

opinion of the Secretary of the Board concerning the receivability of the appeal.

II. The Joint Appeals Board did not consider the question of a possible waiver of the time-limits provided for in Staff Rule 111.3 (d).

III. The Tribunal therefore considers that it would be inappropriate to consider the merits of the case at this stage and refers the case to the Joint Appeals Board for consideration in the light of Staff Rule 111.3 (d).

(Signatures)

Francis T. P. PLIMPTON
Vice-President, presiding

Samar SEN
Member

Arnold KEAN
Member

New York, 6 November 1980

Suzanne BASTID
President, alternate member

Jean HARDY
Executive Secretary

Judgement No. 261

(Original: English)

Case No. 245:
Boelen

Against: **The Secretary-General
of the United Nations**

Non-renewal of a fixed-term appointment.

Nature of the Applicant's appointment and her expectations concerning renewal of such appointment.—Applicant's failure to produce conclusive proof concerning alleged promises.—Conclusion of the Tribunal that the Administration made no commitment about the renewal of the Applicant's appointment.—Circumstances of the Applicant's separation from service.—The Applicant's objections against the periodic report on which the decision not to renew her appointment was based.—Those objections are not well founded.—Failure of the Administration to comply with the provisions of Administrative Instruction ST/AI/115.—It cannot be concluded that the decision not to renew the Applicant's appointment was either unjust or illegal.—A subsidiary request of the Applicant is not receivable.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, Vice-President, presiding; Mr. Francisco A. Forteza;
Mr. Samar Sen;

Whereas, at the request of W. A. Marianne Boelen, a former staff member of the United Nations Development Programme, hereinafter called UNDP, the President of the

Tribunal, with the agreement of the Respondent, extended to 15 October 1979 the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 October 1979, the Applicant filed an application the pleas of which read as follows:

"1. The Applicant requests the Tribunal to waive the requirements of article 7 of the Rules of the Administrative Tribunal to the extent that they have not been met here; alternatively Applicant requests to be informed of the necessary corrections (article 7, paragraph 10 of the Rules of the Tribunal).

" . . .

"2. The Applicant requests the Tribunal to rule and judge that the application is receivable and the Tribunal is competent to hear it.

"3. (a) The Applicant requests the Tribunal that the decision of the Administration not to renew the fixed-term contract of the Applicant be rescinded . . . and that she be given another two-year fixed-term contract.

"(b) Alternatively, the Applicant requests that she receive compensation equivalent to two years' net base salary.

"4. The Applicant requests that she be given compensation as '*pretium doloris*' in an amount to be determined by the Tribunal, since the open mailing of the letter of the Secretary-General of 23 May 1979 . . . further deteriorated her chances of further employment, now with FAO."

Whereas the Respondent filed his answer on 5 February 1980;

Whereas, on 5 May 1980, the Applicant filed written observations in which she requested oral proceedings;

Whereas the presiding member rejected that request on 14 August 1980;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 7 August 1972 as a Programme Officer under a fixed-term appointment for two years and was assigned to the UNDP Office in Ethiopia. In a first periodic report, covering the period from August 1972 to June 1973, the first reporting officer, namely Mr. F. Seib, Resident Representative of UNDP in Ethiopia, gave the Applicant the first rating on three items (initiative, punctuality, and personal relations with others), the second rating (on a five-point scale) on four items (written expression in working language, oral expression in working language, industry, and sense of responsibility), and the middle rating on all other items (professional knowledge and skill, power of analysis, skill in producing a solution, judgement, quality of work accomplished, and quantity of work accomplished); he commented:

"This was staff member's first assignment as Programme Officer. I have given guidance and occasionally corrected unsuitable approaches."

The second reporting officer rated the Applicant as "a staff member who maintains a good standard of efficiency". The Applicant's second periodic report, which covered the period from June 1973 to March 1974, was drawn up on 19 March 1974 by Mr. R. B. Stedman, Assistant Administrator and Regional Representative of UNDP in Ethiopia, as first reporting officer. He gave the Applicant the second rating (on a five-point scale) on three items (industry, quantity of work accomplished, and sense of responsibility), the middle rating on five items (skill in producing a solution, written expression in working

language, oral expression in working language, initiative, and punctuality), the fourth rating (on a five-point scale) on three items (professional knowledge and skill, judgement, and quality of work accomplished), and the lowest rating on two items (power of analysis and personal relations with others); he commented:

“Miss Boelen has served about 20 months of her first UNDP appointment, of which 10 have been under my supervision. Miss Boelen is felt to be deeply involved and committed to the work of UNDP. Some of the deficiencies reported under B above are perhaps not surprising in light of her limited experience, and others are related to her apparent inability to recognize her own shortcomings or to accept her supervisors’ judgements about them. She often thinks and talks about people, projects and events in inaccurate but categorical and hyperbolic terms. She has a highly possessive attitude towards her work assignments, and worries about imagined conspiracies against her amongst colleagues, thought to be aimed at taking over some of her work. Her relationships with national staff and project personnel are uneven. The Deputy Regional Representative, who has directly supervised Miss Boelen’s programme work since November 1973, shares these views.

“ . . .

“I have discussed her performance with Miss Boelen on several occasions, and had a comprehensive and specific review of the points discussed above shortly before Christmas 1973, at which time I informed her that I could not recommend an extension of her appointment.”

The second reporting officer rated the Applicant as “a staff member who maintains only a minimum standard”, adding:

“In view of the nature of this report, the Regional Bureau for Africa gave it very careful consideration. In agreeing with the recommendations of the Assistant Administrator and Regional Representative in Addis Ababa, special note was taken of Miss Boelen’s previous report.”

Mr. Stedman transmitted the Applicant’s periodic report to Mr. J. C. Phillips, the Deputy Regional Representative, under a letter dated 18 March 1974 saying:

“ . . .

“Please note that the final sentence of Section I F says that you share the views I have expressed. If you do, please return the report to Eugene Youkel. If you have any hesitation, reservation or amendment to suggest, you had better hold the report for my return, so that we can jointly amend it.”

On 25 March 1974 Mr. Phillips forwarded the periodic report to the Chief of the Recruitment and Placement Section of the UNDP Division of Personnel with the following statement:

“I confirm that I concur with the assessment given, including that in Section I F.”

On 5 April 1974 the Applicant inquired of the UNDP Division of Personnel as to whether her contract would be extended. On 17 April 1974 the Director of the UNDP Division of Personnel cabled Mr. Stedman to advise the Applicant that the decision at Headquarters was not to extend her contract. On 19 April 1974 he wrote to the Applicant informing her that, mainly on the basis of her recent periodic report, it was the decision of the

Regional Bureau for Africa and of the Division of Personnel not to recommend a further extension of her appointment. On 29 April 1974 the Chief of the Manpower Planning Section of the UNDP Division of Personnel enclosed the periodic report in a letter addressed to the Applicant. On 3 May 1974 the Applicant left Addis Ababa for Holland on annual leave. On 27 May 1974 the Applicant requested the Secretary-General to review the decision not to extend her contract. On 10 June 1974 she returned to duty. On the same day she wrote to the Director of the UNDP Division of Personnel that she had not yet received a copy of the periodic report, explaining that during her absence on leave some mail from Headquarters had been forwarded to her brother's address in Holland on the erroneous assumption that she was with him and asking that a copy of the report be sent to her by ordinary mail. On 11 June 1974 Mr. Phillips cabled Headquarters asking for a duplicate of the Applicant's periodic report. On 13 June 1974 the Chief of the Manpower Planning Section sent a letter to the Applicant in which he enclosed her periodic report. On 16 June 1974 the Applicant sent to the Assistant Secretary-General for Personnel Services a letter in which, after stressing that she had not yet received or seen a copy of her periodic report, she requested the Secretary-General to review her case. On 19 June 1974 the Applicant's mail which had been forwarded to Holland was returned unopened to Addis Ababa and handed to the Applicant. On the same day Mr. Phillips received an additional copy of the Applicant's periodic report which he had requested from Headquarters but he "did not hand this second copy to her" "for reasons of delicacy" as she was unwell. On 21 June 1974 the Director of the Division of Personnel Administration informed the Applicant that the Secretary-General saw no reason to request the Administrator of UNDP to reconsider his decision which had been based on an evaluation of her performance as recorded in her periodic report. On the same day the Chief of the Manpower Planning Section cabled the Applicant that additional copies of her periodic report had been pouched to her in care of Mr. Phillips on 13 June. On 24 June 1974 he was informed by cable that those copies had not been received and he was asked to send them by ordinary mail. On 27 June 1974 the Applicant, in a second letter addressed to the Assistant Secretary-General for Personnel Services, indicated that she had received her periodic report on that date, commented on it at length and renewed her request that her case be reconsidered. On 2 July 1974 the Applicant wrote to the Chief of the Manpower Planning Section to acknowledge that on that day Mr. Phillips had given her the copies of her periodic report. In a reply dated 22 July 1974 the Chief of the Manpower Planning Section outlined the rebuttal procedure to the Applicant and asked her to advise him as to whether she intended her letter of 27 June 1974 to serve as such a rebuttal. On 30 July 1974 the Applicant requested the Chief of the Manpower Planning Section to consider both her letters of 16 and 27 June 1974 "as a rebuttal of the decision taken by the Office of Personnel not to extend [her] contract on the basis of [her] periodic report . . .". In a reply dated 5 August 1974 the Chief of the Manpower Planning Section pointed out that a rebuttal dealt only with the periodic report and not with the administrative decision concerning contract renewal and therefore was not the mechanism to request review of the decision not to renew her contract. On 13 August 1974 the Applicant lodged an appeal with the Joint Appeals Board. The Board submitted its report on 19 March 1979. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"59. The Board finds that the appellant had a reasonable expectation that she would be considered for an extension of her contract on the basis of her performance

and that such performance would be assessed in an unprejudiced way. The decision not to renew her contract was based on a report by the Regional Representative, who according to the preponderance of the evidence submitted to the Board was manifestly, strongly and persistently irritated with the appellant. While this raises questions as to the objectivity of the report, the Board finds that there is no conclusive proof that the report and the consequent decision was motivated by prejudice. Therefore the Board finds that the request for the rescission of the decision not to renew the appellant's fixed-term appointment cannot be sustained.

"60. The Board finds, however, that the appellant was denied due process when the decision not to renew her appointment was taken on the basis of a periodic report which she was not given the opportunity to rebut before the decision was adopted.

"61. Consequently, the Board concludes that compensation is the appropriate remedy for the injury sustained by the appellant in this case, and accordingly recommends that a sum equivalent to two months' net base salary be awarded to her."

On 23 May 1979 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken the following decisions on the appeal:

"The Secretary-General has re-examined your complaints in the light of the Board's Report and recommendations and has decided to accept the Board's conclusion on the question of non-extension of your fixed-term appointment and to maintain the administrative decision not to extend that appointment.

"Nevertheless, the Secretary-General has agreed that the non-renewal of your appointment was decided without having taken into account your rebuttal to the periodic report and that, as pointed out by the Board, this had not afforded to you the element of due process. Consequently, the Secretary-General has decided to accept the Board's recommendation for the payment to you of a sum equivalent to two months' net base salary as compensation for any injury that you may have sustained."

On 12 October 1979 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's second periodic report was written by the wrong person and the person who wrote it, the Regional Representative, was biased against the Applicant, making the report not objective.
2. The above-mentioned defaults render the periodic report not to be a legal *nullum*, but they make it invalid when and since it is contested, hence no valid report exists.
3. The decision not to renew the Applicant's contract was based on this report which does not exist as a valid report.
4. The decision not to renew the Applicant's contract, being based upon a non-existent report, is by definition faulty and—since contested—invalid and must be rescinded.

Whereas the Respondent's principal contentions are:

1. Renewal of a fixed-term appointment is within the discretion of the Secretary-General, who is responsible for the selection and appointment of staff. The decision against renewal of the Applicant's appointment was a valid exercise of that discretion: in the absence of a written commitment by an authorized UNDP official changing the

express terms of her appointment, the Applicant had no right to UNDP employment after her appointment expired. In any event the Applicant failed to establish that the decision against her further employment was motivated by personal prejudice.

2. The lapse of procedures with respect to the Applicant's rebuttal to her periodic report did not substantially affect her rights and in any event no further payment beyond that already made by the Respondent on recommendations of the Joint Appeals Board is justified, having regard to the fact that her rebuttal was considered by the Respondent prior to the contested decision and that no proof was furnished that she suffered any damage from the lack of an investigation.

The Tribunal, having deliberated from 30 October 1980 to 11 November 1980, now pronounces the following judgement:

I. The main request of the Applicant is that the Tribunal rescind the decision of the Respondent not to renew her fixed-term appointment. This plea is both receivable and within the Tribunal's competence.

II. The issues before the Tribunal in this connexion are:

(a) The nature of the Applicant's fixed-term appointment and her expectations concerning renewal of such appointment; and

(b) The circumstances of her separation from service.

III. As to the first of these issues: The Applicant's appointment was for a fixed term of two years which expired on 6 August 1974. Her letter of appointment explicitly stated, in accordance with Staff Rule 104.12 (b), that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment".

This provision of the Staff Rules has not been changed by Administrative Circular UNDP/ADM/PER/55 of 23 May 1974 which states *inter alia*:

"Taking into account that a fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment, at the conclusion of the initial fixed-term appointment, one of the following courses of action may be taken by the Administration:

"(a) The appointment may be permitted to expire; or

"(b) Subject to satisfactory performance, the staff member may be offered an extension of the fixed-term appointment for an additional two-year period."

IV. The Applicant contended before the Joint Appeals Board that she had received assurances about a future career in UNDP from the Chief, Personnel Division, Bureau of Administration and Management in a conversation held at the time of her appointment. She asserted that she would not have given up her job as a social research worker—and a permit to work in the United States—if she did not have an expectation of renewal of her appointment. According to her, such expectation was reinforced by an interview with an officer of the Africa Bureau of UNDP in 1973.

Beyond mere assertions, however, the Applicant has not produced any conclusive proof concerning the alleged promises. It is significant that in the long letters she wrote to Headquarters after having received its letter of 19 April 1974, she gave no indication that she expected her appointment to be extended on the basis of assurances given to her. The Respondent, on the other hand, refers to two letters of the Applicant which show

that she was well aware of her legal situation and did not believe that her consultations with UNDP officers or any other circumstance had removed the uncertainty inherent in the nature of her appointment. In the first of these letters, addressed to the Resident Representative and dated 5 November 1972, the Applicant wrote *inter alia*

“ . . . I have a two-year contract and no security that this will be extended . . . ”

In the other letter, which she addressed on 5 April 1974 to the UNDP Division of Personnel, New York, she wrote:

“I would be most grateful if you would kindly inform me at your earliest convenience what my status is, so that I may make my plans accordingly. I realize that there are still 3½ months left before the expiration of my contract, but were my contract not extended, I shall have to go and visit the various Agencies in Europe in order to look for alternative possibilities of employment . . . ”

On the basis of the available evidence, the Tribunal finds that the Administration made no commitment about the renewal of the Applicant's appointment and consequently, her expectations could not have amounted to more than a hope that her employer would use his discretionary power to assess her performance and that depending on his findings he would offer her a renewal of appointment.

V. As to the second of the issues mentioned in paragraph II above: The appointment of the Applicant expired on 6 August 1974. Well before that date, the Applicant was informed in April 1974, upon her inquiry, that her appointment would not be extended. The letter of 19 April containing this information referred to the second periodic report as the main basis of the decision.

VI. With regard to that periodic report, which covered the period June 1973–March 1974, the Applicant initially contended that it was irregular inasmuch as it had been written by the Regional Representative and not by the Deputy Regional Representative, who was the Applicant's immediate supervisor. Moreover, the Regional Representative was, according to the findings of the Joint Appeals Board, “manifestly, strongly and persistently irritated” with the Applicant. The Respondent, however, referred in his answer to the UNDP Field Manual, Section IV-B (Field Office Staff, International) according to which it was for the Regional Representative to complete and sign the first section of the report. The Applicant, in her written observations, does not contest this point anymore but holds, nonetheless, that the Regional Representative was the wrong person to write the report as he was frequently away from Addis Ababa and that he harboured considerable prejudice against her.

VII. The Tribunal considers that these objections against the periodic report are not well founded. Before submitting the report to the proper authorities Mr. Stedman, the Regional Representative, forwarded it on 18 March 1974 to his Deputy, Mr. Phillips, with the following request:

“Please note that the final sentence of Section I F says that you share the views I have expressed. If you do, please return the report to Eugene Youkel. If you have any hesitation, reservation or amendment to suggest, you had better hold the report for my return, so that we can jointly amend it.”

In his answer of 25 March 1974, the Deputy Regional Representative wrote:

“I confirm that I concur with the assessment given, including that in Section I F.”

Four and a half years later, Mr. Phillips (who in the meantime had become Resident Representative in the People's Democratic Republic of Yemen and was thus no longer a subordinate of Mr. Stedman), when asked for information by the Chairman of the Joint Appeals Board, gave in a letter sent from Aden on 18 November 1978 the following details:

“In January 1974 I advised Mr. Stedman that her work continued to be unsatisfactory and that I did not think her contract should be renewed. He urged me to increase my supervision in hopes that the standard of her work would improve. He also had a meeting of several hours with Miss Boelen trying to explain where she would have to improve her work. Unfortunately both Mr. Stedman and my attempts at guidance failed and were misinterpreted by Miss Boelen. If anything the standard of her work deteriorated to a point where I had a written memo from the Ministry of Education requesting that Miss Boelen be removed from handling the projects relating to that Ministry.

“Mr. Stedman's report on her performance from June 1973 to March 1974 was a redraft of my recommendations—namely that Miss Boelen's contract should not be renewed. I advised Mr. Stedman that I considered Miss Boelen a liability to UNDP particularly in the difficult situation pertaining in Addis Ababa at that time.

“I can say without hesitation that Mr. Stedman never expressed or exhibited antipathy or personal animosity towards Miss Boelen.”

These quotations establish beyond doubt that the adverse opinion of the Regional Representative was fully shared by his then Deputy, a person in respect of whom the Applicant alleges neither frequent absence from the duty station nor prejudice. The adverse assessment of the Applicant's performance by the Deputy Regional Representative supports the Joint Appeals Board's conclusion that the Regional Representative was not motivated by prejudice in writing the periodic report in question.

VIII. The Tribunal observes that the Administration did not proceed with the necessary circumspection in handling that periodic report. It did not see to it that it should reach the Applicant in time with clear instructions concerning the possibility of rebuttal. There is no record of the appraisal of the Applicant's formal complaints relating to the contents of the report. Furthermore, no special report was prepared or given to the Applicant. In the given circumstances, however, this disregard of Administrative Instruction ST/AI/115 does not carry such weight as would be necessary to find that the Respondent's decision not to renew the Applicant's fixed-term appointment was either unjust or illegal. In the Tribunal's view, the payment received by her on the recommendation of the Joint Appeals Board adequately compensated her for any losses she might have suffered on this account.

IX. As to the Applicant's request for compensation for the damage she allegedly suffered because of the open mailing of the letter from the Assistant Secretary-General for Personnel Services dated 23 May 1979, the Tribunal finds that this claim does not arise from a “dispute” between the Applicant and the Respondent, as it was not submitted previously to the Respondent and the Joint Appeals Board did not make a recommendation on it (Judgement No. 203: *Corrado*). It follows that according to article 7 of the Tribunal's Statute this plea is not receivable.

X. For the foregoing reasons, the application is rejected.

XI. The proceedings before the Joint Appeals Board in this case lasted from 13 August 1974 to 19 March 1979. The Tribunal feels constrained to observe that such protracted procedure is not consistent with Staff Rule 111.3 (h) and is hardly conducive to the proper administration of justice.

(Signatures)

Endre USTOR
Vice-President, presiding

Samar SEN
Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

New York, 11 November 1980

Judgement No. 262

(Original: French)

Case No. 248:
Thorgevsky

Against: The Secretary-General
of the United Nations

Request of a former staff member promoted from the General Service to the Professional category, seeking to ensure that her promotion does not have the effect of reducing her pension entitlement.

The Tribunal notes that during the last five years of the Applicant's participation in the Pension Fund, her pensionable remuneration was lower than it would have been had she not been promoted.—Inapplicability of Staff Rules 103.9 and 103.16(c).—Applicant's contention based on Judgement No. 257 of the ILO Administrative Tribunal.—Notwithstanding the desire to strengthen the common system, solutions differ from one Organization to another.—Grounds of the aforementioned judgement No. 257.—Since that judgement was expressly based on a text which is not included in the provisions which the Tribunal must apply, the latter cannot apply the solution provided in that judgement for the benefit of the Applicant.

Request for compensation for procedural delays.—Since the Applicant has sustained no injury as a result of the procedure followed, the request is rejected.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Francisco A. Forteza;

Whereas on 11 February 1980, Wanda Thorgevsky, a former staff member of the United Nations, filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;