

ance granted the Applicant appropriate reliefs and the adequacy thereof cannot be determined by the Tribunal.

VIII. The Tribunal finds that there is no violation of the relevant Staff Regulations and Rules and that the Applicant does not fall within the purview of the administrative circulars quoted above.

IX. The Tribunal therefore rejects the application.

(Signatures)

R. VENKATARAMAN
President

CROOK
Vice-President

Francis T. P. PLIMPTON
Member

ZENON ROSSIDES
Alternate Member

Jean HARDY
Executive Secretary

New York, 14 October 1969

Judgement No. 134

(Original: English)

Case No. 130:
Fürst

Against: The Secretary-General
of the United Nations

Request for the rescission of a decision refusing to grant a permanent appointment at a higher level.

The Applicant's claim for a permanent appointment can only be sustained if there is an obligation binding on the Respondent in that regard.—Argument based on a letter offering the Applicant the expectancy of a permanent appointment if the appraisal of his services was favourable.—Examination of this letter.—The Tribunal concludes that the Respondent did not assume any commitment in the said letter and that it did not constitute an offer by the Administration, accepted as such by the Applicant, to award a permanent appointment in the event of a favourable appraisal.—Argument based on the Provisional Statement of Policy Guidelines for Personnel Management in UNDP Field Office.—Impossibility of concluding that the Statement creates an expectancy in the legal sense for either a renewal of contract or for permanent appointment.

Claim that, under the "Policy governing the Use of Titles in UNDP Field Offices", the Applicant should have been automatically graded P-4.—This claim is rejected.

The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton; Mr. Zenon Rossides; the Lord Crook, Vice-President, alternate member;

Whereas, on 26 February 1969, Ewald Viktor Fürst, a staff member of the United Nations Development Programme, hereinafter called UNDP, filed an appli-

cation against a decision to grant him a fixed-term appointment at the P-3 level rather than a permanent appointment at a higher level;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 19 March 1969;

Whereas the pleas of the application read:

“(a) No request for preliminary or provisional measures.

“(b) *Decision contested whose rescission is requested*

“Letter dated 25 November 1968 by the Under-Secretary-General for Administration and Management to the Applicant, referring to the report of the Geneva Joint Appeals Board and to the decision of the Secretary-General to maintain the previous administrative decision i.e. to reject the Board’s recommendation.

“(c) *Obligation invoked whose performance is requested*

“In accordance with commitments to the Applicant and policies concerning appointments, titles and grades by the UNDP Administration, to appoint the Applicant

“(i) As a permanent UNDP staff member;

“(ii) In the capacity of Deputy Resident Representative;

“(iii) At the grade P-4;

“(iv) Retroactively to 1 September 1967.

“(d) *Compensation in accordance with article 9 (1) of the Statute*

“In case the Secretary-General and the UNDP Administration decide that the Applicant shall be compensated without any further action being taken, the Applicant may have to consider separation from the service. In this event, and in view of the fact

“(i) That he is now 50 years of age;

“(ii) That since 1961, his work for the United Nations has entailed his permanent residence overseas, and thus brought with it the severance of personal contacts, in Europe, which would help him to find alternative employment; and

“(iii) That his chances of future employment are severely limited by the very nature of his work since joining TAB/UNDP in 1961, since the tasks imposed on the Deputy Resident Representative are of a specialized nature having no comparable application in private enterprise, industry or commerce, so that the experience gained by the Applicant during those years constitutes no usable recommendation for employment outside the United Nations,

“he would claim a compensation in accordance with the provisions of the Tribunal’s Statute and powers of discretion, of not less than two years’ salary as from the date of such separation from service, at a level corresponding to his emoluments, had he been re-graded to P-4 on 1 September 1967.

“(e) *Other relief*

“To compensate for delays in being re-graded, an indemnity amounting to the difference in total emoluments the Applicant has been receiving since 1 September 1967, at level P-3, step V (with annual increments on 1 November

1967 and 1 November 1968), and the salary and allowances he would have received, had he been re-graded to P-4 on 1 September 1967.”;

Whereas the Respondent filed his answer on 30 June 1969;

Whereas the Applicant filed written observations on 12 August 1969;

Whereas, on 6 October 1969, the Respondent submitted additional information at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 4 December 1961 under a fixed-term appointment of two years at the P-2 level as Assistant Resident Representative of the Technical Assistance Board in Ankara (Turkey). On 1 November 1962 he was promoted to the P-3 level. On 16 November 1963 he was reassigned to Damascus (Syrian Arab Republic) as Deputy Resident Representative and, on 4 December 1963, his appointment was extended for two years. During the Applicant's assignment in Syria, strained relations seem to have developed between him and his superior, the Resident Representative. On 1 August 1965 the Applicant was reassigned to Phnom Penh (Cambodia) as Deputy Resident Representative. On 4 December 1965 his appointment was extended to 31 August 1966. On 1 September 1966, it was further extended for one year; the purpose of this extension was explained to the Applicant in a letter of 15 April 1966 from Mr. Kraczkiewicz, Assistant Administrator and Director of the Bureau of Administrative Management and Budget of UNDP as follows:

“ . . . we take the view that the final decision concerning your continuation in the service of UNDP or otherwise should be taken as soon as possible in the light of your performance in your present post in Cambodia. While there are specific reasons for this approach in your particular case, may I point out that the UNDP Appointment and Promotion Board has adopted a policy of reviewing the cases of staff members completing four years service for the purpose of determining their suitability for permanent appointment; in case a staff member has *not* been selected for permanent service in principle his appointment is to be terminated as soon as feasible. You are therefore on ‘probation’ also in that wider sense and it is now necessary to reach a final conclusion without too much delay.

“ . . .

“Finally, there is a human consideration; if the worst comes to the worst, and we decide not to offer you long-term service in the organization, we still would wish to provide you with a reasonable period of time for the exploration of other possibilities of employment. All these considerations have led us to the conclusion that we should in any event offer you an extension of your current appointment which expires on 31 Aug 1966 of the duration of another year, i.e., until 31 August 1967.

“I should like, however, to avoid any misunderstanding on your part of the meaning of this extension. The purpose of it is, firstly, to allow a better opportunity to make an appraisal of your qualifications and performance either by Mr. Gauthereau [the Resident Representative in Cambodia] or by his successor as soon as possible, and, in any event, not later than the beginning of 1967; so that the Appointment and Promotion Board may proceed with the review of your case. If this appraisal leads to a favourable decision, then, of course, you can look forward to a continuation in our service

and a reassignment to new duties in due course. If, on the other hand, the result of the appraisal is negative, then you would still have at least half a year to prepare yourself for the interruption of your services with UNDP."

In the periodic report covering his assignment in Cambodia up to March 1967, the Applicant was rated as an efficient staff member giving complete satisfaction. His performance was also appraised in a confidential letter of 15 March 1967, addressed to the Chief of the Personnel Branch of UNDP, in which the Resident Representative, *inter alia*, expressed the view that the Applicant was able to continue to work as a Deputy Resident Representative. The opposite view, however, had been expressed earlier in a confidential report sent to Headquarters on 2 November 1966 by a Special Adviser to the Administrator of UNDP. On 25 May 1967, the Applicant wrote to Mr. Krackiewicz that in view of the above-mentioned periodic report, read in conjunction with Mr. Krackiewicz's letter of 15 April 1966, he was confident that his future service with UNDP might soon be put on a long-term basis and that this might be an occasion to review his present grading. On 24 July 1967 Mr. Krackiewicz informed the Applicant that UNDP was investigating the possibilities of an alternative assignment within the United Nations family; in the meantime, the Applicant's contract would be extended for six months, it being understood that such extension would not preclude an alternative solution nor the possibility of a reassignment within UNDP. In a reply dated 7 August 1967, the Applicant stressed that all the conditions stipulated in the letter of 15 April 1966 had been satisfactorily met, and asked that the "explicit commitments" made in that letter be carried out. On 28 August 1967 the Acting Director of the Bureau of Administrative Management and Budget of UNDP advised the Applicant that, while his assignment in Cambodia had been considered by the Administration as the opportunity to come to a final decision regarding the continuation of his service with UNDP and while there were now grounds for recommending his further service with UNDP in certain types of functions, there remained doubts that he was particularly suited for work on an all-round basis in a Resident Representative's Office; in these circumstances, the Administration was prepared to offer a two-year extension instead of the six-month extension previously envisaged; the Acting Director added that it was UNDP policy to limit the number of permanent appointments to a proportion of the total UNDP staff. The Applicant having inquired about the title and grade envisaged for the proposed extension of his contract, the Acting Director informed him, by a cable addressed on 12 September 1967 to the Resident Representative, that the proposed extension would be at the same grade and title. On 12 October 1967 the Applicant, who had been evacuated to Geneva on medical grounds and whose contract had been extended for two months pending medical clearance, protested in a letter addressed to the Secretary-General against the decision to offer him a two-year extension of contract at the P-3 level. By a reply dated 16 November 1967 sent on behalf of the Administrator of UNDP, the Applicant was informed that the position of UNDP on these matters remained as stated in the Acting Director's letter of 28 August 1967. On 4 December 1967 the Applicant, whose contract had been extended for another period of two months, filed an appeal with the Joint Appeals Board. While the case was pending before the Board, the Applicant's contract was extended for one year and eight months and the Applicant was reassigned to Rabat (Morocco) as (Second) Deputy Resident Representative at the P-3 level. The Joint Appeals Board at Geneva considered the Applicant's appeal and submitted its report on 10 October 1968. The concluding section of the report read as follows:

“Recommendations

“88. Taking into consideration:

“the above-mentioned findings,

“the length of the Appellant’s experience in TAB [Technical Assistance Board] and UNDP field offices as well as the responsibilities and duties he exercised and exercises therein in four different countries as Deputy Resident Representative, and

“the fact that most Deputy Resident Representatives appear to be at a level not lower than P-4,

“the Board makes the following recommendations:

“89. *In the matter of promotion to P-4 level*

“The Board thinks that unless there has been a fall in the quality of his performance at his present post in Morocco, as compared with his performance in Cambodia, the Appellant deserves to be recommended for promotion to P-4 level and consequently recommends that the appropriate UNDP authorities at Headquarters should recommend him accordingly when submitting his name to the UNDP Appointment and Promotion Board at the latter’s next review session.

“90. *In the matter of the granting of a permanent appointment*

“Provided the policy of UNDP regarding permanent appointment is still the one indicated in Mr. Krackiewicz’s letter of 15 April 1966 to the Appellant and outlined in the ‘Provisional Statement of Policy Guidelines for Personnel Management in UNDP Field Offices’; and provided that it is not contrary to the general policy of the United Nations, set out in General Assembly resolution 2241 (A) (XXI) which recognized ‘the need for a large proportion of permanent contracts and fixed-term contracts of longer duration to ensure the suitability and efficient operation of the Secretariat’ and believes ‘that, as a temporary measure and under the existing conditions, increased recruitment on the basis of fixed-term contracts, especially in the case of developing countries, might help to achieve a balanced geographical distribution’, the Board is of the opinion that the appropriate UNDP authorities at Headquarters might consider the feasibility of granting to the Appellant an appointment that would ensure for him a greater permanency of tenure as a member of the UNDP staff.”

On 25 November 1968, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had reached the following decisions concerning the appeal:

“... The Secretary-General has carefully examined your case in the light of the Board’s report.

“Your appeal was based on a claim that you should be offered an appointment as a permanent official and that such appointment should be at a level not lower than P-4. The Secretary-General considered that your complaint was not in fact against an administrative decision involving the non-observance of your terms of appointment, or of any pertinent regulations or rules, and did not therefore fit in with the conditions of Staff Regulation 11.1.

“In any case the Board has found no evidence that ‘the decision taken by the UNDP Administration had been motivated by prejudice’. The Board has concluded, however, that ‘certain extraneous factors... had clouded the consideration of the Appellant’s performance and career with UNDP and

militated against consideration of the question of either promotion or permanency'. The Secretary-General considered that, in view of all the circumstances of your case, the internal and confidential consultations which were made available to the Board and to yourself were perfectly in order and were necessary to enable the UNDP Administrator to determine his further contractual relations with you.

"In view of the aforesaid, the Secretary-General has taken the view that there was no adequate basis for concluding that the action of UNDP had violated any entitlement or any applicable element of due process. He has therefore decided that the administrative decision be maintained. At the same time, the Secretary-General has decided to transmit the Board's recommendations to the Administrator of UNDP for his information and for such action as he may, in his discretion, deem appropriate."

On 26 February 1969, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The UNDP Administration failed to carry out its commitment towards the Applicant to consider him for permanent appointment after he had passed the test which was the condition of his appointment.

2. The UNDP Administration failed also to adjust the level of the Applicant's post, in view of the policy statement governing the use of titles in UNDP offices. The decision not to adjust the level of the Applicant's grade to that of his functions was not justified by the Administration and was therefore motivated by prejudice or other extraneous factors.

3. The UNDP Administration demoted the Applicant from his functions of Deputy Resident Representative to those of Assistant Resident Representative without informing him of its intentions, and concealing them by allowing him to keep his title. This was a breach of the terms of the Applicant's last letter of appointment.

4. The evidence shows that the UNDP Administration's decisions were motivated by prejudice or other extraneous factors.

Whereas the Respondent's principal contentions are:

1. The administrative decision on the terms of the Applicant's future appointment was entirely within the Respondent's authority and discretion on selection and appointment of staff:

(a) The Applicant had no right or legal expectancy of employment after the expiry of his fixed-term contract. Employment rights additional to those set forth in duly executed letters of appointment are acquired only by virtue of communications written in express and specific terms by authorized officials;

(b) The reasons for offering the Applicant particular terms of appointment are not open to review.

2. The decision contested before the Tribunal is the decision communicated to the Applicant in 1967. The Secretary-General's action with respect to the Joint Appeals Board's recommendations for the future has not itself been the subject of any Joint Appeals Board appeal.

The Tribunal, having deliberated from 6 to 17 October 1969, now pronounces the following judgement:

I. The Applicant's pleas have been set out in detail in the earlier part of the Judgement. The Applicant's main contentions are that he is entitled to a permanent contract from 1 September 1967 and that he should be graded as P-4.

II. The Applicant entered the service of the Technical Assistance Board on a fixed-term contract which was extended from time to time. The last extension relevant to the case was for one year from 1 September 1966 to 31 August 1967. The Applicant's claim for a permanent appointment on the expiry of his one-year contract is contested by the Respondent on the ground that Staff Rule 104.12 (b) as well as the letter of appointment stipulates that the fixed-term appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment". Thus the Applicant can sustain his claim for a permanent appointment from 1 September 1967 only if there is an obligation binding on the Respondent.

III. The Applicant relies on a letter dated 15 April 1966 wherein the Administration had stated that the extension of the fixed-term appointment for one year from 1 September 1966 was made for the purpose of providing a better opportunity to make an appraisal of the qualifications and performance of the Applicant by the Resident Representative in Cambodia and that if the appraisal led to a favourable decision, "then, of course, you can look forward to a continuation in our service and a reassignment to new duties in due course". This, according to the Applicant, constitutes a stipulation that if the appraisal was favourable, he was entitled to a permanent appointment.

The appraisal of his qualifications and performance made in the periodic report covering the period from August 1965 to March 1967 having rated him as "an efficient staff member giving complete satisfaction", the Applicant claims that he had fulfilled the condition and had become entitled to a permanent appointment.

A careful examination of the letter dated 15 April 1966 shows that the Administration was anxious to take a final decision concerning the continuation of service of the Applicant with UNDP and that the Applicant was to be given an extension of his contract of one year for the purpose of making an appraisal of his qualifications and performance by the Resident Representative in Cambodia. As stated earlier, the letter further explains that if the appraisal was favourable then, "of course, you can look forward to a continuation in our service and a reassignment to new duties in due course". However, the letter continues: "If, on the other hand, the result of the appraisal is negative, then you would still have at least half a year to prepare yourself for the interruption of your services with UNDP". Thus the letter merely explains the consequences of favourable and unfavourable appraisal of the Applicant's work. If favourable, the Applicant can expect a continuation in service, and, if not, a separation. Merely by pointing out the alternative, the Administration did not bind itself to any course of action in the event that one or other of the alternatives materialized. Appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same. In this case the Tribunal is unable to find any commitment to an obligation on the part of the Respondent on the basis of the letter of 15 April 1966 quoted above.

IV. The Applicant further contends that the letter dated 15 April 1966 constituted an offer of the extension of appointment for one year during which

period the Applicant was to be placed on probation and that the probationary nature of this appointment was to come to an end by virtue of an appraisal of his performance either by the award of a permanent appointment or by termination. The Applicant argues that, as he was free to accept or reject the extension, his acceptance of the extension constituted a valid agreement binding on the Administration.

The plea of the Applicant that the letter dated 15 April 1966 constituted an offer by the Administration which became a concluded agreement by the Applicant's acceptance is unsustainable. The letter merely explains the situation of staff members completing four years of service in UNDP for the purpose of determining their suitability for permanent appointment. The letter also mentions that if the appraisal leads to a favourable decision the Applicant "can look forward" to a continuation of service, but it does not assure him the right to a permanent appointment. The Tribunal therefore concludes that the letter dated 15 April 1966 does not constitute an offer by the Administration to award a permanent appointment in the event of a favourable appraisal.

V. The Applicant also contends that according to the Provisional Statement of Policy Guidelines for Personnel Management in UNDP Field Offices, staff members towards the end of their fourth year of service should be reviewed for either the award of a permanent appointment or termination, and that in denying him a permanent appointment the Respondent acted contrary to his formally declared policy. But it is not possible to infer from a study of the Statement of Policy Guidelines an obligation on the part of the Administration to award a permanent appointment at the end of four years to those with satisfactory service. On the other hand, the Statement of Policy Guidelines emphasizes that "it is important to realize the factors which are limiting the development of a career service in UNDP". Therefore, the Tribunal does not agree with the plea that the Statement of Policy Guidelines creates an expectancy in the legal sense for either a renewal of contract or for permanent appointment to all the staff covered by the Statement.

VI. The periodic report covering his assignment in Cambodia up to March 1967 rated the Applicant as "an efficient staff member giving complete satisfaction". The Resident Representative in Cambodia, in a confidential letter dated 15 March 1967, expressed the view that the Applicant was able to continue to work as a Deputy Resident Representative. There was, however, a contrary view expressed by the Special Adviser to the Administrator of UNDP in a confidential report sent to Headquarters on 2 November 1966. Though a consideration of these reports could lead to a favourable appraisal of the Applicant's performance, the Tribunal finds that such a conclusion would not establish an enforceable obligation against the Respondent.

Furthermore, the Tribunal has been informed by the Administration that the Applicant has since been offered, and accepted, a five-year extension of his contract effective 1 September 1969.

VII. The Applicant claims that according to a document entitled "Policy governing the Use of Titles in UNDP Field Offices" officers not below the P-4 level are to be assigned the title of Deputy Resident Representative, and that since he exercised the responsibilities of a Deputy Resident Representative he should have been automatically graded P-4. A study of the document shows that officers not below the P-4 level assigned to a UNDP field office to serve as next officer to the Resident Representative will be assigned the title of Deputy Resident Representative; the document does not provide that all Deputy Resident Representatives should be assigned to P-4 level. That many of the posts of Deputy Resident

Representatives are manned by officers at the P-4 level and above does not establish a claim for promotion to P-4 level.

VIII. For the foregoing reasons, the Tribunal reaches the conclusion that the Applicant's claim for a permanent contract and promotion to P-4 level cannot be sustained.

IX. In view of the above decision, the question of fixing compensation in the event of the Secretary-General exercising the option under article 9, paragraph 1 of the Statute of the Tribunal does not arise.

X. The application is therefore rejected.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON.
Member

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

New York, 17 October 1969

STATEMENT BY THE LORD CROOK

I have participated in the consideration of the case and in the drafting of the judgement and I would have signed the judgement with other members had I not been obliged to leave New York earlier.

(Signature)
CROOK

New York, 15 October 1969

Judgement No. 135

(Original: English)

Case No. 134:
Touhami

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.

Principal request for the rescission of the decision not to renew the appointment.—Claim that oral representations had been made to the Applicant that he would eventually be given an indefinite appointment.—Staff Rules 104.1 and 104.12.—Clause in the initial letter of appointment stipulating that the appointment does not carry any expectancy of renewal.—UNDP practice with regard to appointments of field staff.—The Administration was at fault for not covering the appointment by a letter of appointment.—Ex gratia payment to the Applicant in view of that circumstance.

Request for retroactive classification at salary level 5, step VI, and subsidiary request for the production of related documents.—These documents are not necessary, as the initial letter of appointment clearly mentions the salary level.—Failure of the claims made by the Applicant in this regard.—Salary adjustment made by the Respondent on the recommendation of the Joint Appeals Board.—Conclusion that no further adjustment is appropriate.