

ADMINISTRATIVE TRIBUNAL

Judgement No. 431

Case No. 452: NARULA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, Vice-President, presiding;
Mr. Jerome Ackerman; Mr. Ioan Voicu;

Whereas, on 4 December 1987, Partap Singh Narula, a staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application, the pleas of which read as follows:

"II. PLEAS

The Administrative Tribunal is respectfully requested:

- (A) To promote the Applicant to ND-6; and/or
- (B) To have the Applicant's candidature placed before the New Delhi Appointment and Placement Committee so the Applicant can receive most favourable/ favourable consideration for promotion to ND-6; and/or
- (C) To make [the] Applicant's ND-5 promotion retro- active to January 1980 (the date of his G-4 promotion); and/or
- (D) To award compensation to [the] Applicant for considerable frustration caused by the mistakes of UNICEF administration; and/or
- (E) To send the Applicant on an extensive training programme in order that he might become more promotable to higher level posts; and/or
- (F) To award any other appropriate remedy."

Whereas the Respondent filed his answer on 2 May 1988;

Whereas the Applicant submitted additional documents on 16 June 1988 and 27 July 1988;

Whereas, on 26 September 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and the Respondent provided his answer on 30 September 1988;

Whereas, on 10 and 14 October 1988, the Applicant submitted additional documents;

Whereas the facts in the case are as follows:

Partap Singh Narula was recruited by UNICEF on 6 October 1971. He initially served under a series of special service agreements until 1 January 1974, when he was offered a three month fixed-term appointment as a Secretary at the ND-4 level. His appointment was successively extended until 1 July 1977, when he was offered a probationary appointment. On 1 January 1978, his appointment was converted to a regular appointment.

On 24 May 1978, a Personnel Officer at Headquarters informed the Applicant that the UNICEF Representative in Sana'a, Yemen, had selected him for a secretarial post at the UNICEF Eastern Mediterranean Office. He was initially offered a two-year fixed-term appointment at the FS (Field Service) 3, Step 1 level, and was advised that he would retain a lien on his ND-4 post at New Delhi for the duration of the assignment to Sana'a. The Applicant accepted the offer and reported for duty at Sana'a on 22 September 1978.

The Applicant's assignment was successively extended, first for seven months until 30 April 1981, then for six months until 31 October 1981 and finally for two months through 31 December 1981.

While the Applicant was serving in Sana'a, he was promoted to the G-4 level effective 1 January 1980. His appointment was accordingly converted from the Field Service to the Headquarters General Service category.

The Applicant returned to the UNICEF New Delhi Office on 1 January 1982. Since he had retained a lien on his post, he reverted to the ND-4 level, which he held at the time of his assignment to Sana'a.

The Applicant then raised the question of the appropriateness of the level at which he should be placed in the New Delhi Office. He felt that, had he not been assigned to Sana'a, he would have by then reached the ND-6 level. He therefore requested the Personnel Officer to look into his case and to offer him a level comparable to the level which he had held in Sana'a.

On 15 July 1982, the Personnel Officer, UNICEF, New Delhi, transmitted to the Applicant an extract from the minutes of the General Service Appointment and Promotion Committee (GSAPC). According to the minutes, the Committee recommended that the Applicant be promoted to the ND-5 level "based upon sufficient documentation in his file dating back to 1977", and on his performance in his international assignment. The Committee also noted comments by the Regional Director "that proven performance at ND-5 level is the minimum requirement for further promotion". In addition, the Personnel Officer informed the Applicant that the Regional Director concurred with the recommendation and would implement the promotion from the date on which he would assume the duties of an appropriate post.

On the same date, the Applicant asked the Personnel Officer to reconsider his case on the ground that he had worked at a level equivalent to ND-6 during his international assignment for more than three years and had obtained excellent reports. On 23 July 1982, the Applicant wrote to the Regional Director, UNICEF, New Delhi, reiterating his request to be placed at the ND-6 level on the grounds that he had already served at that level at the UNICEF Office in Sana'a and that he had been promoted to the HQ/G-4 level, a level equivalent to ND-6 at the field office, on 1 January 1980.

On 29 July 1982, the Applicant instituted a recourse procedure before the General Service Appointment and Promotion

Committee. According to the minutes of the meeting, the Committee concluded that "to suggest the HQ/G-4 is comparable to an ND-6 in India is confusing job function with remuneration" and reiterated its earlier recommendation that the Applicant was promotable to the ND-5 level. On 27 August 1982, the Personnel Officer at the New Delhi Office communicated to the Applicant the Committee's recommendation and the Regional Director's concurrence with the recommendation. In the interim, on 9 August 1982, the Assistant Personnel and Training Officer offered to the Applicant the post of Senior Secretary in the Planning Section at the ND-5 level. He indicated that the Applicant's promotion would be effective from the first day of the month on which he would accept the offer. The Applicant accepted the offer on 10 August 1982.

On 7 October 1982, a Personnel Officer at Headquarters wrote to the Applicant concerning his request to be placed on an ND-6 level post. She noted that UNICEF had guaranteed his return to the New Delhi Office, at the ND-4 level, and advised him that his detail to Sana'a had not been a "bona fide" promotion, but an appointment to a new job, at a new duty station, with a new job description.

On 21 October 1982, the Applicant sought the Executive Director's intervention on grounds that despite his demonstrated ability to perform at the HQ/G-4 level and despite his excellent performance evaluation reports by different UNICEF Representatives in Sana'a, the responsible officials at the New Delhi Office had refused to place him at the GS-6 level, which he believed he had earned on the basis of his performance and ability.

No further action was taken on the Applicant's request until the end of 1983. In a letter dated 10 November 1983, the Chief, Personnel Services Section at Headquarters, admitted to the Applicant that there had been an omission on UNICEF's part in not reviewing his case for promotion during his period of service in Sana'a. Accordingly, he was prepared to recommend to the Regional Director that the Applicant be placed at the ND-5 level from 1 January 1982, the date of his return from assignment in Sana'a.

In a reply dated 13 September 1983, the Applicant informed the Chief, Personnel Services, that his proposal did not provide a "fair and satisfactory solution of [his] case for proper placement" since he believed he would have been promoted to the ND-5 level in January 1980 and not in January 1982.

Not having heard further from the Administration, on 15 May 1984, the Applicant wrote to the Executive Director, reiterating his request to be placed at a higher level. In a reply dated 11 June 1984, the Director, Division of Personnel, informed the Applicant that the Executive Director found no grounds to make any further recommendation in his case. The Applicant's promotion to the ND-5 level was made effective from 1 January 1982.

On 19 June 1984, the Applicant requested the Secretary-General to review the administrative decision by UNICEF not to place him at the ND-6 level. On 16 July 1984, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had reviewed the decision by the Executive Director of UNICEF and had found no grounds to reverse it. On 16 August 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 3 February 1987. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

38. The Panel finds that the appellant was temporarily assigned to the UNICEF office in Sana'a for a fixed period and was not seconded. Hence the Inter-Organization Agreement concerning transfer, secondment or loan of a staff among the organizations applying the United Nations common system of salaries and allowances did not apply to him.
39. The Panel finds that UNICEF, New Delhi, had reclassified in 1979 many (30) ND-4 posts to ND-5 level and also had a number of vacant posts at the ND-5 level available for promotion purposes in 1980 (6) and 1981 (11). They also had the performance evaluation reports on the appellant for the periods 1976 to 1981, a written recommendation from the UNICEF Representative in Sana'a for the promotion of the appellant to the next higher level, and other relevant information needed to include him in the list of staff members to be reviewed for promotion.

40. The Panel further finds that UNICEF, New Delhi, due to administrative error and oversight failed to include the appellant's name for promotion consideration by the GSAPC [General Service Appointment and Promotion Committee], New Delhi, in the years 1979, 1980 and 1981 and thus committed a serious procedural error, which has deprived the appellant from being considered for promotion by the GSAPC in any of those years. As this serious procedural error cannot be corrected at this stage, the Panel recommends the payment of US\$2,000 to the appellant as compensation.
41. The Panel urges UNICEF administration to complete a performance evaluation report on the appellant for the period January to December 1984 so that his fact sheet could be updated for promotion exercise.
42. The Panel recommends that the appellant in view of his proven excellent performance, his mobility factor and high seniority at the ND-5 level be given most favourable consideration for promotion to the ND-6 level at the first available opportunity."

On 8 August 1987, the Assistant Secretary-General for Human Resources Management¹ informed the Applicant that:

"The Secretary-General has re-examined your case in the light of the Board's report. While not agreeing with the Board's position, he has decided that you be paid, in settlement of the case, US\$2,000, the amount recommended by the Board as compensation.

With regard to the recommendation contained in paragraph 42 of the report, the Secretary-General has decided that you be given favourable consideration for promotion to the ND-6 level if you are recommended for such promotion by the Appointment and Promotion Committee."

On 4 December 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The UNICEF Office in New Delhi failed to consider the

¹ Successor of OPS.

Applicant for promotion for the years 1979, 1980 and 1981, even though the field office processed all the relevant documentation for promotion consideration.

2. The Applicant has suffered from numerous and serious breaches of procedure by UNICEF officials who knew or should have known correct procedures.

Whereas the Respondent's principal contention is:

Staff have no right to promotion even though they are entitled to be considered for promotion at the periodic promotion reviews. The Applicant has already been adequately compensated by the granting to him of a promotion to the ND-5 level and the payment of \$US 2,000 for failure by the UNICEF Administration to consider him for promotion between 1979 and 1981.

The Tribunal, having deliberated from 18 October 1988 to 4 November 1988, now pronounces the following judgement:

I. The facts of this case are not in dispute, the Respondent having admitted that the UNICEF Administration committed procedural errors in failing to review the Applicant's case for promotion from 1979 to 1981.

II. The Tribunal considers that the point at issue is the compensation, if any, now payable in respect of the breach of the Applicant's contract of employment resulting from the procedural errors.

III. The Respondent contends that "the Applicant has already been adequately compensated by the granting to him of a promotion to the ND-5 level and the payment of \$US 2,000 for failure by the UNICEF Administration to consider him for promotion between 1979 and 1981".

IV. The Applicant contends that in all the circumstances he was

entitled to promotion to the ND-6 level, and that the Tribunal should order such promotion. That is not a matter which can be decided by the Tribunal. The jurisprudence of the Tribunal has established that a staff member can have no right to promotion (Judgement No. 134, Fürst (1969), para. III), though there is an exception if the Administration has previously entered into a binding agreement for his promotion in accordance with an agreed system (Judgement No. 389, Hrubant (1987)). This exception apart, the Tribunal will not interfere with the Secretary-General's exercise of his discretion in deciding whether to promote, unless it is marred by prejudice, breach of procedure or any other extraneous factor (Judgement No. 312, Roberts (1982)). The procedural error here was not of that nature and the Tribunal assumes that the Applicant will not be penalized in any way for having sought the present review. It follows that the Tribunal cannot review the Applicant's claim for promotion to the ND-5 level as of 1 January 1980, or grant his pleas in respect of his further promotion or career development.

V. The outstanding question is therefore whether the damage suffered by the Applicant from the admitted errors of the Administration has already been sufficiently compensated by a payment of \$US 2,000, bearing in mind that the damage was mitigated to some extent by his receiving additional entitlements while in Sana'a and by his promotion to the ND-5 level in 1982.

VI. If the Applicant had been considered for promotion in the period from 1979 to 1981, his subsequent career, and with it his receipt of an improved salary, might well have been accelerated. On the other hand, it is a matter of speculation whether he would in fact have been promoted, which could depend on the quality of his competitors or other factors.

VII. The Tribunal must attempt to make a pecuniary assessment of

the damage the Applicant in fact suffered, taking into account his receipt of additional entitlements in Sana'a and his promotion to the ND-5 level on his return to New Delhi in 1982. According to information as to his basic salary, furnished by the Respondent and not disputed by the Applicant, the sum of \$US 2,000 more than covers any salary differential. The Tribunal considers that it also covers any frustration he may have suffered in respect of his career. Accordingly, the Tribunal makes no additional award.

VIII. All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice-President, presiding

Jerome ACKERMAN
Member

Ioan VOICU
Member

New York, 4 November 1988

R. Maria VICIEN-MILBURN
Executive Secretary