

Suzanne BASTID
Vice-President

Nicolas TESLENKO
Acting Executive Secretary

Herbert REIS
Member

New York, 28 September 1982

Judgement No. 293

(Original: English)

Case No. 275:
Nayyar

**Against: The Secretary-General
of the United Nations**

Request for rescission of a decision not to promote a staff member.

Flaw in the work of the Appointment and Promotion Panel inasmuch as it did not proceed in the required way in evaluating the merits of staff members.—Acceptance of the Panel's report by the Administration.—Responsibility of the Administration.—Impossibility of determining whether the Applicant would have been promoted if the Appointment and Promotion Panel had followed the established procedure.—Award of \$1,000 to the Applicant as compensation.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Arnold Kean;
Mr. Luis de Posadas Montero;

Whereas at the request of Om Parkash Nayyar, a local staff member of the Office of the United Nations Development Programme, hereinafter called UNDP, at New Delhi, India, the President of the Tribunal, with the agreement of the Respondent, extended successively to 19 November 1981, 18 December 1981 and 18 January 1982 the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 January 1982, the Applicant filed an application the pleas of which read

“RELIEF SOUGHT

“The Appellant requested the JAB (Joint Appeals Board) and respectfully requests the Tribunal:

“(1) To find that . . . the APP [Appointment and Promotion Panel] had:

“(a) failed to observe due process and principles of equity; and/or

“(b) failed to act in accordance with the Staff Rules and the Guidelines of

the APP; and/or

“(c) made substantial errors of fact and law; and/or

“(d) failed to make due or proper recommendation in good faith and with due consideration of the rights of the Appellant; which in fact and in law amounts to the failure to make a recommendation as required of it;

“(2) To find that in accepting and acting on the recommendation of the APP the Respondent failed to duly exercise the decision regarding the promotion of the Appellant;

“(3) To rescind the decision of the Respondent not to promote the Appellant communicated by a letter dated 31 March 1978 by the Director of the Division of Personnel.

“(4) To find further, that the written presentations, consisting of the basic documentation placed before the APP, necessarily required the APP to recommend his promotion. Any reasonable and impartial APP duly constituted and acting without prejudice, in accordance with due process, justice and equity in the proper performance of its duties, could only have acted accordingly.

“(5) Consequently to recommend the Respondent:

“(a) to reject the findings and recommendations of the APP, and

“(b) to effect the promotion of the Appellant to Level V with the effect from 1 January 1977; or alternatively

“(c) to compensate the Appellant for the loss of emoluments resulting from the failure to promote the Appellant from 1 January 1977; or

“(d) to grant such other relief that may seem appropriate.”

Whereas the Respondent filed his answer on 12 March 1982;

Whereas the Applicant filed written observations on 12 May 1982;

Whereas the Respondent submitted an additional written statement on 3 June 1982;

Whereas the President of the Tribunal decided not to grant the Applicant's request for oral proceedings;

Whereas Counsel for the Applicant submitted supplementary written observations on 16 September 1982;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Technical Assistance Board Office at New Delhi, India, on 30 April 1965 under a three-month appointment as a Junior Assistant-Typist at the ND-3 level. On 1 August 1965 he received a one-year fixed-term appointment which was converted into an indefinite appointment as a Typing Clerk on 1 August 1966. On 1 February 1969 he was promoted to the ND-4 level as a Secretarial Assistant and on 1 November 1972 he was granted a permanent appointment. On 11 March 1976, in a memorandum to Mr. H. Kaufman, Chairman of the Appointment and Promotion Panel, Mr. G. D. Merrem, Section Chief, recommended the Applicant's promotion to the ND-5 level on the ground that he had demonstrated capacity to take on more responsible work. On 31 March 1976 the Applicant's supervisor, Mr. V. Kolchin, Senior Industrial Development Field Adviser (SIDFA), endorsed that recommendation in a memorandum addressed to Mr. Kaufman. On 25 June 1976, the 1976 promotion list having been issued, the Applicant wrote to the Resident Representative a.i.—Mr. Kaufman—to express his

disappointment that his name did not figure on the list. On the same day the Applicant met with Mr. Kaufman and recorded the following note in the file:

“Discussed with Mr. Kaufman today. Mr. Kaufman assured me that I have a very good clean record but due to the absence of an additional vacancy to ND5 level in the budget, I could not be promoted this year. He further assured me that my case is on the border-line and I am definitely going to be promoted next year. He also further advised me that I should not go for any recourse appeal etc.”

On 31 March 1977 Messrs. Kolchin and Merrem sent to Mr. D. R. Malhotra, the new Chairman of the Appointment and Promotion Panel, a joint memorandum in which they reiterated their recommendation for the promotion of the Applicant. On 28 July 1977, in a letter addressed to the Resident Representative, the Applicant mentioned that he had received in the mail an anonymous “Special Bulletin extracts from the recommendations of the Appointment and Promotion Panel held from 13 to 15 April 1977” from which it appeared that his name was not included in the 1977 promotion list; the letter continued:

“Even before the receipt of the anonymous special bulletin I had feared that the present composition of the APP would not give me due justice. Having heard of no refutation from any member of the APP on the contents of the special bulletin my fear is now fully confirmed. I am prepared to substantiate my belief about the biased attitude of the present members of the APP with whom I had at one time or the other had misunderstandings due to my nature of being a frank, fearless and fair-minded person. While I can also substantiate the general nature of these peoples by quoting other instances, I prefer to keep this issue only confined to their attitude towards me.

“ . . . ”

On 2 August 1977 the Resident Representative replied:

“ . . . ”

“As the promotion list for 1977 has not yet been published due to unavoidable circumstances, I cannot take any action on your [letter]. If your name is not included in the promotion list when it is published, you may wish to use the recourse action which is open to all staff members according to rules.

“Finally I am sorry I cannot agree with your statement about ‘the biased attitude of the present members of the APP’. On my behalf I can assure you that no personal considerations will prevail when your candidature for promotion will be considered along with other eligible candidates.”

On 12 August 1977 the Chief of the Policies and Procedures Section of the UNDP Division of Personnel advised the Applicant that a staff member who believed that his case for promotion had not been duly recognized had the option of submitting a recourse under the terms of UNDP/ADM/PER/137—“Promotion Reviews for 1977”. On 23 August 1977 the Applicant sent the following letter to the Resident Representative:

“I have come to know that you have already announced promotions of the local staff vide your circular No. ADM/250/34 dated 22-8-77 and my name does not figure in the promotions announced this year also.

“In this connection, I would be very much grateful to you, Sir, if you would very kindly supply me the following information at your earliest convenience before

The above request is made by me in accordance with paras. 277 and 278 of UNDP Personnel Policies and Practices guidelines received by UNDP Administrator Mr. BRADFORD MORSE'S circular No. UNDP/ADM/HQTRS/296 - UNDP/ADM/FIELD/491 dated 23 March 1977.

“ . . . ”

On 30 August 1977, in a further letter to the Resident Representative copied to the Chief of the Policies and Procedures Section, the Applicant again asked for the reasons why he had not been considered for promotion. In a reply dated 9 September 1977 the Resident Representative stated that the documentation provided to the Appointment and Promotion Panel consisted of a list of all staff members time-wise qualifying for consideration for promotion, recommendations wherever received from the supervisors and the non-privileged personnel files for perusal. On 12 September 1977 the Chief of the Policies and Procedures Section, referring to the Applicant's letter of 30 August 1977, advised him that “we cannot intervene with the Appointment and Promotion Panel and ask them for the reasons for not recommending you for promotion, because the deliberations of *all* Appointment and Promotion Boards and Panels are strictly confidential”. The Deputy Resident Representative—Mr. Kaufman—having requested from the Chairman of the Appointment and Promotion Panel the details of the promotion review of the Applicant, received from the latter the following reply dated 10 October 1977:

“In response to your request for the details of considerations in respect of the promotion review of Mr. O. P. Nayyar, here are the views of the APP in this case:

“1. The APP noted with satisfaction his good performance in his present duties.

“2. The APP could not however be assured, beyond doubt, of his capabilities to shoulder higher responsibilities.

“3. It was the APP's view on the basis of individual knowledge of him that he seriously lacked essential qualities which would enable him to cultivate good relations with his colleagues. On a further in-depth evaluation of his performance reports, the APP came to the conclusion that they could not concur with the outstanding report given to him.

“4. In view of the above consideration and the availability of a limited number of posts, it was the unanimous view of the APP that Mr. Nayyar did not merit promotion this year in comparison with his other two colleagues who were recommended.”

On the same day Mr. Kaufman conveyed Mr. Malhotra's reply to the Applicant. On 12 October 1977 the Applicant filed with the Secretary of the Appointment and Promotion Panel a letter requesting reconsideration of his promotion in accordance with the recourse procedure set out in UNDP/ADM/PER/137; the letter provided additional information to the Panel and continued:

“2. At the time of APP meeting, it can be safely assumed that the Administration did not make it known to the APP that the post of SIDFA's Secretary is

