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ADMINISTRATIVE TRIBUNAL

Judgement No. 458

Case No. 491: SILVEIRA

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Arnold Kean, President; Mr. Roger Pinto,  
First Vice-President; Mr. Jerome Ackerman, Second Vice-President;

Whereas, at the request of Celine Silveira, a staff member of  
the United Nations, the President of the Tribunal, with the  
agreement of the Respondent, extended to 15 December 1988 the  
time-limit for the filing of an application to the Tribunal;

Whereas, on 15 December 1988, the Applicant filed an  
application, the pleas of which read as follows:

"(a) Preliminary Relief

As a preliminary matter Applicant requests that the Tribunal  
direct the appropriate department:

(i) To restore Applicant to full pay status;

(ii) To restore to Applicant leave charged for  
absence taken during the calendar year 1988  
for which Applicant did not sign inasmuch as  
such leave was caused by violation of the  
terms of employment inherent in Applicant's  
appointment as a member of the staff of the  
United Nations - specifically articles 2  
and 23 of the Universal Declaration of Human  
Rights and regulation 4.3 of the Staff  
Regulations;

(iii) To accord Applicant sick leave if and when  
requested by Applicant pursuant to letters

from her personal doctors substantially in the form of Annexes 1 and 2 hereto;

(iv) To accord Applicant administrative leave at full pay and benefits until such time as the recommendations of the Joint Appeals Board 'to effect a transfer of the Appellant to a post in an office which has no connection with the Office of Legal Affairs' (...), which recommendation was ostensibly accepted by the Secretary-General (...), has been implemented; and

(v) To cease using the Personnel Record (...) because of the prejudicial inclusion therein of language calculated to preclude acceptance of Applicant in a post other than the Office of Legal Affairs.

(b) and (c) Decisions Contested and Obligations Invoked

(i) Applicant contests the Administrative Decisions entailed in failing to withdraw or revise her performance evaluation report for the period March 1983 through February 1986 or, at the least, to have it rewritten by supervisors who supervised her for longer periods of time (...) and who were not biased against her.

(ii) Applicant invokes the obligation of the Organization generally to provide her with a reasonable opportunity for career development as well as a work environment that is not deleterious to her physical well-being and in which she is not subjected to harassment.

(iii) Applicant invokes the obligations of the Administration to implement the recommendation of the Joint Appeals Board which it ostensibly accepted (...).

(iv) Applicant contests the failure of the Joint Appeals Board to award compensation for the Administration's violations of her rights as a human being, a woman and an employee.

(d) Compensation

Applicant requests compensation equal to two years' net base salary for the injury to her health, to her reputation and to her morale.

Applicant believes she should be entitled to greater compensation. However, sadly, instances of sexual harassment and bias by management against specific staff members are not exceptional at the present time in the Secretariat. (...).

(e) Other Relief

In view of the extreme pain and suffering inflicted upon Applicant and the unjustified injuries to her career, her reputation and her morale, Applicant requests that the Tribunal direct that the Administration grant Applicant acceleration of promotion effective immediately.

\* \* \* \*

The foregoing prayer for relief is over and above the relief requested before the Joint Appeals Board to the extent the relief sought below is not subsumed herein."

Whereas, on 24 January 1989, the Applicant filed a motion for default judgement;

Whereas the Respondent filed his answer on 16 February 1989;

Whereas the Applicant filed written observations on 17 March 1989;

Whereas, on 28 September 1989, the Applicant submitted additional documents;

Whereas, on 11 October 1989, the Applicant filed an additional statement and submitted further documents;

Whereas the facts in the case are as follows:

Celine Silveira entered the service of the United Nations on 11 September 1972 as a Clerk Stenographer at the G-3, step I level at the Office of Public Information. She served on a series of fixed-term appointments until 21 July 1973, when she was granted a probationary appointment. On 1 September 1974, she was granted a permanent appointment. In March 1977, the Applicant was transferred to the International Trade Law Branch of the Office of Legal Affairs (Legal Office) and on 1 April 1977, the Applicant was promoted to

the G-4 level.

During the course of her employment with the Legal Office, the Applicant was assigned for a one year period, commencing on 28 February 1982, to the United Nations Truce Supervision Organization, released for a six week period running from 24 October to 4 December 1987, on a non-reimbursable loan basis, to assist the Office of the Under-Secretary-General for Special Political Affairs, and assigned temporarily, from 11 April until 31 October 1988, to the New York Office of the United Nations Conference on Trade and Development. The Applicant continues to work for the Legal Office. She is currently assigned to the Treaty Section.

The Applicant's performance during the period running from March 1983 to February 1986 was evaluated in a performance evaluation report dated 12 January 1987. The Applicant received five "B" (very good) individual ratings, two "C" (good) ratings, and two "F" (unsatisfactory) ratings. The reporting officers commented under the item "ability to meet schedules and deadlines", that "the staff member has been unwilling to carry out certain assignments and there have been reported delays in completing work assigned"; under the item "quantity of work", that "the staff member constantly absences herself from duty", and under the item "effectiveness in maintaining harmonious working relations", that "the staff member is quarrelsome and uncooperative at work with colleagues and supervisors." Three different Legal Officers signed the report as First Reporting Officers. The Applicant's overall performance was rated "fair" and the Director of the General Legal Division noted in this regard:

"Staff member is apparently technically well qualified for her assignments, but her personality has made her a difficult collaborator, for myself as well as for a series of supervisors."

The Applicant refused to sign the report and on 9 February 1987 instituted a rebuttal procedure pursuant to ST/AI/240/Rev.2.

From March through 31 July 1987 an exchange of correspondence

ensued between the Applicant and the Administration concerning the composition of the Rebuttal Panel to be established in accordance with ST/AI/240/Rev.2, to examine the substance of the Applicant's complaint. Only one member from the Legal Office served on the Panel as finally constituted. The other two members of the Panel worked in other departments.

On 30 September 1987, the Panel submitted its report on the rebuttal to the Legal Counsel. The Panel interviewed the reporting officers who had signed the contested report, as well as "practically all the Legal Officers with which, at one time or another, Ms. Silveira has worked ... as well as the Administrative Officer of the Office of Legal Affairs." The Panel concluded that the Applicant had "experienced serious difficulties in her relationship with her supervisors and her colleagues. One of her problems appears to be an erratic attitude towards supervisors and colleagues which varies from very cooperative to disrespectful. Practically everyone agreed that the staff member is normally very competent ... but that this erratic behaviour affects her work performance." In addition, the Panel recommended that the rating for "quantity of work accomplished" be changed from "F" to "D" (fair); the rating for "effectiveness in maintaining harmonious working relations" be changed from "F" to "E" (somewhat below standard), and the general overall performance be changed from "fair" to "a good performance". The Panel further noted that it could not "but support Ms. Silveira's request for a transfer to another department" on the understanding that the Legal Office would not oppose such transfer.

On 18 December 1987, the Legal Counsel submitted to the Assistant Secretary-General for Human Resources Management his appraisal of the contested report in the light of the Rebuttal Panel's report. The Legal Counsel accepted the change in the individual ratings, but decided to maintain the rating of "fair" for the Applicant's overall performance.

On 17 March 1988, the Applicant requested the Secretary-

General to review the administrative decision by the Legal Counsel.

In a reply dated 3 May 1988, the Assistant Secretary-General for Human Resources Management informed the Applicant that he had decided to maintain the Legal Counsel's decision. On 24 May 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 30 September 1988. Its considerations, conclusions and recommendation read in part as follows:

"Considerations and conclusions

21. The Panel first considered the Respondent's procedural objection that the subject matter of this appeal does not constitute an administrative decision within the meaning of staff regulation 11.1. The Panel noted, however, that although this issue has been raised in many prior appeals directed against PER's [performance evaluation report] and their appraisals, other JAB Panels have decided that the subject matter did come within its competence and have reviewed the cases on the merits. The United Nations Administrative Tribunal has not yet rendered an opinion on this subject.
22. The Panel decided to proceed therefore with a consideration of the merits, noting that under staff rule 111.2(k), it was specifically precluded from a consideration of the substantive question of efficiency, and was obliged to limit its consideration to the allegation that the contested decision or action has been motivated by prejudice or some other extraneous factor or is vitiated by procedural error. In this connection, the United Nations Administrative Tribunal has held that the evaluation of a staff member's performance in a PER cannot be substantively reviewed by another panel. Accordingly, the Joint Appeals Board cannot substitute its judgement for that of the appellant's supervisors, the rebuttal panel or the appraising officer; the Board could neither upgrade nor downgrade a PER.
23. The Panel noted the contention of the appellant and counsels that the Respondent's reply had incorrectly referred to the appellant as 'G-4/XI' whereas she was in fact G-4/X and had been 'frozen at step X for many years'. The Panel concluded that the mistake was due to an error in the P.5 action form number F8N-004, issued on 2 May 1988, incorrectly describing the appellant as 'G-4/XI'. The Panel observed that the ceiling of G-4 was indeed step X.

24. The Panel addressed several issues in the Respondent's reply that had been challenged in counsels' observations. In particular, it noted that the Respondent had not stated, as contended by counsels, that the appellant had returned from the field to work specifically as secretary to Mr. Nardi [Senior Legal Officer], but merely to 'her former position in OLA [Office of Legal Affairs]', which could be loosely interpreted as meaning as a secretary anywhere in the Office.
25. The Panel did not accept the contention of the appellant and counsel that no 'concerted effort was made by the Administration' to effect a transfer of the appellant, nor could it accept that the Director of the General Legal Division, Mr. Szasz, was attempting to block her transfer. To the contrary, Mr. Szasz did appear to support her transfer and had willingly 'lent' the appellant on assignments on three occasions.
26. The Panel noted that the appellant and counsels had cited ST/AI/240, paragraph 11, in referring to the need to discuss the PER with the staff member before the First Reporting Officer completes part B. The Panel noted that ST/AI/240/Rev.2, issued on 28 November 1984, superseded ST/AI/240 and therefore this AI [administrative instruction] was operative at the time the rebutted PER was prepared (and is still operative). This revision has omitted the strict requirement for the cited discussion to take place. In general, the Panel found that all relevant procedures had been followed in producing the contested PER.
27. The Panel rejected the submission of the appellant that the composition of the panel composed to review the rebuttal was faulty. In particular, the Panel could not accept the claim that the rebuttal review panel included 'two people who were subordinate to Mr. Paul Szasz'. One of the three was from DTCD [Department of Technical Co-operation for Development], another from A+M [Administration and Management] and the third, although from OLA, did not report to Mr. Szasz. In fact, then, none of the panel were subordinate to Mr. Szasz. In any event, ST/AI/240/Rev.2 calls for a panel to be composed of members from the department or office. In the case of this particular PER, the Administration went to great lengths, at the appellant's request, to compose a panel not only outside of the appellant's office, but mostly from outside the Department. Finally, the Panel noted that the appellant herself had selected each name from lists provided to her and had accepted the final panel.
28. The Panel found nothing particularly unusual in the downgrading of the appellant's rating in Section III, Item 13 (expression in English) from A to B. This could merely

reflect different subjective judgements of supervisors and the change was, moreover, not dramatic. In any event, the Panel could substitute its judgement neither for that of the appellant's supervisors nor for that of the panel which reviewed the rebuttal. The JAB Panel could also not recommend an upgrading (as mentioned in paragraph 22 above).

29. The Panel noted that the appellant had been denied the opportunity to participate in several courses in the Staff Development Programme. Although it recognized the prerogative of the Director of the Division to deny such a request, the Panel thought that the staff member deserved an explanation for the rejection. It also noted that the forms should have been forwarded, with the negative endorsement, to the Training and Examinations Service. The Panel, however, did not consider these irregularities as major matters.
30. In general, therefore, the Panel could find no merit in the appeal. It was convinced, however, that the staff member's service in OLA has been a very unhappy experience. The appellant has accumulated such an overwhelming negative feeling towards Mr. Szasz and others in the Office that it has become a debilitating obsession. The Panel noted that, in the opening words of paragraphs ... of the observations which she wrote with her counsels, she even referred to Mr. Szasz as the author of the Respondent's reply. Accordingly, the panel joins with the Medical Director and the rebuttal panel in strongly recommending a transfer of the appellant, who has the potential to perform very satisfactorily, according to reports from various previous supervisors.

#### Recommendation

31. The Panel unanimously recommends that every effort be continued to effect a transfer of the appellant to a post in an office which has no connection with the Office of Legal Affairs. The Panel makes no other recommendation in support of the appeal."

On 7 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided "to maintain the Legal Counsel's appraisal of the Rebuttal Panel's report in [her] case and to continue to make every effort to effect [her] transfer or reassignment to a post outside the Office of Legal Affairs".

On 15 December 1988, the Applicant filed with the Tribunal



the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent has not observed the guidelines set forth in the "Report on Standards of Conduct in the International Civil Service" concerning standards of conduct to be expected from supervisors.

2. The JAB was misled by actions by the Respondent who misinformed the Board concerning the Applicant's assignment to another department and the consequent resolution of her health problem.

3. The Applicant's contested report should be withdrawn from her personnel files and rewritten by an unbiased supervisor.

4. The Respondent has not acted in good faith when seeking to find a new assignment for the Applicant.

Whereas the Respondent's principal contentions are:

1. The performance evaluation report was found by all review bodies to be an objective assessment of the Applicant's performance and abilities. No review body found any trace of prejudice or improper motive. The Applicant's unsupported assertions of prejudice and discrimination should, therefore, be dismissed.

2. The Applicant has no right to any particular assignment. The Secretary-General decided to continue efforts to reassign her from the Legal Office. The Applicant's rights are limited to a good faith effort to reassign her, not to an actual reassignment.

3. The Applicant's rebuttal and the Legal Counsel's appraisal are part of the Applicant's record and inclusion of that record in her personnel files does not violate her rights.

The Tribunal, having deliberated from 18 October to 7 November 1989, now pronounces the following judgement:

I. This application is concerned only with the Applicant's appeal on which the Joint Appeals Board (JAB) adopted its report on 30 September 1988 (Report No 681). It is not concerned with any later report.

II. The application includes pleas which were not before the JAB and which therefore cannot be considered by the Tribunal in the absence of agreement of the Respondent to a direct reference to the Tribunal. Further requests are introduced in the Applicant's written observations, a practice which, as her Counsel should know, is not acceptable to the Tribunal. Judgement No. 446, San José (1989); Judgement No. 449, Janitschek (1989).

III. The additional pleas included in the Applicant's written observations on the Respondent's answer include requests for what the observations refer to as "preliminary and interim relief". All of these requests are rejected on their merits by the Tribunal, as the relief requested is inappropriate or unnecessary. In particular, the written observations call for rejection of the Respondent's answer as untimely, which the Applicant had previously sought by a motion dated 24 January 1989. There is no provision in the Tribunal's rules for such a motion or for the rejection of the Respondent's answer as untimely, and it is not the practice of the Tribunal to give judgement by default against the Respondent in such circumstances. Although the Tribunal condemns tardiness on the part of either party, it notes that in the present case the delay was no more than one month and did not place the Applicant at a disadvantage.

IV. The Tribunal notes that the Applicant's counsel also asks for production of a series of documents, a request which could have been made in the original application and which is in the nature of a fishing expedition.

V. The substance of the application is directed to the appraisal by the Legal Counsel of the report by the Rebuttal Panel on the performance evaluation report made in respect of the Applicant. The Tribunal's view is that such an appraisal, and the decision partly to maintain the performance evaluation report, constitute an administrative decision within the meaning of staff regulation 11.1, and so fall within the jurisdiction of the Tribunal.

VI. The Applicant criticizes the performance evaluation report as having been the result of prejudice on the part of those making it.

The Tribunal accepts that the Applicant's relations with her superiors in the Legal Office were strained. In its Judgement No. 363, de Franchis (1986), the Tribunal observed in paragraph VIII:

"... to have the Applicant's performance assessed by an official with whom there existed such an extremely strained relationship seriously affected the Applicant's right to have his performance assessed in an impartial way ...".

This general rule must, however, be applied in the light of all the circumstances of the case. In de Franchis, there were circumstances described in paragraph VI of the judgement which the Tribunal characterized as "exceptional" in the following paragraph, and which are, by no means, paralleled in the present case. Indeed, in the present case the Applicant's relationships are recorded as having been strained with her colleagues in the Legal Office generally. Her complaint is, in fact, directed principally to the statements of the reporting officers of her "lack of co-operation", in particular the comment of the Director of the General Legal Division, OLA, that "her personality has made her a difficult collaborator, for myself as well as for a series of supervisors". If so, it must have been difficult, if not impossible, to find a reporting supervisor who was not affected consciously or unconsciously by this strained relationship.

VII. The JAB was evidently satisfied that neither the performance evaluation report nor the report of the Rebuttal Panel was affected by prejudice, and the Tribunal has reached the same conclusion. The Tribunal also finds that the Applicant had no ground for complaint against the composition of the Rebuttal Panel, particularly in view of the efforts that were made to find a panel acceptable to her. It did not, in fact, consist of subordinates of the Director of the General Legal Division, as alleged by the Applicant.

VIII. However that may be, the Tribunal need not pursue the point further, inasmuch as the application is not directed to the performance evaluation report but to the appraisal of the Rebuttal Panel's report. The issue before the Tribunal is the Applicant's challenge of the appraisal of the report of the Rebuttal Panel by the Legal Counsel.

IX. The Tribunal is satisfied that this appraisal was made with due care and was not affected by prejudice, sexual harassment, improper motive or other irregularity, and that there is no evidence to the contrary other than the Applicant's unsupported statements.

X. The Applicant also claims compensation on the ground that the Respondent has failed to carry out, in good faith, the JAB's recommendation that he should continue to make every effort to effect the Applicant's transfer or re-assignment to a post outside the Legal Office in accordance with medical advice received. The Tribunal is satisfied by the evidence that such efforts have been made, in good faith, but have not proved successful. The Tribunal trusts they will be vigorously pursued.

XI. For the foregoing reasons, all the Applicant's pleas are rejected.

(Signatures)

Arnold KEAN  
President

Roger PINTO  
First Vice-President

Jerome ACKERMAN  
Second Vice-President

New York, 7 November 1989

R. Maria VICIEN-MILBURN  
Executive Secretary