



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1085

Case No. 1176: WU

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Ming Wu, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 8 March 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 2 March 2001, the Applicant filed an Application containing pleas which read as follows:

"II: PLEAS

...

7. ... the Applicant ... requests the Tribunal *to find*:

- (a) that the Administration failed to carry out proper procedures in vacancy announcements ...;
- (b) that the Respondent neglected basic requirements in recommendation and selection procedures;

...

8. ... the Applicant ... requests the Administrative Tribunal *to order*:
- (a) that the decisions not to select the Applicant for promotion against the three P-4 posts be quashed;
 - (b) that the defective methodology of survey adopted in the Chinese Translation Section be abolished;
 - (c) that the comments in the last two [performance evaluation report (PERs)] derogating the Applicant's language abilities be reworded;
 - (d) that the comments and rating of language qualifications in PERs and [performance appraisal report (PARs)] of the staff members in the Chinese Translation Section be thoroughly reviewed and a unified standard adopted;
 - (e) that the Applicant's challenged PAR (1997-1998) be excluded from his files and a new one be prepared by a supervisor other than the Chief, Chinese Translation Section ...
 - (f) that the Rebuttal Panel's report on [the] Applicant's PAR be declared null and void;
 - (g) that the Applicant be promoted to a P-4 post, retroactive to the date of the first impugned decision in this case; or failing that:
 - (h) that the Applicant be granted one year net salary in compensation for the considerable moral injury, anguish and distress;
 - (i) that in addition, the Respondent make every effort to have the Applicant fairly and seriously considered for promotion, as soon as possible, to a P-4 post for which he is qualified."

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 30 August 2001 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 31 July 2002;

Whereas, on 18 October 2002, the Applicant filed Written Observations amending his pleas as follows:

"II. Additional Pleas

...

the [Applicant] ... requests the Tribunal *to order*
that the defective methodology of survey adopted in the Chinese Translation Section be declared illegal ...; and

that the Applicant be granted six months net salary, in addition to a retroactive promotion to P-4 ... to compensate him for the unnecessary aggravation these delays caused him ...".

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a two-year fixed-term appointment as an Associate Translator, Chinese Translation Section, Conference Services Division, United Nations Office at Geneva (UNOG), (CSD), at the P-2 level on 15 December 1985. Effective 1 December 1987, the Applicant was promoted to the P-3 level and on 1 October 1991 he was granted a permanent appointment.

From December 1985 through March 1997 the Applicant's performance was consistently rated "very good" or "excellent". For the period April 1997 to March 1998, his performance was rated as frequently exceeding expectations ("2").

In December 1997 and in July 1998 vacancy announcements were issued for two P-4 posts of Translator in the Chinese Translation Section (hereinafter referred to as vacancy No. 1 and vacancy No. 2, respectively). The Applicant applied for both posts.

On 14 December 1998, the Applicant was informed that he had not been selected for vacancy No. 1. On 18 December, the Applicant wrote to the Secretary-General, requesting review of this decision.

Also on 18 December 1998, the Applicant initiated a rebuttal of his PAR covering the period April 1997 to March 1998.

On 12 January 1999, the Applicant was informed that he had not been selected for vacancy No. 2. On 19 January, the Applicant requested administrative review of this decision.

Early in 1999, the Applicant applied for another P-4 post of Translator in the Chinese Translation Section (vacancy No. 3).

On 14 April 1999, the Applicant lodged his first appeal with the Joint Appeals Board (JAB) challenging the decisions not to select him to fill vacancies No. 1 and No. 2.

On 4 January 2000 the Applicant was advised that he was not selected to fill vacancy No. 3 and on 10 January, the Applicant requested administrative review of this decision.

On 18 January 2000, the Acting Director, CSD, established an Informal Group to review the working atmosphere in the Chinese Translation Section. The Informal Group submitted its report on 29 February 2000.

On 27 March 2000, the Rebuttal Panel concluded that the rating given to the Applicant in his rebutted PAR was justified.

On 28 April 2000, the Applicant lodged his second appeal with the JAB, contesting the decision not to select him to fill vacancy No. 3.

The JAB adopted its report on both cases on 8 November 2000. Its summary of facts, considerations, conclusion and recommendation read, in part, as follows:

"Summary of Facts

...

13. On 30 September 1998, the Departmental Panel of CSD met to review the applications for vacancies No. 1 and [No.] 2. The Panel unanimously agreed to recommend [another candidate] for promotion against vacancy No. 1. Concerning vacancy No. 2, however, the Panel was unable to reach a unanimous recommendation for promotion, being split between [another candidate] and the [Applicant].

14. By memorandum dated 26 October 1998, the Officer-in-Charge, CSD, transmitted to the Chairperson of APC his recommendation concerning vacancy No. 1, which endorsed the Departmental Panel's recommendation.

15. By memorandum dated 28 October 1998, the Officer-in-Charge, CSD, transmitted to the Chairperson of APC his recommendation concerning vacancy No. 2, which was in favour of [the other candidate].

...

18. On 20 November 1998, APC met and unanimously endorsed the recommendations for promotion of the Officer-in-Charge, CSD, concerning vacancies No. 1 and [No.] 2. ...

...

31. On 15 April and 28 April 1999, the Departmental Panel of CSD met to review the applications for vacancy No. 3. The Panel considered the [Applicant's] rebuttal. The Panel recommended two candidates for the post, the [Applicant] and [another candidate]. The Panel also considered another staff member as a deserving candidate, although the latter had not applied for the post.

...

37. By memorandum dated 14 July 1999, the Acting Director, CSD, transmitted to the Chairperson of APC her recommendation concerning vacancy No. 3, which was in favour of [the other candidate].

...

42. On 7 October 1999, APC met and unanimously endorsed the recommendation for promotion of Acting Director, CSD, concerning vacancy No. 3.

...

Considerations

...

76. ... The Panel is not competent to judge the merits of the candidates.

...

79. As far as the allegation of prejudice is concerned, the Panel found no evidence at all that the [Applicant's] non-selection for promotion was based upon prejudice. A careful review of the [Applicant's] submissions and the APC confidential documentation did not reveal any *prima facie* evidence that the [Applicant] had been discriminated against or that the successful candidates had been improperly favoured.

...

81. ... [The Applicant] submits that vacancy announcements No. 1 and [No.] 2 ... omitted to specify the normal language requirement for translators at the P-4 level, namely 'Must have working knowledge of two other official languages. Knowledge of other official languages will be an asset' ...

82. The Panel is of the view that such omission constitutes a minor flaw, which did not affect the right of the [Applicant] to a full and fair consideration. ... [I]t appears from the APC documentation that the above-mentioned criterion was duly taken into account

...

87. ... The Panel concluded that the relevant procedures had been complied with and that no prejudice, discrimination or other extraneous factor had tainted the outcome of the selection process for vacancies No. 1, [No.] 2, and [No.] 3.

...

Conclusion and Recommendation:

90. ... The Panel concludes that the [Applicant] received the full and fair consideration for promotion to which he is entitled.

91. Accordingly, the Panel makes no recommendation in support of the present appeals.

Special Remark

92. The Panel found that the surveys used to evaluate the P-3 Chinese Translators are, in principle, useful for they discipline the subjectivity involved in any type of

performance evaluation. However, the Panel ... questioned whether these surveys are compatible with the Performance Appraisal System [(PAS)]. Accordingly, the Panel recommends that the Secretary-General review the methodology of these surveys."

On 3 January 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's findings and conclusions and had decided to take no further action on his appeals.

On 2 March 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The omission of language requirements in the vacancy announcement is a violation of Article 101.3 of the Charter and of staff regulation 4.2.
2. The consideration of the Applicant's candidature before the Departmental Panel and the APC was tainted.
3. The process, resulting in a so-called "ranking list", which was adopted by the Chief, Chinese Translation Section, as the basis for the PAR for 1997-1998 and beyond, violated the Applicant's rights to due process.
4. There were serious irregularities in the rebuttal process, depriving the Applicant of due process.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by the decision not to select and promote him to the P-4 posts he sought.
2. The contested decision was not improperly motivated or founded on extraneous factors.
3. The Applicant's requests for remedies relating to his performance evaluations are not the subject of this Application

The Tribunal, having deliberated from 8 to 25 November 2002, now pronounces the following Judgement:

I. In this case the Applicant applied for relief because of what he believes was the failure of the Respondent to follow his own rules and proper procedures in connection with the Applicant's applications for promotion to a P-4 post of Translator (Chinese) and the related performance appraisal process. Having reviewed the Applicant's numerous contentions and the applicable rules and regulations, the Tribunal finds that the Respondent properly exercised his discretion.

II. In connection with the first vacancy announcement, which was published in December 1997, there were four applicants. One of the contentions of the Applicant is that the Respondent omitted from the vacancy announcement the words "must have working knowledge of two other official languages and knowledge of other official languages will be an asset". The Chief, Languages Service, rated the four candidates - all internal applicants - as meeting all the requirements for the post. The Departmental Panel recommended a candidate other than the Applicant.

The second vacancy announcement was published in July 1998. Again there were four applicants, three P-3 translators from UNOG and one P-4 interpreter from ESCAP. The Applicant asserts, regarding this vacancy announcement also, that the Respondent inappropriately omitted the usual wording about language capabilities. Again, all the candidates were rated as meeting all the requirements for the post. The Departmental Panel was divided between the Applicant and another candidate. After receiving this split recommendation, the Officer-in-Charge, CSD, recommended the other candidate to the APC.

III. With regard to the wording of the first two vacancy announcements, the Tribunal notes that its omission could have had important consequences, since it could have permitted a less qualified person to appear to meet all the requirements for the post. However, in this case, as noted by the JAB, the APC documentation proves that the language criterion was taken into account during the selection process.

IV. The APC was not convinced by the additional information supplied by the Applicant to change its decisions to select other candidates to fill the first two vacancies. The Applicant requested a review of the decision regarding the first vacancy and rebutted his April 1997 to March 1998 PAR on the same day, 18 December 1998. Later, he requested a review of his non-selection for the second vacancy. Subsequently he appealed both decisions to the JAB. His rebuttal process was not completed until March 2000, when the Rebuttal Panel concluded that the rating given him was justified.

V. A third vacancy was announced on 15 January 1999. The applicants were five UNOG P-3 translators and one P-4 ESCAP interpreter. The Chief, Languages Service, rated the UNOG candidates as meeting all the requirements of the post and the ESCAP candidate as meeting most of the requirements. While considering the qualifications of the candidates, the Departmental Panel also considered the Applicant's rebuttal, according to the report of the JAB. The Departmental Panel recommended two candidates, including the Applicant, but also considered a seventh person as a deserving candidate. The possible selection of an "outside candidate" for this vacancy was the subject of some internal debate and, in part, led to the creation of an Informal Working Group to Review Working Atmosphere in the Chinese Translation Section. The APC, which the Applicant complains did not have before it his PAR for 1 April 1998 to 31 March 1999, selected another candidate. As stated by the JAB, this PAR was not relevant since it includes a time period after the January 1999 vacancy announcement. This third selection was contested by the Applicant internally and eventually before the JAB.

With regard to the third vacancy the Applicant also contests certain surveys by revisers to evaluate the work of translators. He believes the surveys prejudiced the promotion decision toward the selection of another candidate. While the JAB did not find that the surveys were prejudicial, it did recommend that the Secretary-General review the methodology of the surveys, since they might not be compatible with the PAS. The Tribunal finds that the record raises some questions about the role and appropriateness of the surveys in connection with performance reviews but does not support a determination that their use was prejudicial to the Applicant.

Like the JAB, the Tribunal finds that the Applicant did not sustain his burden of proof. (See Judgements No. 93 *Cooperman* (1965); No. 350, *Raj* (1985); No. 613 *Besosa* (1993).)

There is insufficient evidence of prejudice, discrimination or some other improper motive in the selection process such as would render the decision by the Respondent unfair to the Applicant.

VI. In addition to the above contentions, the Applicant also argues that the usual practice of suspending the selection process during a rebuttal was not followed regarding any of the three vacancies. As stated, the Applicant had rebutted his PAR for April 1997 to March 1998. The rebuttal was filed in December 1998, after the selection of the successful candidate for the first vacancy and after the posting of the second vacancy announcement but before the selection of the successful candidates for the other two job openings. The Applicant refers only to the practice of suspending the selection process. He provides no support for this statement, such as examples of other circumstances in which there was a suspension of the process. Consequently, based on the record the Tribunal cannot agree with the Applicant on this issue.

However, this finding does not respond to the less direct issue of the timeliness of the Respondent's action on the rebuttal. There was not an accelerated rebuttal process as envisaged by the attachment to the 10 March 1997 memorandum from the Assistant Secretary-General for Human Resources Management to Executive Officers at Headquarters and all Chiefs of Administration/Personnel away from Headquarters. The attachment was entitled "Guidelines to Assist in the Submission of Complete and Up-to-Date Performance Records to Reviewing Bodies". It requires that the rebuttal process take place on a "strict time line" with the rebuttal panel normally constituted within three weeks.

VII. Another of the major claims by the Applicant is that there were improper motivations and abuse of authority in certain actions of the Respondent connected with the decision not to promote him. He believes that he was the most qualified candidate for the posts. As often stated by the Tribunal, a staff member has only the right to a fair consideration for promotion but has no right to a promotion. Yet, it also goes without saying that the consideration must be fair and untainted by procedural irregularities, lack of due process, prejudice or discrimination. When the Respondent properly exercises his discretion regarding a promotion, the Tribunal will not interfere with the decision made. (See Judgement No. 1056, *Katz* (2002).) In this case, the Applicant has not satisfied his burden in challenging the decision to promote the other candidates. Although it is clear that there was dissatisfaction within the office with the choices

made and that the performance appraisals for the Applicant, which improved from very good (1985-1989) to excellent (1989-1997) then changed to frequently exceeds expectations (1997-1998, the rebutted PAR), the Applicant did not present sufficient evidence of prejudice against him or an improper motive to justify a determination that the decision to promote other persons was unfair.

VIII. In conclusion, the Tribunal finds that the Applicant received full and fair consideration for promotion to the P-4 posts. The Tribunal additionally finds that there was undue delay in the rebuttal process of the Applicant's PAR, for which he should be compensated. Furthermore, the Tribunal recommends that the Secretary-General review the methodology of the survey system used by the Respondent and determine whether it is compatible with the PAS.

IX. For the reasons stated, the Tribunal:

1. Orders the Respondent to pay the Applicant the equivalent of one month's net base salary at the rate in effect on the date of this judgement, as compensation for the delays in the rebuttal process of the Applicant's PAR; and
2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Spyridon FLOGAITIS
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary