

## **EIGHTY-SECOND SESSION**

### ***In re Ricart Nouel***

#### **Judgment 1583**

The Administrative Tribunal,

Considering the complaint filed by Mr. Rafael Ricart Nouel against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 13 November 1995, UNESCO's reply of 14 December 1995, the complainant's rejoinder of 13 February 1996 and the Organization's surrejoinder of 15 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the Dominican Republic who was born in 1941, joined UNESCO in September 1976, on a fixed-term appointment. He served in Guatemala as a regional liaison officer at grade P.3 for the preservation of the cultural heritage. At the material time he was stationed at the Regional Office for Culture in Latin America and the Caribbean (ORCALC), in Havana.

In a report of 21 October 1991 on his performance from March 1990 to August 1991 his first-level supervisor, the Director of ORCALC, gave him an E rating (unsatisfactory). On 28 February 1992 the Deputy Director-General for Management, who chaired the Reports Board, rejected the report on the grounds of a procedural flaw and ordered another one.

In a second report of 17 July 1992 the Director of ORCALC gave the complainant the same general rating, and he challenged it in a memorandum of 11 September. The Reports Board met on 29 October. It recommended making no change in the E rating. By a memorandum of 12 November the secretary of the Board told the complainant that the Director-General had endorsed the recommendation. On 23 December 1992 he addressed a "complaint" to the Director-General against the decision. By a memorandum of 20 January 1993 the Director of the Bureau of Personnel rejected it on the Director-General's behalf. The complainant lodged an appeal on 18 February 1993.

The Senior Personnel Advisory Board (SPAB) had been consulted on 14 December 1992 about the renewal of the complainant's appointment. Its opinion was that a written warning or postponement of annual increment would be more fitting than separation. The Director of Personnel nonetheless notified to the complainant in a telex of 29 January 1993 a decision by the Deputy Director-General for Management not to renew his appointment after 31 January and to let him have the equivalent of three months' pay in lieu of notice. By a letter of 5 February the complainant asked the Director-General to reconsider. In a memorandum of 8 March the Director of Personnel refused on the Director-General's behalf. The complainant lodged an appeal on 26 March 1993.

On 27 June 1995 the Appeals Board reported on both appeals. It recommended having some other suitable official write a new report for 1990-91 and reinstating the complainant as from 1 February 1993. By a letter of 21 September 1995 -- the impugned decision -- the Director-General upheld the decisions the complainant had challenged.

B. The complainant alleges breach of due process in setting aside his first performance report. He cites several incidents which in his submission showed the bias of his first-level supervisor in the second appraisal of his performance.

The decision not to renew his appointment is, to his mind, unlawful because it is unexplained and draws mistaken conclusions from the evidence.

He seeks the quashing of the impugned decision, reinstatement as from 1 February 1993, the renewal of his appointment, an award of moral damages in an amount he puts at 2,000 United States dollars, and 12,000 French francs in costs.

C. UNESCO replies that he is too late to challenge the decision, notified on 28 February 1992, to set aside his first report. The new report was uninfluenced by the previous one and shows neither procedural flaws nor bias.

He had known since being summoned by the SPAB that the grounds for non-renewal were unsatisfactory performance. Staff Rule 104.6(b) says that renewal of a fixed-term contract is at the discretion of the Director-General, on whom the SPAB's recommendation is not binding. The impugned decision was taken on the strength not only of the last appraisal of his work but of his previous performance, which had not been "entirely satisfactory".

D. In his rejoinder the complainant enlarges on his pleas. He says he had no reason to challenge the setting aside of the first report until his first-level supervisor made use of the opportunity of rewriting it to take a "swipe" at him instead of just acting in good faith and putting the procedural errors right. His last report was the first bad one he had ever had.

E. In its surrejoinder UNESCO presses its pleas and points out that the reporting officer gave a fuller assessment in the second report to explain why he abided by the E rating.

## CONSIDERATIONS

1. This case arises out of the decision refusing on grounds of poor performance to renew the complainant's fixed-term appointment.

A report was written on his performance from March 1990 to August 1991. As chairman of the Reports Board the Deputy Director-General for Management found a procedural flaw in it and asked the reporting officer to rewrite it. The second report made much more of the complainant's shortcomings. His second-level supervisor and the Reports Board approved it.

The Appeals Board thought it a breach of procedure for the chairman to have had the original report replaced, a matter which only the Board as a whole might decide. So it recommended allowing the appeal.

The complainant himself challenged the original report on formal grounds and rightly does not object to the writing of a new one.

It is also understandable that the chairman, on seeing an obvious oversight, pointed it out at once to the reporting officer before consulting the Board as a whole.

Besides, even supposing that the chairman had no authority to act as he did, the Board would in any event have approved what he had done: after all it took up the complainant's objections to the second version, and he has no quarrel with its doing so.

What is more, when a decision is reversed because it is not adequately explained, an official may not object to a new decision on the grounds that it is less favourable provided that the explanation for it is adequate.

So there is no formal flaw that warrants setting aside the second report and having yet another written by someone else.

2. The case law allows wide discretion both in appraising performance and in extending fixed-term appointments. The Tribunal will not interfere unless the decision was taken *ultra vires* or in breach of a formal or procedural rule, or rests on a mistake of fact or law, or unless some essential fact was overlooked, an obviously wrong conclusion was drawn from the evidence, or there was misuse of authority: see Judgment 1546 (*in re Randriamanantenasoa*) and the precedents cited therein.

3. In the complainant's submission both the appraisal of his performance and the non-renewal based thereon show misuse of authority. Those decisions were taken, he says, not for the sake of the Organization's interests but because the reporting officer was hostile and wanted to get rid of him.

The evidence does not bear out that contention. The reporting officer's own supervisor, the Reports Board and the Director-General upheld the appraisal on the whole. Though the Board did not uphold the charge of disloyalty, that made no difference because the E ratings were confirmed anyway. Despite what the complainant says, there is no reason to treat the findings and appraisals in the report as mistaken. Although the Appeals Board found that he and his supervisor had been at odds, he had a duty as the subordinate to carry out his supervisor's instructions, and it was in the Organization's interests for him to do so. There was nothing wrong with his supervisor's reporting difficulties in that regard; indeed he was bound to do so.

Nor was there any misuse of authority in the writing of a fuller report the second time: it was plainly in the Organization's interest to have a properly full report with no formal flaw.

4. The conclusion is that the appraisal shows no fatal flaw and the Tribunal will not replace the Director-General's discretionary decision with an assessment of its own.

5. The complainant pleads that the text notifying to him the decision not to renew his appointment failed to state reasons.

Consistent precedent has it that a decision not to renew a fixed-term appointment must be notified to the official and the grounds for it must be valid and duly notified to the official so that he may appeal if he so wishes: see Judgments 544 (*in re* Bordeaux), 675 (*in re* Pérez del Castillo), 946 (*in re* Fernandez-Caballero), 1128 (*in re* Williams), 1154 (*in re* Bluske) and 1298 (*in re* Ahmad No. 2).

Here the complainant knew full well that the reason for non-renewal was his poor performance. That was obvious to him from the request for an appraisal, the notification of the report, the discussion of it by his supervisors and by the Reports Board, their recommendations, the notification of the start of proceedings to end his contract, the consultation of the Senior Personnel Advisory Board (SPAB) and the proceedings before that body. On getting the telex of 29 January 1993 he must have realised that the reason for the non-renewal notified therein was the poor quality of his services and that UNESCO had no exceptional reasons for keeping him on notwithstanding. So he was free to defend the charge properly, and indeed did so. UNESCO stated its reasons yet again in its pleadings in the appeal proceedings. So there was nothing wrong with its way of communicating them.

6. His pleas on the merits are that non-renewal was in any event unwarranted under the circumstances. His prospects for improvement were good, considering the too short period covered by the report: from March 1990 to August 1991 instead of the usual two years. His performance had been up to scratch for years: from 1976 to 1990. He never got the written warning required by the circular in force at the material time, namely No. 1743. He could have been put on another post in which he would have met expectations.

The gist of the defendant's reply is that his performance had already been below par for some time even though his reports had not said so. In 1981 he got an extension for only one year whereas he had been getting two years before that and got two years afterwards as well. There was no promise of any improvement in his conduct. The reporting period was normal for an appraisal of someone under contract that was requested for reasons of unsatisfactory performance. UNESCO tried to find him another post but failed mainly because of his training and experience. So it was in its interests to get rid of him.

(a) An organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better. The warning need not contain express mention of the risk of termination if performance does not improve: the risk is implied. Nor need any later shortcomings be the same as those that prompted the warning: it suffices that the official understood that his performance as a whole must improve: see Judgment 1546 under 18.

In his second report the Director of the Regional Office in Havana says that he pointed out each of the complainant's lapses in preparing a yearbook. In his letter of 21 October 1991 accompanying the original report he said: "I must point out that every time there was a problem Mr. Ricart-Nouel had a chance to go over it with me". There is no reason to doubt that assertion even though the complainant has challenged the content of the letter. Some of the difficulty seems to have been due to the complainant's unwillingness to brook his supervisor's authority. The Appeals Board spoke of "hostility" between the two and said they were in such utter disagreement as not to be able to stand each other.

The conclusion is that UNESCO gave the complainant due notice of his shortcomings orally and in writing, but to no avail. So the plea of lack of warning fails.

(b) The correspondence shows that the Director-General looked into the possibility of finding him another job but gave up for want of any available position that suited his skills and temperament.

(c) In taking his discretionary decision the Director-General had all the material evidence. Maintaining efficient service was foremost in his mind; and he did not err in taking the view that he had the information he needed, that no improvement was likely, and that termination was the right solution.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

William Douglas  
Michel Gentot  
Egli  
A.B. Gardner