United Nations AT/DEC/1319

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1319

Cases No. 1382
No. 1406

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 11, 14 and 29 November 2003 and on 29 January, 27 February, 21 March and 4 and 5 April 2004, a former staff member of the United Nations, filed applications that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal extended to 31 July 2004 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 June 2004 and on 21 January 2005, the Applicant filed applications that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 2005, the Applicant, after making the necessary corrections, again filed an Application, the "first case", requesting the Tribunal, inter alia, to:

> "2. Request and provide to [the] Applicant [the] requested documents;
>
> 3. Grant two years' compensation for the delay in resolution of these issues related to the [Joint Appeals Board (JAB)] Panel's recommendations, not based in policy, documentation, jurisprudence or interpretation."

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 case until 21 October 2005;

Whereas the Respondent filed his Answer on 21 October 2005;

Whereas the Applicant filed Written Observations on 10 January 2006;

Whereas, on 16 November 2004, the Applicant filed another application, the "second case", requesting the Tribunal, inter alia, to:

> "…
>
> - find that the JAB did not enjoy the authority to ignore, modify or refuse to consider the pleas of the Applicant, especially since these issues were central to a finding of prejudice, harassment and discrimination, retribution and retaliation.
>
> - [find] that the timing and content of these issues in concert with the actions taken against other colleagues establish a clear pattern of prejudice, harassment, discrimination, retribution and retaliation against the Applicant.
>
> - [order the production of documents.]
>
> - find that the 'Note for the File' was much more an instrument for prejudice, harassment, discrimination, for retribution and retaliation than it was based in fact and in conformity with policy and that the 'Note' should be removed from the Applicant's Official Status and working files.
>
> - find that the Applicant is to be compensated in the amount of two years' net income."

Whereas, on 15 February 2005, the Applicant submitted an addendum to the Application, submitting additional pleas:

> "[T]he Tribunal is respectfully requested to ... to add the following:
>
> The United Nations Administrative Tribunal is respectfully requested to:
>
> a) [find] that the Departmental Recommendations related to [the Applicant's] applications for posts 99-66-[United Nations Security and Safety Service (now Section) (UNSSS)], 00-16-UNSSS and 00-32UNSSS, consistently denied the Departmental Review Panel information, or gave the wrong information related to the candidacy of [the Applicant] so as to mislead the Panel in order to achieve the desired discrimination against [him] and favouritism toward others;
>
> b) [find] that ... the departmental recommendations and content analysis thereof establish the context and fact of prejudice, harassment and discrimination against [the Applicant] and, in addition, the extensive abuse and misuse of Organization policies, the Applicant and the Departmental Review Panel itself;
>
> c) [find] that the Chief, [Human Resources Management Service (HRMS)] and the Director/[Department of Administration and Conference Services (DACS)] took no steps to rectify the situation ...;
>
> d) [find] that the Chair, [Appointment and Promotion Board (APB)], stated that HRMS informed him that no minutes or meeting notes were taken by the [Appointment and Promotion Panel (APP) in those] cases, and that, in view of the existence of these minutes which make statements to the advantage of the Applicant and to the disadvantage of the Chief, UNSSS, HRMS, thereby misinformed the Chair, APB;
>
> e) [direct] the Secretary-General to undertake an external, truly independent investigation of the extensive, pervasive and systematic breaches and abuses of Organizations' policies and breaches of the basic duties, obligations and responsibilities of staff members.

In addition, the Tribunal is respectfully requested to:

> f) secure copies of the confidential Report of the Departmental Advisory Panel, Vacancy Announcement No. 99-66-UNSSS as well as others related to the posts for which [the Applicant] applied.
>
> g) secure copies of another confidential note by the Departmental Advisory Panel of 25 August 2000, Vacancy Announcement 00-32-UNSSS, as well as others related to the posts for which [the Applicant] applied.
>
> h) secure copies of departmental recommendations for vacancy announcement 99-12-UNSSS of 19 May 1999."

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 once thereafter to 30 June;

Whereas the Respondent filed his Answer on 30 June 2005;

Whereas the Applicant filed Written Observations on 9 September 2005;

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

Whereas, on 7 June 2007, the Applicant filed an additional plea in both cases, as follows: "Should ... the ... cases … be found to be receivable, this is to formally request, as a plea, that the Tribunal proceed to a consideration of the merits of the [cases] as in [Judgement No. 1157, *Andronov* (2003)], rather than remanding them to the [United Nations Office in Vienna (UNOV)/JAB]";

Whereas the statement of facts in both cases, including the employment record, contained in the report of the JAB (Report 1) reads, in part, as follows:

> "[**Employment history**]
>
> … [The Applicant] joined the [UNSSS/UNOV], on 18 November 1985 as Security Officer (G-3) initially on a short-term appointment through 17 February 1986. On 18 May 1986, his short-term appointment was converted to a fixed-term appointment and, effective 18 May 1991, to a probationary appointment.
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> …
>
> … According to all available official performance records, [the Applicant's services were consistently satisfactory]. … In 2000 and 2001, the [Applicant] made a rebuttal against his Performance Appraisal [(PAS)] in which his performance had been rated as 4 ('Partially Meets Performance Expectations'). Both rebuttals were successful and his rating was upgraded to 3, i.e. 'Fully Meets Performance Expectations' ...
>
> … At the end of July 2002 the [Applicant] had been on extended sick leave for almost 5 months. …
>
> … On 13 March 2003, the [Applicant] exhausted all his entitlement to paid sick leave and annual leave. Therefore, effective 14 March …, the Respondent placed him on Special Leave with Half Pay as per … administrative instruction ST/AI/1999/16, [dated 28 December 1999,] pending the review of the [Applicant]'s case … for a disability benefit.

…

... Effective … 1 October 2003, the Applicant was promoted to the G-4 level, following reclassification of post level.

… … Effective 12 February 2004, the Applicant was separated from service for health reasons, and was awarded a disability benefit ...

[**Summary of the facts**]

… On 10 June 2001, [the Applicant's Counsel] (...), wrote to then Under-Secretary-General for Management ... on behalf of [the Applicant and the Applicants in Judgements No. 1329 and No. 1330, rendered at this session, hereinafter referred to as Mr. D. and Mr. M., respectively], ... requesting administrative review of[, inter alia, the Respondent's failure to transmit the Report of the UNOV Panel on Discrimination of 2 June 2000 to the Director General, UNOV, and the Assistant Secretary-General [for] ... Human Resources Management, enabling the continued, on-going, documented manifestations of prejudice, discrimination, mismanagement and misconduct towards staff; failure to take appropriate steps about breaches of policy; and, failure to grant them access to documents that could have contained other breaches of policy].

… On 4 September 2001, [the Applicant] submitted an appeal [to the JAB in Vienna]. ... [On 8 September 2001, Mr. D. and Mr. M. also submitted appeals, and subsequently, Counsel requested that all three cases be joined because of identical or almost identical issues, common breaches of policy and common personalities] …

On 10 September 2001, [the Applicant] submitted a 'Request for Administrative Review of the "Note for the File of 23 August 2001"'. …

…

… On 28 December 2001, [the Applicant] filed a request for review 'of the administrative decisions taken to the detriment of [the Applicant] and [Mr. M.] contained in the memos from [a senior investigator], Office of Internal Oversight Services (OIOS), to ... Counsel, of 12 and 26 November ...' … On 10 May 2002, Counsel submitted, via e-mail, three identical Appeals on behalf of [the Applicant, Mr. D. and Mr. M.] contesting the [alleged failure by OIOS to re-open the 'UNSSS case', and to offer them 'whistleblower' protection.]

…

… On 15 March 2002, Counsel sent by e-mail, a request for administrative review of 'the preparation of [the Applicant]'s PAS for 2001' ... [and, on 15 May 2002, submitted an appeal on behalf of the Applicant regarding] 'the … administrative decisions … related to those antecedent to, and as contained in the PAS, 2001'...

… On 16 July 2002, ... the Presiding Officer [of the JAB] ... requested a change of venue to the New York [JAB, which request was denied on]. 20 September …"

The JAB in Vienna met in February 2003 and considered the preliminary issues, including the issue of receivability, arising in the eleven appeals filed by the Applicant, Mr. D. and Mr. M.. During the proceedings, the JAB raised a number of concerns in regard to procedural shortcomings in the appeals. In particular, the JAB found that Counsel had breached the Rules of Conduct of the Panel of Counsel, as adopted in New York on 28 June 1985, which state that "[a Counsel] shall in all situations and circumstances of a case, refrain from unsubstantiated or

irrelevant allegations of bad faith or other impropriety" in respect of his clients and the Organization. The JAB adopted JAB Report 1 in the "first case" on 29 July 2003. Its conclusions and recommendations read, in part, as follows:

> "CONCLUSIONS AND RECOMENDATIONS
>
> 128. The Panel noted that, had it elected to take a strict view, most of the 11 appeals could have been found irreceivable on procedural grounds alone. The Panel is aware, however, that the Appellants have experienced protracted delays in connection with these appeals. The Panel considered that these delays were caused partly by the swamping of the JAB secretariat with their own Counsel's demands for attention, but also by factors entirely outside the Appellants' control. For this reason, the Panel sought in this process to take a generous view of issues related to receivability, in particular to the observance of time limits.
>
> 129. However, it remained dismayed at the way in which these appeals were filed, in particular the ambiguity generated by the drafting, and the fact that several key documents were dated some considerable time before they were received by the JAB. With regard to the first point, the [three Appellants]' chances of having an appeal found receivable are considerably improved by a clear statement of the contested administrative decision. To oblige any Panel to search through a statement of appeal to try to identify its purpose, or to construe the administrative decision being contested, may jeopardize unnecessarily an appeal that might well deserve a hearing on its merits. With regard to the second point, the Panel recommends that, in all future dealings with the JAB, the [Appellants] strictly observe relevant time limits and exercise the greatest care with regard to the dating and submission of key documents, as other Panels might not be so generous in their recommendations.
>
> 130. The Panel also noted that the Vienna JAB Secretariat - comprising a Secretary, acting on a voluntary basis in addition to his/her normal work duties, and a temporary assistant - had shouldered a heavy burden in the administration of the many appeals and the exceptional amount of correspondence and communication generated by Counsel in connection with the appeals. It seemed to the Panel that the JAB Secretariat's modest capacity had been stretched beyond its limits in attempting to respond to Counsel's many verbal and written queries. The Panel commended the Secretariat (…) on its diligence in attempting to maintain this correspondence, and in exploring alternative ways of exposing the Appellants to the internal justice system more expeditiously (…). It also acknowledged Counsel's persistence in repeatedly posing questions that had not been answered to his satisfaction. However, it agreed that the maintenance of such a correspondence was not a satisfactory use of JAB resources and that, by absorbing limited capacity, it risked damage to the interests, not just of the three staff members mentioned in this report, but also to those of other appellants to the JAB, whose appeals were equally deserving of the JAB's attention.
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> ...
>
> [Of the four appeals filed by the Applicant, the Panel decided that only one was receivable and recommended that it be considered on its merits by a separate Panel.]"

On 27 August 2003, the Under-Secretary-General for Management transmitted a copy of JAB Report 1 to the Applicant and informed him that the Secretary-General agreed with the JAB that three appeals were not receivable and that he had decided to take no further action thereon. This decision was subsequently appealed to the Tribunal as the "first case".

On 12 December 2003, a separate JAB Panel was convened to consider the merits of the Applicant's appeal concerning the "Note for the File" (the "second case"), following which the JAB adopted its Report 2.

Its findings read as follows:

> "FINDINGS
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> 29. In relation to the entry into the log-book, the Panel found that this was a very minor performance shortcoming. However, it considered that the Appellant should have followed the established procedure.
>
> 30. On the facts relating to the false fire alarm, the Panel found that there had been a system shortcoming that day and that there had been an error in the system which could not be clearly considered as due to the Appellant.
>
> 31. The Panel considered that the 'reassignment' was the only actual decision contained in the 'Note for the File' and that it was a normal and routine managerial decision. It did not find that this decision had any effect or damage on the Appellant's career.
>
> 32. The Panel considered the documents received from the [APB] but it did not find that they contained any evidence of discrimination or harassment.
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> 33. The Panel was, however, surprised by the reference to the Appellant's sick leave record in paras. 5 and 7 of the 'Note for the File'. It considered that the reference to the Appellant's sick leave gave the impression that the Appellant was being punished for his sick leave record, which was not appropriate.
>
> 34. Finally, the Panel noted that the contested document was only a 'Note for the File'; it was not contained in the Official Status file of the Appellant - only in his working file in UNSSS. It therefore considered that the 'Note for the File' would not have any consequence on the Appellant's career or reputation.
>
> 35. The Panel found no breach of any of the Appellant's rights. Therefore, the Panel recommended that the 'Note for the File' **should** stand but that the entire para. 5, and [the last part of the sentence in para. 7,] **should be erased** ..."

On 24 August 2004, the Under-Secretary-General for Management transmitted a copy of JAB Report 2 to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and recommendation to erase the text identified by the JAB from the "Note for the File". On 16 November 2004, the Applicant appealed this decision to the Tribunal as the "second case".

Whereas the Applicant's principal contentions in the "first case" are:

1. The JAB erred when it decided that it could not establish the administrative decisions being appealed.
2. The appeals are receivable.
3. The JAB proceedings were marred with irregularities.
4. The JAB erred when it decided that a PAS report involves no administrative decisions and that it has no competence in addressing policy breaches with respect to administrative instruction ST/AI/1999/14 because it failed to cite any policy, jurisprudence or other authority to that effect.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Applicant's appeals were not receivable, as none of them constituted an appeal against "an administrative decision".

2. There is no substantiated evidence that the JAB proceedings were marred with irregularities, or that the actions of the JAB were based on prejudice or improper motives.

Whereas the Applicant's principal contentions in the "second case" are:

1. The issues that are antecedent and subsequent to the "Note for the File" are "not actionable" under the present Application however, they support his claim of discrimination and harassment against him by the Administration.

2. With respect to the "Note for the File" itself, it was an instrument for prejudice, harassment, discrimination, retribution and retaliation.

3. The failure by the Administration to provide him or his Counsel with copies of the departmental recommendations during the JAB proceedings violated his due process rights.

Whereas the Respondent's principal contentions in the "second case" are:

1. The issues that are "antecedent" and "subsequent" to the preparation of the "Note for the File" fall outside the scope of the present Application and, therefore, are not receivable.

2. There is no substantiated evidence that the "Note for the File violated the Applicant's rights or constituted evidence of discrimination or harassment against him.

3. The departmental recommendations concerning the Applicant's applications for three vacancy announcements do not contain any evidence of discrimination or harassment against the Applicant. The Applicant's claims relating to these vacancies should have been the subject of separate appeals, which the Applicant did not initiate.

The Tribunal, having deliberated from 31 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 was a UNOV Security Officer at the G-4 level, with a permanent appointment. He joined the UNSSS on 18 November 1985, was detailed on a number of missions and maintained throughout a performance rating of "satisfactory". Twice - in 2000 and in 2001 - he rebutted a "4" rating ("Partially meets performance expectations") which was subsequently upgraded to "3" ("Fully meets performance expectations"). Effective 12 February 2004, the Applicant separated from service for health reasons and was awarded a disability benefit.

On 10 June 2001, the Applicant's Counsel wrote to the Under-Secretary-General for Management on behalf of the Applicant and two other staff members, Mr. D. and Mr. M., requesting administrative review of the cases of the Applicant and the two other staff members concerning prejudice and discrimination. On 4 September, the Applicant submitted an appeal to the JAB. On 8 September, the other two staff members also submitted appeals to the JAB and, on the same date, Counsel requested that the three cases be joined.

On 10 September 2001, the Applicant submitted another request for review of a "Note for the File of 23 August 2001", and, subsequently, he lodged an appeal with the JAB against decisions "related to those antecedents to and as contained in the 'Note for the File' of 23 August 2001 as prepared by the Chief, UNSSS". On 28 December, the Applicant filed a third request for review "of the administrative decisions taken to the detriment of [the Applicant] and [Mr. M]" contained in memoranda from OIOS to Counsel, of 12 and 26 November 2001.

On 15 March 2002, Counsel submitted a fourth request for administrative review of "the preparation of [the Applicant's] PAS for 2001" and, subsequently, Counsel lodged appeals on behalf of the Applicant and Mr. M. to the JAB, contesting "the administrative decisions … antecedent to, and as contained in [their] PAS [for] 2001".

On 10 May 2002, Counsel submitted three identical appeals on behalf of the Applicant and the two other staff members, contesting the "alleged failure by OIOS to re-open the UNSSS case" and to offer them "whistle-blowing protection".

Following repeated requests to join the appeals; several failed attempts to put together a JAB panel; and, a failed attempt to change the venue to New York, the JAB met and considered the preliminary issues, including the issue of receivability, in the eleven appeals filed by the three staff members. The JAB found that three of the four issues appealed by the Applicant were irreceivable because it was unclear what specific administrative decisions were being appealed. It found, however, that the appeal concerning the "Note for the File" was receivable and recommended that a separate JAB Panel be established to hear this appeal.

II. The JAB Panel established to hear the appeal on the "Note for the File" issued its report on 12 December 2003. It found no breach of any of the Applicant's rights; recommended that the "Note" should stand; but, that the entire paragraph 5 and one sentence in paragraph 7 be removed. The Secretary-General accepted this recommendation.

III. The Tribunal will deal with the Applicant's two cases separately in one judgement, considering the case regarding the "Note for the File" last.

IV. The "first case" presents a number of difficulties. These difficulties arise from the disorganized manner in which not only the Application, but the whole file has been submitted to the Tribunal. As the Tribunal understands it, the Application is one of three Applications, involving three staff members (the Applicant, Mr. D, and Mr. M.), which were filed simultaneously. The issues presented are similar, if not identical, and, indeed, they were considered jointly by the JAB. The Tribunal, however, has decided to deal with each of these three Applications separately.

V. The Tribunal notes that there is a preliminary issue, that is, whether or not most of the contentions presented by the Applicant to the JAB were receivable. It notes that the JAB

> "remained dismayed at the way in which these appeals were filed, in particular the ambiguity generated by the drafting, and the fact that several key documents were dated some considerable time before they were

> received by the JAB. With regard to the first point, the Appellants' chances of having an appeal found receivable are considerably improved by a clear statement of the contested administrative decision. To oblige any Panel to search through a statement of appeal to try to identify its purpose, or to construe the administrative decision being contested, may jeopardize unnecessarily an appeal that might well deserve a hearing on its merits. With regard to the second point, the Panel recommends that, in all future dealings with the JAB, the Appellants strictly observe relevant time limits and exercise the greatest care with regard to the dating and submission of key documents, as other Panels might not be so generous in their recommendations."

The Tribunal recalls its Judgement No. 1157, *Andronov* (2003), where held that

> "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems, that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions."

VI. Article 7, paragraph 3 of the Rules of the Tribunal specifies that:

> "3. The pleas shall indicate all the measures and decisions which the applicant is requesting the Tribunal to order or take. They shall specify:
>
> …
>
> (*b*) The decisions which the applicant is contesting and whose rescission he is requesting under article 9, paragraph 1, of the Statute",

and paragraph 4 of the same article stipulates that "[t]he explanatory statement shall set out the facts and the legal grounds on which the pleas are based".

The Tribunal recalls two Judgements in which it addressed the issue of claims that are not set out clearly. In Judgement No. 1269 (2005), it noted that: "[w]hen these proceedings were commenced before the JAB, it was unclear to the Respondent precisely what administrative decisions were intended by the Applicant to be covered by her appeal". In an earlier Judgement (No. 1248 (2005)), it noted that:

> "II. … This claim is far from straightforward. It is difficult to understand it and it is difficult to understand what case she makes. This part of the claim appears to contain irreconcilable conflicts or contradictions.
>
> …
>
> The Tribunal has insurmountable difficulties trying to understand the factual basis said to be behind the said part of the Applicant's claim, that she was wrongfully denied opportunities for promotion, which, it is stressed, is a different claim to one alleging that she was not promoted to any one of the vacancies for

> which she had applied or to a claim *simpliciter* that she was not promoted. This somewhat unusual approach may have been adopted by the Applicant's counsel as a legal stratagem in the hopes of avoiding a rejection of the non-promotion aspects of the Applicant's claim on the basis that administrative review had not been sought in relation to them. Alternatively, and perhaps more likely, it might have been adopted because her counsel was aware that the Applicant lacked evidence which could establish procedural or due process violations, or establish that she had been wrongfully denied appointment to any one of those positions or that her non-promotion was as a result of any prejudice or other extraneous factor, so that any claim for compensation for her non-appointment to any one of them was doomed to failure."

VII. In addition, it is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interests is predicated upon the condition that the impugned decision is stated in precise terms. Of course, there are situations where an applicant is not aware of all administrative decisions affecting him/her, for instance, when the Administration withholds evidence, the existence of which is wholly unknown to the other party. This is the reason why the Statute and the Rules give the Tribunal investigatory powers and stipulate in article 10 of the Rules that the President can order the production of any other evidence he deems necessary or useful "from any party, witnesses or experts". However, nothing can repair the damage that vagueness and imprecision can cause to an application. Moreover, it is not the role of the Tribunal to review general patterns of behaviour absent a specific, identified, even implied, administrative decision: this is a Court, deciding on the legality of administrative decisions.

VIII. The Tribunal observes, in particular, that the Applicant presents four sets of grievances relating to:

- working in an environment characterized by long-standing, continuing and documented prejudice, discrimination, mismanagement and misconduct; failure to adhere to the provisions of administrative instruction ST/AI/1994/14 of 17 November 1999, when preparing his PAS; the failure to transmit the Report of the UNOV Panel on Discrimination to the Director General, UNOV, and the Assistant Secretary-General, for Human Resources Management; failure to take appropriate steps about breaches of policy with respect to departmental recommendations about posts to which he had applied, and the failure to grant him access to documents that could have contained other breaches of policy;

- the decision by OIOS not to re-open the UNSSS case and not to offer him whistle-blower protection;

- the request that his performance appraisal report for 2001 be considered by the JAB; and,

- the fact that the JAB proceedings were vitiated by irregularities and errors of fact.

The Tribunal will deal with each of these issues separately.

IX. With regard to the first grievance, the Tribunal notes that the vague terms in which it is couched make it impossible to determine exactly what administrative decisions are being contested. This claim must therefore fail.

X. With regard to the request for re-opening the UNSSS case, the Tribunal recalls its long-standing jurisprudence that to hold an investigation is at the discretion of the Administration. In particular, it notes Judgement No. 1271 (2005):

> "VI. Moreover, the Tribunal wishes to stress that, even if it had been in the Applicant's interests to take action on this issue, the decision to conduct such an investigation is the privilege of the Organization itself. In Judgements Nos. 1086, *Fayache* (2002), and 1234 (2005), the Tribunal heard requests for the instigation of disciplinary proceedings against staff members and noted that '[i]t is not legally possible for anyone to compel the Administration to take disciplinary action against another party' (*Fayache*). This reasoning applies, by analogy, to the kind of general investigation requested by the Applicant in the present case."

It also notes *Fayache* (*ibid.*):

> "Furthermore, the Tribunal takes this opportunity to underline that the instigation of disciplinary charges against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party."

Therefore, this claim must also fail.

XI. Next, the Tribunal turns its attention to the issue of the PAS. The Tribunal agrees with the JAB and the Secretary-General that, again, this claim is not receivable. The PAS procedures as contained in the relevant administrative instruction, ST/AI/1999/14, set out in detail in what manner staff members' performance is to be appraised. The same administrative instruction gives the staff member special procedural rights, so that the staff member can defend him or herself adequately by rebutting a PAS he or she deems unfair. The staff member then has the right to appeal to the Tribunal in order to question the legality of the final appraisal, after having exhausted the rebuttal process. If the staff member could appeal the process at any stage before the final decision is made, then it would jeopardize the rebuttal process and would unduly and prematurely create further burden on the administration of justice. It is a general principle of procedural administrative law that, when a parallel procedure (*recours parallèle*) is offered to a staff member, this procedure must be exhausted and it is only then that the case is ready to come to the Tribunal.

Therefore, in order for his claim to be receivable, the Applicant must first exhaust the rebuttal process and, if he is of the view that the rebuttal process was flawed, he may bring a case to the Tribunal. If, however, the intention of the Applicant is to question the PAS policy in general, then, again, his claim is not receivable as it does not address a specific administrative decision.

XII. The Tribunal, finally, will deal with the allegations of the Applicant that the JAB's proceedings were vitiated by irregularities and errors of fact.

In the first place, the Tribunal wishes to state that, when an applicant presents, at his own risk, a disorganized application, then he should be aware that errors of fact may occur. It would be an abuse of procedure for anyone addressing him/herself to an authority in a confused manner to claim later that the authority thus addressed did not understand the facts with clarity. The Tribunal is of the view that the instant case suffers

precisely from the lack of clarity described above and not only finds that the JAB did not commit any error of fact, but strongly feels that this claim of the Applicant constitutes, under the circumstances, an abuse of procedure.

Furthermore, it is the burden of the Applicant to prove that the JAB's proceedings suffered from irregularities and the Applicant failed to do so. Therefore, the claim must be rejected.

XIII. The Tribunal now turns to the "second case", wherein the Applicant requests removal of the "Note for the File" from his records.

On 4 January 2002, the Applicant lodged an appeal with the JAB against decisions "related to those antecedent to and as contained in the 'Note for the File' of 23 August 2001 as prepared by … [the] Chief, UNSSS". The JAB examined the issue and, while it found no breach of any of the Applicant's rights, recommended that the "Note" should stand but, that the entire paragraph 5, relating to sick leave granted by the Administration, and the last part of the last sentence in paragraph 7 be removed. The Secretary-General decided to adopt the recommendation made by the JAB.

The Tribunal notes that paragraph 5 and the relevant language of paragraph 7 have already been removed. It recalls on this occasion, that there is a general principle of administrative law that the Administration has to act in good faith and that, in light of that principle, the Administration cannot be seen contradicting its own decisions (*venire contra factum proprium*).

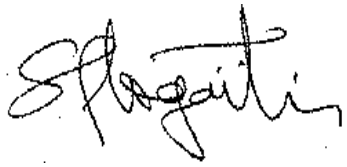
The Tribunal cannot, however, accept the claim of the Applicant that the entire "Note for the File" be removed from his personnel file. In fact, the characteristic of this document is that it is a record of what was said in a meeting. What was said is fact and cannot be changed. Moreover, the Tribunal declares that it is the right of any staff member to consider that the Administration discriminates or harasses him/her and to try to defend him or herself accordingly. Therefore, it decides that the decision of the Tribunal should be put in all of the Applicant's records, together with the "Note".

XIV. In view of the foregoing, the Tribunal:

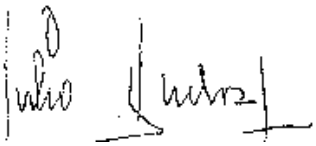
1. Rejects both Applications in their entirety; and,

2. Orders the Respondent to put a copy of the Judgement in all of the Applicant's records, together with a copy of the"Note".

(Signatures)

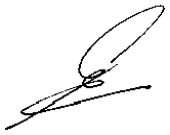


Spyridon **Flogaitis**
President



Julio **Barboza**
Member

Brigitte **Stern**
Member



Geneva, 27 July 2007

Maritza **Struyvenberg**
Executive Secretary