



ADMINISTRATIVE TRIBUNAL

Judgement No. 1435

Case No. 1502

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas at the request of a former staff member of the International Criminal Tribunal for Rwanda (ICTR), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 August 2005, and regularly thereafter until 30 September 2006;

Whereas, on 29 September 2006, the Applicant, filed an Application containing pleas which read, in part, as follows:

“II: PLEAS

...

8. ... [T]o find that the non-renewal of the Applicant’s contract:

- (a) constituted a breach of the contract of employment ...;
- (b) contradicted the Staff [Regulations and Rules];
- (c) was arbitrary and discriminatory in nature; and
- (d) caused financial loss as well as undue anxiety and stress to the Applicant.

9. ... [T]o order:

- (a) that the Applicant be reinstated to his position at the ICTR; or

(b) that the Applicant be paid compensation in the amount of two years net base salary calculated on the basis of the Applicant's last annual remuneration, taking into account the amount of three months net base salary already paid to the Applicant by the Respondent."

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 20 March 2007;

Whereas the Respondent filed his Answer on 24 January 2007;

Whereas the Applicant filed Written Observations on 27 July 2007;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

#### **"Employment History**

... The [Applicant] joined the [ICTR] in May 1998 on a one-year fixed-term appointment [FTA] as Chief of the Communications Section at the P-4 level. His fixed-term appointment was extended for one year through May 2000 and subsequently to 3 June 2000 [when his contract expired.]

#### **Summary of the facts**

... On 4 May 1999, the [Applicant] received his first Performance Evaluation Report (PER) covering the period 4 May 1998 to 3 May 1999, signed by [the] then Chief of Administration [CoA]. The [Applicant's] performance was rated 'good'. On 10 May 1999, [the] then Officer in Charge (OIC), Administration, ICTR, addressed a memorandum to the then Chief of Personnel, proposing that [the Applicant's] appointment be extended for only one month to 'allow him suitable time to be reintegrated into Deutsche-Telekom and provide [them] with an adequate window to circulate a vacancy announcement to find an appropriate replacement'. The OIC stated in his communication that he was of the opinion that the [Applicant] was 'a poor manager, possessing insufficient leadership and interpersonal skills befitting a chief of section'. In view of the shortness of the OIC's supervisory period, his recommendation was not implemented and as a result, the [Applicant]'s appointment was further extended.

... On 24 January 2000, the [Applicant] addressed a confidential memorandum to [the] OIC Administration [OIC-A]. The purpose of the memorandum according to the [Applicant] was to clarify the issue of shipping eight batteries to Kigali and also to call upon [the OIC-A] for the establishment of a more 'cooperative, positive style of management'. In the same memorandum, the [Applicant] requested that a meeting be held 'in order to harmonize [their] working relations and to streamline [their] operational requirements and procedures between sections and [the OIC-A office].'

... On 27 January 2000, [the OIC-A], further to the breakdown of a Security Channel, instructed the [Applicant] to provide him with a detailed and comprehensive report on how he intended to correct the situation.

... On 23 February 2000, the [Applicant] sent a fax to [...] UNHQ, with copy to [the] Assistant Secretary-General, Office of Human Resources Management, and to [the] UN-ICTR Chief of Personnel, informing him that practices within the Mission had led to the following:

'-A breakdown in the chain of command

-Intimidation of staff in use of senior staff names to achieve results for themselves

- Psychological pressure being exerted to achieve result
- Decisions made in consultation with chiefs of section are changed on a daily basis
- Qualified staff are being offered contracts that do not reflect their qualifications or experience, and yet lesser qualified staff are promoted'

The [Applicant] called upon [UNHQ] to take any remedial action in order to prevent the 'drain of essential manpower' within the Mission.

... On 24 February 2000, the [Applicant] addressed a memorandum to the Registrar complaining about a number of incidents, among which the ICTR Doctor's visit to his house when he was reported sick, which the [Applicant] felt was in contravention with the relevant staff rules. The [Applicant] therefore requested that the matter be investigated. On the same date, [the] Chief, Health Services Section, reacted to the [Applicant]'s memorandum to the Registrar, stating that he had followed [the OiC-A's] instructions to extend him medical assistance in view of the fact that he failed to respond to telephone calls when he was deemed to be on sick leave. [The Chief, Health Services Section] continued that once at the [Applicant]'s residence, he was informed that he had travelled to Dar es Salaam. The Doctor then stated that in accordance with staff rule 106.2 (i) he had to ascertain that the [Applicant] remained in the Mission area while on sick leave, which explained his inquiry from the [Applicant's] Secretary.

... In a memorandum dated 6 March 2000, the [Applicant] explained to the ICTR Doctor that contrary to his belief, he fell sick while in Dar es Salem, which he visited on 5 February 2000, therefore, not in violation of any staff rule. The [Applicant] expressed his disagreement with the Doctor's investigating his sick leave. The [Applicant] expressed the opinion that the Doctor's action was part of UN-ICTR Administration's efforts to undermine him.

... On 13 March 2000, [the UN-ICTR Chief of Personnel] requested the [Applicant] to substantiate his allegations contained in his communication of 23 February ... On 14 March ..., the [Applicant] replied stating that his message to [UNHQ] was prompted by the crisis situation that followed the departure of a qualified staff in the Communication section, without any support on the part of the Administration. In addition, the [Applicant] stated that staff members' morale was really low as a result of '[...] unacceptable psychological pressure from the current Administration.' The [Applicant] further added that he had some concerns regarding the Mission's practices with respect to nepotism, contracts with ICTR Arusha, leave and home leave, and official travel.

... On 18 April 2000, the [Applicant] received his second PER covering the period 4 May 1999 to 3 May 2000, which was rated 'Fair'. The PER was signed by [the OiC-A] as First as well as Second Reporting Officer.

... On 3 May 2000, the Chief, Personnel Section, ICTR, advised the [Applicant] that his fixed-term appointment that was being extended until 3 June 2000 would not be extended beyond that date.

... On [the same date], [the OiC-A] wrote to the [Applicant] expressing his disagreement with the [Applicant's] new method regarding procedures on reporting problems with telephone lines. [The OiC-A] deemed it as '[...] an attempt to obstruct and sabotage the operations of the Tribunal while depriving the organization of continuous and vital telecommunication capabilities'.

... In May 2000, the [Applicant] rebutted his performance evaluation report ... for the period of 4 May 1999 through 3 May 2000, which was rated 'fair'. On 11 May 2000, in accordance with ST/AI/240/Rev.2 of 28 November 1984 on 'Performance Evaluation Report System', a rebuttal panel was established in order to review the [Applicant's] contested PER.

... On 15 May 2000, upon his return from sick leave, the [Applicant] wrote to [the OiC-A] with copy to the Registrar, and the Sections Chiefs, informing them of his return to duty as of 15 May 2000, with resumption of his duties as Chief of Communications Section. On 22 May ..., [the OiC-A] wrote to [the] then Chief, Personnel Section, instructing him to disregard the [Applicant]'s communication dated 15 May ... as it was contrary to his previous instructions. He also informed [the Chief, Personnel Section] that '[an Applicant's colleague] should remain OIC of Communications until further notice, and that pending [another Applicant's colleague]'s return, [the Applicant] [was] hereby appointed temporary Supervisor of Cluster 1.'

... In a fax dated 17 May 2000, the [Applicant] wrote to the Secretary-General requesting administrative review of the decision not to renew his appointment beyond its expiry date. On 19 May ..., the Chief, Administrative Law Unit (ALU) acknowledged receipt of the [Applicant's] request for administrative review.

... On 23 May 2000, the [Applicant] replied to [the OiC-A's] memorandum dated 3 May ..., on 'telephone trouble reporting'. The [Applicant] explained that the purpose of his memorandum was 'to clarify and enlighten staff to the appropriate action that needs to be taken in reporting faults [...]' and not to negatively affect the operations of the Tribunal as claimed by [the OiC-A].

... On 25 May 2000, the [Applicant] wrote to the Secretary of the [JAB] in Nairobi, requesting a suspension of action on the decision not to renew his appointment beyond 3 June 2000, which was based on his negative PER. In addition, the [Applicant] stated that 'the PER was completed maliciously with the intention to remove [him] from the office that [he] was recruited for and replace [him] with an associate.'

... On 24 July 2000, the [Applicant] wrote to the Secretariat of the JAB in New York, referring to his request for administrative review of the decision not to renew his appointment and the rebuttal of his last PER. The [Applicant] indicated that the post he had encumbered had been advertised, despite his pending appeal before the JAB, and that the Respondent had failed to acknowledge his initial request for administrative review. Finally[,] the [Applicant] stated that his appeal was serving the purpose of revealing UN-ICTR's practice of mistreatment of its staff members.

... On 31 October 2000, the rebuttal panel submitted its final report. It concluded that it was not in a position to 'determine exactly what ratings should have been given to [the Applicant].' However, the Panel expressed its opinion that the ratings appeared to be 'substantially lower than what should have been given.' The Panel inferred that it was the consequence of a 'long-standing conflict' between the [Applicant] and the then OIC, who acted as First Reporting officer and Second Reporting Officer as well. In view of the situation, the panel recommended a re-evaluation of the [Applicant]'s PER, taking into consideration the circumstances of the case.

... In a fax dated 2 January 2001, the [Applicant] reiterated his request, addressed to the USG for Management. The Chief, ALU, in a letter dated 15 January 2001 responded to the [Applicant]'s communication. He referred the [Applicant] to his letter of 19 May 2000 and also informed him that his request for suspension had been processed and that the decision was rendered on 5 June 2000.

... On 6 February 2001, the ICTR Registrar, in view of the lack of an implementable recommendation in the rebuttal panel report, decided to only 'take note' of the said report."

On 24 July 2000, the Applicant lodged an Appeal with the JAB in New York. The JAB adopted its report on 29 September 2004. Its considerations, conclusions and recommendation read, in part, as follows:

**“Considerations**

28. The Appellant contended that the contested decision was based on his unfavourable PER which lacked any objectivity as it had been issued by his supervisor with whom he had a strained relationship and who also signed his PER as First and Second Reporting Officer. The Appellant further contended that the Registrar failed to adhere to performance evaluation procedures when he disregarded the rebuttal panel’s recommendation. The Appellant deemed these improprieties prejudicial to him as they adversely affected his professional career and reputation. The Respondent on his part argued that the Appellant’s FTA was properly not renewed as his performance failed to meet expectations. The Respondent further argued that FTA by nature does not carry any expectancy of renewal as stated in Staff Regulation 104.12 (b) (ii) and reaffirmed by the United Nations Administrative Tribunal (UNAT). The Respondent maintained that the rebuttal process was carried out in accordance with the applicable rules and regulations. Therefore, none of the Appellant’s right[s] had been violated as a result of that process.

29. The main issues before the Panel were to determine whether the decision not to renew the Appellant’s appointment was motivated by prejudice or extraneous factors and then to ascertain whether his due process rights had been affected during the performance evaluation process and the subsequent rebuttal.

...

31. ... In the case under consideration, the Panel took note that the Appellant’s second PER was completed by the then OIC, Administration, both as First and Second reporting Officer. That in the view of the Panel deprived the evaluation of its intended objectivity and fairness. The Panel therefore shared the view of the Appellant that his right to due process had been compromised as a result of the irregularity in the PER process. Moreover, in view of the content and the tone of the communications exchanged between the Appellant and his supervisor, the Panel was satisfied that it was adequate evidence revealing the nature of their relationship.

32. As a result of the above, the Panel considered that the performance appraisal was vitiated by a substantial failing of a sufficiently serious nature as to render the Appellant’s second PER void. The Panel consequently decided that the PER be removed from the Appellant’s official status file. In determining whether the rebutted PER was a factor in the non extension of the Appellant’s FTA, the Panel was of the view that while the Appellant had no legal right to expect his FTA to be continually renewed, the events described tend to show that the unfavourable PER contributed to the reaching of the contested decision. The Panel, in view of the evidence provided, concluded that the decision not to renew the Appellant’s FTA was tainted by extraneous factors.

33. Turning to the second issue, the Panel took note that the rebuttal process was governed by ST/AI/240/Rev.2 of 28 November 1984, while a new Administrative Instruction (AI), ST/AI/1999/14 came into effect on 1 December 1999. The Panel was of the view that the new AI should have governed the said process that took place in October 2000. The Panel was thus in disagreement with the Respondent who maintained that the rebuttal process was properly governed by the old ST/AI. The Panel took note that the new AI offered more favourable provisions for the Appellant. The Panel in that respect took note that Section 13.3 of the applicable AI states: ‘[t]he performance rating resulting from the rebuttal process shall be binding on the head of the department or office and of the staff member concerned [...]’. In the case under consideration, the rebuttal panel recommended that the Appellant’s performance be re-evaluated, as in its opinion the ratings should have been ‘substantially higher’ than what he had received. The Panel however took note that such recommendation was not upheld by the Registrar who decided to only take note of the report. The Panel was of the view that failure on the part of the Registrar to exercise his prerogative in compliance with the new AI was harmful to the Appellant as he deprived the latter of the opportunity to have his performance record corrected. The Panel thus concluded that the Appellant did not enjoy fair and due process right with respect to the rebuttal procedure, which the Panel felt entitled him to compensation.

34. The Panel observed the failure by DPKO [Department of Peacekeeping Operations] to undertake an investigation into the circumstances leading to this appeal despite the various requests in that respect, in addition to the numerous communications reflecting the state of both parties' relationship. It was the Panel's opinion that an attempt to mediate, counsel or guide both parties would have helped resolve the crisis internally.

### **Conclusions and Recommendations**

35. In light of the foregoing, the Panel unanimously concluded that there was merit to this appeal. The Panel unanimously agreed that there was ample evidence tending to show that the contested decision was based upon extraneous factors as it was influenced by an irregular PER. The Panel also unanimously agreed that ... ST/AI/1999/14 was applicable to the present rebuttal process. The Panel unanimously agreed that failure to use the applicable AI violated the Appellant's due process rights. The Panel unanimously agreed that these failings on the part of the Administration adversely affected the Appellant's career prospects and professional reputation.

36. The Panel therefore unanimously recommends that the irregular PER be expunged from the Appellant's official status file, and that he be awarded one year's net base salary for the unfair treatment.

37. The Panel unanimously agreed to reject any other plea."

On 24 February 2005, the Department of Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case and finds that he is unable to agree with the JAB's findings. The Performance Appraisal System (PAS) was only phased in for use in ICTR in 2001 and administrative instruction ST/AI/1999/14 became applicable as of that time in ICTR. Therefore, contrary to the JAB's finding, the applicable administrative instruction in ICTR for the PERs and rebuttals of all ICTR staff prior to 2001 was the ST/AI/240/Rev.2. That instruction, unlike ST/AI/1999/14, did not provide that the results of the rebuttal process were binding upon the head of department. In addition, paragraphs 9 and 14 of ST/AI/240/Rev.2 anticipate the possibility of the same person being the first and second reporting officers. Thus, in accordance with the rules applicable in ICTR at the time, there was no violation of your due process rights by the application of that instruction on your rebuttal. Nevertheless, the Secretary-General takes note of the strained relationship that clearly existed between you and your supervisor. In light of the Tribunal's decision in *De Franchis* (Judgement No. 363), which involved a similar fact situation, the Secretary-General has decided to accept the JAB recommendation to remove the PER from your official status file and to pay you compensation in the amount of three months net base salary."

On 29 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The non-renewal of his contract constituted a breach of contract of employment between the Applicant and the Respondent that contradicted the Staff Regulations and Rules.
2. The non-renewal of his contract was arbitrary and discriminatory in nature.
3. The non-renewal of his contract caused financial loss as well as undue anxiety and stress.

Whereas the Respondent's principal contentions are:

1. The non-renewal of the Applicant's contract did not violate his rights, and was not arbitrary or discriminatory.
2. The evaluation of the Applicant's performance was carried out in accordance with the applicable rules, and his rights were not violated.
3. The Applicant was adequately compensated for any irregularities that may have occurred in his case.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The Tribunal notes that the Applicant first received a FTA as Chief of Communications Center at the ICTR from 4 May 1998 to 3 May 1999.

II. In a PER, which the parties agree was dated 4 May 1999, signed by the Chief of Administration, the Applicant's performance was rated as "Good".

III. On 5 May 1999, the Chief of Personnel asked the OIC of Administration for his advice regarding the extension of the Applicant's contract, which had expired on 3 May 1999. No mention was made of the "Good" performance appraisal of the prior day.

IV. On 10 May 1999, the OIC of Administration unequivocally responded:

"1. [...] I am unable to recommend in good conscience, the renewal of [the Applicant's] one-year, fixed term contract.

2. During my tenure as OIC Administration and as his immediate supervisor, I have had ample opportunity to observe [the Applicant] closely and assess his competence as Chief of Communications Section.

3. I have unfortunately concluded that, in my opinion, [the Applicant] is a poor manager, possessing insufficient leadership and interpersonal skills befitting a chief of section.

4. Specifically, [the Applicant] shows no ability to:

a. Meet deadlines, as evidenced in the deplorable delay in establishing a functioning telephone service at the Equator Hotel;

b. Assess the needs of a particular job and plan appropriately (he continues to order required equipment at the last minute);

c. Secure sufficient and competent staff to perform the required duties (recently, he attempted to hire two technicians DPKO/FALD [Field Administration and Logistics Division], and failed, and has made no further recommendations to me); and

d. Elicit the respect of and maintain good working relationships with his subordinates (though unsolicited, I have been informed by many of his staff that his 'people skills' are non-existent and that, owing to his inefficient running of the section, he [does] not have their respect.

5. Since my arrival here, he has not been able to improve Internet service or any other communications service. He has not ordered enough radios for our needs [...]

6. For the foregoing reasons, I propose to extender (sic) [the Applicant's] contract for

an additional one-month period to allow him suitable time to be reintegrated into [...] and provide us with an adequate window to circulate a vacancy announcement to find an appropriate replacement.”

V. The Tribunal notes that there was an obvious element of inconsistency in these documents. If the “Good” and favourable appraisal was signed by the Chief of Administration on 4 May 1999, it is incomprehensible that the Chief of Personnel would on 5 May 1999, ask the OIC of Administration for his opinion regarding the renewal of the Applicant’s contract without any reference to the appraisal. Adding to the inconsistency was the memorandum dated 10 May 1999, by the OIC of Administration, which did not refer to the “Good” performance appraisal, signed by the Chief of Administration. The Tribunal finds this mutual silence intriguing.

VI. The Tribunal acknowledges the Applicant’s contention that the second PER was unfairly inconsistent with the first one, but the Tribunal finds, to the contrary, that it was the first PER that was inconsistent with the whole of the Administration’s evaluation of the Applicant’s qualifications for renewal of his contract. The Tribunal has consistently held that performance appraisals and the related decisions regarding the renewal of a contract are within the discretionary authority of the administration, provided that they are not vitiated by improper motive, misreading of the facts, abuse of power, or any other extraneous facts. (See Judgements No. 1237 (2005); No. 1003, *Shasha’a* (2001); and No. 440 *Shankar* (1989)). Upon careful consideration of the record, the Tribunal finds that the Administration acted within its discretionary authority in its decision not to renew the Applicant’s contract.

VII. The Tribunal notes that in the second PER, the OIC of Administration rated the Applicant’s performance as fair. The OIC of Administration signed that appraisal in the capacity as both first and second reporting officer. On 3 May 2000, the Chief of Personnel advised the Applicant that his appointment would only be extended until 3 June, and that his contract would expire on that date.

VIII. The Applicant appealed to the JAB, which found that the Organization had deprived him of his due process rights in that his PER had been signed by the same person as “first” and “second” reporting officer. The JAB recommended removing this questionable PER from the Applicant’s official status file, and recommended an award of compensation in the amount of one year’s net base salary. The Organization accepted the JAB’s recommendation to remove the PER from the Applicant’s official status file and award him compensation in the amount of three months net base salary. That is the impugned decision.

IX. The PER for the period 4 May 1999 to 3 May 2000, was also rebutted by the Applicant. The Rebuttal Panel, while finding fault in the evaluation, concluded that it could not by itself change the rating, and recommended instead a re-evaluation of the Applicant’s PER. By this time, the Applicant



was no longer in office and such a course of action was not feasible. For that reason, the Administration concluded that the Rebuttal Panel's recommendation was not implementable.

X. The Applicant claims that these allegations are indicative of animosity towards him. The Tribunal finds that the Applicant merely makes cursory arguments on this point and fails to counter the evaluation given by both the new and former OIC of Administration, and their strong criticisms of his work and skills, as documented in a very detailed negative performance appraisal.

XI. Therefore, based on its review of the record, the Tribunal finds that the impugned decision was not motivated by personal animosity. The Tribunal notes that a new evaluation, as suggested by the Rebuttal Panel was impossible because the Applicant was no longer in service.

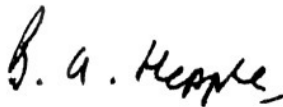
XII. The Tribunal finally turns to the Applicant's contention that his due process rights were violated by the OIC of Administration who signed his second PER in the capacity of both first and second reporting officer. Even though it is argued by the Administration that the norms in existence at the time provided for such a dual role, it is clearly unreasonable to suggest that a person can legally supervise his own supervision and thus countersign his own simultaneous evaluation. While the Tribunal finds that the Applicant's due process rights were violated in this respect, it concludes that such breach was reasonably compensated by expunging the report from that Applicant's official status file and by the three months net base salary already awarded by the Administration.

XIII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

*(Signatures)*



**Spyridon Flogaitis**  
President




**Bob Hepple**  
Member



Agustín **Gordillo**  
Member

Geneva, 31 July 2009



Tamara **Shockley**  
Executive Secretary