

Judgement No. 122

*(Original: English)***Case No. 122:****Ho (Deletion of comments
from periodic reports)****Against: The Secretary-General
of the United Nations**

Request for the deletion of comments from periodic reports.

Request for oral proceedings.—Request rejected, as the circumstances of the case do not warrant such proceedings.

Request for the production of supplementary documents.—Request rejected, as the documents are intended to buttress the Applicant's argument on a subject which is not within the jurisdiction of the Tribunal.

Principal request.—The Tribunal cannot substitute its own rating for the opinion given by the officers responsible for completing periodic reports.—A periodic report may be contested before the Tribunal if it is established that the report was dictated by improper motives or misrepresents the facts.—In the absence of facts that would enable the Tribunal to establish that the comments in dispute were dictated by improper motives or constitute a clear and obvious misrepresentation, it can only consider the regularity of the procedure followed when the Applicant contested the periodic reports.—Contestation of the comments by the Applicant.—Applicability of the procedure prescribed in Administrative Instruction ST/AI/115.—Acceptable, although belated and extremely brief and succinct, compliance with this procedure by the Administration.—Request rejected.

Request for compensation for mental anguish.—Request rejected.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Héctor Gros Espiell;
Mr. Louis Ignacio-Pinto;

Whereas, on 18 January 1968, Cheng-Hao Ho, a staff member of the United Nations, requested an extension of the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 January 1968, the President of the Tribunal, with the agreement of the Respondent, extended to 30 April 1968 the time-limit for the filing of the application;

Whereas, on 30 April 1968, the Applicant filed an application requesting the Tribunal:

“1. To order, as a preliminary measure, the Respondent to produce the documents containing the unfounded criticisms which were presented to the Appointment and Promotion Committee in 1965, and to the Director of Personnel on 25 February 1966 in connection with the 1965 and 1966 P-2 promotion registers.

“2. To rule that the Secretary-General's decision of 25 October 1967 to take no action on the incomplete and unwarranted comments in the Applicant's 1961 and 1963 periodic reports was not in conformity with Administra-

tive Instruction ST/AI/115 of 11 April 1956, and to order the deletion of the said comments, namely, 'He would be categorized as "a square peg in a round hole", which he himself recognizes since he has been seeking other assignment for sometime.', from his 1961 and 1963 periodic reports."; Whereas the Respondent filed his answer on 22 July 1968;

Whereas, on 20 August and 8 October 1968, the Applicant filed written observations in which he requested that oral proceedings be held and that compensation to the amount of \$200 be awarded to him "for the mental anguish sustained over the incomplete and damaging comments in his 1961 and 1963 periodic reports";

Whereas, on 23 September 1968, the Executive Secretary of the Tribunal, on the instructions of the President, informed the Applicant that it would not be possible to hold oral proceedings at the forthcoming session of the Tribunal but that the Tribunal would be seized of his request in order that it might decide on whether to hold such proceedings at a later stage;

Whereas the Applicant submitted additional statements on 6 and 7 October 1968;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 29 January 1951 as a Junior Security Officer at the G-4 level. On 1 March 1955 he received a permanent appointment and was promoted to the G-5 level. On 1 February 1959 his functional title was changed to Security Lieutenant and, on 1 June 1966, he was placed at the S-5 level in the newly created Security Service category.

In his periodic report covering the period 1 January 1959-1 January 1961, the Applicant received from the first reporting officer top ratings for technical competence, industry, quality of work accomplished, reliability, punctuality and effectiveness in supervising staff, and middle ratings for judgement, initiative, personal relations with others and organization of work. To this evaluation the first reporting officer added the following comments:

"This staff member is very conscientious, industrious and punctual. He is methodical and thorough in carrying out his duties. These qualities are considered strong points which contributed much toward an overall very good performance during the period of this report.

"During the First Part-15th General Assembly, during a period when a number of Chiefs of State were attending the sessions, the platoon commanded by Lt. Ho apprehended a trespasser in possession of a fire bomb. Lt. Ho was commended for the alertness and efficiency of his Unit."

The second reporting officer rated the Applicant as "a staff member who maintains a good standard of efficiency" and made the following comments:

"From my observation Mr. Mayan [the first reporting officer] is most generous in the ratings given to Lieutenant Ho. The problem from an organization standpoint seems to require a different type of assignment. He would be categorized as a 'square peg in a round hole', which he himself recognizes since he has been seeking other assignment for sometime."

The Applicant signed that periodic report on 2 May 1961 and appended to it the following statement:

"On 18 April 1960, I submitted a report to Mr. David Vaughan through Mr. Frank Begley, requesting for transfer in accordance with Information

Circular, ST/ADM/SER.A/437, dated 17 Oct. 1957. A similar report was sent to Miss B. Whitelaw, Chief of Placement Section, on 28 Oct. 1960. The reason for my request was self-explanatory in these reports (Copies of the said reports are attached herewith), that was to facilitate my promotion case which were twice turned down by the Appointment and Promotion Committee on an alleged ground that my present job was not professional post. My action was also inspired by Mr. Begley's remarks made in my periodic report in 1957, which was later reviewed and confirmed by the Wood Committee as a remark made in good intention. Could these two reports be interpreted as my recognition of being 'a square peg in a round hole'? If not, I wondered what was Mr. Begley's statement based on?

"I am very proud of my ten years of performance record, least disciplinary cases and best attendance records. As a commanding officer of a platoon, I obtained the best efforts and cooperation from the staff under my supervision. My personal conduct is beyond reproach. My fitness of doing the job is further proved by the fact that among seven non-American security lieutenants working with this Section during the past ten years, I am the only one still remaining on the job.

"If, on the other hand, the career and advancement of an international civil servant could be jeopardized by an insinuating statement of a second reporting officer, or if I were, after more than ten years of service, found unfit for my job, it would not be the matter of my individual concern, but a matter concerning the whole United Nations personnel system which would inevitably be placed in an untold jeopardy."

The word "seen", initialled by the Director of General Services and dated 3 May 1961, appears on the original of the above statement.

In his subsequent periodic report, which covered the period 1 January 1961-1 January 1963, the Applicant received the same ratings as in the previous one from the first reporting officer, who in addition made the following comments:

"This staff member is very conscientious, industrious and punctual. He is methodical in carrying out his duties and maintains a high degree of interest in maintaining the efficiency of his squad. These qualities are considered strong points which contributed to an overall very good performance during the period of this report."

The second reporting officer again rated the Applicant as "a staff member who maintains a good standard of efficiency", and noted: "No change from last report". The Applicant signed the report on 9 April 1963 and attached to it this statement:

"In March 1961, I disagreed on the remarks made by Frank M. Begley [the second reporting officer] under Section 2 of my last report, on the ground that my performance, conduct, attendance and professional background had demonstrated to be excellent, if not the best, during the past ten years.

"Since then, there has been no change of my continuity of efforts in maintaining an efficient performance; therefore, no change of my disagreement in regard to the same remarks under Section 2 of this report."

On 7 May 1965 the Applicant, who in the preceding years had made several attempts to be promoted or transferred to a professional post, addressed to the Director of Personnel a memorandum asking for "establishment of full

facts" regarding his "claim to promotion". He requested, in particular, that clarification of the following points be given:

"1. In section 2 of my 1961 and 1963 periods reports, the Second Reporting Officer checked the Statement under 'A' as 'A staff member who maintains a good standard of efficiency', and made a general statement under 'B' as '... He could be categorized as a square peg in a round hole ...' indicating a staff member who was completely unfit for the job. Are these statements contradicting themselves?

"2. According to Administrative Instruction ST/AI/115 of 11 April 1956, there should be an appraisal made by the Head of the Department to attach to the reports. In order to clear my records, numerous attempts were made to present my oral testimony before the Appointment and Promotion Committee, but in vain. Since there has been no such appraisal filed with the reports in question together with my statements, should these two reports be considered as complete and valid?

"..."

The Chief of Staff Services, Office of Personnel, replied in a memorandum of 28 May 1965 stating *inter alia*:

"Regarding your periodic reports of 1961 and 1963, I regret that the Director of Personnel has no authority to dictate the evaluation reflected in your reports or any comments regarding your suitability for the post. The comments made by you on the said periodic report did not amount to a rebuttal, and therefore the procedure laid down in Administrative Instruction ST/AI/115 was not followed."

Having requested on 3 June 1965 an appraisal of his periodic reports by the Director of General Services under Administrative Instruction ST/AI/115, the Applicant was informed by the Acting Director of General Services, on 7 June 1965, that after a full examination of all aspects of the matter the Acting Director had found no basis for further action to be taken with respect to the periodic reports. On 29 October 1965 the Applicant raised again the issue with the Director of General Services in a memorandum requesting *inter alia* that

"An appraisal be given on the Second Reporting Officer's comments in Section 2 of my 1961 and 1963 periodic reports which have detracted me from getting advancement ever since. These comments, I believe, were not only contradictory, but also contrary to the term 'Service and Conduct' provided by Rule 112.6."

On 4 November 1965 the Director of General Services replied that the question of reviewing the Applicant's periodic reports for 1961 and 1963 had been dealt with previously and that he did not intend to reopen the matter for the reasons given by the Chief of Staff Services in the above-mentioned memorandum of 28 May 1965. The Applicant pursued the matter by requesting, in a memorandum of 24 March 1967 addressed to the Director of Personnel, that "the unwarranted and incomplete comments in section 2 of my 1961 and 1963 periodic reports be deleted from my cumulative record". That request was denied by the Acting Director of Personnel on 26 May 1967 in a reply stating in part:

"The only basis on which I could agree to modifications in a staff member's official performance record would be a clear evidence of falsification or patent injustice. I do not find any indication of either of these in your 1961 and 1963 periodic reports and I am therefore not in a position to

agree to your request that certain comments in Section II of these periodic reports be deleted from your record.”

On 24 June 1967, the Applicant requested the Secretary-General to review the decision of the Acting Director of Personnel. On 6 July 1967, the Acting Director of Personnel replied on behalf of the Secretary-General that he did not “consider that any administrative decision for review” arose out of his “inability to expunge parts of a periodic report of many years back”. The Applicant having filed an appeal with the Joint Appeals Board, the Board submitted its report on 3 October 1967. The concluding section of the report read as follows:

“Conclusions and Recommendations

“39. Having ruled out the question of appellant’s promotion as an issue in appeal, the Board confined its consideration to the two specific complaints presented by the appellant. Its findings in respect of each of them are as follows:

“(i) On the question of the appellant’s periodic reports of 1961 and 1963, the Board does not regard it as being within its terms of reference to consider the substantive question whether the supervisor’s comments to which the appellant objected were warranted or not. It nevertheless finds that there is no indication that these comments were dictated by improper motives. The Board regrets that the procedure prescribed in Administrative Instruction ST/AI/115 had not in time been followed upon the submission by the appellant of written statements registering his disagreement with the periodic reports. The Board is, however, satisfied that the requirements of the Administrative Instruction were subsequently met by the memorandum of the Acting Director, Office of General Services, dated 7 June 1965. The Board believes that the matter has been settled after having the appraisal of the periodic reports by the Head of the Department recorded. In view of these findings and taking into account the history of the case, the Board unanimously recommends that no further action be taken with regard to the appellant’s periodic reports of 1961 and 1963.

“(ii) As regards the appellant’s complaint of allegedly unfounded criticisms made by his Department regarding his qualifications for promotion, the Board finds that his allegations present no justifiable question. For this reason, the Board unanimously decides to declare that part of the appeal frivolous.”

On 25 October 1967 the Director of Personnel informed the Applicant that the Secretary-General had accepted the Board’s recommendation and taken note of its declaration. On 30 April 1968, the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The question placed before the Joint Appeals Board involved a question of arbitrariness and capriciousness.

2. The comments in question neither enabled the essential appraisal of efficiency to be reached, nor afforded the staff member the opportunity of correcting any lack of efficiency.

3. The Board erred in considering that the comments in question were justified as reflecting the second reporting officer’s long-held belief in regard to the Applicant’s placement.

4. The comments in question were motivated by prejudice and other extraneous factors.

5. A reporting officer is not entitled to his opinion without being guided by the directives on completing periodic reports.

6. The Applicant was not told by the second reporting officer of the shortcoming reflected in his periodic reports for 1961 and 1963.

7. The Board did not interpret Administrative Instruction ST/AI/115 in a manner to give effect to its general purposes and objectives. The Director of General Services himself did not regard the memorandum of 7 June 1965 as having fulfilled the requirements of that Instruction.

Whereas the Respondent's principal contentions are:

1. The Applicant's complaint concerning criticisms presented to the Appointment and Promotion Committee and to the Director of Personnel having been found frivolous by the Joint Appeals Board is not receivable under article 7, paragraph 3 of the Statute of the Tribunal.

2. The decision of the Secretary-General concerning the 1961 and 1963 periodic reports of the Applicant did not contravene any of his contractual rights. This decision relates exclusively to internal administrative matters which fall within the competence of the Secretary-General who is not required, under the Staff Regulations and Rules, to adopt any particular procedure subsequent to the submission by a staff member of a rebuttal to statements in a periodic report, or to comply with a request for the deletion of statements from such report. Furthermore, the Applicant was provided with ample opportunity to establish the validity of his allegations and had recourse to the internal appeals procedure provided for under the Staff Regulations and Rules.

The Tribunal, having deliberated from 17 to 30 October 1968, now pronounces the following judgement:

I. The Applicant has submitted a request for oral proceedings to the Tribunal. The Tribunal rejects this request, considering that the circumstances of the case do not warrant such proceedings.

The Applicant requests, as a preliminary measure, that the Tribunal order the Respondent to produce the documents containing "the unfounded criticisms which were presented to the Appointment and Promotion Committee in 1965, and to the Director of Personnel on 25 February 1966 in connection with the 1965 and 1966 P-2 promotion registers".

The Tribunal notes that, in its report of 3 October 1967, the Joint Appeals Board unanimously decided that the Applicant's complaint of allegedly unfounded criticisms made by his Department regarding his qualifications for promotion was frivolous.

Article 7, paragraph 3, of the Statute of the Tribunal states: "In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous".

The Tribunal considers that since the Joint Appeals Board unanimously decided that the substantive question raised in this connexion by the Applicant was frivolous, it cannot order a preliminary measure which has the express aim of obtaining production of supporting documents intended to buttress the Applicant's

argument on the subject, when according to the Statute of the Tribunal this question is not within its jurisdiction.

II. In his second plea, the Applicant contests the decision taken by the Secretary-General on 25 October 1967 in accordance with the recommendation of the Joint Appeals Board of 3 October 1967. In that decision, the Secretary-General, to whom the Applicant had addressed a series of requests, had resolved to take no action on the comments, which the Applicant regarded as incomplete and unwarranted, made in the Applicant's 1961 and 1963 periodic reports and not to order the deletion from those periodic reports of the said comments.

The Tribunal points out that periodic reports on staff members presuppose an evaluation of the performance and competence of the persons concerned. This evaluation falls essentially within the exclusive competence of the superiors to whom this duty is assigned and the Tribunal obviously cannot revise it or substitute its own rating for the opinion given by the officers responsible for completing periodic reports.

This limitation of the Tribunal's competence (with regard to periodic reports on staff members) does not, however, mean that such reports may in no case be contested before it.

A periodic report may be contested before the Tribunal if it is established that the report was dictated by improper motives or misrepresents the facts on which it is supposed to be based.

The Tribunal notes that no facts were presented to it which would make it possible to assert that the comments made by the second reporting officer on the Applicant in the two periodic reports covering the periods 1959-1961 and 1961-1963 were dictated by improper motives or constitute a clear and obvious misrepresentation, even if the wording used, which is unusual in a periodic report, could explain the reaction of the staff member.

While it is true that the ratings of the first and second reporting officers are not consistent and that this inconsistency, which may appear strange, was neither explained nor justified in these two reports, it has nevertheless not been proved that this divergence, as regards the rating given by the second reporting officer, was based on improper motives or constituted a deliberate and undeniable departure from the truth.

In these circumstances and in the absence of evidence which would enable it to determine whether or not the rating given by the second reporting officer was warranted, the Tribunal can only consider the regularity, in respect of form, of the procedure followed when the Applicant contested the periodic reports.

The Tribunal notes that it is clear that the Applicant, who did not accept the comments made about him in the periodic reports, registered his disagreement and protested on several occasions. This was the attitude he adopted in the written statements which he made on 2 May 1961 and 9 April 1963 when he signed his periodic reports and more particularly in his memorandum to the Director of Personnel, of 7 May 1965, and in the request which he addressed to the Director of General Services on 3 June 1965.

These successive steps by the Applicant undoubtedly constitute a form of contestation of the comments in the periodic reports which he considered to be unfair and incomplete.

For this reason, at the outset, the procedure prescribed in Administrative Instruction ST/AI/115 of 11 April 1956 should have been observed; paragraph 13 of this Instruction reads as follows:

"If the staff member so desires, he may make a written statement in explanation or rebuttal of part or all of any report, which statement shall be joined to the report to which it refers. Where a staff member makes such a statement, the Head of the Department will investigate the case and will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement."

In this case, the Administration was negligent in not acting in conformity with these provisions from the outset since, as soon as there is a written statement in explanation or rebuttal of part or all of a report, it is necessary to apply the procedure prescribed in Administrative Instruction ST/AI/115.

Paragraph 13 quoted above does not specify the form of or the procedure for the investigation to be ordered by the Head of Department. It is therefore sufficient for the investigation to be made and for the Head of Department to record his appraisal in writing in order for the minimum requirements of the Administrative Instruction to be met.

For this reason, in the opinion of the Tribunal, the memorandum of 7 June 1965 in which the Acting Director of General Services replied to the Applicant's memorandum of 3 June in the following terms: "After a full examination of all aspects of the matter, I find no basis for further action to be taken with respect either to your periodic reports or to the recent designation of Acting Deputy Chiefs of the Security and Safety Section", constitutes an acceptable, although belated and extremely brief and succinct, form of compliance with Administrative Instruction ST/AI/115.

Consequently, there are also no grounds, from the formal standpoint, for admitting the Applicant's claim, since the Administration eventually acted, although belatedly and perhaps not in the most desirable manner, in accordance with the general rules applicable.

III. In paragraph 20 of his written observations filed on 20 August 1968, the Applicant requests compensation for the mental anguish which he sustained.

In his observations of 8 October 1968, he claims a sum of \$200, in compensation for the "mental anguish sustained" because of the "incomplete and damaging comments in his 1961 and 1963 periodic report".

The Tribunal sees no reason to award compensation to the Applicant for alleged moral anguish of which, moreover, no proof was adduced. In addition, the anguish was allegedly caused by comments made in the periodic reports, comments which must continue to appear in those reports, since the Tribunal has not granted the Applicant's request concerning them.

IV. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Suzanne BASTID
President

H. GROS ESPIELL
Member

L. IGNACIO-PINTO
Member

Jean HARDY
Executive Secretary

New York, 30 October 1968.