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**ADMINISTRATIVE TRIBUNAL**

Judgement No. 1327

Case No. 1403

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Ms. Brigitte Stern;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 5 July 2004 and periodically thereafter until 28 February 2005;

Whereas, on 26 February 2005, the Applicant filed an Application requesting the Tribunal, inter alia, to order:

- “(a) That the transcripts of witnesses’ statements against the Applicant are presented[; that the witnesses are heard; and that] the Applicant [be] given a fair chance.
- (b) That both sides are treated equally and the Administration’s biased judgement be weighed and its efforts to produce an independent evaluation be examined.
- (c) That the Applicant’s letters of recommendation (...) be considered ...
- (d) That the Applicant’s [performance evaluation report (PER)] be corrected and the words ‘hostile’ and ‘aggressive’ be deleted from it.
- (e) That a written apology for the verbal and physical abuse be presented to the Applicant ...
- (f) That a neutral letter from ... [the Internal Criminal Tribunal for the former Yugoslavia (ICTY)] giving positive references be issued ...
- (g) That twelve months’ salary be paid, adjusted by inflation ...”

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 August 2005 and periodically thereafter until 21 October;

Whereas the Respondent filed his Answer on 30 September 2005;

Whereas, on 17 October 2006, the Applicant requested the Tribunal to hold oral hearings in her case, and on 26 October, the Respondent commented thereon;

Whereas, on 26 October 2006, the Applicant submitted a communication;

Whereas, on 21 November 2006, the Tribunal decided to postpone consideration of this case until its next session;

Whereas, on 29 June 2007, the Applicant submitted a document;

Whereas, on 11 July 2007, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

#### ***"Employment history"***

... The [Applicant] was a staff member who worked for ... ICTY under several fixed-term appointments. [She] joined ... ICTY on 2 September 1999, as a Language Assistant at the G-5 level, within the Office of the Prosecutor, ICTY. The [Applicant] separated from service on 31 January 2001.

#### ***Summary of the facts***

... On 17 October 2000 and in accordance with ST/AI/240/Rev. 2 [of 28 November 1984], the first reporting officer of the [Applicant] completed section III of the PER covering ... 11-month[s] ... The first reporting officer appraised the [Applicant] mainly with the rating B or C, except for item 7: 'Effectiveness in maintaining harmonious working relations' for which the first reporting officer rated her with an 'E' and added the following comment:

'[The Applicant's] behaviour has caused considerable problems on Team 5. She has demonstrated open hostility towards several members of the team, has become aggressive, and has been counseled on three occasions for shouting at other staff during team meetings, and other actions that have caused concern. Due to concerns for fire prevention and safety, [the Applicant] has also been spoken to for burning a candle in the office. This behaviour is unacceptable and has negatively affected working relations within the team.'

... On 1 November 2000, the second reporting officer completed section IV of the PER. Keeping in mind the requirements of the post, the second reporting officer checked box No. 5, describing the [Applicant]'s performance as 'a performance that does not fully meet standards'. He further added the following comment:

'I have discussed this PER with [the Applicant] and the Team Leader. We have all agreed that the current situation is untenable. The PER reflects a generally acceptable level of performance but with a clearly defined problem. I see two options here: 1) To move the staff member to an alternative working situation, or 2) Non-renewal of contract.'

... The [Applicant] signed the PER and received a copy of it on 17 November 2000. On 29 November ..., the [Applicant] filed her rebuttal statement on her PER. She rebutted her PER on two basic grounds: '1) The "E" is exaggeratedly negative, even though we have had some personality clashes; and 2) "5" is too low even on the existing form'.

... On 19 December 2000, the Rebuttal Panel submitted its report to the Chief, Human Resources, ICTY. The [Rebuttal] Panel concluded and recommended that [no changes be made] in respect to the rating given to the staff member ...

.... On 10 January 2001, ... [the] Prosecutor of ... ICTY, made an appraisal and finalized the rebuttal proceedings. She stated, *inter alia*, that:

'I came to the conclusion that the main issue of concern is the staff member's inability to work in a team environment rather than her work performance. ... As a member of a team composed of people from different cultures and backgrounds all working towards a common goal, one ought to be a team player in order to be welcomed by the team. ... I agree with the panel's recommendation that the staff member's "E" rating (Unsatisfactory) under Item 7 (...) is appropriate, hence it should be maintained.'

Nevertheless, while the ability to maintain harmonious working relations is an important factor in evaluating a staff member's overall suitability, in my opinion the other aspects of a staff member's work performance must be given due weight. I see justification, therefore, in considering an upgrade in the staff member's overall rating from 5 (A performance that does not fully meet the standards) to 4 (Fair).'

..."

On 28 January 2001, the Applicant filed a request for review of the administrative decision taken by the Prosecutor with regard to her PER rebuttal.

On the same date, the Applicant sent a request for suspension of action in respect of the decision not to renew her contract based upon the non-completion of her PER, to the Secretary of the JAB in New York. On 29 January 2001, the Secretary of the JAB informed the Applicant that due to the insufficient documentation submitted and insufficient time available to proceed further, the JAB could not accept the request for a suspension of action.

On 30 January 2001, the Applicant filed a request for review of the decision not to renew her contract, conveyed to her verbally by the Chief of Personnel on 26 January.

On 31 January 2001, the Applicant's contract of expired and she separated from service.

On the same date, the Applicant lodged an appeal on the merits with the JAB. The JAB adopted its report on 11 December 2003. Its considerations, conclusions and recommendations read, in part, as follows:

### **"Considerations**

...

19. The Panel ... turned to consider the request made by the Appellant [with regard to the Rebuttal Panel]:

[...] The [Rebuttal] Panel's allegations against me are serious. Therefore my counsel requests that I be provided with the transcripts of the interviews with the eight witnesses so they I may see exactly what was said and have the right to reply.' (sic).

20. The Panel enquired with the ICTY on this issue and received the reply that it has no record of any transcripts of witness interviews. The only official record of the case is contained in the report of the Rebuttal Panel dated 19 December 2000. The Panel noted from the report of the Rebuttal Panel that the Appellant was interviewed on two occasions, on 13 December 2000 and again on 19 December ... The Rebuttal Panel discussed with the Appellant which witnesses would be interviewed. During the course of the proceedings, the Rebuttal Panel interviewed eight witnesses, consisting of supervisors, colleagues of Team 5 and former colleagues. The Panel also noted that the witnesses were interviewed on 14, 15 and 18 December ... It was clear and evident to the Panel that the Appellant had the right to qualify or disqualify the witnesses during her meeting with the Rebuttal Panel held on 13 December ... and also to discuss afterwards the outcome of the witnesses' interviews, as the Appellant also met with the Rebuttal Panel on 19 December ... Taking this fact into account, the Panel was of the view that the right of due process of the Appellant was respected and that the Rebuttal Panel conducted its investigation in an impartial manner.

21. The Panel turned to consider the contention made by the Appellant that she was subject to unfair and unjust treatment by being marked as a person 'who is not able to work in a team environment' and that she worked with the whole team without actual problems. From the records of this case, the Panel was not able to find any evidence of the contention made by the Appellant. On the contrary, the Panel found that the Rebuttal Panel in its report, paragraph 11 stated that:

'Following its review of the documents submitted by the staff member and after interviewing the above mentioned witnesses, the members of the Panel have found that the staff member gave conflicting versions of the facts of the incidents mentioned in her statement. Moreover, although the staff member as well as the witnesses mentioned the same incidents, the details of her statements did not correspond with any of the statements given by the witnesses, **while all of the witness statements were consistent.**' [(JAB's emphasis.)]

22. ... [T]he Panel observed that the Appellant herself admitted that there were problems ...

23. Regarding her performance, the Panel ... found that the provisions of ST/AI/240/Rev. 2 were adhered to by ... ICTY and that the rebuttal proceedings were undertaken faithfully and accurately. The Rebuttal Panel acted in a timely manner. The Panel further noted that the Appellant actually benefited from the rebuttal proceedings as the ICTY Prosecutor upgraded her overall performance from 5 (A performance that does not fully meet standards) to 4 (Fair).

...

25. The Panel further noted the allegations introduced by the Appellant ... that she experienced problems such 'as anonymous harassing telephone calls and with her doorbell ringing late at night' and that she suffered verbal and physical abuse carried out by certain team members and supervisors towards her. The Panel felt that if there was substance to these allegations, the Appellant should have taken action in a timely manner, in accordance with administrative instruction ST/AI/371 on 'Revised Disciplinary Measures and Procedures' of 2 August 1991.

26. The Panel further considered the remaining contentions of the Appellant ... and found no evidence to substantiate them.

#### ***Conclusions and recommendations***

27. The Panel *unanimously concluded* that the appraisal on the Appellant's PER had not violated her rights as a staff member, including the right to due process. The rebuttal procedure as outlined in ST/AI/240/Rev.2 was adhered to and no prejudice or other extraneous factors were found to violate the Appellant's rights.

28. Accordingly, the Panel *unanimously decided* to make no recommendation in support of this Appeal."

On 18 December 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's reasonings and findings and had accordingly decided to take no further action on her appeal.

On 26 February 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Administration failed to take effective action to deal with the situation and treated the Applicant badly.
2. The Administration failed to respond in a timely manner and did not justify this delay.
3. The non-renewal of her fixed-term appointment was arbitrary, unfair and in violation of her due process rights.
4. The ICTY Administration used its discretion maliciously and capriciously.
5. She was not afforded due process or proper consideration in the proceedings before the JAB.

Whereas the Respondent's principal contentions are:

1. The PER and rebuttal process were fair and not tainted by procedural irregularities.
2. There is no evidence that the Applicant was subjected to abuse or harassment.
3. The JAB process was not tainted by procedural irregularities.
4. The Applicant's plea in respect of her alleged expectancy of continued employment with the Organization is without merit.

The Tribunal, having deliberated from 24 October to 21 November 2006, in New York, and from 26 June to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. The Applicant has raised a number of pleas, the most significant of which is whether the decision not to extend her final fixed-term contract on the expiration of its term stands vitiated by an allegedly flawed PER, which she rebutted, but which she claims was the basis for the decision not to renew her contract. She also, albeit half-heartedly, asserts that an oral commitment was made, creating an expectation of renewal. The Respondent has denied this, and the Tribunal agrees that there is no evidence of any such commitment. The central issue, then, is her performance evaluation and its impact on the decision not to renew her contract.

Before outlining the facts or dealing with the issues in this case, it is pertinent to recall staff rule 104.12 (b) (ii) which provides that a fixed-term contract does not carry any expectancy of renewal, as well as the settled jurisprudence of the Tribunal that, when it comes to the extension of a fixed-term contract, performance, even if outstanding, cannot in and of itself create an expectation of renewal. In normal circumstances, the Applicant's fixed-term contract would simply have expired by the effluxion of time. However, as the Applicant's claim appears to be that her contract was not renewed because of a flawed performance evaluation, the Tribunal will deal with the case on that basis.

II. The Applicant joined ICTY on 2 September 1999, as a Language Assistant at the G-5 level in the Office of the Prosecutor and held a number of fixed-term appointments, the last of which expired on 31 January 2001, when she separated from service.

On 17 October 2000, the first reporting officer of the Applicant completed section III of her PER covering the period 1 December 1999 to 31 October 2000. The first reporting officer appraised the Applicant mainly with the rating "B" or "C", except for item 7: "Effectiveness in maintaining harmonious working relations" for which the first reporting officer rated her with an "E" (Unsatisfactory), adding a comment that the Applicant's behaviour had caused considerable problems in "Team 5".

On 1 November 2000, the second reporting officer completed section IV of the PER and rated the Applicant "5" ("A performance that does not fully meet standards"), adding that the current situation was untenable and that there were only two options: 1) to move the staff member to an alternative working situation, or 2) non-renewal of contract. The Applicant signed the PER and, on 29 November 2000, filed a rebuttal.

III. In its report dated 19 December 2000, the Rebuttal Panel concluded that there was no evidence that the comments made were unfounded or ill-motivated and that it was clear that the Applicant's interpersonal skills were not adequate for a team environment. The Panel thus recommended that no changes be made to the PER ratings.

On 10 January 2001, the Prosecutor made an appraisal and finalized the rebuttal proceedings. She noted that the main issue of concern was the Applicant's inability to work in a team environment rather than her work performance and thus decided to maintain the "E" rating under item 7. However, as she felt that "the other aspects of a staff member's work performance must be given due weight", she saw justification in an upgrade in the Applicant's overall rating from 5 to 4 (Fair). The contract of the Applicant was not extended or renewed beyond 31 January.

IV. On 28 January 2001, the Applicant filed a request for review of the administrative decision as embodied in the PER rebuttal appraisal. On the same date, the Applicant sent a request for suspension of action to the Secretary of the JAB. According to the Applicant, her PER was not correctly completed and nevertheless her contract was going to end on 31 January. On 29 January, the Secretary of the JAB

informed the Applicant that, due to the fact of insufficient documentation submitted and insufficient time available to proceed further, the JAB could not accept the request for suspension of action.

On 31 January 2001, the Applicant lodged an appeal with the JAB. In its report dated 11 December 2003, the JAB decided to make no recommendation in favour of the appeal. On 18 December, the Applicant was informed that the Secretary-General agreed with the reasoning and the findings of the JAB.

V. The evaluation of a staff member's level of performance is much in the realm of managerial judgement and discretion, in the exercise of which the Tribunal will not lightly interfere unless it has been done capriciously and prejudice established, or it is substantively flawed in some other respect. A staff member is, however, entitled not only to rebut the correctness of the evaluation but also to have his or her due process rights in the rebuttal process properly protected.

The Applicant's claim is that the rebuttal process was flawed and that her due process rights had been violated because the Rebuttal Panel had heard a number of witnesses without her being present and because she had not been provided with the transcripts of the interviews or allowed to comment on the evidence obtained. The record shows that the Rebuttal Panel did not prepare transcripts of the witnesses' testimonies. Administrative instruction ST/AI/240/Rev.2 provides that:

"10. If the staff member so desires, he or she may make a written statement in rebuttal of part or all of the report ... addressed to the Office of Personnel Services (...). The Office of Personnel Services will, within two weeks, transmit the statement to the head of the department or office concerned for an investigation. ...

...

13. Unless geographical location makes it impractical, the panel shall hear the interested parties. The panel members should normally conclude their investigation within six weeks of the date of their nomination as panel members.

14. Following the investigation, the panel will submit a report to the head of the department or office, who will record his or her appraisal in writing. ..."

Thus, whilst the Rebuttal Panel must necessarily obtain relevant information to carry out its functions, the need to interview witnesses is not made a mandatory requirement.

The Tribunal notes that the Applicant herself was interviewed by the Rebuttal Panel on two separate occasions and, in coming to its conclusion that the ratings did not require to be changed, the Panel observed that the Applicant's version of events had internal inconsistencies. The main issue of concern to the Tribunal at this point is the judgement which management had formed with regard to her ability to work in a team environment. In other words, in the instant case, how effectively she was able to maintain harmonious working relations - a matter involving a large measure of subjective judgement, albeit on the basis of available information, not necessarily posited on a single or specific incident, and involving an

assessment of the personalities concerned. Whilst the Tribunal is particular to ensure the observance of due process at all times, it is also not unmindful that, in the context of non-disciplinary situations where information has to be gathered, a more nuanced approach to the panoply of rights relevant to disciplinary proceedings is called for and that the particular circumstances of each case must be taken into account, subject, of course, to the constraint that no one can be denied the right of being dealt with fairly. The application of the rights critical to disciplinary proceedings is not automatic in every other situation.

VI. The Applicant's supervisors were under the obligation to assess the Applicant's ability to work in a team environment and the Rebuttal Panel had to ensure that her supervisors' conclusions on this sensitive issue had not been reached lightly or capriciously. To allow rebuttal panels sufficient discretion in gathering information actually protects staff members and should not, in the Tribunal's view, be unduly confined. The Rebuttal Panel's decision to interview witnesses was not prohibited by the provisions of ST/AI/240/Rev.2, and the Tribunal does not view that the absence of transcripts in this case violated the Applicant's due process rights. The Tribunal notes that the Rebuttal Panel actually went out of its way to keep the Applicant apprised of the proceedings: it had meetings with the Applicant herself both before and after it interviewed the eight witnesses; the Panel not only interviewed the Applicant, but consulted her on which witnesses should be interviewed; and, it met with her again, after hearing the witnesses, to discuss the outcome of the interviews. As the JAB stated:

“The Panel enquired with the ICTY on this issue and received the reply that it has no record of any transcripts of witness interviews. The only official record of the case is contained in the report of the Rebuttal Panel dated 19 December 2000. The Panel noted from the report of the Rebuttal Panel that the Appellant was interviewed on two occasions, on 13 December ... and again on 19 December ... The Rebuttal Panel discussed with the Appellant which witnesses would be interviewed. During the course of the proceedings, the Rebuttal Panel interviewed eight witnesses, consisting of supervisors, colleagues of Team 5 and former colleagues. The Panel also noted that the witnesses were interviewed on 14, 15 and 18 December ... It was clear and evident to the Panel that the Appellant had the right to qualify or disqualify the witnesses during her meeting with the Rebuttal Panel held on 13 December ... and also to discuss afterwards the outcome of the witnesses' interviews, as the Appellant also met with the Rebuttal Panel on 19 December ... Taking this fact into account, the Panel was of the view that the right of due process of the Appellant was respected and that the Rebuttal Panel conducted its investigation in an impartial manner.”

Thus, the process appears to have been carried out with the full participation of the Applicant.

The Tribunal further notes, with satisfaction, that the Prosecutor herself looked again into the issues in detail before arriving at the final assessment in this case and proceeded to make eminently fair adjustments, albeit that she did not make a change on the critical issue of the Applicant's inter-personal skills.

VII. In light of the above, the Tribunal concurs with the findings of the JAB that the PER appraisal did not violate the Applicant's rights as a staff member, including the right to due process, and that the rebuttal

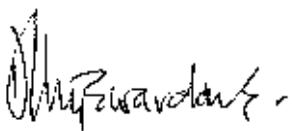
procedure as outlined in ST/AI/240/Rev.2 was adhered to. Thus, the Applicant's claim that the non-renewal of her contract was due to a flawed rebuttal process must fail.

VIII. The Application is rejected in its entirety.

(Signatures)



Spyridon **Flogaitis**  
President



Dayendra Sena **Wijewardane**  
Vice-President



Brigitte **Stern**  
Member

Geneva, 27 July 2007



Maritza **Struyvenberg**  
Executive Secretary