



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1067

Case No. 1116: OU

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 26 July 1999, Zhicai Ou, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1999, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"Section II: Pleas

...

2. Decision contested

The [Applicant] contests the administrative decision of the Secretary-General not to appoint him to the post ... [of] Chief, Chinese Translation Section ... [United Nations Office at Vienna (UNOV)].

...

4. Relief

The [Applicant] requests the following relief:

- (i) The Respondent should overturn the decision not to appoint the [Applicant] to the post ... and appoint [him] to the ... post; or
- (ii) The Respondent should offer the [Applicant] an appointment to a comparable P-5 post within the United Nations system, whether at Vienna, or elsewhere, and
- (iii) The [Applicant] requests compensation from the Respondent for injuries sustained in an amount not less than the sum recommended by the Joint Appeal Board [(JAB)], namely [seven] months of his net base salary ... Such compensation should be paid at the rate in effect on the date the Tribunal makes its decision or on the date the actual payment will be made, whichever is greater."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's Answer until 31 May 2000 and periodically thereafter until 30 November 2001;

Whereas the Respondent filed his Answer on 30 November 2001;

Whereas the Applicant filed Written Observations on 22 March 2002;

Whereas on 13 June 2002, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Industrial Development Organization (UNIDO) in Vienna, as a Translator on a one-year fixed-term appointment at the P-3 level on 23 April 1983. On 1 October 1987, the Applicant was promoted to the P-4 level and effective 1 February 1992 he was granted a permanent appointment.

As of 1 June 1992, the Applicant was designated Officer-in-Charge of the Chinese Section and effective 1 September 1992 he was granted a Special Post Allowance (SPA) to the P-5 level.

On 13 March 1996, the Applicant submitted his application for the P-5 post of Chief, Chinese Translation Section, UNOV. On 3 December 1996, the Director-General, UNOV, sent a memorandum to the Chairperson, Appointment and Promotion Board (APB) containing a short list of three candidates, ranking the Applicant first, and the female candidate who was later selected for the post, second.

On 27 June 1997, the Secretary of the APB informed the Director-General, UNOV, that on 24 June, the Secretary-General had approved the APB's recommendation to promote the female candidate to the post.

On 17 July 1997, the Applicant requested the Secretary-General to review the administrative decision not to appoint him to the P-5 level post, and on 22 July, the Applicant lodged an appeal with the JAB requesting suspension of action regarding the filling of that post.

On 28 August 1997, the Chief, Human Resources Management Section (HRMS), UNOV, formally informed the Applicant that another staff member had been selected for the post.

In its report of 5 September 1997, the JAB noted that the decision of the Secretary-General had yet to be implemented and concluded that its implementation would cause irreparable injury to the Applicant. Accordingly, the JAB recommended that the request for suspension of action be approved. On 10 September 1997, the Under-Secretary-General for Administration and Management advised the Applicant that the Secretary-General did not accept the JAB's recommendation.

On 14 October 1997, the Applicant lodged an appeal with the JAB on the merits.

In January 1998, the Respondent initiated a conciliation process, whereby, in return for the withdrawal of his appeal, the Applicant was offered a lateral reassignment to a regular P-4 post of a Chinese Translator in the Department for General Assembly Affairs and Conference Services, and would be considered for the next suitable P-5 post. The Applicant accepted this offer. However, on 14 July 1998, the Respondent withdrew his proposal.

The JAB adopted its report on the merits on 3 May 1999. Its conclusions and recommendations read, in part, as follows:

"C. Conclusions and recommendations

72. ... The Panel is of a view that the withdrawal of the [conciliation] offer was not in keeping with the spirit of good faith that should prevail in a conciliation process.

73. The Panel unanimously concluded that the Respondent failed to demonstrate that the Appellant's candidature was given full and fair consideration and that the Appellant sustained injury as a result of this and other breaches of procedure. ... The Panel ... concluded that the Appellant should be awarded appropriate compensation for the injury he sustained ...

74. The Panel also unanimously recommends that the Appellant be awarded financial compensation of 7 months of his net base salary ...

75. The Panel ... unanimously recommends that the Appellant be given priority consideration for vacancies at the P-5 level for which he is found to be qualified and in which he is interested.

76. All other pleas of the Appellant are rejected."

On 25 August 1999, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

... With respect to the Board's comment about not having been provided with a copy of the APB's report to the Secretary-General, the Secretary-General notes that the APB promptly forwarded to the Board the documents the latter had requested and that it was for the Board to request the APB for this document, too, which it did not do. In any event, the APB's report to the Secretary-General contained all papers relevant to your case, including the recommendation by the Head of the Department, that of the departmental panel and that of the APB, as required by paragraph 17 of ST/AI/413 [of 25 March 1996, entitled 'Placement and promotion'].

In view of the above, the Secretary-General can find no support for the Board's conclusion that your candidature was not given full and fair consideration. ... Pursuant to long-established and consistent practice, the confidentiality of the APB files, documents and records is vigorously protected and it is only the Joint Appeals Board which, pursuant to Staff Rule 111.2(l), has a qualified right of access to APB records. The record makes clear in this case that the APB responded in a very prompt manner to the Board's requests for documents.

In light of the above considerations, the Secretary-General cannot accept the amount of compensation recommended by the Board and has decided to take no further action on your appeal. ..."

On 3 December 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to observe the requirements of Article 101 (3) of the United Nations Charter, staff regulation 4.2 and administrative instructions ST/AI/412, dated 5 January 1996, entitled "Special Measures for the Achievement of Gender Equality" and ST/AI/413, while giving paramount consideration to matters relating to gender.

2. The successful candidate's qualifications were not substantially equal or superior to the Applicant's, but rather substantially less than his.

3. The Applicant's candidature was not given "full and fair consideration".

4. The Applicant's rights to due process were violated and he suffered prejudice and discrimination in the procedural breaches and irregularities during the various stages of the appointment and promotion process.

5. The Respondent did not conduct the conciliation process in good faith.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to full and fair consideration for promotion.

2. All pertinent rules and procedures regulating the promotion process were properly followed.

3. The decision not to promote the Applicant is in accordance with the general principle of the Organization regarding the improvement of the status of women in the Secretariat, as mandated by the General Assembly.

4. There was no delay in the proceedings as a result of the conciliation offer.

The Tribunal, having deliberated from 5 to 26 July 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision not to promote him to the P-5 post of Chief, Chinese Translation Section, UNOV, preferring a female candidate instead. The Applicant claims that in arriving at the disputed decision, the Respondent abused his authority and violated administrative rules and regulations. He further claims that he did not receive full and fair consideration and that his rights of due process were violated throughout the administrative process. The Applicant requests the Tribunal to rescind the Respondent's decision.

II. It has long been established by the Tribunal that the Respondent has broad discretionary authority in promoting qualified staff members. (See Judgement No. 134, *Furst* (1969).) This authority is guided by procedural rules and has been curtailed by the Tribunal only in cases

where the Respondent abused this authority, made procedural or substantive errors, or violated the principles of due process. The Applicant alleges that the Respondent's decision not to promote him is in violation of Article 101.3 of the Charter of the United Nations, staff regulations 4.2 and 4.3 and administrative instructions ST/AI/412 and ST/AI/413.

III. The Applicant began his career with the United Nations on 23 April 1983 as a translator at the P-3 level. On 1 October 1987, the Applicant was promoted to the P-4 level and on 1 February 1992 he was given a permanent appointment.

In March 1996 the Applicant applied to the P-5 level post of Chief, Chinese Translation Section, UNOV ("the post"). Thereafter, the Director-General, UNOV, submitted to the Chairperson of the APB in New York his recommendation of three internal candidates, ranking the Applicant as his first choice to fill the post.

On 10 January 1997, the APB informed the Director General that after having carefully reviewed the qualifications of all the candidates, the APB was inclined to recommend the promotion of a female candidate, listed second on the Director General's short-list, rather than the Applicant, and invited the Director General to present his comments. In his reply to the APB, the Director General reiterated his recommendation that the Applicant be promoted to the post in question and provided his analysis of both candidates. Nevertheless, the APB recommended, and the Respondent approved, the promotion of the female candidate. In a memorandum to the Director General, the Secretary of the APB stated that, in making its recommendation the APB took into consideration the position of UNOV but ultimately felt that the female candidate was deserving of the promotion on the basis of her qualifications, excellent performance record, mobility, higher seniority, and knowledge of two additional languages. The APB also noted that the Department had indicated that the female candidate was fully qualified for the post. The APB further informed the Director General that the recommendation was made in accordance with the guidelines of ST/AI/412 which stipulates that substantially equally qualified female candidates should be given preference in promotion.

The Applicant was informed of the decision to promote the female candidate to the post and subsequently he lodged an appeal with the JAB.

Following the Applicant's appeal to the JAB, the parties began discussions, with the intention of reaching an amicable solution to the Applicant's case. The Respondent offered the Applicant a lateral transfer to a P-4 post of a Chinese Translator in the Department of General

Assembly Affairs and Conference Services at Headquarters and a commitment to be considered for the next suitable P-5 post on a priority basis, in return for a withdrawal of his appeal. The Applicant accepted this conciliation proposal. Subsequently, the Chief, HRMS, advised the JAB of the withdrawal of this conciliation proposal, stating that it violated the established process of filing vacancies in the Secretariat and would be prejudicial to the interests of other staff members.

On 3 May 1999 the JAB submitted its report and unanimously concluded that the Respondent failed to demonstrate that the Applicant was given full and fair consideration and that the Applicant sustained injury as a result of this and other breaches of procedure. The Applicant was informed on 25 August 1999, that the Secretary-General rejected the JAB's conclusions. This Application followed.

IV. The Applicant claims that paragraph 15 of ST/AI/412, which establishes that female candidates are to be given preference when their qualifications are "substantially equal or superior to competing male candidates," was not applied correctly. He claims that the competing staff member's qualifications were not substantially equal or superior to his, but rather substantially lower.

The Respondent claims that the decision to promote the female candidate, rather than the Applicant, was in accordance with the general principles of the Organization regarding the improvement of the status of women in the Secretariat, as mandated by the General Assembly. The Respondent cites ST/AI/412, which attempts to promote gender balance in the Secretariat to "50-50 parity between men and women both overall and for positions at the D-1 level and above by the year 2000". The Respondent further claims that after conducting an independent review of the information before it, the APB concluded that both candidates were equally qualified for the Post and consequently recommended the female candidate.

V. The Tribunal has consistently held that appointments and promotions are within the broad discretion of the Secretary-General. However this power is neither absolute nor unfettered. It is governed by the relevant provisions of the Charter and General Assembly resolutions and shall be reviewed when there are allegations of abuse of discretion. (See Judgement No. 870, *Choudhury and Ramchandani* (1998).)

Article 101 of the Charter states that "The paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence and integrity". (See Judgement No. 828, *Shamapande*, (1997).)

The Tribunal in Judgement No. 958 *Draz*, (2000) reaffirmed that the implementation of special measures for the achievement of gender equality, in compliance with General Assembly resolutions, is fully consistent with the exercise of the Secretary-General's discretionary authority, even if such measures are at the expense of other candidates. In Judgement No. 671, *Grinblat* (1994) the Tribunal made reference to General Assembly resolutions 44/185, 45/239 and 46/100, all of which recalled Articles 8 and 101 of the Charter and urged the Secretary-General to strengthen his efforts to increase the number of women, particularly in senior posts and stated that:

"Unless affirmative action measures are taken towards ameliorating the effects of ... history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women ... The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates ..."

The Tribunal reaffirms the above and finds that the Respondent acted within his discretionary powers in deciding to promote the female candidate, rather than the Applicant, to the P-5 level post.

VI. The Applicant further claims that the Respondent's decision-making process and final decision violated his rights of due process as well as his right to full and fair consideration and that the Respondent's decision to disregard the JAB's recommendation constituted an unequivocal violation of his rights.

The Respondent contends that the Applicant received full and fair consideration at every stage of the process and that the Applicant's rights were not violated by his non-selection to the post in question. Furthermore, the Secretary-General is under no obligation to implement the

JAB's recommendations, the non-implementation of which was neither improper nor influenced by arbitrary factors.

In addressing the issue, the JAB determined that "the Respondent failed to demonstrate that the Appellant was given full and fair consideration" and that "the Appellant sustained injury as a result of this and other breaches of procedure".

The Tribunal does not agree with the JAB's conclusion. Having examined the record, the Tribunal is of the opinion that the APB carried out a thorough examination of the information presented to it, giving the Applicant the full and fair consideration to which he was entitled. The APB subsequently reached an informed decision and the Applicant's claim in this regard is consequently rejected.

VII. As for the Applicant's request for production of documents, the Tribunal pronounced itself on this issue in Judgement No. 1056 *Katz* (rendered during this session):

"the Tribunal is sympathetic to this legitimate interest in obtaining information on how his candidacy was reviewed, particularly in light of the strong departmental recommendation to promote him and the contradicting final outcome; at the same time, the Tribunal shares the Respondent's concern, that these documents should be kept beyond the reach of the parties in order to preserve the confidential nature of the APB proceedings and to enable it to function properly and efficiently."

The Tribunal notes that in accordance with staff rule 111.2 (l), the APB provided the JAB, upon its request, with all the necessary documents and information.

VIII. On the issue of the conciliation, the Tribunal agrees with the JAB that, "the withdrawal of the offer was not in keeping with the spirit of good faith that should prevail in a conciliation process". It is the Tribunal's view that the Administration's behaviour in this regard was not in keeping with good administration practices and that the Applicant should be compensated for that.

Having said this, the Tribunal commends the efforts made to reach an agreed resolution of this dispute by way of conciliation. It is the Tribunal's view that the notion of conciliation between the parties is to be encouraged. However, any conciliation process has to be negotiated and carried out in good faith. Recalling an offer, after it had already been accepted by the Applicant, is not consistent with conducting negotiations in good faith.

IX. In conclusion, the Tribunal holds, that the Respondent's decision not to promote the Applicant was not arbitrary and did not violate the Applicant's right to a full, fair and just consideration. Furthermore, the Tribunal holds, that the promotion of a substantially equally qualified female candidate was in line with the General Assembly resolutions and the policy of the Organization.

X. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation of three months' net base salary at the rate in effect of the date of his Judgement; and,

2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary