



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1306

Case No. 1390

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Kevin Haugh;

Whereas, on 27 September and 29 December 2004, a former staff member of the United Nations filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed an Application, which was received by the Tribunal on 7 February 2005, containing pleas which read as follows:

**“II. Pleas**

...

7. On the merits, the Applicant respectfully requests the Tribunal to find:

(a) the Administration’s reason for not renewing the Applicant’s contract is defective. ...;

(b) that the Administrative Tribunal agrees with the [Joint Appeals Board's (JAB's)] unanimous recommendation. The Respondent's continued insistence that the Applicant should have reported the arrest on his P.11 personal history form when applying for employment with the Organization is legally wrong;

(c) as the Administration did not cite staff rule 104.12 (b) as the reason for the non-renewal of the Applicant's contract but gave another cause, it is barred from the retroactive application of this staff rule;

(d) that the Application is well founded and order the rescinding of the contested decision and award compensatory damages for the injury incurred resulting from the period of unemployment; and,

(e) should the Respondent decide to compensate the Applicant instead of reinstating him the Applicant respectfully prays the Tribunal, considering the more than 12 years of satisfactory service, to grant an award equal or greater than the full termination indemnity contained in Annex III of the Staff Regulations."

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 2005 and twice thereafter until 31 August;

Whereas the Respondent filed his Answer on 31 August 2005;

Whereas the Applicant filed Written Observations on 26 September 2005;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

***“Employment History***

... The [Applicant] joined the Organization on 5 September 1989 on a short-term appointment as a Security Officer at the S-1 level in the Security and Safety Service [(SSS)]... in New York. The [Applicant] subsequently served under a series of fixed-term appointments ... and was promoted to the S-3 level. ... Effective 1 January 2001, [his] contract was extended through 31 December ...

***Summary of the facts***

... On 17 October 1988, the [Applicant] completed a P.11 personal history form when applying for a Security Officer post at United Nations Headquarters. To the question in paragraph 32 of the form 'Have you ever been arrested, indicted, or summoned into court as a defendant in a criminal proceeding, or convicted, fined or imprisoned for the violation of any law (excluding minor traffic violations)?' the [Applicant] checked the 'No' answer. In paragraph 33, [he] certified his statements to be true and correct to the best of his knowledge and belief and that any

misrepresentation or material omission would render him liable to termination or dismissal.

... In August 2001, it came to the attention of the Chief[, SSS,] that the [Applicant] had completed a Pistol License application form with the New York City Police Department in which he stated that he had been arrested for robbery on 13 October 1983. On 24 August ..., the Chief[, SSS,] wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), inquiring whether the [Applicant] had disclosed his arrest on 13 October 1983 on his P.11 form. It was found that he had not disclosed this information.

... On 17 September 2001, ... OHRM informed the [Applicant] that the Assistant Secretary-General[, OHRM] had received a memorandum from the Chief[, SSS,] which indicated that, prior to the [Applicant's] employment with the United Nations, he had been arrested on 13 October 1983 and charged with robbery.

... On 19 September 2001, [the Applicant was asked] to provide his comments on the subject ... no later than 3 October ...

... On 24 October 2001, the Assistant Secretary-General[, OHRM,] informed the [Applicant] that in view of the fact that ... no response had been received from him by 3 October ...,

'we must assume that the situation as described in the memorandum of 19 September ... is factual. In view of these facts having come to light, I am hereby notifying you that the Organization will not be in a position to renew your fixed-term appointment upon its expiration on 31 December ...'

On 19 December 2001, the Applicant requested the Secretary-General to review the administrative decision not to renew his contract, on the grounds that the charges against him as a Youthful Offender had been dismissed and that he had been informed by his attorney at the time that his record would be expunged and that he would never need to disclose his arrest.

Also on 19 December 2001, the Applicant submitted an appeal to the JAB in New York requesting suspension of the administrative action not to renew his contract. On 27 December, a summary hearing was held on the Applicant's request for suspension of action and, on 31 December, the JAB produced its report. It noted that the decision of the Secretary-General had yet to be implemented and recommended that the request for suspension of action be approved. The same day, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had not accepted the JAB's recommendation.

On 5 February 2002, the Criminal Court of New York provided the Applicant with a Certificate of Disposition which stated that, further to a disposition dated 28 March 1984, in regards to the offence in question, the Applicant had "sealed 720 Youthful Offender Status".

On 18 February, a private attorney provided the Applicant with a written opinion indicating that, pursuant to Section 720.35 of the New York Criminal Procedure Law, the sealed file could not be made available to any person or public or private agency. He advised that,

“under subsection 1 of the law, ... Youthful Offender Status is an adjudication, not a conviction. So, if a person, having been adjudicated a Youthful Offender, told a prospective employer or a Court, under oath, that he had not been convicted of a crime, he would be telling the truth.”

On 19 February 2002, the Applicant lodged an appeal on the merits of his case with the JAB. The JAB adopted its report on 19 May 2004. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

22. The Panel considered first whether the Appellant had any legal obligation under oath to provide any prospective employer about his arrest of 13 October 1983 as a Youthful Offender. The Panel concurred with both the Appellant’s Court-appointed lawyer at the time of his arrest and, subsequently, the Marine Corps Recruiting Officer who advised the Appellant that because the charges against him had been dismissed and his case had been sealed by the Court under a Youthful Offender Status, he would not be committing perjury if he did not disclose under oath his prior arrest. The Panel agreed that the Appellant had no legal obligation under oath, whether nationally or internationally, to disclose to any prospective employer his prior arrest as a Youthful Offender. Besides, pursuant to New York Criminal Procedure Law, Section 720.35, Sub-Section 1, the Youthful Offender Status is an adjudication not a conviction. The charges against the Appellant having been dismissed and sealed by a Court, his record would be *ipso facto* expunged.

23. The Panel observed further that, as pointed out by the Appellant’s Attorney ...on 18 February 2002, ‘the Appellant’s sealed file could not be made available to any person or public or private agency’. Anyone who would unseal the file by disclosing the Youthful Offender arrest, would have broken the law.

24. It was noted, however, that when the Appellant was given the opportunity on 19 November 2001 ... to provide ... his comments on his lack of disclosure of his prior arrest ..., he should have forthrightly stated his case as he knew it rather than procrastinate until December 2001. ...

25. The Panel found that the Respondent’s decision not to renew the Appellant’s fixed-term appointment was the result of too harsh an interpretation of staff regulation 9.1 and staff rule 104.4 (e) regarding the Appellant’s lack of disclosure of a prior arrest. In the view of the Panel, the Respondent had not taken into account the fact that the Appellant was at the time of the incident recognized by a Court as a Youthful Offender whose charges were dismissed and whose case was sealed by the Court. ... The Panel agreed that in the case under consideration, the Administration gave a reason (lack of disclosure of a prior arrest) [for the non-renewal of the Applicant’s contract] which the

Panel found not to be legally sound as it related to a Youthful Offender who had been cleared of all charges and whose case had been sealed by the Court.

...

***Conclusions and recommendation***

27. In light of the foregoing, the Panel *unanimously* agreed that as a Youthful Offender who was cleared of all charges and whose case was sealed by the Court, the Appellant was under no legal obligation under oath to disclose to any prospective employer, whether nationally or internationally, his arrest of 13 October 1983. The Panel recommended *unanimously* to the Secretary-General that the Appellant be re-employed by the Organization within the next three months in an appropriate position commensurate with his experience and record of service.”

On 28 December 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

“[t]he Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. He does not share the JAB’s conclusion that the reason for the contested decision was not ‘legally sound.’ Even if, pursuant to your status as a ‘Youthful Offender,’ you could technically or truthfully assert that you had not been convicted of a crime, the [United Nations] personal history form requested information not only about convictions but also about arrests and summons into court as a defendant in a criminal proceeding. Although adjudication as youthful offender does not equate conviction, it nevertheless does not absolve you from the responsibility of reporting that you had been arrested as a youth, albeit not convicted. Therefore, since your response on the [United Nations] form was not substantially or entirely true, the reason for the contested decision was well-founded. Consequently, the Secretary-General cannot accept the JAB’s recommendation that you should be re-employed, especially considering that you had been denied a pistol licence by the New York Police authorities – a prerequisite for employment as a Security Officer in the [United Nations]. In light of the above considerations, the Secretary-General has decided to maintain the contested decision and take no further action on your case.”

On 7 February 2005, the Tribunal received the Applicant’s above-referenced Application.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s juvenile record having been sealed, he was under no obligation to disclose his arrest and adjudication.
2. The Respondent’s decision not to renew the Applicant’s contract was legally flawed and should be rescinded.
3. The Applicant is entitled to compensation.

Whereas the Respondent's principal contentions are:

1. The Applicant's failure to honestly disclose the facts and circumstances concerning his 1983 arrest on his personal history form was inconsistent with the standards of conduct expected of a United Nations' staff member.
2. The Respondent's decision not to renew the Applicant's fixed-term appointment was a proper exercise of his discretion.

The Tribunal, having deliberated from 3 to 28 July 2006, now pronounces the following Judgement:

I. The Applicant seeks review of the Administration's decision not to renew his contract as a result of his failure to disclose a prior arrest on his P.11 personal history form.

II. The Applicant, at the time of the contested decision, was a Security Officer at Headquarters in New York, serving at the S-3 level. Prior to joining the Organization, he was a United States Marine. During his approximate 12 years with the United Nations, he had served the Organization admirably, including on field missions in Somalia, Angola and Bosnia. At no time during his tenure with the Organization was the Applicant's performance deemed unsatisfactory.

III. According to the Applicant, he was arrested as a teenager in 1983, after having stolen, along with other boys, the sum of US\$ 8 from another youth. He was arrested, placed in detention for a day and then released. Pursuant to New York's Youthful Offender statute, the District Attorney dropped the charge against the Applicant, and his case was sealed by the court. Also according to the Applicant, he believed at the time of the adjudication of Youthful Offender status that the case had been expunged and, as he was advised by his attorney, he would not have to disclose the arrest to anyone; specifically, he would not have to disclose the arrest to any prospective employer. Subsequently, the Applicant asserts, when he joined the Marines, his recruiter also advised him that he need not disclose to anyone, including the United States military, that he had been arrested, as the matter had been sealed by the courts.

IV. In 1988, when he applied for a position with the Organization, the Applicant filled out the standard P.11 form. Question 32 of that form requires that the person completing the form indicate "Yes" or "No" to the following question: "Have you ever been arrested, indicted, or

summoned into court as a defendant in a criminal proceeding, or convicted, fined or imprisoned for the violation of any law (excluding minor traffic violations)?”. Immediately following, Question 33 asks the person to certify that the answers he gave on the P.11 form were “true, complete and correct to the best of [his] knowledge and belief”. In response to Question 32, the Applicant indicated “No”; he then signed the certification in Question 33. According to the Applicant, he indicated “No” in response to Question 32, because, as he understood it, his record was expunged by virtue of the Youthful Offender designation he had received, and he was not required to disclose the arrest.

V. On 21 September 2000, in order to comply with the Organization’s requirement that Security Officers be licensed to carry a firearm in the course of their duties, the Applicant applied for a New York City firearm license. On that application, he indicated his 1983 arrest. As a result, as the Respondent asserts, the Applicant was denied the license. In accordance with established procedures, the License Division of the New York City Police communicated a Notice of Disapproval to the United Nations Security and Safety Service Gun Custodian, which Notice indicated the Applicant’s prior arrest as the stated reason for the rejection of his license.

On 19 September 2001, the Administration informed the Applicant in writing of its knowledge of his prior arrest and his failure to disclose the arrest on his personal history form and asked him to comment on the matter. The Applicant, however, failed to respond to the Administration by its stated deadline of 3 October. As a result, the Administration notified him that “in light of his failure to explain why he did not honestly disclose his 1983 arrest for robbery when completing his personal history form”, OHRM had to assume that the facts of the matter were as set forth in the 19 September memorandum. He was advised that, in consequence, “the Organization [would] not be in a position to renew [his] fixed term appointment upon its expiration on 31 December 2001”.

#### VI. The Tribunal

“begins by recalling that it is true that a staff member who holds a fixed-term contract is not, in general, entitled to expect an extension; this is clear from staff rule 104.12 (b). The Administration has the discretionary authority not to renew or extend the contract and does not need to justify such decision. In that case, the contract expires automatically and without prior notice in accordance with staff rule 109.7 (see Judgements No. 440, *Shankar* (1989); No. 496, *M.B.* (1990); No. 1003, *Shasha’a* (2001); and, No. 1052, *Bonder* (2002)). However, as indicated in *Shasha’a* (*ibid.*)

‘when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is

examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence.” (Judgement No. 1135, *Sirois* (2003).)

This is not to say, however, that the provision of a false reason as justification for the non-renewal of a fixed-term contract might, by itself, require that the Applicant be treated as if he had been wrongly denied expectancy of renewal. As we have previously held in Judgement No. 1238 (2005),

“[s]uch an interpretation or understanding would not be justified. Where there is no right, the giving of a wrong reason cannot create such a right nor place an Applicant in a position where he should be treated as if he had enjoyed such a right. Such reasoning would be illogical. However, nothing contained in this present Judgement should be construed as implying that the Administration is automatically immune from the imposition of financial or other consequences where it should seek to explain or justify its decision by proffering a false or disingenuous reason. The giving of a false or invalid reason for a discretionary decision is, in itself, maladministration which may breach a staff member’s right to be treated fairly, honestly and honourably. A breach of such a staff member’s right may entitle the staff member to compensation for that very wrong, rather than on the basis that the giving of a false reason is evidence in itself that, had it not been given, the staff member would have enjoyed an extension of contract or some other benefit that was ‘lost’ because of the falsity of the reason proffered.”

In the instant matter, the reason stated at the time of the non-renewal by the Assistant Secretary-General, OHRM, in her letter dated 24 October 2001 was the Applicant’s failure to disclose his prior arrest on his P.11 form and his subsequent certification that the answer regarding the arrest was “true, complete and correct to the best of [his] knowledge and belief”, which the Administration construed as evidence of his dishonesty or fraud:

“[a]s indicated in [the Administration’s memorandum of 19 September 2001], ... information relating to an incident which took place in 1983 appears to have been withheld from your P.11 personal history form at the time of your application for employment with the Organization. You will recall that [you were] requested ... to provide your comments relating to this matter no later than 3 October 2001.

As no response has been received from you, we must assume that the situation as described in [the memorandum of 19 September] is factual.

In view of these facts having come to light, I am hereby notifying you that the Organization will not be in a position to renew your fixed-term appointment upon its expiration on 31 December 2001.”



Thus, it is clear that the Administration believed that the Applicant acted dishonestly when filling out his personal history form, by misrepresenting the status of his prior arrest, and that this was the reason for the non-renewal of his contract. Although the Respondent subsequently asserted an additional reason for non-renewal, that is, that the Applicant was not able to satisfy the Organization's requirement that all Security Officers be licensed to carry firearms, this latter reason was only provided as an after-thought, following the report of the JAB, in justification of the Respondent's decision. It is clear to the Tribunal, however, from the evidence proffered that the alleged dishonesty of the Applicant was the reason for the decision not to renew his contract, and this fact is specifically acknowledged by the Respondent in his Answer in these proceedings. In this regard, the Tribunal notes that had the Respondent decided not to renew his contract because the Applicant could not obtain a firearms license, such a decision would have been within his discretion. However, the Tribunal finds that the reason for the non-renewal had nothing to do with the firearms requirement and everything to do with the Applicant's alleged dishonesty.

VII. While the Tribunal is mindful of the Administration's concerns in appointing staff members of integrity and suitability for service, as well as the requirements of staff rule 104.4 and the obligations it places upon staff members both upon appointment and thereafter to supply such information as is required by the Secretary-General, given the unusual circumstances of this case, however, the Tribunal finds the facts do not justify the Administration's imputation of dishonesty to the Applicant and the attendant decision not to renew his contract. While it is true that the Applicant was arrested and knew that he was arrested, he believed, "to the best of his knowledge and belief" that for purposes of his application with the United Nations (as well as any other application for employment), it was as if that arrest had not occurred. Believing it so, he answered "No" to Question 32. The Tribunal recalls, in contrast, Judgement No. 306, *Gukuu* (1983), in which it found that a staff member's negative response to Question 32 "was both false and deliberate". The circumstances of that case were quite different from the instant matter, and the Tribunal was satisfied that the Applicant in *Gukuu* knowingly provided false information on his personal history form.

The Tribunal notes that in some jurisdictions, an arrest such as the one in question would indeed have been expunged, so that legally a staff member would not be required to disclose it; it would be as if the arrest never occurred. In the instant case, however, the Tribunal need not address whether the Applicant was legally correct in not disclosing his arrest. Rather, the Tribunal finds that the Applicant's belief that he did not need to divulge his arrest, even if he

was mistaken about it, was a genuinely held belief that was neither unreasonable nor dishonest given the very specific circumstances of this case. The Tribunal, in reaching its conclusion, is persuaded, not only by the limited, actual legal knowledge possessed by the Applicant, a Security Officer, but also by the circumstances of the arrest. The Tribunal finds it not unreasonable for the Applicant to have believed that the record was expunged, given his youth at the time of arrest and the fact that the Youthful Offender statute itself, as conveyed to him by his attorney at the time, specifically provided for the sealing and non-disclosure of the record. In addition, the Applicant made reasonable efforts to confirm his knowledge and belief that he did not need to disclose this information, when he raised the issue with his military recruiter. It is not hard to see how one would imagine that, if the United States Marine Corps did not require him to disclose this information, he did not need to disclose it to anyone else. To find the Applicant liable for dishonesty under circumstances such as these is unwarranted and inappropriate.

Thus, having found the reason offered for the impugned decision not to renew the Applicant's contract to be inconsistent with the evidence, in accordance with *Shasha'a*, the Tribunal concludes that it amounted to maladministration on the part of the Organization, for which the Applicant is entitled to be compensated.

VIII. The Tribunal takes this opportunity to point out that the issue raised herein might have been avoided if the language of Question 32 were different. It may well be considered inappropriate to ask if a person has ever been arrested, as a mere arrest should carry no implication of guilt. The Tribunal notes that often false arrests are the result of, for example, misrepresentation or mistake on the part of the accuser or the arresting party(ies). This is particularly true in cases involving profiling by arresting authorities. The same holds true of the question whether a potential staff member has ever been "summoned into court as a defendant in a criminal proceeding". To suggest otherwise would obviate the need for judicial process; the very question amounts to a dilution of the presumption of innocence. See Judgement No. 951, *Al-Khatib* (2000) (the Tribunal condemned the Respondent for terminating a staff member's employment just because the staff member had been put on trial for an offence, notwithstanding that the staff member had been acquitted).

In addition, Question 32 could direct a potential staff member to answer the question in the negative, if the relevant offence involved a minor traffic violation or any matter which was adjudicated or expunged pursuant to a Youthful Offender statute or other similar accelerated rehabilitation statute. As noted in paragraph VII above, in some jurisdictions, legally, it is as if

the arrest never happened, and the arrestee would be under no obligation to report it. Rephrasing the question might clarify a current grey area whilst addressing the legitimate concerns of the Administration in recruiting employees with the highest standards of integrity.

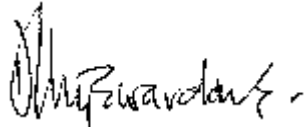
IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of three months' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;
2. Orders the Respondent to place a copy of this Judgement in the Applicant's Official Status file; and,
3. Rejects all other pleas.

*(Signatures)*



Jacqueline R. **Scott**  
First Vice-President, presiding

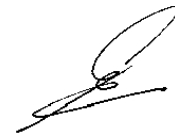


Dayendra Sena **Wijewardane**  
Second Vice-President



Kevin **Haugh**  
Member

Geneva, 28 July 2006

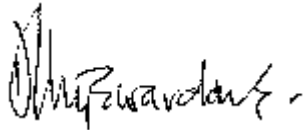


Maritza **Struyvenberg**  
Executive Secretary

**DISCLAIMER BY DAYENDRA SENA WIJEWARDANE AND KEVIN HAUGH**

We are of the view that the references in paragraphs VII and VIII to the effect of an “expunged” arrest under a Youthful Offender statute are not material to the conclusion in this case. The issue is whether the Applicant had acted dishonestly and we are satisfied with the Tribunal’s conclusion that he did not. We do not, however, agree with the content of the Judgement insofar as it deals with the effects or consequences of expunged proceedings, albeit that this part of the Judgement is merely *obiter*.

(Signatures)



Dayendra Sena **Wijewardane**  
Second Vice-President



Kevin **Haugh**  
Member

Geneva, 28 July 2006



Maritza **Struyvenberg**  
Executive Secretary