



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1087

Case No. 1178: EL-CHARAOUI

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 Abdelwahab El-Charaoui, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 22 March 2001, the Applicant filed an Application requesting the Tribunal:

"a) [To find] that the Administration committed stark irregularities in the promotion procedures, which jeopardized [the Applicant's] right to a fair consideration and fair treatment in the promotion process ...

b) [To find] that the Administration violated the principle of good faith in dealing with [the Applicant's] case by behaving in a manner that made it impossible [for] the [Appointment and Promotion Board (APB)] to assess [the Applicant's] performance on the basis of complete and full information.

c) [To find] that the Respondent used his discretionary power arbitrarily ...

...

To order the payment of two years gross salary as ... compensation".

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 15 April 2002;

Whereas the Respondent filed his Answer on 15 April 2002;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 24 May 1981, on a one-year fixed-term appointment at the P-3 level, as an Arabic Interpreter in the Department of Conference Services. The Applicant's appointment was subsequently extended and, on 1 August 1984, he was granted a permanent appointment. On 1 April 1985, the Applicant was promoted to the P-4 level.

On 5 August 1995, the Applicant's performance evaluation report (PER) for the period 1 January 1992 to 30 September 1994 was completed. The Chief, Arabic Interpretation Section, the Applicant's first reporting officer, gave the Applicant a "B" ("very good") rating for quality of work accomplished. His second reporting officer agreed with this evaluation and rated the Applicant's overall performance "a very good performance". The Applicant was only partially successful in his rebuttal of this PER and, on 22 September 1995, despite the Rebuttal Panel's recommendation that his "B" rating be changed to "A" and his overall performance rating be changed to "an excellent performance", only the latter was upgraded.

On 2 March 1998, the Applicant's PER for the period 1 October 1994 to 31 December 1996 was completed. Once again, the Chief, Arabic Interpretation Section, gave the Applicant for "Quality of work accomplished" a "B" rating. The second reporting officer rated the performance of the Applicant as "an excellent performance" while commenting that "[t]his rating should be interpreted in the context of the rebuttal to the preceding performance report". On the same day, the Applicant submitted a rebuttal of this PER.

In response to a vacancy announcement, the Applicant applied for the P-5 level post of Senior Interpreter (Arabic), in the Department of General Assembly Affairs and Conference Services (DGAACS). On 30 June 1998, the Office of Human Resources Management (OHRM) informed the Applicant that the Departmental Panel had recommended another candidate for the post and that, within 10 days, he could submit additional information relevant to his suitability for the post.

On 16 July 1998, the APB recommended another candidate for the post and, on 22 July, the Secretary-General endorsed the APB's recommendation. The Applicant learned of this decision through information circular ST/IC/1998/55, dated 14 August 1998. Subsequently, on 18 September, the Applicant requested administrative review of the decision to appoint another staff member to the post.

On 29 October 1998, the Applicant lodged an appeal with the JAB.

On 23 November 1998, OHRM informed DGAACS that, due to an oversight on the part of both OHRM and DGAACS, no progress had been made on the Applicant's rebuttal for almost eight months, and requested that the case be given urgent attention. Consequently, on 25 November, DGAACS initiated the rebuttal proceedings. On 30 November, however, the Applicant informed DGAACS that while he appreciated this belated initiation of the rebuttal procedure, it would not redress the damage done to his career development.

On 12 June 2000, the JAB adopted its report. Its considerations, conclusions and recommendations read, in part, as follows:

### **"Considerations**

...

17. The Panel agreed ... that ... it was not within its mandate to go into the substantive question as to who was more qualified and competent among the competing candidates ...

18. The Panel considered ... the question of procedural irregularities in connection with the rebuttal procedures ... It regretted the Administration's negligence and ensuing long delays in handling the [Applicant's] PER rebuttal procedure. ... The majority of the Panel ... agreed that this negligence in no way altered significantly the rebuttal process and even less the APB recommendation to promote another staff member.

19. The majority of the Panel noted that there was no evidence that the APB recommendation was tainted by prejudice or other extraneous factors.

### **Conclusions and Recommendations**

20. The majority of the Panel agreed that the [Applicant] had offered no convincing evidence for the Administration to set aside the results of the promotion exercise at issue.

21. The majority of the Panel agreed to make no recommendation in support of the appeal."

One member of the Panel dissented as follows:

"1. ...

(i) ... The [Applicant] has raised genuine issues of fact ... as to the injury sustained due to procedural irregularity on the part of DGAACS ...

(ii) The [Applicant] was deprived of fair and full consideration as a result thereof. The APB did not have before it complete data ... i.e. a ***PER after rebuttal***, to enable it to make a full assessment of his overall qualifications as opposed to those of other candidates ... This constitutes a violation of his right to due process.

...

5. It is therefore my opinion that the Administration is responsible for the defects in the PER ... that had been challenged and for the failure to prepare an updated one in a timely fashion. This might have most probably resulted in the APB's failure to recommend him for the post ... Moreover the failure to keep his personnel records up-to-date is inexcusable.

6. For this procedural irregularity and in recognition of the injury sustained ... I recommend that the [Applicant] be compensated the remedy sought in his appeal."

On 17 July 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General regrets that the rebuttal process of your PER was delayed due to an administrative oversight and confirms that such delays should be avoided. However, you were not harmed by such delay as the PER you rebutted was in fact a very good PER, and also because the APB evaluated you as meeting only some of the requirements of the post. The Secretary-General therefore agrees with the conclusion by the majority of the Board and has decided to accept its recommendation and take no further action on your appeal."

On 22 March 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The procedural irregularities in the promotion process jeopardized the Applicant's right to fair consideration for the post.
2. The Administration's undue delay in carrying out the rebuttal process violated the Applicant's rights.
3. The APB acted in violation of General Assembly resolution 50/11 of 2 November 1995.
4. The Respondent used his discretionary power arbitrarily.

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.
2. The contested decision was not improperly motivated or founded on extraneous factors.
3. The Respondent did not violate General Assembly Resolution 50/11 of 2 November 1995.

The Tribunal, having deliberated from 6 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant, an Interpreter (P-4) in the Arabic Interpretation Section, seeks compensation for what he considers was the Respondent's arbitrary and unfair decision not to promote him to a P-5 position. He claims that procedural irregularities prevented him from receiving "just consideration and fair treatment in the promotion process" for a Senior Interpreter (Arabic) position, among other complaints.

II. It is the longstanding position of the Tribunal that an applicant has only the right to be considered for a promotion and that the Tribunal will not interfere with the *proper* exercise of the discretion vested in the Secretary-General under Article 101 of the Charter and staff regulation 1.2(c). (See Judgement No. 312, *Roberts* (1983).) The Applicant in essence argues that the Respondent improperly exercised his authority. In part, the Applicant links the Respondent's long delay in acting on his rebuttal to the decision not to promote him.

III. The Respondent issued a vacancy announcement for a P-5 post of Senior Interpreter (Arabic) for which the Applicant applied. The Departmental Panel made its recommendation to the APB on 21 May 1998, suggesting that another person be selected. Then, in mid-July, the APB met, assessed the applicants and agreed with the Departmental Panel's recommendation that another person be selected for the vacancy. In a 30 June pre-review letter, the APB requested from the Applicant any additional information relevant to his suitability for the post, as required by ST/AI/413, para. 11. He did not respond and says that he was on extended leave during that time so did not receive his mail.

According to a 26 October 1998 memorandum from the secretariat of the APB, the APB had before it "all relevant information", including the evaluation of the candidacy by the Programme Manager, the report of the Departmental Panel, the Applicant's application and his personnel record. Regarding the pre-review letter, the JAB report notes that the Secretary of the APB said that, even with a response to the pre-review letter, it is "doubtful" that it would have changed the outcome, because the Applicant did not meet all the requirements for the post, while another candidate did.

IV. As stated, the Tribunal will not interfere with the exercise of the Respondent's discretion to select candidates for promotion, when that authority is properly exercised. In this case, the Tribunal finds that, when looked at only with regard to selection criteria, the Respondent had a valid basis for selecting a candidate who met all the requirements for the post instead of the Applicant, who met only some of those requirements.

However, the Applicant argues that the selection was tainted because he did not receive just consideration and fair treatment in the promotion process. In particular, according to the Applicant, the Departmental Panel and APB did not have before them a response from the Applicant to the pre-review letter and might not have been aware that the Applicant had rebutted his PER for 1 October 1994 through 31 December 1996 and that the rebuttal process was pending.

V. The parties disagree about whether the APB knew about the rebuttal. It should have known. On 10 March 1997, the Assistant Secretary-General, OHRM, sent a memorandum to all

Executive Officers at Headquarters and all Chiefs of Administration/Personnel away from Headquarters, to which he attached "Guidelines to Assist in the Submission of Complete and Up-to-Date Performance Records to Reviewing Bodies" (Guidelines). Paragraph 23 of the Guidelines says that

"Departments/offices are requested to:

- a. communicate the rebuttal statement to the departmental panel or AP body together with the PER, with the indication that, until completion of the rebuttal process, the statements made by the staff member should be accepted at face value and be deemed well-founded".

An accelerated rebuttal process must then occur "on a strict time line", with the rebuttal panel normally constituted within three weeks. In fact, the Respondent did not follow his own procedures and delayed for eight months, with the result that he had not completed this process before the APB met to consider candidates for the post at issue.

The dissenting member of the JAB panel found that the Respondent was responsible for the procedural flaws that "most probably resulted in the APB's failure to recommend [the Applicant] for the post [for which] he applied". He found the failure to keep the Applicant's personnel records up to date "inexcusable" and recommended that the Applicant be compensated. The majority of the JAB panel made no recommendation in support of the Applicant.

VI. It is impossible to be certain whether, and if so how, the circumstances surrounding the Applicant's rebuttals affected his chances for promotion and the consideration given him for the P-5 post. The Tribunal notes in this regard the statement by the secretariat of the APB that the Applicant met only some of the criteria for the post, which puts him in a different position than those who fulfilled all the requirements. Under the circumstances, the Applicant could not have been the successful candidate, even with the highest ratings on his PER.

While the Applicant's candidacy might not have been directly prejudiced by the delays, the Tribunal finds that the file of the Applicant that was presented to the APB was incomplete and did not meet the requirements of paragraph 23 of the Guidelines. The Respondent failed to follow his own rules regarding the performance appraisals and rebuttal process that were relevant to the Applicant's request to be considered for the post. Information circular ST/IC/1996/72 of 6 December 1996, entitled "Staff Performance Appraisal", attempts to balance the responsibilities

of the Administration and a staff member regarding performance appraisals. Time and timing are crucial considerations in conducting an efficient and fair system: "primary responsibility for the timely execution of the PAS, including completion of the PAS forms, rests with the Supervisor". The Respondent failed to fulfill this responsibility.

VII. Paragraph 13 of the Guidelines permits the consideration of a case by the APB

"if, on the basis of the available record, the relevant AP body determines that the applicant(s) in question do not meet all or most of the requirements for the post. Consideration will be postponed only in those cases where there are missing PER's for candidates who meet all those requirements."

Thus the Tribunal concludes that the Respondent need not have stopped the promotion process, because the Applicant did not meet all the requirements for the post.

VIII. The Applicant also argues that the Respondent did not follow the letter and spirit of paragraph 3 of General Assembly resolution 50/11, in which the General Assembly "requests [the Secretary-General] to ensure that the use of another of the six official languages is duly encouraged and taken into account, particularly when promotions and incremental steps are under consideration, in order to ensure linguistic balance within the Organization". Article 101 of the United Nations Charter and the General Assembly resolutions created pursuant to that Article are the fundamental criteria for the selection of staff. The Tribunal notes the statement in ST/AI/413 that the "paramount consideration in the assignment or promotion of staff shall be the necessity of securing the highest standards of efficiency, competence and integrity". "Linguistic proficiency" is only one of the criteria to be taken into account. Consequently, the Tribunal cannot conclude that the Respondent failed to give sufficient weight to the language criterion.

IX. For the reasons stated, the Tribunal:

1. Orders that the Applicant be paid one month's net base salary at the rate in effect on the date of this judgement, as compensation for the failure of the Respondent to fulfil his responsibility regarding the file before the Departmental Panel and APB; 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