard to the review of the Applicant's probationary appointment:

"...

"There is no doubt, therefore, that Mr. Peynado's performance regrettably does not meet the burden of proof which rests upon a probationer of demonstrating clearly his competence in his assigned field of work. On this ground alone it is the conclusion of the Office of Personnel that this probationary appointment should be terminated.

"Apart, however, from the question of Mr. Peynado's performance there is another question which, in the view of the Office of Personnel, would preclude the award of a permanent appointment because it raises grave questions of his suitability as an international civil servant.

"Following the decision of the Secretary-General to extend the probationary appointment of Mr. Peynado for a period of one year and following a request for administrative review under Staff Rule 111.3(a), he filed an appeal with the Joint Appeals Board. This was clearly his right under the Staff Rules and, even though the discretionary decision of the Secretary-General concerning performance under probation has not been considered reviewable by appellate bodies, the Office of Personnel at no time questioned his right of appeal. What did give grounds for concern about the staff member, however, was that under the protective cloak of the appellate procedure he made grave and unsupported accusations against the character of his chief and suggested that he was the victim of personal vengeance. Following the submission of the respondent's reply, Mr. Peynado withdrew his appeal but has neither supported, retracted nor apologized for the irresponsible and unfounded allegations against his chief. It was, therefore, necessary to draw officially to his attention the obligations of a staff member not to misuse his rights of appeal to libel colleagues or supervisors. A copy of a memorandum to Mr. Peynado is attached as Annex II. Notwithstanding this Mr. Peynado, in a comment on his last periodic report, refers again to his irresponsible allegation and in effect seeks to use his calumny against his chief as a means of disqualifying the latter from fulfilling his responsibilities as a supervisor.

"The Office of Personnel's recommendation is, therefore, based on both performance and suitability and it is our belief that, on either ground independently of the other, this staff member must be held not to qualify for a permanent appointment; and that termination under Staff Regulation 9.1(c) and Staff Rule 104.12(a) should be recommended to the Secretary-General."

On 21 August 1968 the Appointment and Promotion Committee, having interviewed the Applicant, submitted to the Appointment and Promotion Board a report

recommending the termination of the Applicant's appointment. The Committee's report read in part:

" . . .

"2. The Committee noted that the periodic report covering the period of the staff member's additional year of probationary service as a whole was not only somewhat mediocre but was particularly deficient in items 4, 8 and Section II.

"3. At the meeting, the Committee interviewed Mr. Peynado at length. After considerable discussion, the Committee finally decided to recommend that Mr. Peynado's probationary appointment be terminated on the grounds stated in [the recommendation of the Office of Personnel]."

On 23 August 1968 this report was endorsed by the Board, which advised the Secretary-General as follows:

" . . . The Board satisfied itself that, as concerns the staff member's failure to meet standards of performance, there was no basis to find that the evaluation of his work was prejudiced; and as concerns the issue of unsuitable conduct, the recommendation of the Department and the report by the Appointment and Promotion Committee were both based on full and fair consideration of the facts and were not therefore arbitrary or prejudiced."

On 10 September 1968 the Acting Director of Personnel informed the Applicant that the Secretary-General had decided to terminate his probationary appointment in accordance with the provisions of Staff Regulation 9.1(c). On 8 October 1968 the Applicant requested the Secretary-General to review his decision. The Secretary-General's decision was reaffirmed on 21 October 1968 and, on 28 October 1968, the Applicant lodged an appeal with the Joint Appeals Board. In its report, submitted on 26 March 1970, the Board noted that the Secretary-General's decision had been taken on the recommendation of the Appointment and Promotion Board, which had specified two grounds for termination of the Applicant's appointment: failure to meet standards of performance, and unsuitable conduct. Concerning the first ground, the Joint Appeals Board found:

"that although the administrative action had been taken which had the appearance of being arbitrary, the appellant had not met the burden of proving that the decision to terminate his probationary appointment on the ground of failure to meet the high standards of efficiency and competence established in the Charter had been motivated by prejudice."

With regard to the second ground of termination of the Applicant's appointment, the Board concluded:

"that the decision to terminate the appellant's probationary appointment on the ground of unsuitable conduct was founded on misuse of information presented confidentially to the Joint Appeals Board. This error, however, was not of such a nature as to alter the essential validity of the termination, which was based on the appellant's failure to demonstrate fully by his performance that he met the high standards of efficiency and competence established in the Charter."

The concluding section of the Board's report read:

"Conclusions and Recommendations"

"61. The Board finds that in deciding to terminate the appellant's probationary appointment under Staff Regulation 9.1(c), the Secretary-

General followed the procedure laid down in Staff Rule 104.14, and based his decision on the recommendation adopted by the Appointment and Promotion Board after a review of the case, in the course of which the appellant was offered and exercised the opportunity to state his case fully.

"62. The Board further finds that the appellant has not established that the Secretary-General's decision to terminate his probationary appointment on the ground that he had not fully demonstrated, by his performance, his suitability as an international civil servant was taken for improper motives. While noting that an allegation of unsuitable conduct had been erroneously made against the appellant and that the allegation formed one of the grounds of the decision, the Board finds that this error does not detract from the essential validity of the Secretary-General's decision, which was taken in the proper exercise of his discretionary powers under Staff Regulation 9.1(c). The Board therefore, by a majority vote, decides to make no recommendation in support of the appeal.

"..."

The Alternate Member elected by the Staff appended to the report a separate opinion reading as follows:

"In accordance with Staff Rule 111.3(j), I should like to avail myself of the privilege of having my dissenting opinion included in the report of the Board.

"In my opinion, the admitted failure of supervision at the secondary level during the appellant's first twenty months of service, the failure to place the appellant under a different second supervisor during the third year of probation, and the irregular use of a reprimand, which was erroneously placed in his official status file and which could not fail to have an adverse effect on the eventual decision concerning his status, in effect, combined to deprive the appellant of a fair opportunity to demonstrate his suitability for career service.

"Furthermore, the retroactive repudiation by the Office of Personnel of the appraisals made in two more than satisfactory periodic reports covering twenty months of probationary service which had in fact formed the basis of its own recommendation for a permanent appointment under Staff Rule 104.13 (c) (i) creates a dangerous precedent. This tends to undermine, to the detriment of the staff member concerned, the system of periodic reporting which is normally relied upon as the principal basis for the evaluation of a staff member's service and conduct.

"I wish therefore to express my deep concern over the administrative aspects of this case which departed from the high standards which the Organization has normally maintained and which the staff is entitled to expect will be maintained. Accordingly, while not dissenting from the Board's finding that the Secretary-General did not exceed his discretionary powers under Staff Regulation 9.1(c), for considerations of equity to the staff member and in the interests of good administration, I cannot join in the decision of the Board to make no recommendation in support of this appeal."

On 3 June 1970 the Director of Personnel informed the Applicant that having re-examined his case in the light of the findings of the Joint Appeals Board and having taken note of both the majority decision and the separate opinion, the Secretary-General had decided to maintain the administrative decision terminating

the Applicant's appointment. On 6 August 1970, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

The Respondent has repeatedly violated the principle that the Secretary-General's discretionary power must not be exercised in an arbitrary or capricious manner, and that an action of termination must not be assigned specious or untruthful reasons, such as would connote a lack of good faith or due consideration for the rights of the staff member involved:

1. On the question of performance: Apart from the prejudice displayed against the Applicant by his chief of service, the Respondent committed many errors in law and in fact and many procedural irregularities. In particular:

(a) The unilateral and retroactive repudiation of the Applicant's first two periodic reports was arbitrary;

(b) Consequently, the Respondent's action in extending the Applicant's probationary period on the ground that he had not established his professional competence was taken in violation of the requirements of Staff Rules 104.13(a)(i) and 112.6 and therefore was irregular;

(c) That irregularity was compounded by the refusal of the Appointment and Promotion Committee to hear the Applicant at the time of the expiration of his first two years of probationary service;

(d) The extension of the Applicant's probationary period violated his right to be offered a permanent appointment after two years of probation once he had demonstrated his professional competence;

(e) During the third probationary year the Respondent no longer enabled the Applicant to demonstrate his competence under fair and equitable conditions: the Applicant remained under the over-all supervision of the Chief of TARS in spite of the strong antagonism between them and he was inadmissibly placed under a grave psychological burden, entirely of the Respondent's making, in the form of an irregular reprimand;

(f) The validity of the third periodic report—the basis of the Applicant's termination—was vitiated by the Respondent's failure to follow the procedure prescribed in Administrative Instruction ST/AI/115.

2. On the question of unsuitable conduct:

(a) Virtually all of the Applicant's contentions concerning the alleged ground of unsuitable conduct have been accepted by the Joint Appeals Board. In particular, the Board noted that the Applicant's statements in the course of appellate proceedings "should not have been considered unsuitable conduct" and that the Office of Personnel, while accusing the Applicant of publicizing certain allegations, "itself had been responsible for publishing these allegations";

(b) Since a profound error in law was present throughout the proceedings which resulted in the termination of the Applicant's probationary appointment, those proceedings inevitably were tainted by that error and consequently were irregular and invalid.

3. A probationary appointment does include rights with respect to employment after completion of probationary service, particularly if its holder demonstrates his suitability for international civil service.

Whereas the Respondent's principal contentions are:

1. The reasons or motives for the Secretary-General's decision not to grant a permanent appointment to the Applicant are not in issue because the Applicant's terms of appointment did not include any right with respect to employment after completion of his probationary service: Determinations of suitability for appointment as well as the reasons or grounds for not granting an appointment are not subject to the Tribunal's examination, unless the administrative decision affects some right or legitimate expectation under an existing contract of employment; since the Applicant has not established any entitlement or expectancy based on his employment contract to receive a permanent appointment, the validity of the negative decision by the Secretary-General is not in issue in the proceedings before the Tribunal.

2. The Secretary-General's decision to terminate the Applicant's appointment was consistent with Staff Regulations 4.5(b) and 9.1(c) and did not constitute abuse of power:

(a) The Applicant's separation from the United Nations after three years of probationary service was a necessary corollary of his non-appointment under Staff Regulation 4.5(b);

(b) The termination decision was within the Secretary-General's discretion under Staff Regulation 9.1(c) and was not vitiated by improper procedures or motives; the Tribunal need not determine whether unsatisfactory service as a ground for termination has been established or whether "extraneous reasons" motivated the decision, as would be necessary in the case of termination of a permanent appointment under Staff Regulation 9.1(a); rather the Tribunal must determine whether the Applicant has established improper motivation and consequent abuse of the Secretary-General's authority and discretion under Staff Regulation 9.1(c); not only has the Applicant failed to prove any deprivation of due process or abuse of authority, but on the contrary the record affirmatively shows that the decision was properly motivated and that it was reached by the Secretary-General only after thorough consideration at various occasions of the Applicant's allegations of prejudice and error.

The Tribunal, having deliberated from 13 to 30 October 1970, now pronounces the following judgement:

I. The Applicant seeks rescission of the decision dated 10 September 1968 terminating his probationary appointment under Staff Regulation 9.1(c). The Applicant's suitability for a permanent appointment was referred to the Appointment and Promotion Board in accordance with Staff Rule 104.13 (c) (iii) prior to the termination. The Appointment and Promotion Board made a recommendation approving the proposal of the Office of Personnel that the appointment of the Applicant be terminated on two grounds, namely, failure to meet standards of performance and unsuitable conduct.

II. The Tribunal in earlier judgements has consistently upheld the discretionary power of the Secretary-General to terminate all appointments other than permanent or fixed-term appointments if, in his opinion, such action would be in the interest of the United Nations. Such discretionary power must, however, be exercised without improper motive so that there shall be no misuse of authority. In Judgement No. 54 (*Mauch*) the Tribunal stated:

"While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an

arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

III. In Judgement No. 93 (*Cooperman*) the Tribunal, while recognizing the right of the Secretary-General to terminate a probationary appointment under Staff Regulation 9.1(c) at his discretion, drew a distinction between termination arising at the end of the probationary service and the one arising during the period of probation. The Tribunal stated:

"Looking at the tenor of Staff Rules 104.12 and 104.13, it appears that they deal with a situation arising at the end of the period of probation when a decision about the grant of a permanent or regular appointment has to be taken."

IV. The purpose of probationary appointments is to grant career service on satisfactory performance and procedures are prescribed for a proper assessment of the suitability of staff members on probation for the grant of permanent or regular appointments. Under Staff Rule 104.13 (c) (iii), it is mandatory, in the absence of a favourable recommendation agreed between the Office of Personnel and the Department concerned, to refer the case to the Appointment and Promotion Board at the end of the period of probation. According to Staff Rule 104.14 (f), the Appointment and Promotion Board shall make recommendations to the Secretary-General in respect of the suitability for permanent or regular appointment of staff members serving on probationary appointments. Thus certain safeguards for a fair review of the suitability for the grant of permanent appointments have been provided under the Staff Rules and the observance of these provisions constitute due process for the assessment of such suitability.

V. The Respondent contends that the Applicant's case was referred to the Appointment and Promotion Board, that the Applicant was afforded an opportunity to present his views and that, as the Board came to a conclusion regarding the Applicant's standard of performance, there was no lack of due process or improper exercise of discretion. The Tribunal recognizes that it cannot substitute its judgement for that of the Secretary-General concerning the standard of performance or efficiency of the staff member involved. However, where the Board reached its conclusions in the light of inadequate or erroneous information and the Secretary-General relied on these conclusions for the termination of the appointment, the fact that there was a review by the Board does not secure that the Secretary-General's decision is valid.

VI. The Staff Rules and Administrative Instructions provide a measure of protection against arbitrary assessment of the efficiency or performance of staff members. In particular, the right of rebuttal of any part of a periodic report and the procedure prescribed for handling such rebuttal afford a valuable protection to the staff member against arbitrary or prejudicial assessment.

In the present case, the Applicant's services during his last year of probation were evaluated in a periodic report dated 11 and 14 June 1968. While the first reporting officer recorded an average or above-average rating on all items except items 4 (Judgement) and 8 (Quality of work accomplished), the second reporting officer rated the Applicant as "a staff member who maintains only a minimum standard". The Acting Director of Personnel recorded this comment on section III of the report: "I too have on more than one occasion had grounds

to question judgment and to say so to the staff member." The Applicant, who signed the report on 24 June 1968, appended to it this rebuttal:

"I do not agree with para. 4 and 8 at Section I as well as to Section II and III. As a matter of fact [the Chief of TARS] and myself having had a personal incident before this report he is at the same time a judge and a party consequently I am afraid his appraisal cannot be fully impartial."

Administrative Instruction ST/AI/115 provides in paragraph 13:

"If the staff members so desires, he may make a written statement in explanation or rebuttal of part or all of any report, which statement shall be joined to the report to which it refers. Where a staff member makes such a statement, the Head of the Department will investigate the case and will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement."

The Tribunal observes that the Head of the Department made no investigation of the case nor recorded an appraisal in writing of the rebuttal made by the Applicant. The Appointment and Promotion Board, when it evaluated the Applicant's suitability for permanent appointment, had thus two conflicting statements but no investigation and appraisal by the Head of Department as required by the Administrative Instruction. The Tribunal considers that the periodic report on the basis of which a recommendation for termination of the Applicant's appointment was made was thus an incomplete document. It was also inconclusive as far as the Applicant's standard of performance was concerned. In its report dated 21 August 1968, the Appointment and Promotion Committee stated:

"The Committee noted that the periodic report covering the period of the staff member's additional year of probationary service as a whole was not only somewhat mediocre but was particularly deficient in items 4, 8 and Section II."

In arriving at its recommendation the Appointment and Promotion Board thus relied on contested ratings under items 4 and 8 of Section I and under Section II which admittedly were not investigated.

In view of the ill feelings between the Applicant and the second reporting officer and in view of the allegation of prejudice against the latter, the absence of an investigation and appraisal by the Head of the Department further weakened the Board's recommendation.

VII. The Tribunal therefore holds that, since the Applicant was denied the protection afforded by Administrative Instruction ST/AI/115 and deprived of a fair and reasonable procedure, the recommendation of the Appointment and Promotion Board was unsustainable. As the Secretary-General's decision to terminate the Applicant's probationary appointment was based on the recommendation of the Board, the Tribunal holds that his decision suffered the same defect.

VIII. As regard the second ground of termination of the Applicant's appointment, namely, unsuitable conduct, the Tribunal notes that the Joint Appeals Board has held that the objectionable statements made in the course of the earlier proceedings before it were both confidential and privileged and could not form the basis of a decision to terminate the Applicant's appointment. The Tribunal endorses the conclusion of the Joint Appeals Board "that the decision to terminate the [Applicant's] probationary appointment on the ground of unsuitable conduct was founded on misuse of information presented confidentially to the

Joint Appeals Board". The Tribunal is also of the view that the introduction in the Applicant's Official Status file of a reprimand based on privileged communications to the Joint Appeals Board was an impropriety and that it might have prejudiced the recommendation of the Appointment and Promotion Board.

IX. The Tribunal is disturbed by a number of unsatisfactory features of the case. Prior to the contested decision the Applicant, who was on probation for a period of two years, was rated favourably in two periodic reports and was recommended for permanent appointment by the Office of Personnel. After being reported to the Appointment and Promotion Board, this recommendation was actually approved by the Secretary-General, although no notification to the Applicant followed. Thereafter the recommendation for permanent appointment was changed to a recommendation for extension of the probationary period by one year and the case was referred to the Appointment and Promotion Board. The Tribunal is informed that this is the only case in the last five years where, after a favourable recommendation had been made and approved by the Secretary-General, the recommendation was changed and the case referred to the Appointment and Promotion Board under Staff Rule 104.13 (c) (iii). The Tribunal has not gone into the validity of such a procedure as the issue is not directly before it. However, the Tribunal wishes to comment that in such an extraordinary case, the Applicant should have been afforded opportunity for oral rebuttal of the case made against him. The lapse is all the more regrettable when it is observed that an opportunity for oral presentation was afforded to the Chief of TARS and denied to the Applicant. The Tribunal assumes that all the aspects of the case received the earnest and fullest consideration of the Appointment and Promotion Board but wishes to point out that justice should not only be done but also seem to be done. The denial of the right of presentation of his case, especially when an earlier favourable decision was sought to be reversed, could not have satisfied the Applicant that justice was being done to him.

The Tribunal further notes that in spite of two periodic reports rating the Applicant as "an efficient staff member giving complete satisfaction", one of which was signed by the same officer who subsequently changed his mind, the Office of Personnel eventually made a recommendation at variance with those reports. Such retroactive reappraisal of earlier performance properly evaluated in periodic reports might affect prejudicially the protection which staff members are entitled to.

The Tribunal also observes that if there was a breakdown in the supervision of the Applicant during the greater part of his probationary period, as admitted by the Office of Personnel, the Applicant should not have been made to suffer.

Although these matters were not directly in issue before the Tribunal, the Tribunal felt it a duty to draw the attention of the Administration to the lapses noted above.

X. Having noted the failure of the Respondent to observe the procedure prescribed in Administrative Instruction ST/AI/115, the Tribunal inquired on 16 October 1970 whether the Respondent proposed to request a remand of the case for correction of procedure under article 9, paragraph 2 of the Statute of the Tribunal. In his memorandum dated 20 October 1970, the Respondent stated *inter alia* that "correction now of the deviation from the Administrative Instruction would seem to have no material bearing on the Applicant's procedural rights under the Staff Rules or on the basis for the Secretary-General's decision".

XI. The Tribunal therefore decides on the merits of the case that the Applicant has been denied the protection afforded by Administrative Instruction ST/AI/115 and thereby deprived of a fair and reasonable procedure before termination of his appointment. The application is therefore well founded.

XII. Article 9, paragraph 1, of the Statute of the Tribunal provides that:

"If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked."

In the present case, rescinding the decision terminating the Applicant's appointment would provide no relief to the Applicant as the period of probation has expired. Nor is there on the part of the Respondent any obligation whose specific performance might be invoked. The Tribunal has held in similar cases (Judgements Nos. 68, *Bulsara*, and 92, *Higgins*) that compensation in lieu of specific performance may prove to be adequate and proper relief.

XIII. The Tribunal considers that in the circumstances of the case a sum equivalent to three months' net base salary will be adequate compensation for the injury caused to the Applicant by procedural defects, and awards accordingly.

XIV. The Tribunal rejects the Applicant's request for the correction of his Official Status file and other files as "there is no authority for the Tribunal to interfere with the notations and comments on files and documents intended for internal circulation within the Organization" (Judgement No. 107, *Miss B*).

XV. Since the Applicant had been represented by a member of the panel of counsel, the Tribunal rejects the claim for costs.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

New York, 30 October 1970

Judgement No. 139

(Original: English)

Case No. 138:
Rajappan

Against: The Secretary-General
of the United Nations

Non-renewal of the fixed-term appointment of a staff member of the United Nations Children's Fund.

Conversion of the initial probationary appointment of the Applicant into a fixed-term appointment.—The Applicant accepted this appointment and subsequent similar appointments.—Claim that the Fund was under the obligation to convert the probationary appointment into a regular appointment.—Such conversion would depend on the