



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1080

Case No. 1121: GEBREANENEA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha Echols; Mr.
Omer Yousif Bireedo;

Whereas at the request of Hailemichael Gebreanenea, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 1999 and periodically thereafter until 31 March 2000;

Whereas, on 27 January 2000, the Applicant filed an Application containing pleas which read, in part, as follows:

"Section II: PLEAS

...

11. On the merits, the Applicant respectfully requests the Tribunal *to find*:
 - (a) that his assignment to [the Data Analysis and Systems Control Unit, Programme Planning and Budgeting Division (PPBD), Office of Programme Planning,

Budget and Finance (OPPBF), Department of Administration and Management (DAM), (DASCU)] which lasted from 16 October 1989 to 2 February 1996 cannot be considered temporary ...;

- (b) that he had a right to classification of his functions and responsibilities ...;

...

- (e) that he should be compensated for the work he performed at the higher level as well as the undue tardiness of the Administration in complying with Staff Regulation [2] ...;

12. Wherefore the Applicant requests that the Tribunal *order*:

...

- (b) that the Applicant be awarded compensation in the amount of:
 - (i) [a special post allowance (SPA)] equal to the difference between G-4 and G-6 (depending on the ultimate classification of the post) from 16 October 1989 until effectiveness of classification;
 - (ii) appropriate compensation for the hardship caused by the transfer against his will and the denial of his right to fair opportunity for a meaningful career and full and fair consideration in all [personnel] matters;
 - (iii) appropriate consideration for the undue delay in the administrative actions detailed above;

or failing that:

- (c) two years' net base pay for:
 - (i) each year [the] Applicant's request for classification was not acted upon;
 - (ii) the violations of his rights summarized in (b) (ii) above; and
 - (iii) the undue delay referred to in (b) (iii) above."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2000 and periodically thereafter until 31 December 2001;

Whereas at the request of the Respondent, the President of the Tribunal suspended the time limit for filing a Respondent's answer on 9 January 2002;

Whereas, on 15 February 2002, the Applicant amended his pleas as follows: "in plea 12 (b) (i) the reference to G-6 should be changed to G-5 in line with the recent decision of the Assistant Secretary-General for Human Resources Management";

Whereas, on 27 February 2002, the time limit for filing a Respondent's answer was reinstated and set at 31 March 2002;

Whereas the Respondent filed his Answer on 15 March 2002;

Whereas the Applicant filed Written Observations on 24 April 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 11 September 1973, on a short-term appointment at the G-1 level as a Messenger with the Mail Operations Unit, Office of General Services, United Nations Office at Geneva. At the material time, the Applicant held a permanent appointment and occupied the G-4 level post of Mail Clerk.

Effective 16 October 1989, the Applicant was "temporarily reassigned" to DASCUS. His post was initially financed by general temporary funds from OPPBF.

On 13 April 1993, the Officer-in-Charge, PPBD, informed the Executive Officer, DAM, that the Applicant would be assigned functions previously performed by a staff member at the G-6 level who had recently retired and noted, inter alia, "[i]n view of the continuous nature of the functions, this post should eventually be redeployed to PPBD on a permanent basis".

On 12 December 1995, the Director, PPBD, informed the Executive Officer, DAM, that the Applicant was encumbering a post that belonged to the Office of Internal Oversight Services (OIOS) and that, while he had temporarily accommodated the Applicant's wish to work in PPBD, the arrangement could not continue and the Applicant had been advised that he would have to start working in OIOS. On 1 February 1996, the Applicant was assigned to OIOS and, the following day, he was detailed to the United Nations Iraq-Kuwait Observation Mission.

On 22 January 1996, the Applicant requested administrative review of the failure to classify the functions he performed in DASCUS.

On 2 May 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 2 June 1998. Its consideration and recommendations read, in part, as follows:

"Consideration

16 ... The Panel noted that on several occasions the [Applicant] had requested that the functions he performed be classified, and that in each case there was no classification review. The Panel further noted that in the absence of a classification, [the Applicant] was denied the possibility of consideration for promotion - clearly a violation of his terms of appointment. ...

17. The Panel recalled that in [Judgement No. 632, *Mughir* (1993)], the Tribunal had noted, with dismay and regret that the [Applicant Mughir] had to wait seven years to have her post classified, the same period of time as the [Applicant]. The Panel ... concluded that he had been denied a fundamental right of a staff member, that of the possibility of promotion review, and for that alone he should be indemnified.

...

19. The Panel, therefore, concludes that the [Applicant's] request for a classification review of his functions in DASCU is reasonable and valid.

Recommendations

20. The Panel unanimously recommends that:

a) [the Applicant] be paid the equivalent of two months' net base salary to indemnify him for the failure of the Administration to respond to his request - in effect, to deny his request - for a classification review;

b) [the Applicant's] functions in DASCU be classified ...;

c) Should the review determine that those functions were at the G-5 or G-6 level, [the Applicant] be paid an amount equivalent to [an SPA] to G-5 from 16 January 1990 to 31 January 1996.

..."

On 15 April 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General first observes that the Board has offered no basis or reasoning for its finding that you were denied the possibility of a promotion review. In the absence of such reasoning, he cannot accept the Board's conclusion that you should be compensated on this account.

The Secretary-General further observes that, following the abolition of your post in the Messenger Unit, you were reassigned to DASCUS until either you would be placed on a suitable post elsewhere or redeployed, and you had been made aware of this fact. In addition, the record makes clear that, as DASCUS did not have a regular budget post to accommodate you, you were placed on a succession of temporary, extra-budgetary, short-term or established posts not belonging to DASCUS. In the absence of a post in DASCUS, there was no possibility to act upon your request for classification and this is the reason that the functions that you were discharging in DASCUS have not been classified. It is for this reason also that the Secretary-General cannot entertain the Board's recommendation for payment of a special post allowance, as this recommendation is not in accordance with Staff Rule 103.11 which sets out the terms and conditions for the granting of a special post allowance.

However, in view of the fact that you were discharging continuing functions in DASCUS for several years, the Secretary-General is willing to have those functions reviewed on an *ex post facto* basis with a view to determining their level. Should it be determined that the functions you discharged at DASCUS were at a higher level, your performance at a higher level shall be reflected and acknowledged in your Official Status File.

..."

Thereafter, on 30 April and 16 August 1999, respectively, the Applicant and the former Chief, DASCUS, submitted job descriptions in respect of the Applicant's service with DASCUS.

On 27 January 2000, the Applicant filed the above-referenced Application with the Tribunal.

On 8 August 2000, the Chief, Common System and Inter-Agency Policy Unit, OHRM, informed the Executive Office, DAM, that they had reviewed the draft job description submitted by the Applicant and, in the absence of an organizational chart depicting its organizational context, had "tentatively determined that the job is classifiable at the G-4 level under the title Administrative Clerk". A similar "tentative determination" was made by the Chief, Compensation and Classification Policy Unit (CCPU), on 28 December.

On 23 February 2001, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting review and revision of this "tentative decision". The Chief, CCPU, responded on 9 March that the job description submitted did not contain the necessary elements required to issue a formal decision and that, as their advice did not constitute a classification decision, it could not be appealed. He offered to conduct an audit of the Applicant's functions, however. In the subsequent CCPU audit report of 22 March, it was concluded that the post was properly

graded at the G-4 level. On 8 May, the Chief, CCPU, confirmed that the functions were classifiable at the G-4 level.

The Respondent subsequently referred the case to the Classification Appeals and Review Committee (CARC). On 21 November 2001, the CARC recommended that the functions were "classifiable at the G-5 level". The Assistant Secretary-General, OHRM, accepted this recommendation the same day.

Whereas the Applicant's principal contentions are:

1. The Respondent's failure to classify the Applicant's functions seriously damaged his career prospects.
2. The Respondent erred in permitting DASCU to have a post "on loan" for such an excessive length of time and in not requesting a budgeted post.
3. The Applicant was denied fair treatment and due process, and has been treated in bad faith throughout.
4. The Applicant is entitled to compensation for the undue delays exercised by the Respondent and for the violation of his contractual rights.

Whereas the Respondent's principal contentions are:

1. A classification review has been conducted and the Applicant has been offered appropriate compensation.
2. The delay in conducting a classification review was not excessive given the uncertainty about the availability of a post for the Applicant's placement on a long-term basis.
3. The Applicant's career has not been prejudiced; performance evaluation reports prepared for him detailed his services in DASCU and such reports provide reference for career purposes.

The Tribunal, having deliberated from 1 to 20 November 2002, now pronounces the following Judgement:

- I. This case arises from the Applicant's "temporary" assignment to DASCU where he performed unclassified functions from 16 October 1989 to 31 January 1996, notwithstanding his

request for classification. An *ex post facto* classification exercise performed in 2001 found the functions "classifiable at the G-5 level". There are two main issues to be addressed by the Tribunal: first, whether the Applicant had the right to expect that his functions be classified; and, second, whether there was excessive and undue delay that damaged his career as a result of the failure of the Administration to respond to his request for classification and that violated his rights in the administration of justice in the case.

II. The Applicant contends that his assignment to DASCU cannot be considered temporary and that the Administration's refusal to classify his functions violated his rights. He claims that he was denied appropriate compensation for the functions he executed for more than six years to the full satisfaction of his superiors in DASCU, which functions had previously been performed by a G-6 level staff member. He requests payment of an SPA as well as compensation for damage to his career on the basis that, because he was not promoted to the G-5 level, he was unable to apply for G-6 level positions.

The Respondent rejects the contention that the Applicant assumed the full duties and responsibilities of a G-6 level position, and further responds that the Applicant's promotion opportunities were not affected because, at any time during his assignment to DASCU, he could have applied for higher-level vacancies, in competition with other eligible candidates.

III. Staff regulation 2.1 provides that "[i]n conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required". The Tribunal has previously held that "it cannot substitute its judgement for that of the Respondent in job classification matters ... The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion." (Judgement No. 792, *Rivola* (1996). See also Judgement No. 1073, *Rodriguez* (2002).) In the instant case, the Tribunal is not persuaded that the Administration's refusal to classify the Applicant's functions fell within that "reasonable discretion", and recalls Judgement No. 632, *Mughir* (1993), where it noted "with dismay and regret" that a staff member had to wait seven years for her post to be classified. Further, it has not escaped the Tribunal that the final decision to classify the Applicant's functions came only pursuant to such a recommendation from the JAB.

When the Administration finally submitted the Applicant's former functions to the Classification Appeals and Review Committee (CARC), the latter found the functions classifiable at the G-5 level. The Tribunal agrees with the Applicant that this classification, some twelve years after he first requested it, does not erase the mistreatment he suffered, his emotional damage, or the effects the earlier non-classification had on his career.

The Respondent argues that, in the absence of a regularly-budgeted post in DASCUC, it was impossible to act upon the Applicant's request for classification. The Tribunal notes that, given DASCUC's extensive workload for the seven-year period in question, the Administration could have made efforts to request a regularly-budgeted post in order to regularize the Applicant's status in DASCUC. The Tribunal recalls Judgement No. 857, *Daly & Opperman* (1997), wherein it found:

"The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable in the light of the special circumstances of this case. The budgetary provisions for upgrading these posts ... involved an insignificant sum of money when viewed against the total Biennial Programme Budget of the United Nations Secretariat."

In the circumstances of the instant case, such a justification would be equally unacceptable.

The Tribunal finds that the Respondent erred in not classifying the Applicant's functions earlier, and that the Applicant suffered financially as a result. Staff rule 103.11 (b) provides that a staff member given all the responsibilities and obligations of a post classified manifestly higher than his or her own may, in exceptional circumstances, receive an SPA. In this case, the functions performed by the Applicant have been classified at a higher level than his personal grade. Had the post been classified in a timely fashion, the Applicant could have requested an SPA or even been promoted to the higher level. Accordingly, the Tribunal feels it is appropriate to order that he be compensated an amount equivalent to an SPA from the date of his entry to DASCUC until the date of the CARC recommendation, or until the date of his promotion to the G-5 level, whichever is earlier. It notes in this regard that even the Respondent concedes that the Applicant should be paid the equivalent of an SPA to the G-5 level.

IV. The Tribunal now turns to the issue of whether the delay in classifying the Applicant's post amounted to undue delay resulting in devastating damage to the Applicant's career. The

Tribunal agrees with the Applicant that the excessive delay in classification of his functions constituted not only a far-reaching violation of his contractual rights but also deprived him of appropriate compensation for years and continues to have a serious negative impact on his career prospects.

The Tribunal has maintained that an inordinate delay "not only adversely affects the administration of justice, but on occasions can inflict unnecessary anxiety and suffering to an Applicant". (Judgement No. 414, *Apete* (1988), citing Judgement No. 353, *El-Bolkany* (1985).) Furthermore, the Tribunal has emphasized that staff should be appropriately compensated for the work they perform and that their work should be properly classified with established procedures and standards. (See *Daly & Opperman, ibid*, and Judgement No. 597, *Colayco* (1993).)

Further, while the Tribunal obviously cannot find that the Applicant *would have* been promoted, it agrees with the JAB that timely classification of the Applicant's functions "could well have [had] consequences for [his] career", and holds that as the Applicant was denied the *possibility* of consideration for promotion, his fundamental rights as a permanent contract holder were violated. In Judgement No. 974, *Robbins* (2000), the Tribunal found:

"The amount recommended was arrived at by the JAB on the assumption that the Applicant would have been promoted. The Tribunal is of the view that this was an erroneous assumption on which to base the calculation of compensation. The Tribunal has consistently held that a staff member has no right to promotion in the absence of a specific legal obligation creating such a corresponding right, but that is not the case here. On the other hand, the Tribunal has also held that the discretion to promote a staff member, which the Respondent enjoys, must not be abused. As the Tribunal stated in Judgement No. 905, *El-Far* (1998): 'The administrative authority has a discretion in regard to promotion (cf. Judgements No. 275, *Vassiliou*, No. 375, *Elle* (1986) and No. 390, *Walter* (1987)). However, this discretion is not an absolute one and must be exercised without abuse so that the staff member is accorded fair treatment.' Irregularities in procedure (see Judgement No. 293, *Nayyar* (1982)), including undue delay in taking a decision relating to a promotion (see Judgement No. 310, *Estabial* (1983)), may result in an abuse of discretion."

As in *Robbins*, the Applicant in the instant case "had no right to promotion", however he *is* entitled to compensation for the Respondent's "unfair treatment ... which constituted an abuse of discretion".

V. In addition to the lengthy delay in classification endured by the Applicant, the Tribunal also notes the delays in the administration of justice in his case. The record of the case details that the Applicant submitted his appeal to the JAB on 2 May 1996; the Respondent replied on 20 December 1996. On 2 June 1998, the JAB issued its report recommending, inter alia, that the Applicant be paid two months' net base salary for the denial of his request for a classification review; that his functions in DASCUS be classified; and that, in the event the review determined that the functions were at the G-5 or G-6 level, he be paid an SPA. The Respondent made his decision on these recommendations on 15 April 1999, effectively rejecting the compensatory aspects but agreeing to an *ex post facto* classification. The CARC did not make its recommendation until 21 November 2001.

The Applicant submitted his Application to the Tribunal on 27 January 2000; after repeated requests for extension from the Respondent, the President of the Tribunal finally agreed to suspend the time limits in the case to allow for the classification process. Once the time limit was reinstated, the Respondent continued his requests for extension, even after being granted a "final" extension until 31 August 2001. The Respondent's Answer was finally submitted on 15 March 2002.

The Tribunal is satisfied that there was persistent undue delay on the part of the Administration in responding to the requests and appeals of the Applicant, and that this amounted to a gross violation of his rights of due process. In particular, the Tribunal notes the provisions of staff rule 111.2 (g) which provides that "[a]t the duty station where the [JAB] appeal is considered, the designated representative of the Secretary-General shall submit a written reply within two months following the date of receipt of the appeal".

VI. In conclusion, the Tribunal is convinced that the Applicant was entitled to have his functions classified and that the failure of the Administration to classify his functions, as well as the violation of the Applicant's rights of due process, deserves compensation.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to a special post allowance to the G-5 level from 16 October 1989 until the **earlier** of 21 November 2001 or the date of his promotion to the G-5 level;

2. Orders the Respondent to pay the Applicant compensation of four months' net base salary for its failure to classify his functions and its violations of his rights of due process; and,

3. Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

New York, 20 November 2002

Maritza STRUYVENBERG
Executive Secretary