



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1330

Case No. 1407

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 filed an Application, 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 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 21 November 2006, the Tribunal decided to postpone consideration of the case until its next session;

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] started his career with the United Nations on an initial three-month fixed-term appointment effective 24 June 1983, as a Security Officer (S-1) with the Security and Safety Service at [United Nations] Headquarters. ...

...

... Effective 1 October 1997, following successful completion of the 1997 G-to-P Examination, [the Applicant] was promoted to a P-2 level and reassigned to the United Nations Office at Geneva (UNOG) as Deputy Chief of the UNOG Security and Safety Unit.

... On 21 March 1998, following his application, [the Applicant] was selected and reassigned laterally at the same level to become Deputy Chief of [the United Nations Security and Safety Service, United Nations Office at Vienna (UNSSS/UNOV)]. ...

... On 29 June 2001, the Chief of UNSSS recommended that in view of [the Applicant]’s unsatisfactory performance, his appointment should not be extended beyond 31 December 2001 and that [the Applicant] should be reassigned to a different organizational unit through the remainder of his contract.

...

... On 1 October 2001, ... [the Applicant] was advised ... that the recommendation of the Chief of UNSSS would be reviewed in the context of his overall performance, including his 2001 Performance Appraisal Report (PAS), and that in order to complete the evaluation process, his contract would be extended through 31 March 2002. ...

... On [the same day], [the Applicant] took extended sick leave...

... On 15 February 2002, [the Applicant] signed and returned to [the UNOV Human Resources Management Section (HRMS)] his 2001 PAS report and on 14 March ... he submitted a rebuttal against the same PAS. The PAS Rebuttal Panel subsequently upgraded his 2001 PAS to the level of Fully Meets Performance Expectations.

...

[Thereafter, the Applicant’s appointment was successively extended pursuant to ST/AI/1999/12 [of 8 November 1999], until 31 January 2003. Effective 1 February, the Applicant’s appointment was extended through 28 February. On 27 February, the Applicant reported sick. On 1 March, the Applicant’s appointment was extended until 10 March, pursuant to ST/AI/1999/12, as he had ‘revival days’ of his sick leave entitlement. Upon expiry of his appointment on 10 March, the Applicant was separated from the service of the Organization.]

...

**[Summary of facts]**

... On 10 June 2001, [the Applicant's Counsel] (...), wrote to the Under-Secretary-General for Management ... on behalf of [the Applicant and the Applicants in Judgements No. 1319 and No. 1329, rendered at this session, hereinafter referred to as Mr. E. and Mr. D., respectively], ... requesting administrative review of[, inter alia, the Respondent's alleged failure to transmit the report of the UNOV Panel on Discrimination of 2 June 2000 to the Director General, UNOV, and to the Assistant Secretary-General [for Human resource 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, [Mr. E.] submitted an appeal [to the JAB in Vienna]. ... [Subsequently,] Counsel requested 'that all three cases be joined because of identical or almost identical issues, common breaches of policy and common personalities'. On 8 September ..., [Mr. D. and the Applicant] also submitted signed copies of their statement of appeal. ...

... In an e-mail dated 10 October 2001, [the Applicant's] Counsel ... requested administrative review of the 'decisions concerning [the Applicant] contained in the letter from [Chief, HRMS,]'...

...

... On 28 March 2002, [the Applicant] filed a request for suspension of action of the decisions to

'(a) remove him from his post as Deputy Chief; (b) to remove him from the UNSSS; (c) to extend him on the basis of three-month appointments, rather than the two or three year appointments which would be much more appropriate; and (d) to transfer him to ... a post for which he has neither the training nor the experience, a move being made solely for the purpose of ensuring that he will fail'.

This request was forwarded to the Respondent on 26 April ... and a Reply was received on the same date. A [JAB] Panel ... met on 29 April and 10 June ... The Panel unanimously concluded that the suspension of action could not be recommended. The Secretary-General informed [the Applicant], on 27 June ... that he had decided not to grant the request for suspension of action.

... On 9 July 2002, [the Applicant's] Counsel filed another request for suspension of action]. ... [On 20 September 2002, a Panel met to consider his request for suspension of action of the decision to recruit against the post of Deputy Chief, UNSSS. All other matters raised by the Applicant were not considered as they had formed part of the initial request for suspension.] ... The Panel was unable to determine whether this request had the same basis as the [initial] request ... or 'whether [it] implied that the contested action was the advertisement of the post ...' On 4 October ..., the ... [Applicant was informed] that, 'the Secretary-General is in full agreement with the Board's conclusions and has accordingly decided to take no further action in connection with your request for suspension of action'.

...

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

... On 10 May 2002, Counsel submitted, via e-mail, three identical Appeals on behalf of [the Applicant, Mr. D. and Mr. E.] contesting the [alleged failure by the Office of Internal Oversight

Services (OIOS)] to re-open the ‘UNSSS case’, and to offer [them] ‘whistleblower’ protection.] ... These appeals were forwarded to the Respondent on 16 May 2002 and the Respondent submitted a single reply to the JAB on 19 July ...

...

... 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. E.. 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 issued its report on 29 July 2003. Its conclusions and recommendations read as follows:

*“CONCLUSIONS AND RECOMMENDATIONS*

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 [Applicants]’ 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.

...

[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.]”

With respect to the instant case, on 27 August 2003, the Under-Secretary-General for Management transmitted a copy of the report of the JAB 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.

On 29 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred when it decided that it could not establish the administrative decisions being appealed.
2. The appeals were 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, dated 17 November 1999, entitled “Performance Evaluation System”, because it failed to cite any policy, jurisprudence or other authority to that effect.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeals were not receivable, as neither 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.

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 started his career with the United Nations on an initial three-month fixed-term appointment effective 24 June 1983, as a Security Officer (S-1) with the Security and Safety Service at United Nations Headquarters. Between 1985 and 1996, the Applicant received a series of fixed-term appointments and was detailed to numerous missions. Effective 1 October 1997, the Applicant was promoted to the P-2 level. On 21 March 1998, the Applicant became Deputy Chief, UNSSS, in Vienna.

On 29 June 2001, the Chief, UNSSS, recommended that, in view of the Applicant's unsatisfactory performance, his appointment should not be extended beyond 31 December and that the Applicant should be reassigned to a different organizational unit through the remainder of his contract. From 1 July until 30 September, the Applicant was on a non-reimbursable loan during which time another recommendation was made not to extend his appointment. In order to complete the review of his performance, his contract was extended through 31 March 2002. The Applicant was further advised that a decision had been made to assign him elsewhere for the rest of his contract, however, on 1 October 2001, the Applicant took extended sick leave and, therefore, implementation of the decision to reassign him was delayed. Following a rebuttal, the Applicant's 2001 PAS was upgraded to the level of "Fully meets performance expectations". The Applicant again went on sick leave and his appointment was further extended until 31 January 2003. On 30 January, the Applicant returned to duty on a half-time basis. The Applicant was separated from service on 10 March.

On 10 June 2001, the Applicant's Counsel wrote to the Under-Secretary-General for Management, on behalf of the Applicant and two staff members, Mr. D. and Mr. E., requesting administrative review of "the cases of [the three staff members concerning prejudice and discrimination]". On 4 September, Mr. E. submitted an appeal to the JAB. On 8 September, Mr. D. and the Applicant submitted their signed copies of the statement of appeal and Counsel requested that the cases be joined.

On 10 October 2001, Counsel requested administrative review of the decision of the Chief, HRMS, UNOV, not to recommend renewal of the Applicant's fixed-term contract and, on 20 February 2002, submitted, by e-mail, to the JAB a second appeal on behalf of the Applicant. On 28 March, the Applicant filed a request for suspension of action but the JAB unanimously concluded that the suspension of action could not be recommended. The Secretary-General accepted the recommendation of the JAB. Subsequently, the Applicant filed another request for suspension of action, which was also denied.

On 10 May 2002, Counsel submitted three identical appeals to the JAB, 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 "whistleblower" protection.

On 15 May 2002, Counsel submitted a fourth appeal to the JAB on behalf of the Applicant against "the administrative decisions being appealed related to those antecedent to, and as contained in the PAS, 2001".

II. 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. It adopted its report on 29 July 2003. Of the four issues appealed by the Applicant, the JAB found that three were irreceivable, inter alia, because the specific administrative decisions being appealed were unclear.

III. This Application 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. E.), which have been 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.

IV. 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.”

V. 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.”

VI. 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.

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

- the Respondent’s alleged failure to transmit the report of the UNOV Panel on Discrimination of 2 June 2000 to the Director General, UNOV, and to the Assistant Secretary-General for Human Resources Management; the alleged failure to adhere to the provisions of administrative instruction ST/AI/1999/14 of 17 November 1999, in preparing his PAS; the “long process of numerous administrative decisions” during 1998-2000 when he had been “the victim of mobbing and bullying”; the failure of the Chief of UNSSS to delegate to him full authority during his absence; and, the non-involvement of the Deputy Chief in recruitment decisions;



- the decision by the decision by OIOS not to re-open the UNSSS case and not to offer him whistle-blower protection;
- decisions related to those antecedent to, and as contained in the PAS, 2001; 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.

VIII. 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.

IX. 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.

X. 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 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. In fact, the Applicant went through the rebuttal process and his rating was upgraded into “Fully meets performance expectations” on 13 February 2003. However, the present Application is not against the outcome of the rebuttal process. This Application follows the 15 May 2002 appeal filed by the Applicant’s Counsel before the JAB.

If, finally, 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.

XI. 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.

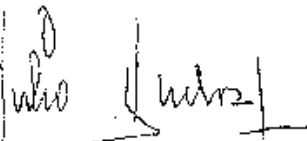
Furthermore, it is the burden of the Applicant to prove that the JAB’s proceedings suffered from irregularities and the Applicant failed to do so. Therefore, the claim must be rejected.

XII. In view of the above, the Application is rejected in its entirety.

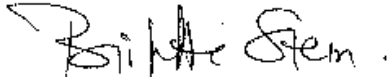
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Spyridon **Flogaitis**  
President

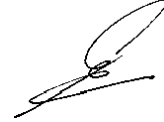


Julio **Barboza**  
Member



Brigitte **Stern**  
Member

Geneva, 27 July 2007



Maritza **Struyvenberg**  
Executive Secretary