

throughout the year and not one made solely as of the beginning of the year. To disregard increases made during the year in the salary scale for the position from which the staff member was promoted would be inconsistent with the obvious purpose of the Staff Rule to ensure that the promotion should result in his receiving during the year compensation in the amount of one step in the new position's salary scale more than he would have received in the prior position during that year. The Respondent's interpretation would require a precise statement in the Staff Rule that all calculations are to be made only at the beginning of the year and without regard to subsequent developments in the year. In the absence of any such statement, increases during the year in the salary scale of either position must clearly be taken into account.

III. No retroactivity is involved since, as stated in paragraph II above, the calculation is to be made for the entire year taking into account any changes as from their effective date.

IV. As to the claim of administrative hardship, the Tribunal observes that the Respondent, when increasing salary scales in the General Service category, need only take into account the effect of the increase on the salaries of professional staff members promoted from the General Service category during the prior year.

V. For the above reasons the Tribunal:

(a) Rescinds the Respondent's decision of 28 July 1971 and orders the Respondent to recompute the Applicant's salary for the year 1 September 1969-1 September 1970 in accordance with Staff Rule 103.9 (i) as construed above by the Tribunal; and

(b) Fixes the amount of compensation to be paid to the Applicant, should the Respondent decide to exercise the option given him under article 9.1 of the Statute of the Tribunal, at a sum equal to the net amount of additional compensation the Applicant would have received if Staff Rule 103.9 (i) had been properly complied with in accordance with this judgement.

(Signatures)

Suzanne BASTID
Vice-President, presiding
Francis T. P. PLIMPTON
Vice-President

MUTUALE-TSHIKANTSHE Vincent
Member
Jean HARDY
Executive Secretary

Geneva, 20 April 1972

Judgement No. 157

(Original: English)

Case No. 156:
Nelson

Against: The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a permanent appointment, on the ground of unsatisfactory service.

Request for the rescission of the decision to terminate the appointment.—Contention that the real ground for termination was a suspicion of unauthorized outside employment

and that the Respondent substituted unsatisfactory services for the real ground in order to avoid the onus of disciplinary procedure.—Where there are several grounds available, the Administration may choose to rely on one or more of them.—The contention is rejected.—Contention that the termination was not preceded by a complete, fair and reasonable procedure.—Legal precedents established by the Tribunal in the matter of termination of permanent appointments.—It is necessary to consider whether the procedure followed for the termination of the Applicant's appointment was complete, fair and reasonable.—Rejection of the Respondent's claim that the investigation relating to a periodic report and the Applicant's rebuttal thereof constituted the necessary procedure.—Where the case is referred to the Appointment and Promotion Board, the five-year review constitutes such procedure.—Where the Staff Rules do not provide for reference to the Board, an equivalent procedure must be followed.—The requirement of a complete, fair and reasonable procedure will be adequately met if the action contemplated is subject to review by a joint body.—Rejection of the Respondent's argument that the rules in force did not allow for such a procedure in the present case.—Rejection of the Respondent's argument that the Joint Appeals Board is itself a joint body whose function it is to ensure that the decision is valid.—The Tribunal concludes that the termination of the Applicant was not preceded by a complete, fair and reasonable procedure.—The case is remanded for institution or correction of procedure.—The Applicant is awarded compensation equivalent to three months' net base salary for loss caused by the procedural delay.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francis T. P. Plimpton, Vice-President;

Whereas, on 7 January 1972, Charles R. Nelson, a former staff member of the United Nations, filed an application in which he requested the Tribunal to order:

“A. The preliminary payment to the Applicant of a sum in the amount of three months net base United Nations salary, as compensation for the loss caused by procedural delay, as recommended by the Joint Appeals Board;

“B. The additional payment to the Applicant of a sum in the amount of his net base United Nations salary from the date of termination to the date of the decision of the Administrative Tribunal, less the amount of the preliminary payment described above under A., as compensation for his loss of earnings and the impairment of his ability to apply for work in the field of public security, which is his profession, as a result of the application of improper procedures by the Respondent;

“C. The rescission of the administrative decision of 12 May 1970 to terminate the Applicant.”;

Whereas the Respondent filed his answer on 16 February 1972;

Whereas the Applicant filed written observations on 23 March 1972;

Whereas, on 19 April 1972, the Tribunal informed the parties, pursuant to article 18 of its Rules, that it was considering the possibility of remanding the case in accordance with article 9, paragraph 2, of its Statute, in order that the required procedure should be instituted or corrected;

Whereas, on 20 April 1972, the Respondent requested that the case be remanded in accordance with article 9, paragraph 2, of the Statute of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 19 May 1966 as a Security Officer under a fixed-term appointment of three months. This appointment was renewed on 19 August 1966 and converted to a probationary appointment on 19 November 1966. In the periodic report evaluating his services from 19 May 1966 to 1 May 1967, the Applicant was rated as "a staff member who maintains only a minimum standard". In the next periodic report, which covered the period from 1 May 1967 to 31 January 1968, he was rated as "a staff member who maintains a good standard of efficiency". On 1 May 1968 the Applicant was granted a permanent appointment. On 18 February 1970, in a memorandum addressed to the Executive Officer of the Office of General Services, the Chief of the Security and Safety Section referred to the Applicant's unauthorized employment by a private concern. In a third periodic report, which related to the period from 1 February 1968 to 1 February 1970, the Applicant was rated as "on the whole an unsatisfactory staff member". The Applicant having appended a statement of rebuttal to that periodic report, the Assistant Secretary-General for General Services instructed a panel of three senior officers of the Office of General Services to consider both the periodic report and the statement of rebuttal. The panel heard the Applicant and his supervisors and submitted a report on 20 March 1970. On 23 March 1970 the Officer-in-Charge of the Office of General Services filed a "note for the record" stating that as a result of his study of the case as well as on the basis of the advice he had received from the panel, he had concluded that there was no need to amend the entries in the periodic report. On 28 April 1970 the Chief of the Security and Safety Section addressed to the Executive Officer of the Office of General Services, with a copy to the Applicant, a special report in which he rated the Applicant as "an unsatisfactory staff member" and his overall performance as "below average"; in a covering memorandum to the Executive Officer, the Chief of the Security and Safety Section added that he could not recommend the Applicant for a within-grade salary increment. On 12 May 1970 the Applicant was notified that the Secretary-General had decided to terminate his permanent appointment on the ground of unsatisfactory service in accordance with Staff Regulation 9.1 (a). This decision was to have immediate effect and the Applicant was granted compensation in lieu of notice. On 27 May 1970 the Applicant requested the Secretary-General to review the decision to terminate his appointment. On 9 June 1970 he was informed that the Secretary-General saw no reason for changing the decision and on 20 August 1970 he lodged an appeal with the Joint Appeals Board. The Board submitted its report on 26 July 1971. The concluding section of the report read as follows:

"Conclusions and Recommendations

"28. The Board finds that the proper procedure was not followed in terminating the appellant's permanent appointment. It therefore recommends that his case be referred to a Working Group of the Appointment and Promotion Board for its recommendation with regard to the termination of the appellant's appointment.

"29. The Board also recommends that the Secretary-General consider the payment of an appropriate sum to the appellant as compensation for the loss caused by the procedural delay. It recommends that a sum equal to three months' net base salary be considered in this respect."

On 5 October 1971, the Director of Personnel informed the Applicant that the Secretary-General had reached the following decisions concerning the appeal:

...

“The Secretary-General has re-examined your case in the light of the report of the Board, including the conclusions and recommendations contained in paragraphs 28 and 29. He has taken the view that the procedure actually followed in arriving at the decision of termination in your case was fair and proper and provided adequate safeguard against any arbitrariness. There was neither a mandatory requirement under the Staff Rules and Regulations nor an equitable need to refer such a case to a Working Group of the Appointment and Promotion Board. Since it cannot be maintained that there was any procedural delay, the question of compensation does not arise. The Secretary-General has therefore decided to take no action on the recommendations of the Joint Appeals Board and to maintain the decision terminating your permanent appointment on the ground of unsatisfactory services under Regulation 9.1 (a).”

On 7 January 1972 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. It is evident from the events that prepared the termination that the real ground was never that of unsatisfactory service. The charge against the Applicant was the allegation of unauthorized outside activity.

2. Extraneous motives came into effect when the ground of unauthorized outside activity that was indicated by untested allegations was discarded but the allegations themselves were maintained.

3. A doubly improper procedure was applied:

(a) Disciplinary procedure was avoided although, as viewed by the Administration, the circumstances had indicated a disciplinary case;

(b) The substitution of grounds for termination under Staff Regulation 9.1 (a) for the grounds for disciplinary procedure vitiated the procedure of termination. The means of exposing this substitution were denied since, as confirmed by the Joint Appeals Board, the proper procedure was not followed: a Working Group of the Appointment and Promotion Board (a joint review body) did not review the Applicant's permanent appointment, and “the complete, fair and reasonable procedure which must be carried out prior to the termination of a permanent appointment” (Judgement No. 98) did not take place.

4. There were no proper grounds for termination since the termination was obtained by an arbitrary substitution of grounds for termination for the grounds of disciplinary procedure and was thus both procedurally and substantively vitiated. The substitution of grounds performed for anticipated results is unacceptable, and the termination itself is invalid.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment was properly grounded on his unsatisfactory services under Staff Regulation 9.1 (a) and was not a misuse of power. It is incumbent on the Secretary-General to terminate staff members regardless of the type of their appointment if their services are unsatisfactory, and whether a staff member's service is less than satisfactory is a question entirely within the Secretary-General's discretion and responsibility. A reasonable basis existed for his determination that the Applicant's services were unsatisfactory and no motive unrelated to the calibre of the Applicant's services has been affirmatively established.

2. The Applicant's procedural rights were observed by proper application of evaluation procedures. Disciplinary proceedings under Staff Rule 110.3 are no more prerequisite to terminations under Staff Regulation 9.1 (a) than to terminations under Staff Regulation 9.1 (c). As for a prior submission of the case to the Appointment and Promotion Board, it would have necessitated choosing as between keeping an unsatisfactory staff member in service for three more years, or, alternatively, disregarding the Staff Rule defining the Board's terms of reference. No procedure beyond compliance with fair evaluation procedures was prerequisite to the Secretary-General's power to terminate the Applicant for unsatisfactory services.

The Tribunal, having deliberated from 18 to 26 April 1972, now pronounces the following judgement:

I. The Applicant seeks rescission of the administrative decision notified to him on 12 May 1970 to terminate his permanent appointment for unsatisfactory services.

II. The Applicant's first contention is that the real ground for termination of his appointment was an unfounded suspicion of unauthorized outside employment, that the Respondent substituted unsatisfactory services for the real ground in order to avoid reference to the Joint Disciplinary Committee and the onus of proving the charge, and that the contested decision is therefore vitiated by extraneous motives.

III. The Tribunal notes that in a memorandum dated 18 February 1970 from the Chief of the Security and Safety Section to the Executive Officer of the Office of General Services recommending that "immediate steps be taken to terminate his [the Applicant's] contract", reference was made both to the Applicant's having an unauthorized second job with a private concern and to his irregularity in attendance. In a special report dated 28 April 1970, the Chief of the Security and Safety Section stated that the Applicant "must be classed as 'unreliable' " and rated him as "an unsatisfactory staff member".

IV. Although the Administration may not substitute one ground for another as a basis for administrative action, where there are several grounds available to it it is not obligatory on its part to rely on all such grounds; it may choose to rely on one or more of them. In the present case, the Administration could have relied on either of two grounds, namely, unsatisfactory services due to irregularity in attendance or unauthorized outside employment. The Tribunal is therefore unable to infer from the Respondent's reliance on unsatisfactory services instead of on unauthorized outside employment as a ground for termination that the action taken was vitiated by extraneous motives.

V. The Applicant's second contention is that a complete, fair and reasonable procedure had not been accorded to him prior to the termination of his appointment, and therefore that the contested decision is vitiated by procedural irregularity.

VI. The Respondent argues that the terms and conditions governing United Nations appointments do not provide for any specific procedure for terminating a permanent appointment on the ground of unsatisfactory services and that "beyond compliance with fair evaluation procedures" there was no prerequisite for termination of the Applicant's appointment.

VII. In Judgement No. 98 (*Gillman*), the Tribunal held in paragraph II that "having in mind the very substantial rights given by the General Assembly

to those individuals who hold permanent appointments in the United Nations Secretariat, the Tribunal has considered that such permanent appointments can be terminated only upon a decision which has been reached by means of a complete, fair and reasonable procedure which must be carried out prior to such decision”.

In Judgement No. 131 (*Restrepo*), the Tribunal held in paragraph VII that it “does not consider itself competent to rule on the question whether or not the Applicant’s services were satisfactory, since the Secretary-General’s appraisal in that respect is final . . . , but his decision must be reached by means of a complete, fair and reasonable procedure”.

VIII. Consequently, it is necessary to consider whether the procedure followed for the termination of the Applicant’s appointment was complete, fair and reasonable.

IX. The Respondent argues that the review, by a three-man panel set up by the Assistant Secretary-General for General Services, of the periodic report for the period from 1 February 1968 to 1 February 1970, and of the rebuttal made by the Applicant, constituted a complete, fair and reasonable procedure before termination of the Applicant’s appointment.

X. The Tribunal observes that the panel had only the limited scope of investigating the periodic report and the rebuttal under Administrative Instruction ST/AI/115 and did not consider the question as to whether or not the Applicant’s appointment should be terminated for unsatisfactory services. Neither in the composition of the panel, which consisted of three senior officers designated by the Respondent, nor in the procedure followed by it, nor in its terms of reference, did the panel provide the complete, fair and reasonable procedure contemplated by the Tribunal.

XI. In Judgement No. 98 (*Gillman*), rendered in a case of termination of the permanent appointment of a staff member for unsatisfactory services after a review by the Appointment and Promotion Board at the completion of five years of service, the Tribunal noted in paragraph III:

“The Staff Regulations and Rules do not specify the precise procedure to be followed in order to terminate a permanent appointment for unsatisfactory service. . . . In the light of the composition of the Working Group of the Appointment and Promotion Board and of the procedure followed by it in arriving at a recommendation, the review by that Group of the services of a staff member represents, in principle, the complete, fair and reasonable procedure which must be carried out prior to the termination of a permanent appointment.”

The Tribunal thus ruled that, where the case is referred to the Appointment and Promotion Board, a review by that Board or its subsidiary bodies constitutes the complete, fair and reasonable procedure. Where the Staff Rules do not provide for reference to the Appointment and Promotion Board, the Tribunal is of the opinion that an equivalent procedure must be followed prior to the decision to terminate a permanent appointment for unsatisfactory services.

The Tribunal endorses in this respect the reasoning of the Joint Appeals Board that “the Staff Rules, considered as a whole, would lack consistency if permanent appointments could be terminated on grounds of unsatisfactory services without prior reference to a joint review body, whereas probationary appointments

cannot” and that “the mandatory review of a [probationary] staff member’s record of performance by a joint review body prior to the termination of his appointment for unsatisfactory services applies by analogy to the holders of permanent appointments”.

XII. The Tribunal considers that the requirement of “a complete fair and reasonable procedure” will be adequately met if the action contemplated is subject to a fair review by a “joint body” with staff participation as already provided for in the Staff Regulations and Rules in other cases. Whether such a body should be newly constituted, or an existing body of such a character designated, to undertake the review in cases of proposed termination of permanent appointments not otherwise provided for in the Staff Regulations and Rules, is a matter for the Administration to decide.

XIII. The Respondent also argues that prior submission of the Applicant’s case to the Appointment and Promotion Board would have necessitated, either continuing an unsatisfactory staff member in service till his five-year review became due, or violation of the Staff Rules by asking the Appointment and Promotion Board to undertake a function not provided for in the Rules.

The Respondent’s argument has no force since the Tribunal does not rule that a review must necessarily be carried out by the Appointment and Promotion Board or its subsidiary bodies. What the Tribunal does rule is that a complete, fair and reasonable procedure to ensure the substantial rights granted to staff members with permanent appointments must be provided prior to the termination of such appointments, either by the Appointment and Promotion Board where the Staff Rules so provide or by a similar joint review body in the absence of such a provision.

XIV. The Respondent finally argues that the Joint Appeals Board is itself a joint body whose function it is to consider whether the contested decision is valid.

The Tribunal wishes to point out that due process requires that a complete, fair and reasonable procedure should be carried out prior to the decision to terminate a permanent appointment for unsatisfactory services, and not subsequently by an appellate body such as the Joint Appeals Board.

XV. For the foregoing reasons, the Tribunal concludes that the Applicant was not accorded a complete, fair and reasonable procedure prior to the termination of his appointment.

XVI. The Tribunal having taken action under article 18 of its Rules, the Respondent has requested that the case be remanded for institution or correction of procedure. The Tribunal therefore decides, without determining the merits, that the case be remanded for institution or correction of procedure in accordance with this judgement.

XVII. Under paragraph 2 of article 9 of the Statute of the Tribunal, should the Tribunal order the case remanded for institution or correction of procedure, it may order payment to the Applicant of compensation not to exceed the equivalent of three months’ net base salary for such loss as may have been caused by the procedural delay.

XVIII. The Tribunal, without deciding the merits of the case, orders:

1. That the case be remanded for institution or correction of the procedure required in accordance with the judgement;

2. That the Applicant be paid as compensation a sum equivalent to three months' net base salary for loss caused by the procedural delay.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice-President

Suzanne BASTID
Vice President

Jean HARDY
Executive Secretary

Geneva, 26 April 1972

Judgement No. 158

(Original: French)

Case No. 144:
Faala

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.—Request for the payment of subsistence allowances and for compensation for damages arising from the Applicant's placement on special leave.

Submission to the Tribunal of an application and a supplement thereto.—Decision of the Tribunal to issue one judgement, in view of the relationship between the two briefs.

Request for the production of three documents.—The first is annexed to the Respondent's answer.—The second is not relevant, with the exception of a few lines of which the text was given to the Applicant.—The Respondent's statement that the third is not in his files.

The Applicant's request for reinstatement through the extension of his last appointment.—Staff Rule 112.6 and Administrative Instruction ST/AI/115.—Commitment by the Respondent to try to find another assignment for the Applicant and implicit obligation to act in a correct manner and in good faith.—Gaps in the Applicant's file at the time the search for a new assignment was undertaken.—Consequently, the commitment undertaken by the Respondent was not correctly fulfilled.—Following the report of the Joint Appeals Board, the Respondent refused to undertake a search for an assignment in a more correct manner.—Conclusion that the obligation assumed by the Respondent has not been performed.—Action taken to complete the Applicant's file.—The Applicant's complaint that one of the periodic reports was prejudiced.—Consideration of that report.—Prejudice on the part of the first reporting officer against the Applicant.—The prejudice was in no way corrected by the second reporting officer.—The report is invalid and must be treated as such.—It is not possible to remedy the situation by rescinding the contested decision or by ordering performance of the obligation contracted.—Award to the Applicant of compensation, equal to six months' net base salary.

Request for compensation for damages arising from the Applicant's placement on special leave.—The Applicant raised no objection to the granting of special leave.—Wide discretion granted to the Respondent under regulation 5.2 of the Staff Regulations.—The request is rejected.