



Administrative Tribunal

Distr.
LIMITED

AT/DEC/697
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 697

Case No. 772: ABD ELAL

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, President; Mr. Luis de
Posadas Montero; Mr. Mikuin Leliel Balanda;

Whereas at the request of Nabil M. Abd Elal, a staff member
of the United Nations, the President of the Tribunal, with the
agreement of the Respondent, extended the time-limit for the filing
of an application to the Tribunal to 31 December 1993;

Whereas, on 21 December 1993, the Applicant filed an
application requesting the Tribunal, inter alia:

- "(a) To rescind the decision of the Secretary-General
accepting the recommendation of the Joint Appeals Board
rejecting the Applicant's appeal;
- (b) To find and rule that the Joint Appeals Board erred
as a matter of law, in substance and procedure by
rejecting the Applicant's appeal;
- (c) To find and rule further that the Applicant was
harmful by the Respondent's actions in failing to
safeguard his rights to a fair and impartial
evaluation and thus forcing him to rebut his first
three PERs which in turn lead to a delay of his
promotion by three years compared to his
colleagues;
- (d) To award the Applicant appropriate compensation to
be fixed at a two year P-4 full salary for the
actual, consequential and moral damage sustained as

a result of the Respondent's actions or lack thereof and to make this determination pursuant to article 9, paragraph 1 of the Statute and Rules;

- (e) To order that the Applicant's promotion to P-4 be made retroactive by the nine months prayed for in the Applicant's initial complaint."

Whereas the Respondent filed his answer on 8 April 1994;

Whereas the Applicant filed written observations on 16 September 1994;

Whereas, on 16 June 1995, the Applicant submitted further documents and on 19 July 1995, the Respondent submitted his comments thereon;

Whereas, on 12 July 1995, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 30 October 1982, as an Interpreter Trainee in the Department of Conference Services (DCS), Interpretation and Meetings Division, Interpretation Service/Arabic, on a three month fixed-term appointment at the P-1, step II level. His appointment was extended for two three-month periods, through 1 August 1983, when the Applicant was granted a probationary appointment and promoted to the P-2 level, as an Associate Interpreter. With effect from 1 July 1986, he was granted a permanent appointment, at the P-3 level, as an Interpreter. The Applicant was promoted to the P-4 level, with effect from 1 July 1991.

On 19 November 1990, the Applicant applied for a P-4 post of Interpreter (Arabic). On 13 March 1991, he was informed by a Recruitment and Placement Officer, Office of Human Resources Management (OHRM), that he had been selected for the post. In a memorandum of the same date, the Recruitment and Placement Officer informed the Executive Officer, DCS, that the Applicant had been

selected for the post and that "the earliest possible effective date of this assignment ... shall be the date on which the APB [Appointment and Promotion Board] short-listed the candidates, namely, 19 December 1990. ... If the staff members are already performing their new functions, this will be the effective date of their assignment. If the staff members are not yet performing their new functions, the effective date will be the date on which they commence their duties." A Personnel Action form (P.5), issued on 3 April 1991, indicated that the Applicant had been assigned to higher level functions with effect from 19 December 1990.

In a memorandum to the Assistant Secretary-General, OHRM, dated 3 May 1991, the Applicant and another staff member selected for a higher level post noted that a colleague in their same situation had been exceptionally granted a promotion with retroactivity. They stated "we deem it unfair that ... we are denied similar privileges" and requested that their promotions be implemented retroactively for a period of nine months. This memorandum was forwarded on 31 May 1991 to the Executive Officer, DCS, for comment. On 7 August 1991, DCS recommended the Applicant for promotion to the P-4 level and certified that the Applicant had performed the higher-level functions satisfactorily for six months following his assignment to the P-4 post.

In a memorandum dated 1 October 1991, a Personnel Officer, OHRM, noted that "DCS has recommended the promotion of the two staff members to take effect six months from the date of their assumption of higher level functions, i.e., on 1 July 1991." She stated that OHRM's review of this recommendation was "pending DCS' comments on the request of the staff members for retroactive promotion to the P-4 level."

According to the record, on 11 February 1992, having received no response from DCS to several reminders, OHRM processed the promotion of the Applicant to the P-4 level, with effect from 1 July 1991. In a memorandum to the Assistant Secretary-General, OHRM, dated 6 March 1992, the Applicant and another staff member

complained that OHRM had implemented the contested promotion "without, in any way, considering our request for retroactivity." In a memorandum to a Personnel Officer, OHRM, dated 19 March 1992, the Executive Officer, DCS, indicated that DCS "would like to support the staff members' request for retroactivity of their promotion to P-4." In a reply dated 31 March 1992, the Personnel Officer requested clarification "since the actions taken by DCS until your memorandum of 19 March 1992 do not accord with your statement that the staff members' request is supported by DCS."

In a memorandum to the Assistant Secretary-General, OHRM, dated 19 May 1992, the Applicant and another staff member again requested the Assistant Secretary-General to implement their promotions retroactively. In a memorandum dated 11 August 1992, the Acting Chief of Staff Administration and Monitoring Service, OHRM, advised the Applicant and his colleague that they had not been assigned P-4 functions until 19 December 1990. Therefore, their promotion to the P-4 level with effect from 1 July 1991, six months from the date of assumption of the higher level functions, was in accordance with the rules.

On 8 October 1992, the Applicant requested an administrative review of this decision. On 11 December 1992, he lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 June 1993. Its considerations, conclusions and recommendations read, inter alia, as follows:

"28. The Panel noted that, based on ST/AI/338/Add.2, the retroactive implementation of a staff member's promotion should depend, in each case, on the date from which the staff member concerned has performed the full functions of the higher-level post. The Panel, however, observed that it was within the authority of the Secretary-General to grant a waiver of the time required in the above-mentioned rule, in case of exceptional circumstances. The Panel, therefore, accepted the Respondent's explanation that the reason for the retroactive implementation of the promotion of the staff members mentioned by the Appellant was that they had been performing duties, for a considerable length of time, at the P-4 level prior to their selection to the P-4 posts.

29. The Panel considered whether any exceptional circumstances were present which would have warranted the granting of an exception to the Appellant. The Panel felt that an exception could be granted only on the grounds that the Appellant had been performing at the P-4 level prior to his selection for the P-4 post. ...

30. The Panel felt that the line between assignments performed by a P-3 level and a P-4 level is very thin. It seemed to the Panel that whenever an interpreter was performing a P-3 or a P-4 level assignment, it was based merely on the amount of confidence and trust given him by his supervisor as indicated by the nature of the interpreter's assignment.

31. Based on the above, the Panel found that it was not within its competence to evaluate the level of the assignments the Appellant performed prior to his selection for the post in question.

32. ... The Panel also noted that DCS had maintained that the Appellant was assigned to the P-4 post on 19 December 1990 and not prior thereto.

33. The Panel took note of the memorandum dated 13 March 1991, from [the Recruitment and Placement Officer, OHRM] to [the Executive Officer, DCS], which referred inter alia, to the effective date on which the Appellant started to perform at a higher level: 'For administrative purposes, the earliest possible effective date of this assignment to a higher level post shall be the date on which the APB short-listed the candidates, namely, 19 December 1990.' (...) The Panel found no reason to change this date.

Conclusions and recommendations

34. The Panel did not concur with the view of the Appellant that the decision not to implement retroactively his promotion from P-3 to P-4 constituted a violation of Appellant's rights.

35. Accordingly, the Panel recommends that the appeal be rejected."

On 15 July 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him that the Secretary-General had "approved the recommendations of the Board ... [and] decided to reject your appeal and to take no further action on your case."

On 21 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was subjected to irregular procedures and was a victim of discrimination and prejudice, which has led to an unfair loss of seniority compared with his colleagues.
2. The JAB erroneously concluded that the Applicant was not performing the higher-level P-4 duties prior to the effective date of his promotion.

Whereas the Respondent's principal contentions are:

1. The effective date of the Applicant's promotion was in accord with the promotion procedures applicable at that time.
2. There is no credible evidence that the decision under appeal was motivated by prejudice or any other improper motive.

The Tribunal, having deliberated from 28 June to 21 July 1995, now pronounces the following judgement:

I. On 19 November 1990, the Applicant, then a staff member at the P-3 level, applied for a P-4 post that had been advertised under the Vacancy Management System in force at the time. His application was considered by the Appointment and Promotion Board (APB) and subsequently he was selected to fill the post.

Having been selected, he was subject to the provisions of ST/AI/338/Add.2 which stipulates that "staff members who have been selected ... for a post one level higher than their present level may have their promotion implemented as of the beginning of the seventh month after the staff member has assumed the full functions of the higher-level post".

II. On 13 March 1991, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, informed the Executive Officer, Department of Conference Services (DCS), that the six-month period required by ST/AI/338/Add.2 was to be counted from 19 December 1990, at the earliest, i.e. the date on which the staff member had been placed on the short list by the APB. This date was established pursuant to the memorandum of the Assistant Secretary-General for OHRM dated 8 September 1990, to the Chairman, APB, on "Promotion under the Vacancy Management and Staff Redeployment Programme", according to which "[if] the staff members are already performing their new functions, this will be the effective date of their assignment. If the staff members are not yet performing their new functions, the effective date will be the date on which they commence their duties".

III. The Applicant challenged this decision, arguing that other staff members appointed to P-4 posts had been promoted to the P-4 level retroactively, while he had to wait for six months. He claimed that he was discriminated against. He further submitted that there was practically no difference between the duties performed by an interpreter at the P-4 level and those performed at the P-3 level and that, therefore, the criterion used by the Administration to grant or to deny retroactivity was unfounded.

IV. The Administration, on its part, while admitting that the duties performed by an interpreter were basically a single function regardless of the grade, maintained that, nevertheless, a difference arose when the importance of the various meetings serviced by the interpreters was considered. Thus, duties of a more responsible nature, such as those performed at the meetings of certain bodies, were considered to be at the P-4 level. To this, the Applicant answered by submitting a list of the meetings he had serviced, which included several meetings of the Security Council. This was not

considered sufficient by the Administration, which alleged that, occasionally, P-3 staff members had to service such meetings, due to shortage of personnel.

V. The Tribunal, therefore, had to determine:

(a) What were the rights of the Applicant as far as the implementation of his promotion to the P-4 level was concerned;

(b) Whether the criterion used by the Administration to establish the commencement of the six month period required by ST/AI/338/Add.2 for promotion to a higher level violated such rights;

(c) Whether the Administration violated the staff member's rights by grading the function of interpreting at different levels, according to the nature and importance of the meeting at which it was performed;

(d) Whether the Applicant performed at the P-4 level prior to his promotion, making him eligible for a retroactive promotion;

(e) Whether the Applicant was discriminated against by the retroactive promotions granted to other staff members.

VI. In this respect, the Tribunal finds:

(a) That the Applicant's rights, as far as his promotion to the P-4 level is concerned were, as provided by ST/AI/338/Add.2, to be promoted after a six-month period "subject to the department or office submitting to OHRM a memorandum certifying satisfactory performance by the staff member of the functions of the higher-level post".

There are no provisions contemplating a waiver of such requirements. Therefore, the six-month period is applicable to all staff members selected for a post classified at a level higher than their level at the time.

(b) When determining the date from which the six months were to be counted, the Administration decided that in the case of those staff members already performing at the P-4 level, it was the date

on which they began to perform at that level. For those staff members "that are not yet performing their new functions the effective date will be the date on which they commence their duties".

The Tribunal is of the view that this distinction in no way contradicts or is inconsistent with the provisions of ST/AI/338/Add.2. Nor is there a possibility of waiving the six-month requirement in a way that would establish an undue privilege in favour of certain staff members to the detriment of others. The six-month period is respected and is applied to all staff members promoted to the P-4 level, in order to ascertain that the staff member selected for a higher level post can perform satisfactorily at such level. It is therefore logical that for those who have already been performing at the higher level, the six-month period should commence when they began performing at such level. It is from that moment that they can demonstrate their proficiency at the new level.

(c) Since the duties performed by an interpreter at both the P-3 or P-4 levels are similar, a criterion had to be established to distinguish between the two categories. The Administration decided that interpretation at particularly high level or sensitive meetings was a P-4 level function while interpretation conducted in different circumstances, at a lower level of responsibility, was a P-3 level function. The Tribunal finds no fault with this criterion. It contradicts no rule or regulation and is not arbitrary as it is based on the increased degree of accuracy required by the special nature of some meetings.

(d) The Administration found that the Applicant's performance only met the requirements of the P-4 level in the latter part of 1990. The Applicant challenged this finding and submitted a list of assignments that showed he had serviced several high level meetings. In the view of the Tribunal, it is up to the Administration to assess whether the Applicant had performed duties

considered at the P-4 level in a manner that would warrant beginning the six-month period earlier than the date of selection for the new post.

Only if it could be proved that the Administration acted arbitrarily and refused to recognize services that would clearly show that the staff member regularly performed at the P-4 level, could the Administration's decision be questioned. This is not the case in the present instance. The list of assignments submitted by the Applicant shows that the Applicant did not perform regularly at the P-4 level. Thus, the decision of the Administration cannot be successfully challenged. The Applicant claims that his performance evaluation report (PER) was altered by shortening the period it covered in order to exclude some P-4 level functions. The Tribunal notes that the functions mentioned, even if they had been covered by the PER, would not have altered the Applicant's possibility to obtain a retroactive promotion. Those functions were performed in February 1991 and only P-4 functions carried out prior to the selection for the new post, i.e. December 1990, would have been relevant for implementing the promotion retroactively.

(e) Discrimination against the Applicant has not been proven. The Respondent stated in his submission to the JAB that "in each of the cases cited by the Applicant, the Department of Conference Services certified that the staff members were performing at the P-4 level prior to their selection to the P-4 level post". The Applicant does not dispute this fact. He merely claims that he also had been performing at the P-4 level and should have been treated accordingly. In order to successfully claim discrimination, the Applicant would have to establish that his situation was identical to that of those staff members who were promoted retroactively. In the view of the Tribunal, the Applicant has failed to do so.

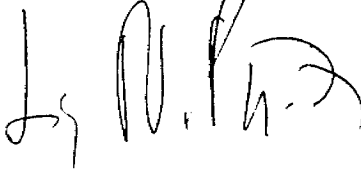
VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

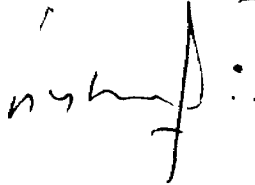
Jerome ACKERMAN
President



Luis de POSADAS MONTERO
Vice-President



Mikuin Leliel BALANDA
Member



Geneva, 21 July 1995



R. Maria VICIEN-MILBURN
Executive Secretary