
ADMINISTRATIVE TRIBUNAL

Judgement No. 470

Case No. 475: KUMAR

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, President; Mr. Ahmed Osman;

Mr. Ioan Voicu;

Whereas, on 26 July 1988, Devendra Kumar, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application, the pleas of which read as follows:

"B. Pleas

V. RELIEF SOUGHT

The Appellant respectfully requests the UN Administrative Tribunal to decide and direct:

1. Promotion of the Appellant to the post of National Officer (Level NO-B) UNDP, New Delhi, effective 1 January 1982.
2. Promotion of the Appellant as the Programme Officer.
3. Salary of NO-B at the appropriate level from the date of the loss of the grade up to the time the Appellant's promotion is made.
4. Financial compensation for the loss of health, mental torture suffered and loss of prestige among colleagues and outsiders with whom the Appellant had official dealings."

Whereas the Respondent filed his answer on 14 October 1988;

Whereas, on 17 April 1989, the Applicant asked the Acting

Executive Secretary "if [he] could convince [him] that it [was] worth pursuing the case No. 475 then only would [he] work on it...;

Whereas, on 23 August 1989, the Executive Secretary asked the Applicant whether he had decided to maintain his appeal or to withdraw it;

Whereas, on 26 September 1989, having received no clear reply from the Applicant, the Executive Secretary informed him that the President of the Tribunal had put his case on the list of cases to be considered at the Autumn session and asked him to confirm whether or not he maintained his appeal;

Whereas, on 20 October 1989, the Tribunal requested the Applicant to inform it in "unambiguous and unequivocal terms" whether or not he maintained his appeal, to which request no reply was received;

Whereas the facts in the case are as follows:

Devendra Kumar entered the service of UNDP on 22 March 1957, as a locally recruited Clerk/Typist at the New Delhi Office. He was initially offered an indefinite appointment at the ND-3, step I level. On 1 January 1959, he was promoted to the ND-4 level and effective 1 April 1964, to the ND-5 level. On 1 May 1968, his functional title was changed from Programme Assistant to Accountant and effective 28 September 1971, to Deputy Finance Officer. On 1 May 1972, he was promoted to the ND-6 level and effective 1 November 1972, he was granted a permanent appointment. On 1 March 1977, the Applicant was promoted to the ND-7 level as Senior Finance Assistant.

In an Office Circular dated 9 May 1983, the UNDP Resident Representative in New Delhi announced to the staff of his office that Mr. J.L. Arora had been promoted to the National Officer Level with effect from 1 January 1983. He added that with that announcement, the appointment and promotion reviews for 1982 and

1983 were complete and invited any UNDP staff member at the ND-7 level who believed that his or her claim to promotion had not received proper and full consideration to file a recourse with the Appointment and Promotion Panel (APP).

On 12 May 1983, the Applicant asked the Secretary of the New Delhi APP for an explanation for his non-promotion. He also requested all the relevant information submitted to the APP at the time of its review of his case. In a letter dated 17 May 1983, the Secretary of the APP advised the Applicant of the criteria taken into account by the Panel in making its recommendation to the Resident Representative. He also advised him that the final decision had been taken at Headquarters. On 7 June 1983, the Applicant instituted a recourse procedure before the local APP.

In a letter dated 22 July 1983, the Secretary of the APP informed the Applicant that the APP had further reviewed his case and considered that the information which had been provided by the Applicant did not warrant a change in the Panel's previous recommendation. On 26 and 28 July 1983, the Applicant requested the UNDP Administrator to review the administrative decision not to promote him from the ND-7 to the ND-X level.

In an Office Circular dated 14 November 1983, the Resident Representative announced to the staff of his office the promotion of Mr. T.R. Maakan, another staff member of the office, to the ND-X level, with effect from 1 September 1983. He also announced that the effective date of Mr. J.L. Arora's promotion would be 1 July 1982 (and not 1 January 1983 as previously stated). On 12 December 1983, the Applicant sought an explanation from the UNDP Resident Representative for the promotion of Mr. Maakan to the ND-X level, since the Resident Representative had stated in his earlier announcement of 9 May 1983, that the promotion review exercise for 1982 and 1983 had been completed. In a reply dated 25 January 1984, the Resident Representative informed the Applicant that Mr. Maakan's

promotion had been "approved by UNDP Headquarters in accordance with established procedures."

On 4 October 1984, the Officer-in-Charge, Division of Personnel, UNDP, informed the Applicant that the Administrator had decided to maintain the decision not to promote the Applicant. He stated that the Administrator had found "no procedural irregularities concerning the composition of the Panel which conducted both the initial promotion review and the subsequent recourse review" as they related to the Applicant, and that his right to be considered for promotion had been honoured. Furthermore, the procedures followed were consistent with the relevant Appointment and Promotion Guidelines. On 14 January 1985, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 25 April 1988. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

39. The Panel concludes that there were no irregularities in the composition of the APP which considered the appellant's case for promotion during the 1982 and 1983 promotion review exercises.

40. It also concludes that the appellant was considered for promotion by the APP during the 1982 and 1983 promotion review exercises and recourse process, which were conducted in accordance with the provisions of the APP Guidelines.

41. The Panel further concludes that the promotion of the other staff member, announced in Office Circular No. 747 of 14 November 1983, had not been made 'out of turn' or in violation of the APP Guidelines, UNDP/ADM/PER/169/Rev.1.

42. Accordingly, the Panel makes no recommendation in support of the appeal."

On 2 May 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in light of the Board's report, had

decided to maintain the contested decision.

On 26 July 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The APP's decision not to promote the Applicant was based on prejudice and errors of fact and law.
2. The APP evaluated the Applicant's performance without due regard to the Applicant's updated performance evaluation report and job description, documentation which the Administration intentionally withheld from the APP.
3. The JAB's report contains factual errors.
4. Two members who sat on the 1982 APP were elected to the Executive Committee of the Field Unit of the Staff Association for the year 1983 and considered the Applicant's recourse, in violation of the criteria for selection of members for the APP set forth in the UNDP Personnel Policies and Practices UNDP/ADM/FIELD/491.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to promotion and the denial of a promotion does not violate their rights.
2. There was no violation of procedure with respect to the 1982 and 1983 promotion reviews which resulted in the promotion of staff members other than the Applicant.

The Tribunal, having deliberated from 20 October to 17 November 1989, now pronounces the following judgement:

I. In the present application, the Applicant has asked for an oral hearing. Since the available documentation is sufficient for reaching definite conclusions, the Tribunal did not deem it necessary to grant him an oral hearing.

II. The Applicant's main plea is to contest the decision not to promote him from the ND-7 to the ND-X level following the 1982 and 1983 promotion reviews.

III. As to the question of promotions as such, the Tribunal reiterates its views as expressed in Judgement No. 312, Roberts (1983), para II:

"The general rule is that they [promotions] are subject to the discretion of the Secretary-General (see Article IV of the Staff Regulations and Chapter IV of the Staff Rules; see also Judgement No. 134 Fürst) and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore, cannot be considered by staff members as giving rise to any expectancy."

IV. Consequently, before dealing with the substance of the case, the Tribunal recalls that it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member. However, the Tribunal is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation. In this regard, it is the consistent view of the Tribunal that the burden of proving prejudice or improper motivation rests upon the Applicant.

The Tribunal will not deal with the substantive question relating to the Applicant's efficiency for promotion and will concentrate on the review of the decision of the Administration not to promote him.

V. The Tribunal notes that the Applicant's candidacy for promotion had been considered by the Appointment and Promotion Panel (APP) during the 1982 and 1983 promotion review exercises, including the recourse procedures.

VI. The Applicant contests the regularity of the composition of the APP on the ground that its members were not selected in accordance with the relevant rules.

VII. The Tribunal notes that, according to the Joint Appeals Board (JAB), the two persons who served on the APP were not members of the New Delhi Executive Committee of the Field Unit of the Staff Association for 1982. Thus, it appears that the provisions of paragraph (c) of the "Criteria for Selection of Members for the APP", attached to the APP Guidelines, which preclude members of the Executive Committee of the Field Unit of the Staff Association from serving on the APP, have been complied with.

VIII. Having carefully examined the documentation on this issue, the Tribunal concurs with the JAB's finding that there were no irregularities in the composition of the APP which considered the Applicant's case for promotion.

IX. The Tribunal cannot detect any improper action by the APP or violation of the promotion guidelines. The fact that the Applicant was not promoted cannot in itself be construed as a violation of these guidelines, because the Administration has only exercised its discretionary authority in not promoting him.

X. The Tribunal observes that the Administration acted in conformity with its discretionary authority over promotions when it decided to promote a staff member other than the Applicant. The Tribunal notes with sympathy the fact that the Applicant devoted over 32 years of satisfactory service with the UNDP but concludes that it has not been demonstrated to its satisfaction that the decision regarding non-promotion of the Applicant was tainted by prejudice or improper motivation.

XI. The Tribunal concludes that the decision of the Administration not to promote the Applicant was a permissible exercise of its discretionary authority and was taken in conformity with the applicable procedures.

XII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Arnold KEAN
President

Ahmed Osman
Member

Ioan VOICU
Member

New York, 17 November 1989

R. Maria VICIEN-MILBURN
Executive Secretary