

ADMINISTRATIVE TRIBUNAL

Judgement No. 438

Case No. 429: NAYYAR

Against: The Secretary-General
of the United Nations

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

Whereas, on 14 February 1986, Om Parkash Nayyar, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant and with the agreement of the Respondent, the President of the Tribunal, successively extended the time-limit for the filing of an application until 30 September 1986, 30 November 1986 and 31 December 1986, 31 March 1987 and 15 April 1987;

Whereas, on 15 April 1987, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

The Applicant respectfully requests the Tribunal:

(1) To find that the APP (Appointment and Promotion Panel), had:

(a) Failed to observe due process and principles of equity; and/or

(b) Failed to act in accordance with the Staff Rules and the Guidelines of the APP; and/or

(c) Made substantial errors of fact and law; and/or

(d) Failed to make due or proper recommendation in good faith and with due consideration of the rights of the Applicant; which in fact and in law amounts to the failure to make a recommendation as required of it;

(2) To find that in accepting and acting on the recommendation of the APP the Respondent failed to duly exercise the decision regarding the promotion of the Applicant;

(3) To rescind the decision of the Respondent not to promote the Applicant communicated by a letter dated 15 January 1986 from the Assistant Secretary-General for Personnel Services;

(4) To find further, that the written presentations, consisting of the basic documentation placed before the APP, necessarily required the APP to recommend his promotion. Any reasonable and impartial APP duly constituted and acting without prejudice, in accordance with due process, justice and equity in the proper performance of its duties, could only have acted accordingly;

(5) Consequently to recommend the Respondent:

(a) To reject the findings and recommendations of the APP, and

(b) To effect the promotion of the Applicant to Level ND VII with effect from 1 January 1984, or alternatively

(c) To compensate the Applicant for the loss of emoluments resulting from the failure to promote the Applicant from 1 January 1984

(d) To grant such other relief that may seem appropriate."

Whereas the Respondent filed his answer on 20 June 1988;

Whereas the Applicant submitted additional written statements on 24 June 1988, 9 August 1988 and 9 September 1988;

Whereas, on 20 September 1988, the Applicant submitted additional documents;

Whereas the Applicant filed written observations on 28 September 1988 in which he included the following additional pleas:

"4. Pleas

In addition to his original plea, Applicant respectfully requests the Tribunal to take the following measures:

(a) To find that the Joint Appeals Board committed a serious error of fact in paragraph 44 of its report and failed to properly address the issue of discrimination in paragraphs 47 and 48 of its report; thus committing two fundamental errors which impaired its conclusions in paragraph 52 of its report and to provide appropriate compensation.

(b) To find that the Applicant is a victim of a deliberate

pattern of discrimination and retaliation on the part of the New Delhi APP [Appointment and Promotion Panel] and of the UNDP Administration going back as far as 1976, due in large part to his vindication by the Tribunal in Judgement No. 293 and which negatively affected Appellant's promotion in 1984 and in subsequent years, and to provide appropriate compensation;

- (c) To find that there is a flaw in the work of the Rebuttal Panel and its subsequent approval by the UNDP Administration, establish the existence of a liability on the part of the Administration and provide \$US 5,000 compensation;
- (d) To establish that the fourteen months delay needed by the Respondent to send its answer and the earlier delays before the JAB are unjustified and to provide \$US 5,000 compensation."

Whereas, on 23 September 1988 and 10 October 1988, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Technical Assistance Board Office at New Delhi, India, on 30 April 1965, under a three-month appointment as a Junior Assistant-Typist at the ND-3 level. On 1 August 1965, he received a one-year fixed-term appointment which was converted into an indefinite appointment as a Typing Clerk on 1 August 1966. On 1 February 1969, he was promoted to the ND-4 level as a Secretarial Assistant and on 1 November 1972, he was granted a permanent appointment. On 1 January 1979, the Applicant was promoted to the ND-5 level.

The Applicant's performance during the period running from July 1981 to June 1983, was evaluated in a performance evaluation report dated 21 September 1983, in which the Applicant, in describing his duties, stated inter alia that he was:

"... Secretary to SIDFA [Senior Industrial Development Field Advisor] ..." that he "Monitor[ed] implementation of SIS projects ..." and "draft[ed] correspondence related to [a

series of projects]...".

The Senior Industrial Development Field Advisor, who was also the Applicant's immediate supervisor, rated the Applicant's performance as "excellent" and assessed him as "a staff member whose performance is consistently outstanding". He also noted that the Applicant had "shown keen interest in programme matters and should be brought into the mainstream of the India Programme/IPF [Indicative Planning Factor]". The Applicant himself stated that in the future he would like "to work in the Programme Section with more additional responsibilities of an Assistant Programme Officer".

In January 1984, in connection with the forthcoming annual promotion review exercise for that year, the Applicant's immediate supervisor recommended the Applicant for promotion from the ND-5 to the ND-6 level. On the form containing the recommendation, the Deputy Resident Representative, who was also the Applicant's second reporting officer, commented as follows:

"I concur with the supervisor's assessment of Mr. Nayyar's efficiency, and I believe he has potential. However, level 6 is a journeyman's grade, i.e. one where the incumbent is fully proficient. This implies good relevant experience at lower levels. In the case of programming, despite his work on other UNIDO activities, I do not believe he has had this experience. He should, therefore first be moved into UNDP programming work at his current level for a year, to gain experience, following which he could be considered for promotion to level 6."

In March 1984, the local Appointment and Promotion Panel (APP) conducted a review of all eligible local staff members, including the Applicant, for promotion to the ND-6 level. The APP recommended that another staff member, Mr. Srinivasachary, be promoted to an existing vacant ND-6 post.

On 25 April 1984, the Applicant wrote to the Resident Representative requesting the reasons for his non-promotion. In a reply dated 27 April 1984, the Resident Representative informed the Applicant that the APP had considered him for promotion together with seven other staff members and had made its recommendation "on

the basis of comparative merit in relation to the functions involved with due consideration to the post available. Efforts at self-improvement were also carefully evaluated and seniority in grade was also considered." However, since "there were eight staff members time-wise eligible for consideration for promotion ... but only one vacancy existed at the higher level in New Delhi ... the majority of the eight eligible staff members would necessarily meet with disappointment in their expectations."

On 7 May 1984, the Applicant instituted a recourse procedure before the local APP in which he requested the Panel to reconsider his case and recommend him for promotion to the ND-6 level. In his letter of recourse, the Applicant contested inter alia the validity of the assessment and performance evaluation made by the Deputy Resident Representative on the form containing his recommendation for promotion. On 24 May 1984, the Resident Representative informed the Applicant that the APP had met on 21 May 1984 to consider his recourse and had decided not to entertain it.

On 28 May 1984, the Applicant again wrote to the Resident Representative. He contested the Deputy Resident Representative's view that he had not gained sufficient experience in programming work to be considered for promotion to the ND-6 level in 1984. He also asserted that the APP had exceeded its mandate in taking into account the Deputy Resident Representative's assessment and not his immediate supervisor's recommendation for promotion. In a reply dated 19 June 1984, the Resident Representative ad interim advised the Applicant that his Job Description, which had been available to the APP, contained elements of both secretarial and programming work; that the APP had not indicated that it did not accept the Applicant's outstanding performance report, and that the Applicant's right to be considered for promotion in accordance with the applicable guidelines had been respected.

On 20 June 1984, the Applicant requested the Secretary-General to review the administrative decision taken by UNDP, New Delhi, not to promote him from the ND-5 to the ND-6 level during

1984. Not having received a reply from the Secretary-General, on 14 September 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 6 November 1985. Its conclusions and recommendations read as follows:

"Conclusions and Recommendation

50. The Panel finds that according to staff rule 111.2(k) it has no competence to consider the substantive question of efficiency of the staff and that the Administrative Tribunal has consistently ruled that as regards promotion the subject is within the discretion of the Secretary-General and, in the absence of a legal obligation binding on him, the Tribunal cannot enter into the merits of the Applicant's claim. The Panel finds that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. Such being the general rule, it follows according to the Administrative Tribunal that decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground.
51. The Panel finds that the administrative decision not to promote the appellant from ND-5 to ND-6 following his consideration in the 1984 promotion review by the Appointment and Promotion Panel, UNDP, New Delhi, was made in accordance with the guidelines for supervisory personnel and UNDP Field Office Appointment and Promotion Panels set out in the UNDP Personnel Manual for locally recruited staff, sections 20209 to 20210 and 20213, of July 1983 and with due regard to the requirement of due process. The panel therefore rejects the Appellant's contention of non-compliance with the UNDP promotion procedure in this case as unfounded and not valid.
52. The Panel finds next that the appellant has not met the burden of proof to substantiate his contention of prejudice and discrimination on the part of the Administration and the APP members of UNDP, New Delhi, against him and, in the absence of concrete evidence, rejects the appellant's contention as unfounded and not valid. The Panel finds, moreover, that the appellant was duly considered by the APP of UNDP, New Delhi, in the 1984 promotion review with due regard to the evaluation of his appropriate supervisory officers on the submitted recommendation form and in his relevant performance review report, on the basis of comparative and objective reviews of all eligible staff of that office, taking into account their comparative merit in

relation to the specific functions of the vacant post and their seniority in-grade.

53. Accordingly, the Panel decides unanimously to make no recommendation in support of the present appeal."

On 15 January 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken note of the Board's report and had decided to maintain the contested decision.

On 15 April 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The comments made by the Deputy Resident Representative concerning the Applicant's promotion were prejudicial to his receiving that promotion. The Resident Representative's refusal to change those comments and to acknowledge his programming skills were further evidence of such prejudice.
2. The failure to remove from the APP a member who was hostile to the Applicant constitutes a denial of due process.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to promotion, a matter entirely within the discretion of the Secretary-General.
2. The decision not to promote the Applicant to the ND-6 level was not vitiated by lack of due process, breach of procedure, prejudice or any other extraneous factor.

The Tribunal, having deliberated from 19 October 1988 to 10 November 1988, now pronounces the following judgement:

I. In substance, the application before the Tribunal is an appeal against the administrative decision not to promote the Applicant from the ND-6 to the ND-7 level, following his consideration in the 1984 promotion review by the APP, UNDP, New

Delhi. (In this connexion, the Tribunal has been informed by the Respondent of the reclassification of ND-5 level posts to ND-6 and of ND-6 level posts to ND-7).

II. The Tribunal notes that, this being the essential issue, it must restate its consistent position that appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same. Cf. Judgement No. 312, Roberts (1983).

In the present case, on the basis of the evidence, the Tribunal cannot find any binding commitment on the part of the Administration to promote the Applicant from the ND-6 to the ND-7 level.

III. Consequently, the Tribunal reiterates its view that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy of promotion. Such being the general rule, it is the consistent opinion of the Tribunal that decisions on promotions cannot be challenged, in the absence of a binding agreement to the contrary, on the ground of inadequate consideration of performance or length of service or any other similar ground. Cf. Judgement No. 389, Hrubant et al (1987) and Judgement No. 431, Narula (1988).

IV. In the case before it, the Tribunal observes that the decision of the Administration not to promote the Applicant was made in accordance with the guidelines for supervisory personnel and UNDP Field Office Appointment and Promotion Panels set out in the UNDP Personnel Manual for locally recruited staff, and with due regard to the requirements of due process.

Therefore, the Tribunal concurs with the JAB's conclusions that the Applicant's contention of non-compliance with UNDP

promotion procedures in his case is unfounded.

V. As to the Applicant's contention of prejudice and discrimination against him on the part of the Administration and members of the APP of UNDP, New Delhi, the Tribunal finds that the Applicant has not met the burden of proof to substantiate it, and, in the absence of concrete evidence, the contention is unsustainable.

VI. The Tribunal has no reason to doubt the JAB's finding that the Applicant:

"... was duly considered by the APP of UNDP, New Delhi, in the 1984 promotion review with due regard to the evaluation of his appropriate supervisory officers on the submitted recommendation form and in his relevant performance review report, on the basis of comparative and objective reviews of all eligible staff of that office, taking into account their comparative merit in relation to the specific functions of the vacant post and their seniority in-grade."

VII. The Tribunal observes that the Respondent took 14 months to file his answer with the Tribunal. It also notes that, according to the Respondent, the delay was due to the fact that the Applicant's personnel files were being held by the UNDP Office, New Delhi, until completion of the 1987 promotion review, and were received in New York only on 27 November 1987. Furthermore, the Tribunal has been informed that the Respondent had to await final clarification from the UNDP Office, New Delhi, regarding the amendment of the Applicant's original plea for promotion to the ND-6 level to a new plea for promotion to the ND-7 level.

VIII. In view of the length of the period during which the Respondent delayed his answer, the Tribunal restates its position as expressed in Judgement No. 414, Apete, para. IX, (1988) that:

"... instances of great delay in the disposal of cases, however brought about, are not only regrettable in themselves, but

can lead to denial of justice. In deciding if any award should be given in any specific instance, this consideration is kept in mind and each claim is examined on its merits."

IX. In the present case, the delay by the Respondent in filing his answer was not due to the Respondent's negligence, and therefore does not create an entitlement to damages for the Applicant.

The Tribunal, therefore, finds that the Applicant's claim for compensation due to delay is unjustified.

X. The various additional claims made by the Applicant in his written observations are not before the Tribunal, as they have not been submitted to the JAB as required by article 7.1 of the Tribunal's Statute.

XI. In view of the foregoing, the Tribunal considers that the Applicant is not entitled to promotion from the ND-6 to the ND-7 level and that there was no violation of due process with respect to the Applicant's consideration for promotion.

XII. For these reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Arnold KEAN
Vice-President, presiding

Ahmed OSMAN
Member

Ioan VOICU
Member

New York, 10 November 1988

R. Maria VICIEN-MILBURN
Executive Secretary