

ADMINISTRATIVE TRIBUNAL

Judgement No. 569

Case No. 620: PEARL

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Jerome Ackerman, President; Mr. Arnold  
Kean; Mr. Hubert Thierry;

Whereas, on 20 September 1991, Stephen Barry Pearl, a  
staff member of the United Nations, filed an application  
containing the following pleas that read, in part, as follows:

"II. PLEAS

The Applicant respectfully requests the Tribunal:

1. To uphold the 'unanimous finding' by the Joint Appeals Board, in its report No. 832, ... , dated June 14, 1991 (...),  
  
'... that extraneous considerations tainted the consideration of the Appellant for the subject post...'.
2. To find that the redress recommended by the Joint Appeals Board in the same report (para. 38) was inappropriate and ineffectual:  
  
...
3. To find as well that the Respondent ... , through the letter dated June 25, 1991, ... grossly misconstrued and ridiculed the recommendation made by the Joint Appeals Board in paragraph 34 of its report No. 832 (...).
4. To find additionally that the Secretary-General acted beyond his authority in deciding, ... unilaterally to extend the duration of the mandatory time-limit provided in staff rule 111.2(a)(ii) ...

5. And consequently to order that:

(a) The decision to fill the post of Chief, Interpretation Service, be rescinded, that the relevant vacancy announcement be recirculated and the process for appointment started anew, ...

(b) The Applicant be compensated for the substantial professional, moral and material damages suffered as a consequence of malicious attitudes and arbitrary decisions by the Administration, which resulted in violations of his terms of appointment;

(c) The compensation referred to in article 9, paragraph 1 of the Statute of the Administrative Tribunal of the United Nations be in an exemplary amount (not less than two years' base salary) ...

(d) Proper application be made in the present case of staff rule 112.3, ..."

Whereas the Respondent filed his answer on 21 February 1992;

Whereas the Applicant filed written observations on 14 July 1992;

Whereas, on 15 October 1992, the Applicant submitted an additional statement and requested the production of a document not contained in his personnel file;

Whereas, on 21 October 1992, the Respondent submitted an additional statement and on 22 October 1992, the Applicant provided his comments thereon;

Whereas, on 22 October 1992, the Tribunal requested the Respondent to produce the document which was not contained in the Applicant's personnel file and on the same date, the Respondent complied with the Tribunal's request.

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 22 July 1962, in the Department of Conference Services, as an Interpreter. He served on a series of short-term appointments at the P-2 level until 22 April 1963, when he was granted a probationary appointment as an Interpreter-Trainee. On 1 October 1964, he was promoted to the P-3 level and granted a permanent appointment as an Interpreter. The Applicant was subsequently promoted to the P-4 level, with effect from 1 July 1968 and to the P-5 level, as a Senior Interpreter, with effect from 1 April 1976. On 1 December 1980, the Applicant was appointed Chief of the English Interpretation Section, a position he still holds.

The D-1 post of Chief, Interpretation Service, became vacant on 14 December 1990. The selection of a replacement was conducted under the Vacancy Management and Staff Redeployment System in force at the time.

The vacancy was announced in Vacancy Announcement Number 90-T-DCS-380-NY. Staff at level P-5 and D-1 were eligible to apply. The Applicant and six other staff members at the P-5 level applied for the post.

On 12 October 1990, a number of interpreters of the Interpretation Service, wrote a memorandum to the Director, Interpretation and Meetings Division, through the Chief, Interpretation Service, containing their "views concerning the appointment of the Chief of the Interpretation Service", and stating inter alia that they could not "view positively the candidacy to that post of the [Applicant], despite his unquestioned ability as an interpreter, which makes him a great asset to the Service in the English Booth." On 20 October 1990, a number of Interpreters from the Arabic Interpretation Section wrote to the Under-Secretary-General for Conference Services and Special Assignments to "place on record their strong opinion that

in the appointment of the new Chief of Service the paramount consideration of the most seniority and experience as well as the highest standards of efficiency competence and integrity should be taken into account, the failure of which would certainly set a dangerous precedent (emphasis in the original)." On 23 October 1990, two Interpreters from the English Interpretation Section wrote to the Director, Interpretation and Meetings Division "to place on record" that "it would be inappropriate and not in the interests of the service ... to allow the decision concerning the appointment of a new Chief of the Service to be influenced by the apparent opportunity that it offers to ease the promotion problem in the English Section." This document was characterized by the Respondent as appearing "to be unfavourable to the Applicant". In an undated communication to the Under-Secretary-General for Conference Services and Special Assignments, a number of Senior Interpreters from the Service stated that they deplored "the campaign of pressure and defamation which was conducted to induce some interpreters to sign [the memorandum of 12 October 1990]" and expressed their strong support for the Applicant's appointment in view of his seniority, "integrity, conscientiousness and competence".

After evaluation of all the candidates by the Professional Staffing Service, Office of Human Resources Management (OHRM), their applications for the post were forwarded to the Appointment and Promotion Board (APB), together with a communication dated 19 November 1990, from the Director, Recruitment and Placement Division, OHRM. Of all candidates for the post, the Applicant had the most seniority in grade, having been promoted to the P-5 level with effect from 1 April 1976. Attached to the memorandum of transmission were evaluation worksheets completed by the Department of Conference Services. The fact sheets for the candidates, containing the full record of

their functions and performance during the course of their employment, as well as their applications, were also attached.

The Applicant's overall performance as an Interpreter in his performance evaluation reports for the periods 1 November 1981 through 28 February 1986, 1 March 1986 through 31 July 1989, and 1 August 1989 through 31 December 1990, was consistently rated as an "excellent performance". However, in his evaluation of the Applicant's qualifications for the post, submitted to the APB, the Director, Interpretation and Meetings Division, Department of Conference Services, stated that "the [Applicant] might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post where human-relations skills are of paramount importance." This evaluation was not shown to the Applicant.

At its meeting held on 29 November 1990, the APB provisionally short-listed six candidates for the post, in alphabetical order. The Applicant's name was on the list. On 19 December 1990, this short list became final and was transmitted to the Department of Conference Services on the same date by OHRM.

On 3 January 1991, the Executive Office of the Department of Conference Services informed the Assistant Secretary-General, OHRM, that the Department had selected a candidate other than the Applicant to fill the post. On 7 January 1991, the Applicant requested the Secretary-General to review the administrative decision not to appoint him Chief, Interpretation Service. He argued essentially that his academic background, work experience in the Department and seniority in grade were superior to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulation 4.2 and 4.4.

On 8 January 1991, OHRM informed the Applicant that

"after the review of the Appointment and Promotion Body", he had not been selected for the post of Chief, Interpretation Service.

On 13 February 1991, the Applicant wrote a second letter to the Secretary-General, containing additional information he thought might be useful for any assessment of his request for review.

On 25 March 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB), in which he requested, inter alia, that the Secretary-General "suspend the decision to confirm the present appointee to the post of Chief, Interpretation Service, until a final determination is made on the [Applicant's] case". In a report dated 30 April 1991, the JAB recommended against the Applicant's request for suspension of action. The Board adopted its report on the merits of the case on 14 June 1991. Its conclusion and recommendations read as follows:

"Conclusion and recommendations"

36. In view of the Panel's unanimous finding that extraneous considerations tainted the consideration of the Appellant by the Department for the subject post, it concluded that redress would be appropriate.
37. While noting that the Appellant had requested the JAB to recommend, inter alia, that his candidacy for the subject post be accorded due consideration, the Panel recalled that the United Nations Administrative Tribunal when considering the appropriate remedy for redress in the event of its finding that there was a breach of a right to due consideration, has held following its Judgement No. 418, Warner, that it 'cannot ask the Respondent to displace the present incumbent ... or to require that the Applicant be promoted ... The Applicant should, however, without being adversely affected by his having appealed in this case, be considered fully and fairly along with other candidates for vacancies ... for which he is found to be qualified and in which he is interested.' (See Judgement No. 444, Tortel (1989)).

38. The Panel recommends that the Respondent write a formal letter to the Appellant, apologizing for the extraneous factors that had tainted the consideration of the Appellant by the Department and expressing regret for the consequent distress caused. The Panel further recommends that the Appellant be considered fully and fairly with other candidates for vacancies in D-1 positions for which he is found to be qualified. The Panel makes no further recommendation on this case."

On 25 June 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him that:

"The Secretary-General has carefully re-examined your case in the light of the Board's report. He has concluded that the selection of the Chief of the Interpretation Service was properly based upon an assessment, by reference to the requirements of the post, of all the excellent candidates on the short list. He is satisfied that the selection of an outstanding candidate, albeit with less seniority than you, did not in any way violate your rights or those of any other staff member on that short list.

At the same time, the Secretary-General regrets that, as indicated in paragraph 34 of the report, you were not given an opportunity to comment on the observation in question. He has decided that, as recommended by the Board, you be considered fully and fairly with other candidates for vacancies in D-1 positions for which you are found to be qualified."

On 20 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to appoint a staff member other than the Applicant to the post in question violates his terms of employment, including Article 101, paragraph 3 of the Charter and staff regulation 4.2, and constitutes a misuse of power which would call for the rescinding of the decision.

2. The Respondent's decision deprived the Applicant of due process and fair consideration, was influenced by extraneous factors and caused serious injury to the Applicant.

Whereas the Respondent's principal contention is:

Although the consideration of the Applicant for promotion included a procedural irregularity, the Respondent's discretionary decision to appoint a staff member other than the Applicant to a particular post was not vitiated by prejudice.

The Tribunal, having deliberated from 26 October to 6 November 1992, now pronounces the following judgement:

I. The application in this case requests the Tribunal to uphold a unanimous finding by the Joint Appeals Board (JAB) that extraneous factors tainted the consideration of the Applicant under the Vacancy Management System for a D-1 post for which he was short-listed together with five other fully qualified applicants by the Appointment and Promotion Board (APB). The application also asks the Tribunal to find that the redress recommended by the JAB was inadequate, improper and, in any event, was not implemented by the Respondent. In addition, the Applicant attacks an alleged unilateral extension by the Secretary-General of the mandatory time limit provided in staff rule 111.2(a)(ii). In consequence, the Applicant seeks rescission of the decision to fill the D-1 post in question and requests that the relevant vacancy announcement be recirculated.

Finally, the Applicant requests compensation for alleged damages suffered by him and an order by the Tribunal that staff rule 112.3 be applied in the present case.

II. The D-1 post in question is that of Chief, Interpretation



Service in the Department of Conference Services. The JAB, having considered the procedure to the fill this post when it became vacant, concluded that the requirements of the Vacancy Management System had been complied with. However, the JAB found that "extraneous considerations tainted" the Department's decision to reject the Applicant's candidacy, in that it was influenced by a negative comment regarding the Applicant's effectiveness in working harmoniously with other staff members. That comment was contained in an evaluation sheet dated 5 November 1990, prepared by the Director, Interpretation and Meetings Division of the Department, which was submitted to the APB. The comment, which plainly did not dissuade the APB from finding the Applicant fully qualified for the D-1 post, was that the Applicant "might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post when human-relations skills are of paramount importance." The JAB considered that this comment was contrary to the Applicant's performance evaluation reports, all of which had a rating of "Very Good" in the matter of "Effectiveness in Maintaining Harmonious Working Relations". The reports had been countersigned by the Director, Interpretation and Meetings Division, without reservation. The panel observed that, contrary to Staff Rules and administrative instructions, the negative comment by the Director of his Department had not been brought to the attention of the Applicant so as to give him an opportunity to rebut it, but was in the record before the Department when it selected the successful candidate.

III. This fact, coupled with the rejection by the JAB of the argument advanced by the Respondent in connection with the negative comment, "raised doubts" in the eyes of the JAB about the Department's objectivity in assessing the Applicant's

candidacy. The JAB accordingly concluded that "extraneous considerations tainted the consideration" of the Applicant for the D-1 post. The relief recommended by the JAB was that the Respondent apologize for the extraneous factors and express regret for the distress caused. The JAB also recommended that the Applicant be considered fully and fairly with other candidates for vacancies for D-1 positions for which he was qualified.

IV. The Respondent, in his decision dated 25 July 1991, did not accept the JAB's finding that extraneous factors had tainted the Applicant's consideration for the D-1 post but expressed regret that the Applicant had not been given an opportunity to comment on the statement quoted above in the evaluation sheet prepared by the Director, Interpretation and Meetings Division. The Respondent accepted the JAB's recommendation with respect to future vacancies.

V. The Tribunal is in accord with the view that the Applicant should have been made aware of and given an opportunity to comment in writing on the statement in the evaluation sheet that he "might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post when human-relations skills are of paramount importance". However, evidence submitted to the Tribunal which was not before the JAB, shows that the above quoted comment in the evaluation sheet was plainly derived from - indeed it was a paraphrase of - a short half-page statement dated 12 October 1990, opposing the Applicant's selection as Chief of the Interpretation Service. The statement was signed by 37 members of the Service, some of whom might not even have been expected to be familiar with the Applicant's qualities. The statement was

addressed to the Director, the author of the evaluation sheet comment. Copies were sent to two of the other three officials who participated in the final selection of the successful candidate. A copy was shown to the Applicant by the Director and the Applicant had an opportunity to discuss it with him. It is not altogether clear to what extent, if any, such a discussion occurred or what was said. What is clear is that the Applicant was not given a copy of the statement by the Director, and did not respond to it in writing. Senior staff members of the Interpretation Service responded with a strong supporting statement on the Applicant's behalf. A statement in support of the Applicant was also submitted by several Arabic interpreters. Another statement was submitted by two interpreters contending that the selection process should not be influenced by considerations relating to easing the problem of promotions in the English section.

The Tribunal believes that, in one way or another, all of these submissions were known to the department officials who participated in the final selection decision. The Tribunal notes the apparent absence of any inquiry as to the factual basis, if any, for the adverse statements. Whether and to what extent, if at all, any of these submissions actually influenced the final decision cannot now be determined.

VI. If the question in this case turned on nothing more than whether the quoted comment of the Director in the evaluation worksheet was considered in the selection decision, and if, in fact, that comment represented only a vague speculative thought about a future possibility that had crossed the mind of the Director, the Tribunal might have difficulty attaching to it the overwhelming and decisive importance assigned to it by the Applicant or even the degree of importance attached to it by the

JAB.

VII. However, the evaluation sheet comment had no basis in any pertinent contemporaneous or prior performance evaluation report and it clearly stemmed from the 12 October 1990 statement in opposition to the Applicant's candidacy. It is plain that, at least insofar as the Director was concerned, the 12 October 1990 statement was taken at face value. In the Tribunal's view, this fact, together with the fact that the statement had been submitted to two of the other three officials participating in the selection decision, presents the fundamental issue in this case - namely, the manner in which the Administration dealt with the statements by staff members opposing selection of the Applicant as Chief of the Interpretation Service. The Tribunal considers that the performance evaluation system under the staff rules, as well as the functions of officials responsible for selections for promotion, are subverted if campaigning for or against candidates for promotion is allowed to enter into the process, as it did here. Although it may, as a practical matter, not be possible to prevent campaigning altogether, such campaign-type submissions by staff members should not only be discouraged, but should be returned or promptly discarded upon receipt so that they play no role at all in selections for promotion. No such action was taken here.

VIII. If legitimate complaints against staff members exist which might be pertinent to promotion decisions, they should be promptly brought to the attention of a responsible official and of the staff members affected, for investigation and resolution, within the framework of the ongoing performance evaluation system which is designed to provide important protections to all staff members. It is improper for this process to be subverted, as

occurs when campaign-type statements or petitions are entertained. Promotion exercises are not popularity contests, and should not be open to the potential abuses inherent in treating them as such.

IX. The Tribunal has examined the various contentions advanced by the Applicant based on his splendid performance record, his valuable experience, and other qualifications. These amount to a claim that his merits are superior to those of the candidate selected. However, the Tribunal does not enter into the comparative merits of competing candidates. It will not order rescission of the Respondent's decision since it is unable to conclude with certitude that, but for the procedural irregularity, the Applicant would have been selected for the post. Nevertheless, the Applicant's right to fair consideration having been abrogated, the responsibility of the Organization for the injury to him is engaged.

X. With regard to the Applicant's claim that the redress recommended by the JAB consisting of a written apology was, though nominally accepted, not implemented by the Respondent's letter dated 25 June 1991, the Tribunal recalls a somewhat similar contention in the case of Valters (Cf. Judgement No. 476 (1990)). In paragraph XIV of that Judgement, the Tribunal noted that it regarded a letter in which the Respondent expressed regret "as tantamount to an apology in terms of the JAB's recommendation." Similarly, the Tribunal considers the letter to the Applicant dated 25 June 1991, tantamount to an apology.

XI. The Tribunal considers the memorandum from the Chief, Administrative Review Unit, dated 25 January 1991, regarding the time limit as an inconsequential error which caused no injury to

the Applicant. Likewise, the Tribunal can find no injury to the Applicant in the JAB recommendation, adopted by the Respondent, with respect to consideration for future D-1 vacancies.

XII. With respect to the Applicant's plea regarding the nature of the redress recommended by the JAB, the Tribunal has concurred in the finding that the conjecture by the Director, Interpretation and Meetings Division, contained in the evaluation sheet should have been shown to the Applicant and that an opportunity to respond in writing should have been accorded to him. Although the content of such a response might be quite predictable in view of the Applicant's splendid performance record and experience, that does not diminish the importance of an opportunity to respond. Moreover, the Tribunal has found a very serious irregularity in the manner in which the Administration dealt with the statements submitted opposing selection of the Applicant. The Tribunal considers that the Applicant sustained injury as a result of these irregularities and that he is entitled to compensation therefor, which the Tribunal fixes at US\$35,000.00. But the Tribunal finds no basis for entering into any consideration of staff rule 112.3 in this case.

XIII. In view of the foregoing, the Tribunal orders that

(a) The Respondent pay US\$35,000.00 to the Applicant as compensation for the injury described above;

(b) All other pleas are rejected.

(Signatures)

Jerome ACKERMAN  
President

Arnold KEAN  
Member

Hubert THIERRY  
Member

New York, 6 November 1992

R. Maria VICIEN-MILBURN  
Executive Secretary