The Administrative Tribunal,

Considering the complaint filed by Mr B.S. B. against the World Health Organization (WHO) on 10 March 2005, the Organization's reply of 17 June, the complainant's rejoinder of 14 July and the WHO's surrejoinder of 19 September 2005;

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

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

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

A. The complainant, an Indian national born in 1958, joined the WHO's Regional Office for South-East Asia (SEARO) in December 1984 as a maintenance worker. He was employed under a series of short-term contracts until 6 November 1990, when he was granted a fixed-term appointment which was renewed periodically until his separation from the Organization in September 2002.

On 18 June 2002 a mobile phone belonging to SEARO was reported missing from the drawer of a staff member's desk. SEARO received a telephone bill on 25 July showing that the phone in question had been used since its disappearance. By calling the numbers listed on the bill, it was able to establish that the mobile phone was in the possession of the complainant's family.

From 31 July to 7 August the complainant did not report for duty. On 7 August he came to the office in the afternoon with his wife and, in the presence of three staff members – his first and second-level supervisors and the Head of Travel – returned the missing phone. That same day those three staff members signed a Note for the Record in which they stated that the complainant, who disputes their account, had confessed to having stolen the phone. The Note also mentioned that the complainant had taken a half-day of authorised annual leave on the afternoon of 30 July, but that since then he had neither reported for duty nor conveyed any information regarding his absence.

In a letter of 14 August 2002 SEARO's Director of Administration and Finance informed the complainant that evidence of misconduct on his part had been established. It was clear, he asserted, that the complainant's "confession" had been the outcome of SEARO's investigations. Noting that the complainant had been absent from duty for 11 working days without authorisation, he pointed out that voluntary, unauthorised absence could lead to separation from the Organization for abandonment of post. The Director also drew the complainant's attention to "the consistently deteriorating level of [his] attendance and performance from 1996 onwards". Referring to Staff Rule 1130, concerning the notification of charges, he invited the complainant to comment on these matters in writing within seven days.

The complainant replied, in a letter dated 19 August, that he had not admitted to the theft of the phone. He explained that he had found it in an office during his cleaning duty and that, although he had intended to deposit it with the caretaker, he had unwittingly taken it home. Subsequently, on discovering that the telephone was missing from his home, he had been "at [his] wits' end on whether to report or not to report the circumstances of the loss". However, it had then come to his attention that the phone was being used by his son, whereupon he had obtained it at once and returned it to one of his supervisors. With regard to his absence, the complainant emphasised that he had not abandoned his post, but that he had been told by his first-level supervisor not to report for duty until further notice. As for his attendance and performance levels, he pointed out that there had been no recent instance in which he had been found lacking in either domain.

By a letter of 23 August the Director of Administration and Finance gave the complainant "a final opportunity to comment on the allegation of misconduct" and, in particular, on the Note for the Record of 7 August, a copy of which was enclosed. He agreed that the concerns regarding the complainant's performance were unrelated to the

allegation of misconduct and would therefore not be taken into account. Furthermore, he reminded the complainant that a finding of misconduct could result in his dismissal "pursuant to Staff Rule 1110.1.5 [*recte* 1110.1.4]".

The complainant replied by a letter of 29 August, reiterating his version of the events. He confirmed that the Note for the Record was correct, except for the statement that he had confessed to the theft of the phone, which he again denied. He also asserted that he had informed a staff member of his absence from duty via the caretaker.

On 16 September the Regional Director wrote to inform the complainant that, after having considered the complainant's replies and all the available evidence, he had decided, in consultation with the Managing Director of Human Resources Services at WHO Headquarters, to dismiss him for misconduct with effect from 20 September 2002 in accordance with Staff Rules 1075.1 and 1110.1.4. He stated that the complainant's explanations regarding the theft of the mobile phone were "incompatible with the overwhelming evidence and [...] unconvincing". The theft of the Organization's property alone, he said, constituted misconduct. He had also reached the conclusion that the complainant had been absent from duty without authorisation, though he described this as a "secondary issue". The complainant would receive one month's pay in lieu of notice.

The complainant lodged an appeal against this decision with the Regional Board of Appeal (RBA) on 15 November 2002, arguing that it was tainted with personal prejudice, incomplete consideration of the facts and breach of the Staff Rules. On 28 October 2003 he attended a hearing before the RBA, accompanied by his representative and a witness. In its report dated 19 December 2003 the RBA noted certain "procedural lapses" on the part of the Administration, relating to the fact that no action had been initiated against the complainant in respect of his absence from duty from 31 July until his separation on 20 September 2002, and the fact that he had not been suspended pending investigation. However, the Board found that the complainant had "removed an item of WHO property from the premises, used it inappropriately and later returned it to WHO", and it therefore upheld the Regional Director's decision to dismiss him. The RBA nevertheless suggested that the Regional Director consider asking the Director-General to grant the complainant an "indemnity [...] not exceeding one-half of that payable under Staff Rule 1050.4", in view of his long service and the Administration's "lapses".

By a letter of 5 January 2004 the Regional Director informed the complainant that he concurred with the recommendation of the RBA. He also agreed to grant the complainant the proposed indemnity.

On 16 February the complainant lodged an appeal with the Headquarters Board of Appeal (HBA), against the Regional Director's decision of 5 January. In a report dated 5 November 2004, the HBA supported the recommendation of the RBA and the subsequent decision of the Regional Director, "as [it] found no new evidence to decide otherwise". Consequently, it recommended that the appeal be dismissed. The HBA agreed with the RBA's opinion that there had been a procedural lapse regarding the lack of official notification of suspension to the complainant.

By a letter of 11 January 2005, which constitutes the impugned decision, the Director-General informed the complainant that he had decided to accept the HBA's recommendation that his appeal be dismissed. He noted the Board's comments regarding the lack of official notification of suspension, but stated that he was satisfied that the procedures relating to dismissal for misconduct had been followed.

B. The complainant contends that essential facts were overlooked, because the charge of misconduct was considered to be established solely on the basis of the Note for the Record of 7 August 2002. That Note, he submits, is of questionable probity: not only does it wrongly state that he confessed to theft, but it was signed by his second-level supervisor, who does not understand his language (Hindi). Furthermore, it was not read out to him, nor did he countersign it.

He also considers that the decision to dismiss him was tainted with prejudice. He asserts that he had long been "targeted" by his first-level supervisor "on one excuse or another", and that the findings of the RBA – which noted that his first-level supervisor was in a position to influence his second-level supervisor, given the language barrier between the latter and the complainant – clearly support his allegation of prejudice. He sees further evidence of that prejudice in the fact that, when he came to the office to return the mobile phone, his first-level supervisor told him to "go home and await further orders".

Lastly, the complainant argues that the decision to dismiss him is flawed because the Administration gave him no notice of its intention to dismiss him prior to its letter of 16 September 2002. He submits that this omission is

contrary to the terms of his contract, to “general law” and in particular to WHO Manual paragraphs II.9.480, II.9.490 and II.9.550 concerning termination.

He asks the Tribunal to set aside the dismissal decision of 16 September 2002 and to order the Organization to reinstate him. In addition, he claims compensation for “material and mental injury” and a further award for costs.

C. In its reply the WHO submits that the decision to dismiss the complainant was a proper exercise of its authority, taken in the best interest of the Organization and in compliance with all procedural requirements. It considers that, taken as a whole, the sequence of events and the weight of the evidence convincingly support the conclusion that the complainant took the telephone with the intent to steal it.

On the issue of its compliance with procedural requirements, the WHO recalls that the complainant was notified of the charge of misconduct and given an opportunity to reply, in accordance with Staff Rule 1130, and that after having reviewed the evidence the Regional Director took the decision to dismiss him, with one month’s pay in lieu of notice, in accordance with the provisions of Staff Rule 1075.1 and Manual paragraph II.9.495. Referring to its letters of 14 and 23 August 2002, it points out that it left the complainant in no doubt that a finding of misconduct could result in dismissal, even though it was under no obligation to do so.

The Organization observes that the complainant’s affirmation that the Note for the Record was accurate except as regards his confession is not credible, particularly since it was signed by three officials, one of whom did not supervise him. It emphasises that, in any case, the Note was not the only basis upon which it concluded that the complainant had stolen the mobile phone.

With regard to his allegation of personal prejudice, the WHO points out that neither the RBA not the HBA found evidence of this, and that the charges against him were made after an investigation and were based on documents, including the complainant’s own replies to the charges.

D. In his rejoinder the complainant presses his pleas. He maintains that the charge of stealing the mobile phone is not established beyond reasonable doubt and that the decision to dismiss him constitutes a serious violation of the procedure laid down in the Manual.

E. In its surrejoinder the WHO maintains its position in full.

CONSIDERATIONS

1. On his own admission the complainant, a maintenance worker at SEARO, removed a mobile phone from a desk drawer and took it home with him. He returned it some two months later only after he had come under suspicion as a result of inquiries made by the Administration, which had traced the calls that had been made on the instrument. His contention that he had not intended to steal it but simply to turn it over to the caretaker for safekeeping before leaving the building was not accepted. Following disciplinary proceedings he was dismissed for misconduct. He appealed successively to the Regional Board of Appeal (RBA) and the Headquarters Board of Appeal (HBA), but those bodies recommended against allowing his appeal and their recommendations were endorsed by the Regional Director and the Director-General respectively. By his complaint he impugns the Director-General’s decision.

2. The complainant avers that the impugned decision contains an error of law because it was based on a Note for the Record in which he is said to have confessed his misdeed, but which was signed only by his first and second-level supervisors and the Head of Travel, and not by him. There is nothing to the point since the complainant has made numerous other admissions of having taken the instrument, including in his pleadings before the Tribunal. The issue is not and has never been the fact of the taking, but rather the complainant’s intention; in the language of criminal law, not the *actus reus* but the *mens rea.* The complainant gave his version personally before the RBA, where he was offered but declined the opportunity to cross-examine his first and second-level supervisors. The RBA’s finding was as follows:

“The Board feels that the mobile phone was in the custody of the appellant (or his son which fact was known to the appellant) during the period from first week of June till 7 August 2002. Whatever be the reason, he should have reported the matter to the administration at the earliest possible time. However, the phone was returned by the appellant to the administration only when confronted with the threat of an enquiry having been initiated by the

administration for tracing the whereabouts of the phone. Though the appellant has not directly admitted his guilt of stealing the phone, he has admitted about the removal of the phone by him from the open drawer of one of the staff of the Organization. Also, it has been proved by the administration beyond doubt by way of the telephone bills obtained from the service provider and related inquiry, that the appellant (or his son) has used the phone during the above period, knowing fully well that the mobile phone did not belong to him. It should be noted that the Organization expects the highest standards of integrity from its staff. As such, the appellant was guilty of misconduct."

3. That finding, given the circumstances of the RBA's hearing and its privileged opportunity to appreciate thecomplainant's credibility, is entitled to great deference. It was confirmed by the HBA and the complainant has shown no grounds for the Tribunal to interfere with it.

4. The complainant's second point is that his first-level supervisor was prejudiced against him. Both Boards of Appeal found that the allegation was unproven. Before the Tribunal there is equally no evidence of prejudice other than the complainant's own unsupported assertions. The point cannot succeed**.**

5. The complainant's final point is that he was not given advance notice of the Organization's intention to dismiss him. He does not dispute that he was warned that dismissal might follow if he were found guilty of misconduct, but maintains that the Organization owed him a further duty, after it had found him guilty, to inform him prior to the letter of 16 September 2002 that it then intended to dismiss him. There is no such requirement either in the applicable staff rules or in the principles of natural justice and procedural fairness. The complainant was notified of the charges against him and was twice given the opportunity to reply to them. As he himself acknowledges, his attention was drawn on both occasions to the fact that he could be dismissed if found guilty. His reference to rules requiring notice of an intention to terminate a staff member for unsatisfactory performance is irrelevant: the complainant was not terminated for unsatisfactory performance but was found guilty of misconduct and dismissed, a very different scenario.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.