



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1387

Case No. 1422

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas at the request of a staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), the President of the Tribunal extended to 31 May 2005 the time limit for the filing of an application with the Tribunal;

Whereas, on 24 May 2005, the Applicant filed an Application containing pleas which read as follows:

**“II. Pleas**

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) to decide to hold oral proceedings ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) to find and rule that the findings of the Joint Appeals Board [(JAB)] were based upon errors of fact and of law;

(b) to find further that the [JAB] reached a number of conclusions that were ill-founded and that it failed to provide appropriate and adequate compensation for the harm done to the Applicant for violation of his rights ...;

- (c) to find that the [JAB] was negligent in failing to make a finding of prejudice on the part of the Respondent in this case;
- (d) to order that the Applicant be placed without further delay on an appropriate permanent post commensurate with his qualifications and experience;
- (e) to order that the Applicant be given priority consideration for promotion to the P-5 level, and that he be compensated for the difference in remuneration between the P-4 and P-5 levels with effect from 1 June 2000;
- (f) to award the Applicant appropriate and adequate compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant to his career and professional reputation, as well as for the prejudicial and discriminatory treatment to which he has been subjected as a result of the Respondent's actions or lack thereof;
- (g) to fix pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (h) to award the Applicant as cost, the sum of [US]\$ 10,000.00 in legal fees and [US]\$ 500.00 in expenses and disbursements."

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 October 2005 and once thereafter until 30 November;

Whereas the Respondent filed his Answer on 30 November 2005;

Whereas, on 25 August 2006, two staff members of UNFPA, filed Applications for intervention in the case in accordance with article 19 of the Rules of the Tribunal;

Whereas the Applicant filed Written Observations on 28 August 2006; the Respondent commented thereon on 19 September; and, the Applicant commented on the Respondent's comments on 29 March 2007;

Whereas, on 3 January 2007, the Respondent submitted a communication regarding the requests for intervention and, on 4 May, counsel for the Applicant and the interveners responded thereon;

Whereas, on 7 June 2007, a third staff member of UNFPA, filed an Application for intervention in the case in accordance with article 19 of the Rules of the Tribunal;

Whereas, on 22 June 2007, the Respondent submitted a communication regarding the third request for intervention and, on 26 June, counsel for the Applicant and the interveners responded thereon;

Whereas, on 27 July 2007, the Tribunal decided to postpone consideration of this case until its autumn session, and to hold oral proceedings in the case;

Whereas, on 28 September 2007, a staff member of the United Nations Office for Project Services (UNOPS), filed an Application for intervention in the case in accordance with article 19 of the Rules of the Tribunal;

Whereas, on 25 October 2007, the Respondent submitted a communication regarding the UNOPS staff member's request for intervention;

Whereas, on 26 October 2007, the Respondent submitted additional information to the Tribunal;

Whereas, on 13 November 2007, the Tribunal held an oral hearing, during which the Applicant submitted an additional document to the Tribunal;

Whereas, on 16 November 2007, the Respondent commented on the document submitted by the Applicant during the oral hearing;

Whereas, on 21 November 2007, the Tribunal decided to postpone consideration of this case until its summer 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] joined [UNFPA] in January 1987 as a Junior Professional Officer on a one year fixed-term-appointment ... at the L-2 level, on a 200 series contract. [Thereafter, his contract was extended and he was promoted to the P-3 level.]

...

On 15 May 1993, the [Applicant] was reassigned to the Finance Branch as Chief, Budget and Management Analysis Section. Effective 1 January 1994, [he was promoted to the P-4 level and granted a permanent appointment].

...

The [Applicant] has been a member of the [United Nations Development Programme (UNDP)/UNFPA/UNOPS Staff Council since August 2000.

***Summary of the facts***

... In January 1998, the [Applicant] was reassigned to the [Office of Oversight and Evaluation (OOE)] on a new post No. 1834. This new post was unclassified and the [Applicant] kept his personal level P-4. On 16 November ..., the supervisor requested classification of post No. 1834. On 14 December 1999, the [Applicant] wrote a memorandum to [the] Secretary, UNFPA Appointment & Promotion Board (APB), initiating ... recourse proceedings as he had not been considered for promotion to the P-5 level. ...

... On 5 October 2000, the APB met to consider [the Applicant’s] 1999 recourse and, on 13 October ..., the Secretary of the APB informed [him] of the outcome. The Secretary stated that [the] APB had considered his case but could not recommend a promotion in view of the unavailability of a P-5 post. According to the APB Secretary, the APB had recommended that the [Applicant’s] ‘post classification be regularized’ and this recommendation had been approved by the Executive Director.

... On 20 October 2000, the [Applicant] wrote to the Secretary of the APB requesting that his recourse together with the classification results be resubmitted to the APB for consideration.

... On 7 November 2000, the Secretary of the APB replied to the [Applicant] that following the receipt of [his] recourse for non- promotion in 1999, ... the post was classified at [the] P-5 level by UNDP in June 2000. On the basis of this information, [the APB] reached its conclusion

that it could not recommend promotion to the P-5 level in 1999, '[s]ince the classification of the post at that time could not be confirmed at [the] P-5 level'. ...

...

... In an e-mail dated 4 April 2001, ... [the Office of Human Resources (OHR)] informed the [Applicant] that his post had been classified to the P-5 level in June 2000. ...

... On 17 May 2002, [he] wrote to [OHR] enquiring about the failure to promote him to the P-5 level [during the 2001 promotion exercise] while the post he encumbered had been classified at the P-5 level.

... On 12 September 2002, the [Applicant] received a letter from [the] Secretary, APB, informing him that the Executive Director had approved the APB recommendation not to promote him [in the 2001 promotion exercise] ...

... On 11 November 2002, the [Applicant] requested ... review of [this] administrative decision ... [In its response to his request, UNFPA maintained the contested decision and indicated that the Management Review Group (MRG) which had reviewed his performance appraisal review (PAR) for 2000 had concluded that the Applicant's "overall performance was not quantitatively and qualitatively at a sufficiently high standard to warrant recommendation for promotion to the P-5 level".]

... In a letter dated 24 January 2003, [the Applicant was] informed ... that he was reassigned to [an extra-budgetary post in the Enterprise Resource Planning (ERP) project], Division for Management Services (DMS), ... for a period of one year. [The Applicant responded, rejecting] the proposed reassignment because of the potential negative impact on his career expectations and since 'important issues concerning [his] current post and [his] contractual rights need to be clarified first'.

... In an e-mail dated 31 January 2003, [the] Director, OOE, informed the Executive Director that she had met with the [Applicant] and tried to convince him to take up the assignment, which he strongly rejected. [She] indicated that the [Applicant's] post no longer existed ... and that the work that he had been performing would be performed by the Audit Services Branch.

... [Thereafter,] the Executive Director, inter alia, requested, ... more realistic terms of reference [for the Applicant's proposed position], the classification of his post based on the [terms of reference] and, a lien on a core post.

... In a letter dated 5 March 2003, [OHR] informed the [Applicant] that his assignment as Finance Specialist on the ERP project, DMS, was confirmed, that his post had been classified at the L-4 level and that [he] would hold a general lien against a P-4 post while assigned to the ERP project. The [Applicant] was also informed that the assignment was for one year, initially, and that he was expected to report to DMS on 10 March ... [He] assumed his new duties on 1 April ...

...

... On 30 April 2003, the [Applicant] requested the Executive Director to review the administrative decision to reassign him to the ERP project. The [Applicant] claimed that the reassignment was from a P-5 post to a project post [at the] L-4 level, which would 'negatively affect [his] career and contractual status'."

On 30 June 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 6 January 2005. Its considerations, conclusion and recommendations read, in part, as follows:

*“Considerations*

31. The Panel first considered the preliminary issues of competence and receivability. The Panel found itself competent to consider the issues of non-promotion and reassignment to an extra-budgetary post, addressed in the request for administrative review of 30 April 2003. ... The Panel, however, concurred with the Respondent that the Appellant’s claim regarding his denial of due consideration for promotion in 1999 was time-barred and therefore not receivable. ...

32. The Panel went on to consider the merits of the case. The issues before the Panel were as follows: Was the Appellant fully and fairly considered ... for promotion [in the 2001 exercise]? Was the Appellant duly notified of the result of the classification exercise? Did his reassignment to an extra-budgetary post affect his contractual status as well as his career prospects with UNFPA? Was the Appellant subject to any prejudice or discrimination as a result of his staff council activities?

...

36. The Panel without substituting its judgement for that of the APB took note that the Appellant’s [PARs] for 2000 and 2001 were rated satisfactory. However, the Panel took note that there was no [MRG] proposal for promotion subsequent to the performance review of 2000 and 2001 of his work. The Panel concurred with the Respondent when he stated that

‘meeting the requirement of occupying a higher level post does not automatically entitle a staff member to a promotion to a higher level. It is only one of the important criteria for promotion. Other criteria such as demonstrated performance as documented through the PARs ... demonstrated satisfactory performance at the higher level for a reasonable period of time and proven managerial and supervisory capacity in the case of P-5 level are considered by the APB.’ ....

The Panel took note that the Appellant’s PARs failed to indicate that the Appellant met such requirements.

37. In view of the aforesaid, the Panel was of the view that there was adequate evidence showing that the Appellant had received full and fair consideration during the two promotion exercises, and that there was no legal expectation for promotion as a result of the upward classification of the post he had encumbered. ...

38. The Panel considered the Appellant’s contention that he had never received a formal notification in writing of the classification of the post he encumbered. The Panel observed that ST/AI/1998/9 [of 8 October 1998, entitled ‘System for the Classification of Posts’,] in its paragraph 2.4 requires that the incumbent of the post be provided with a copy of the classification results ... The Panel was of the view that the lack of formal notification and the long period of time that it took Respondent to classify post No. 1834 was prejudicial to the Appellant as they constituted two causes for stress for him.

39. The Panel then turned to the issue of the Appellant’s reassignment to an extra-budgetary post from a core post. The Respondent rejected the Appellant’s contention that his reassignment was harmful on the basis that in UNFPA, there was no fundamental difference between L and P posts. In view of the prevailing situation at UNFPA, the Panel was of the opinion that UNFPA had made [a] good faith effort to maintain the Appellant’s contractual status by assigning him to an extra-budgetary post. Moreover, the Panel took note that the Appellant had a lien on a core post. Based on the foregoing, the Panel rejected the Appellant’s contention as he had failed to

provide adequate evidence of any wrongdoing on the part of UNFPA negatively affecting his career prospects.

40. The Panel examined the contention that the Appellant had been discriminated against as a result of his Staff Council activities. This claim was denied by the Respondent as there was no evidence of prejudice. The Panel, after a review of the Appellant's arguments in support of his claim, failed to find any evidence of discrimination or prejudice against him as a result of his Staff Council activities. The Panel recalled that the shortcomings which had been identified in the Appellant's performance and which had prevented him from being promoted were not related to his staff representative duties. The Panel was thus of the view that the Appellant failed to discharge his burden of proof with respect to his allegations of prejudice and discrimination.

#### ***Conclusion and Recommendation***

41. In light of the foregoing, the Panel *unanimously concluded* that there was evidence showing that the Appellant had been fully and fairly considered for promotion [in the 2001 exercise] in accordance with ST/AI/1999/8 of 17 August 1999, entitled 'Placement and promotion system'. The Panel *unanimously agreed* that the Appellant was not promoted to the P-5 level since according to his performance reports there is no evidence of a demonstrated ability to perform at a higher level.

42. The Panel *unanimously agreed* that the Appellant's contractual status and career prospects were not negatively affected as a result of his reassignment to an extra-budgetary post since he maintains a lien to a core post.

43. The Panel *unanimously agreed* that the delay of the Respondent to have the Appellant's post classified in reasonable time in addition to the lack of formal notification to the Appellant once the classification exercise was completed are both in violation of the Appellant's right to know the grade of the post he was occupying. The Panel therefore *unanimously recommends* that the Appellant be awarded \$ 2500, which is the equivalent of one year step increase, in compensation of the moral injury and the psychological stress he had sustained as a result of the lack of transparency and the delay with respect to the classification of post No. 1834.

4[4]. The Panel *unanimously agreed* that there was no evidence of prejudice or discrimination against the Appellant as a result of his Staff Council duties."

On 8 February 2005, the Secretary of the JAB provided the Applicant with a copy of the JAB report.

On 24 May 2005, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal. The same day, however, the Officer-in-Charge, Department of Management, informed the Applicant that the Secretary-General had "examined [his] case in the light of the JAB's report and all the circumstances of the case, and ha[d] decided to accept the JAB's recommendation that [the Applicant should] be compensated in the amount of \$2,500".

Whereas the Applicant's principal contentions are:

1. UNFPA created a climate of uncertainty regarding his career when it failed to properly classify his post in a timely manner.
2. He was denied due process and fair consideration for promotion, violating his rights.

3. UNFPA further violated his rights by failing to complete timely performance evaluation or rebuttal proceedings.
4. His placement against a non-core post prejudiced his interests.
5. He is being harassed and discriminated against due to his activities as a staff representative.

Whereas the Respondent's principal contentions are:

1. The Applicant's due process rights were fully respected with respect to both the promotion exercises and his reassignment to a project post.
2. The Applicant was not entitled to promotion to a P-5 post.

The Tribunal, having deliberated from 4 to 27 July 2007, in Geneva, from 24 October to 21 November 2007, in New York, and from 23 June to 25 July 2008, in Geneva, now pronounces the following Judgement:

I. The Applicant entered the service of UNFPA in January 1987, as a Junior Professional Officer on a one year fixed-term contract at the L-2 level. At the time of the events which gave rise to his Application, he held a permanent appointment and had been promoted to the P-4 level.

In January 1998, the Applicant was reassigned to an unclassified post. He kept his personal level of P-4 and, that November, his supervisor requested classification of the post. The post was reviewed by external classifiers who reached differing results: one concluded the post was P-4 level; the other considered it to be P-5 level. After the addition of certain functions, the post was resubmitted for classification and, in June 2000, it was classified at the P-5 level. The Applicant was not formally notified of this classification decision in 2000, but learned of it by email in April 2001.

In late 1999, the Applicant had initiated recourse proceedings with the APB as he had not been considered for promotion to the P-5 level in the 1999 promotion exercise. On 13 October 2000, the Secretary of the APB informed him that the APB had considered his case but could not recommend a promotion in view of the unavailability of a P-5 post at the time in question. At the Applicant's request, the APB reconsidered the issue in light of the classification exercise but again concluded that it could not recommend promotion to the P-5 level in 1999, as the post was not classified until 2000.

In August 2000, the Applicant became a member of the UNDP/UNFPA/UNOPS Staff Council.

In 2002, the Applicant again initiated recourse proceedings as he had not been considered for promotion to the P-5 level in the 2001 promotion exercise. On 12 September, he was advised he had not been successful; this time, it would transpire, for performance reasons. The Applicant requested administrative review of this decision on 11 November.

In January 2003, the Applicant was notified that he was being reassigned to a non-core position as a Finance Specialist. Thereafter, the Executive Director intervened and requested "realistic terms of

reference” for the Applicant’s position, classification of his post and a lien on a core post. On 5 March, the Applicant was informed that his assignment had been confirmed, that his post had been classified at the L-4 level and that he would hold a general lien against a P-4 post. On 30 April, he requested administrative review of the decision to assign him to the L-4 post.

On 30 June 2003, the Applicant lodged an appeal with the JAB in New York. In its report of 6 January 2005, the JAB found that the Applicant’s contentions with respect to the 1999 promotion exercise were not receivable, as they were time-barred. It found that, in any event, he had received full and fair consideration during the two promotion exercises and his rights had not been violated therein. The Panel also rejected the Applicant’s claim regarding his reassignment, finding that, “[i]n view of the prevailing situation at UNFPA, ... UNFPA had made [a] good faith effort to maintain [his] contractual status by assigning him to an extra-budgetary post”. In addition, the JAB held that the Applicant had failed to discharge his burden of proving that he had been the victim of prejudice and discrimination. It did, however, find a violation of his rights with respect to UNFPA’s failure to classify his post in a timely manner and to formally notify him of the classification of his post to the P-5 level, and recommended that he be paid compensation of US\$ 2,500.

On 24 May 2005, the Applicant filed his Application with the Tribunal. The same day, he was advised that the Secretary-General had decided to accept the JAB’s recommendation to pay him compensation.

The Tribunal received several Applications for intervention in the case in accordance with article 19 of the Rules of the Tribunal. From UNFPA staff members, it received Applications for intervention from two staff members on 25 August 2006; and, a third one on 7 June 2007. A staff member of UNOPS, filed his Application for intervention on 28 September 2007.

II. The first legal issue that the Tribunal needs to address is the receivability of the Applications for intervention. This matter is governed by Chapter VII, “Intervention”, of the Rules of the Tribunal, article 19 of which provides:

“1. Any person to whom the Tribunal is open under article 2, paragraph 2, and article 13 of the Statute may apply to intervene in a case at any stage thereof on the ground that he has a right which may be affected by the judgement to be given by the Tribunal. He shall for that purpose draw up and file an application in form of annex II for intervention in accordance with the conditions laid down in this article.

...

4. The Tribunal shall rule on the admissibility of every application for intervention submitted under this article.”

None of the interveners has satisfied the Tribunal that he or she has a right which may be affected by the judgement to be given by the Tribunal. In fact, each intervention seems to focus upon the respective



intervener's individual claims against his or her employer. On this basis, the Tribunal finds that the Applications for intervention are not admissible.

The foregoing notwithstanding, as the Tribunal was of the opinion that the interveners might be in a position to provide valuable evidence in the Applicant's case, it decided to call them as witnesses for the Tribunal in the oral hearing conducted in his case.

III. The Tribunal now turns its attention to the substance of the case.

The Tribunal recalls its consistent jurisprudence "recogniz[ing] the broad discretion enjoyed by the Secretary-General in matters of personnel". (Judgement No. 1231, (2005).) This discretion is not unfettered, however, as the Tribunal has clearly determined the control standards it exercises in, for example, promotion cases. See Judgement No. 828, *Shamapande* (1997), in which it stated:

"The Tribunal has held repeatedly that ... it is indispensable that 'full and fair consideration' should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No. 362, *Williamson* (1986), the Tribunal held that

'since the staff member has a statutory right to have "the fullest regard" given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave its "fullest regard" to it.'

In Judgement No. 834, *Kumar* (1997), the Tribunal held that it "may not substitute its judgement for that of the Secretary-General, *in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors*". (Emphasis added.) Such evidence is, of course, incumbent on the Applicant to produce as "in any case where arbitrariness, discrimination or other such improper motivation is alleged - the *onus probandi*, or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996) and, No. 870, *Choudhury and Ramchandani* (1998).)" (Judgement No. 1112, *Suresh* (2003).)

In this case, the Applicant presents many allegations against the Administration: he claims his non-promotion to the P-5 level was the result of prejudice and discrimination; and, in more general terms, he and the interveners allege a reigning atmosphere of prejudice and discrimination at UNFPA.

IV. The Applicant requested administrative review of the administrative decisions with respect to the second promotion exercise and his assignment to the L-4 post. As such, the Tribunal finds that issues relating to the classification procedure and the 1999 promotion exercise are not receivable as substantive claims. Nonetheless, they have evidentiary value in these proceedings.

Insofar as the second promotion exercise is concerned, the Tribunal finds that the Applicant did not carry his burden with respect to proving the allegations of victimization and bias that he presents. It finds, however, that he was maltreated and that he deserves compensation for the violation of his rights.

The Tribunal recalls that the Applicant was a staff member holding a permanent appointment; who considered himself worthy of a P-5 position; and, who wished for such promotion. With respect to the first promotion exercise (the 1999 exercise), it is a matter of record that the post the Applicant encumbered had not been classified at the P-5 level at the time of the exercise. Although the post was ultimately classified at that level - but the Applicant was not notified of the decision - it does not change the fundamental fact that, in 1999, the post was not at the P-5 level. This was the justification given for his non-promotion, and it was entirely reasonable. However, once the Applicant's post had been classified at the P-5 level, and the stated impediment to his promotion no longer existed, the Administration relied upon performance as the reason he had not been promoted. It is not clear to the Tribunal what performance issues - if any - had arisen between the two promotion exercises and no adequate explanation is provided on this matter. Accordingly, the Tribunal is not persuaded by this newly-found concern on the part of the Administration.

The Tribunal wishes to underline that it is in the interest of the Administration to treat staff members with the respect they deserve, as they are the ones who give their competencies and lives in order that the Organization might achieve its goals. The Administration should neither conceal from staff members pertinent information concerning their future (such as the classification of their posts) nor behave in such a manner as to render staff members entirely demoralised and disillusioned with the Organization, due to maltreatment they have suffered. The Tribunal is deeply concerned at the number of long-serving staff members whose testimony in this case indicated a lack of confidence in their employer.

In its Judgement No. 1290, (2006), the Tribunal decided that “[t]he cumulative effect of the facts in the case, reveal a lack of transparency in the way the Administration dealt with the Applicant and clearly destabilized him in a way which the Tribunal views as harassment justifying compensation”. Similarly, the Tribunal finds that the instant Applicant suffered the same fate, and awards compensation in addition to the compensation he received pursuant to the recommendation of the JAB.

V. In view of the foregoing, the Tribunal:

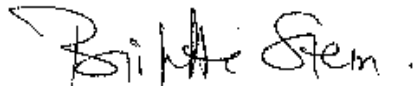
1. Orders the Respondent to pay the Applicant compensation in the amount of three months' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2.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

*(Signatures)*

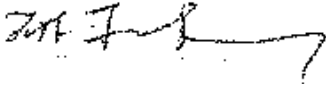
A handwritten signature in black ink, appearing to read 'S. Magaitis', is written over a faint, illegible typed name.

AT/DEC/1387

Spyridon **Flogaitis**  
President



Brigitte **Stern**  
Member



Goh Joon Seng  
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**  
Executive Secretary