

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1188

Case No. 1283: AGBELE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Walter Agbele, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and periodically thereafter until 31 January 2003;

Whereas, on 31 January 2003, the Applicant filed an Application containing pleas which read as follows:

“II. PLEAS

9. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal;

...

(c) *to decide* to hold oral proceedings ...

10. On the merits, the Applicant respectfully requests the Tribunal:

(d) *to find* that the non-recommendation of the Applicant by the [United Nations Truce Supervision Organization (UNTSO)] Local Panel, notwithstanding the fact that the Applicant met all the requirements of the criteria for promotion as stated in ST/IC/1997/89 [of 23 December 1997, “1996/1997 Field Service Promotions”], was in violation of the Applicant’s right to due process;

- (e) *to find* that, by ignoring the Applicant's recourse, the Field Promotion Review Panel violated the Applicant's right to due process;
- (f) *to find* that ... the fact that the Applicant's case was not submitted to review was a violation of his right to due process;
- (g) *to find* that the majority of the [Joint Appeals Board (JAB)] Panel acted with prejudice against the Applicant by basing its recommendation solely on the Respondent's unsupported claims while ignoring the evidence provided by the Applicant, thereby violating the Applicant's right to due process;
- (h) *to find* that the Secretary-General acted upon the JAB's prejudiced recommendation without examining the facts, thereby violating the Applicant's right to due process;
- (i) *to order* the Secretary-General to retroactively promote the Applicant from FS-4 to FS-5, effective the date the 1996/1997 Field Service Promotion register was promulgated; and
- [j] *to order* the Secretary-General to pay the Applicant the equivalent to two (2) years of his net salary, in 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 April 2003;

Whereas the Respondent filed his Answer on 30 April 2003;

Whereas the Applicant filed Written Observations on 30 May 2003;

Whereas, on 12 May 2004, the Tribunal posed a question to the Respondent, who responded on 28 May 2004;

Whereas, on 30 June 2004, the Tribunal posed a question to the Applicant, who responded on 8 July 2004;

Whereas, on 15 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNTSO on 6 November 1982, on a one-year fixed-term contract as a Secretary at the FS-3 level. His contract was subsequently renewed and he was transferred a number of times. At the time of the events that gave rise to this Application, he had been promoted to the FS-4 level, and was assigned to the FS-5 level post of Administrative Assistant, Claims Unit, UNTSO.

On 23 December 1997, information circular ST/IC/1997/89 published the promotion of Field Service staff. The Applicant was not included in the list of staff members promoted to the FS-5 level.

On 8 January 1998, the Applicant asked UNTSO whether he had been recommended for promotion. His request was forwarded to the Department of Peace-keeping Operations (DPKO), New York, which responded on 12 January that “UNTSO local panel had reviewed [the Applicant] for promotion and had not recommended him for promotion register”.

On 9 February 1998, the Applicant filed a recourse letter with the Field Service Promotion Review Panel. On 5 June, he was advised that his recourse letter had been examined in accordance with ST/IC/1997/89, and that the Panel had given “full and careful consideration” to the information presented by the Applicant. The Panel concluded that there were not sufficient grounds to amend its earlier decision not to include the Applicant in the 1996/1997 Field Service Promotion Register. The Applicant was advised that his recourse letter and the response would be placed in his Official Status file.

On 22 July 1998, the Applicant requested the Secretary-General to review the administrative decision not to include his name in the Field Service Register.

On 29 October 1998, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 19 September 2000. The conclusions and recommendations of the majority of the panel read, in part, as follows:

“Conclusions and Recommendations

21. ... [T]he *majority of the Panel* agreed that (a) the [Applicant] has been fully and fairly considered as a collateral candidate in the 1996/1997 Field Service Promotion Exercise; ... (b) there were no procedural irregularities in the promotion exercise and (c) there was no evidence that the decision not to promote him was motivated by prejudice, or improper motive or any other extraneous factor.

The majority of the Panel agreed to make no recommendations in support of this appeal.”

The third member of the panel dissented on the grounds that the Applicant had supported his case with documentary evidence whereas the Respondent had failed to provide documentation supporting his refutation of the Applicant’s allegations.

On 6 October 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General agreed with the conclusions of the majority and had decided to accept its recommendation and to take no further action on his appeal.

On 31 January 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Having met all the criteria for promotion, the Applicant had earned the right to be recommended by UNTSO.
2. The decision not to recommend the Applicant amounted to a violation of his rights of due process.
3. Staff members are entitled to a fair and impartial adjudication in the appeals process.

Whereas the Respondent's principal contentions are:

1. The non-recommendation of the Applicant for promotion conformed fully to the applicable legal procedure and did not violate any of the Applicant's rights.
2. The Applicant is not entitled to promotion to the FS-5 post.

The Tribunal, having deliberated from 30 June to 23 July, now pronounces the following Judgement:

I. The first issue arising in these proceedings relates to the precise nature of the promotion process which was in operation at all relevant times and the precise functions which were assigned to the various bodies who were to participate therein.

II. The Applicant has from the outset maintained that he was entitled as of right to have his name included "in the list of recommended candidates" to be furnished by the UNTSO local panel to the Field Administration and Logistics Division (FALD) at Headquarters, which was in turn to be furnished by FALD to the Field Service Promotion Review Panel (Review Panel). The Review Panel would in due course

furnish its Register to the Respondent, who would then affirm those promotions. What has already been referred to as the UNTSO local panel has been referred to by other names in the course of the various documents submitted and has been referred to by the Respondent by different names. For ease of reference it shall be referred to hereafter as the “local panel”.

In essence, the Applicant submits that all staff members who appeared to have satisfied the criteria for promotion, as set out in ST/IC/1997/89, were entitled as of right to have their names included on the list of recommended candidates to be forwarded by the local panel to FALD and in turn sent on to the Review Panel. The Applicant claims that he had satisfied the said criteria and, accordingly, that his rights were denied to him by the omission of his name from the said list.

In reply to this submission, the Respondent argues that the decision not to recommend the Applicant for promotion “fully conformed to the established procedures and guidelines”, but unhelpfully failed to identify the procedures or guidelines which, the Respondent argued, had applied. The Tribunal accordingly sought from each party the documents said to have governed the promotion process and the functions to be discharged at each relevant step, but surprisingly and unfortunately no documents have been furnished which reflect the agreement of both parties. In the circumstances, the Tribunal has not been furnished with an answer to a simple and clear-cut factual question, so that it by itself must seek to identify the nature of the relevant promotional scheme from the documents which were proved in evidence and from the submissions made by the parties.

III. Since each party has referred throughout the proceedings to the local panel having had the obligation to furnish to FALD in the first instance a list of “recommended candidates”, this by itself pre-supposes that the local panel should carry out a subjective assessment of each candidate and forward a shortened list of those whom they considered should be recommended for promotion from a longer list of candidates who had proclaimed eligibility or sought to be considered for the higher level post. Furthermore, a reading of the provisions of ST/IC/1997/89, which sets out as *criteria for promotion*

“(a) performance; (b) record of mobility; (c) academic training and professional qualifications and achievements; (d) linguistic proficiency; (e) supervisory abilities and leadership capabilities, as applicable; (f) seniority in

grade and experience; and (g) guidelines and measures to improve the status of women”,

supports the construction that recommendations were to be made in a subjective way. That is so because the criteria must necessarily be evaluated or assessed in a subjective way, as there is no yardstick by which many of the qualities to be considered can be measured objectively. Furthermore, if this constriction were ever in doubt, having listed the criteria, the information circular continues as follows:

“It should be noted that promotion necessarily depends not only upon a staff member’s intrinsic merit and seniority but upon a comparison of his or her overall qualities with those of his or her colleagues in a situation limited by the availability of posts”.

This clearly indicates that the list was not to be a list of all competing candidates but rather a whittled-down list setting out a reduced number of persons whom the local panel had determined were best qualified for the vacant post. Bearing in mind that the parties each referred to the list as “the list of recommended candidates” and the other documents put in evidence describe it in a similar way, the Tribunal is satisfied that the local panel was enjoined to draw up a list of recommended candidates rather than to furnish a list of all of those who had applied for, or expressed an interest in, the competition or a list of those whom the local panel might have considered as in some way objectively eligible to compete for the vacant post.

IV. It appears from the record that the local panel conducted an exercise in selecting from the list of all candidates, or a list of those who might objectively be considered as eligible, a shorter list containing the names of the persons they were recommending for the vacant post and that the Applicant’s name did not appear therein. It is little wonder that the Applicant should in due course have suspected that something was amiss or that he was being treated unfairly, for when he sought an answer to his simple query as to whether he had been recommended by the local panel, rather than giving him a quick and simple answer, as one might have expected, the Administration engaged in a tortuous exercise which made it appear as if the answer was some kind of a secret, before it gave him the simple reply.

Neither the JAB nor the Tribunal have any function in seeking to re-examine the weeding-out process which was conducted by the local panel, nor the functions

carried out thereafter by FALD or by the Review Panel, with a view towards evaluating or scoring the various candidates, or towards determining if the Tribunal's subjective view would or would not have accorded with the evaluations made by the bodies concerned. As stated by the Tribunal in Judgement No. 1110, *Sha'ban* (2003), it

“is keen to stress that discretionary decisions, such as the one now under review in these proceedings, are not made by the application of sterile formulae nor are they a mechanical or mathematical process. The discretion to be exercised is the discretion of the Respondent or those to whom he delegates same, and not that of a JAB, the Tribunal or other such body as may be asked to review the decision made. On such a review, the review body would review the contested decision and ask: was it reached on reasonable and rational grounds; was it within the scope of the authority of the person or the body which made it; and, was it fair and free from prejudice. In Judgement No. 1088, *Khader* (2002) the Tribunal stated the following:

‘III. The primary purpose and objective of an Administrative Tribunal in reviewing the propriety and efficacy of a challenged administrative decision, is to determine if it was supported by adequate credible evidence and establish that it was made *intra vires* and in accordance with such Rules or Regulations as might apply and that the due process rights of the challenger (the person who has been affected by that decision) and his rights to fair procedures were vindicated in relation to the entire process. This brief description is not intended to be appropriate to all cases or to be exhaustive. In effecting the discharge of its said function, the Tribunal asks itself “was the decision maker entitled to make the decision under review, was he entitled to accept the evidence relied upon to support it, was he within his powers to make it and was it fair and just, in all of the circumstances?” It is not for the Tribunal to ordinarily embark upon fact finding *de novo* or to seek to substitute its subjective view of the facts in place of the view taken by the decision maker when it finds that the decision-making was *bona fide* and was made on adequate acceptable evidence.’”

The compilation of the list of recommended candidates was in the first instance a matter for the local panel. It appears from such information as is available that the local panel did compile the list giving regard to the relevant criteria and in a rational and cogent way. No evidence can be advanced that the Applicant was treated unfairly.

V. Insofar as seniority is concerned, as a matter of fact, the Applicant had been promoted to the FS-4 level effective 1 October 1987, whereas 21 of the other FS-4 candidates competing for the FS-5 level had been at the FS-4 level since 1986 or earlier, thus enjoying greater seniority at the FS-4 level than that which had been enjoyed by the Applicant. Nobody has ever argued that the Applicant's conduct, record

or abilities were ever less than adequate. That is not an issue. The fact remains that the persons named on the local panel's recommended list and on the list forwarded by FALD to the Review Panel were preferred when compared to the Applicant's candidacy, and there is nothing to show that it was procedurally irregular or otherwise flawed in a manner such as warrants criticism from the Tribunal. The Tribunal is satisfied that the explanation that the Applicant had not attained "the degree of priority for promotion" was just a way of saying that on the seniority issue there were many people who enjoyed seniority over him. This was not an unfair assessment or an irrational one, notwithstanding the Applicant's complaints that seniority could be calculated in different ways. The Tribunal is satisfied that it does not connote the importation of some irrelevant or extraneous factor into the equation. In any event, the criteria set out in ST/IC/1997/89 were not intended to be final and exclusive and seniority by itself was never to be considered to be decisive.

VI. In all of the circumstances, the Tribunal is satisfied that there is ample evidence to establish that the Applicant's candidacy was given reasonable consideration, so that this submission is rejected. There is ample evidence that his candidacy was properly considered in due course by the Review Panel. This is evident from the Review Panel's letter of 5 June 1998, in response to the Applicant's recourse letter dated 9 February 1998, which indicates that the Applicant's candidacy was considered firstly at an early stage and again in the light of the Applicant's letter seeking recourse. This would confirm that the Applicant had been considered as a collateral candidate, being a matter put in issue by the Applicant. It is clear that the Review Panel had initially considered the Applicant's candidacy upon receipt of the collateral list, as it subsequently stated that the information contained in the recourse letter was given full and careful consideration "with a view to determining whether, *had it been known at the time of the initial review*, it would have warranted the inclusion of [the Applicant's] name in the register".

VII. The Applicant takes issue with many of the findings of fact made by the majority of the JAB and with many of the assertions of fact made by the Respondent. The Applicant claims an entitlement to view other evidence so as to ensure that matters asserted are true and that all procedural steps required by the promotional process were properly carried out. In the view of the Tribunal, there was sufficient evidence before the JAB that justified the majority finding that his application for promotion had been

given reasonable consideration. Statements from various bodies involved are entitled to be given some weight and value and need not be looked behind, unless there is good reason to do so. It is not for the Tribunal to re-engage in or to re-examine the entire promotion exercise. In the case of the Applicant's claim that his application was not given fair and reasonable consideration, if there are reasons to suspect this, the onus of establishing that it was afforded proper consideration moves to the Respondent. (See Judgements No. 362, *Williamson* (1986) and No. 828, *Shamapande* (1997).)

In the view of the Tribunal, in the instant case, reasonable *prima facie* evidence was forthcoming to establish that the Applicant's candidacy had been given proper consideration. The Tribunal accepts this evidence at face value as it has not been undermined. Insofar as the Application may seek to infer that the Applicant was treated with hostility or prejudice, there is no evidence which would justify such a conclusion. The Applicant's complaints that his candidacy was never considered, that his recourse was never considered and that the Respondent is engaged in some sort of cover-up are effectively complaints of bias and prejudice, and there is no evidence to support them. The Applicant carries the onus of proving those complaints, the Tribunal having consistently held that the burden of proof is on the Applicant where allegations of extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al.* (1998); and, No. 1069, *Madarshahi* (2002).)

VIII. The majority of the JAB was willing to accept reasonable assertions at face value, provided that there was some evidence to support them and that no reasonable proposition had been offered which should have caused the JAB not so to act. The dissenting member took a very different approach. She appears to have taken as a starting point a presumption that the Applicant's rights had been violated and to cast upon the Respondent an onus of establishing otherwise *beyond reasonable doubt* by the production of suitable documentary evidence. Not only has the dissenting member incorrectly described the burden of proof, but she has misconceived the role of the JAB as she, for example, indicated that the JAB should have satisfied itself on the evidence that the successful candidate was preferable to the Applicant. As stated, neither the JAB nor the Tribunal is enjoined or entitled to embark upon such an exercise. It is the decision of the appropriate bodies charged with the exercise of discretion under the promotion process to make the pertinent decisions and to exercise their discretions, as delegated to them by the Secretary-General. (See *Shamapande, ibid.*, and Judgement

No. 834, *Kumar* (1997).) The Tribunal is satisfied that the said dissenting member misunderstood the JAB's role and jurisdiction. Furthermore, to have released documents of the sort identified by the dissenting JAB member or to release the sort of documents sought by the Applicant would infringe the privacy and the expectations of confidentiality of other candidates and would breach the long-standing practice of the Respondent, which has enjoyed the long-standing approval of the Tribunal.

IX. In the light of the foregoing, all of the Applicant's claims are rejected.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary