



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1302

Case No. 1386

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Kevin Haugh; Ms. Brigitte Stern;

Whereas, on 16 July 2004, 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 1 December 2004, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“SECTION II: PLEAS

...

Decisions which the Applicant is contesting and whose rescission she is requesting, under article 9, paragraph 1 of the Statute

2) The Applicant contests the decision to select a candidate other than herself for the post of Secretariat Services Officer in the Secretariat of the Commission on Narcotic Drugs, United Nations Office on Drugs [and] Crime [(UNODC)], advertised through vacancy announcement VA 01-L-DCP614-VI of 19 December 2001.

...

Measures and decisions which the Applicant is requesting the Tribunal to order to take:

4) The Applicant requests the Tribunal to take the following decisions and measures:

a) To compel the Secretary-General to implement the unanimous recommendations of the Joint Appeals Board [(JAB)] in that the Applicant be

i) paid the salary at the P-4 level effective 1 November 2002 ... until she is promoted to the P-4 level;

ii) placed on the 'Galaxy roster' ... as [a] *recommended* candidate until she is offered a suitable post at the P-4 level.

b) To pay the Applicant compensation for the moral injury [caused by] depriving her of a fair chance in the selection process and for costs related to the internal procedure of administering justice and the application to this Tribunal.

Any preliminary or provisional measures which the Applicant is requesting the Tribunal to order before considering the merits

5) Should the Tribunal decide to request all records of the contested selection decision, the Applicant requests that the records be released to her counsel ...”

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 2005;

Whereas the Respondent filed his Answer on 31 May 2005;

Whereas, on 22 September 2005, the Applicant filed Written Observations;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“... The [Applicant] ... entered the service of the United Nations as a Junior Professional Officer at the L-2 level on 1 September 1990 on a one-year fixed-term appointment with the Narcotics Control Unit of the Secretariat of the [International Narcotics Control Board (INCB)]. After succeeding in the National Competitive Examination, she was appointed as Associate Social Affairs Officer (P-2) in the Secretariat of the INCB on a probationary appointment in September 1991.

... She ... was granted a permanent appointment on 1 September 1993. The [Applicant] was promoted to the P-3 level on 1 January 1997 as a Drug Control Officer with the Secretariat of the [INCB]. ...

... On 19 December 2001 the post of Secretariat Services Officer, P-4, in the Secretariat of the Commission on Narcotic Drugs[, UNODC,] was announced ... In response to the vacancy announcement, the [Applicant] applied for the post on 8 January 2002. On 20 February, her application was acknowledged. On 27 February ..., she was called to come for an interview the following day. Later that afternoon, the

appointment for the interview was cancelled. The following day, 28 February ..., the [Applicant] received a phone call at 11 a.m. from the supervisor of the post informing her that the interview would be held at 11:45 a.m. and that this was the only time the interview could take place. The [Applicant] was interviewed for the post at 12:00 [noon] on 28 February ... On 8 March ..., [she] wrote to the [Administration,] expressing her concern 'about the procedure currently underway in filling the [...] post'.

... The Vienna Appointment and Promotion Committee [(APC)] met twice, on 7 May and 16 July 2002 to review the recommendation ... to fill the post by lateral transfer of a male candidate. Failing to achieve unanimity, the APC referred the case to the Appointment and Promotion Board [(APB)] in New York for review, in accordance with staff rule 104.14 (h). On 3 October ..., the APB concurred with the recommendation of the Administration to fill the post by the lateral transfer of a male candidate and endorsed the recommendation of the [Applicant] as the alternate candidate."

On 22 October 2002, the Applicant submitted an appeal to the JAB in Vienna requesting suspension of the administrative action to fill the P-4 post. On 24 October, the Presiding Officer of the JAB wrote to the Applicant advising her that the JAB would not support her request for suspension of action as the administrative decision had already been implemented, the selected staff member having been informed of the decision to select him.

Also on 24 October 2002, the Applicant was formally notified that she had not been selected for the post.

On 17 December 2002, the Applicant requested the Secretary-General to review the administrative decision to appoint another candidate to the post.

On 26 March 2003, the Applicant lodged an appeal on the merits of her case with the JAB. The JAB adopted its report on 11 February 2004. Its findings and recommendations read as follows:

"FINDINGS

15. The JAB finds that:

a. The Respondent did not follow ST/AI/1999/8 [of 17 August 1999, entitled 'Placement and Promotion System',] and the Guidelines for implementation of the Placement and Promotion system (as of 25 July 2003) in several aspects ...

...

b. As the alternate candidate, the Appellant possessed qualifications that were equal or superior to those of the selected candidate. In her appeal, the Appellant provided evidence that her qualifications fitted the job description perfectly. Moreover, she provided evidence that she possessed the 'additional requirements' as

referred to by the Respondent. The Minutes of the Reconvened meeting No. 10 of the [APC] read that

‘the Committee was unable to reach unanimity to recommend the male candidate for the vacant post. Adequate justification for the non-adherence to ST/AI/1999/8 was not provided [...] Others felt that the selection process was not dealt with in a transparent manner since the vacancy announcement and the interview process did not reflect the criteria for selection.’

The Respondent has not shown how the qualifications of the selected candidate were superior to that of the Appellant. The Respondent should have provided evidence of this to be able to override the provisions of ST/AI/1999/9 [of 21 September 1999, entitled ‘Special measures for the achievement of gender equality’]. This was not done. Therefore the JAB considers that in accordance with Paragraph 1.8 of ST/AI/1999/9 ... and the consistent jurisprudence of the [Administrative Tribunal] that the Appellant should have been offered the post.

RECOMMENDATIONS

16. As the selected candidate has been on the post for more than a year the JAB, having found that the Appellant should have been selected for the post, recommends that:

- a. The Appellant be paid the P-4 salary she would have been entitled to if selected for the post for a duration of 2 years or until she is promoted to the P-4 level, whichever comes first;**
- b. The Appellant be placed on the ‘Galaxy roster’ until she is offered a suitable post at the P-4 level.”**

On 16 September 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“[t]he Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case, and regrets to advise that he does not agree with the JAB’s findings. It is unfortunate that the JAB undertook a comparison of the qualifications of the candidates for the post, as it exceeded its mandate in so doing. The fact that you were endorsed as the alternate candidate by the [APB] does not mean that it considered you to be equally suitable for the post in question. Under the old system, which governed the selection process for the post in question, an alternate was identified in the event the first ranked candidate did not take up the post. With regard to the JAB’s finding concerning the timing of your interview, the rescheduling of interview times in order to ensure the availability of the interviewers is a frequent occurrence and was not specific to your case. It is also noted that you would already have been prepared for the interview (indeed, you acknowledged this yourself in your request for review) as it had originally been scheduled for the previous day. The Secretary-General thus considers that there was no violation of your due process rights or the provisions of administrative instruction ST/AI/1999/9 ... and he has therefore decided not to accept the JAB’s recommendation and to take no further action on your appeal.”

On 1 December 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. As her qualifications were equal or superior to those of the selected male candidate, the Applicant should have been selected for the post, in accordance with the provisions of ST/AI/1999/9.
2. The selection process was tainted by procedural flaws which harmed the Applicant.
3. The Respondent's failure to take remedial action pursuant to the report of the JAB contradicted his policy to accept unanimous JAB recommendations and his commitment to making the achievement of a gender-balanced workforce a priority.
4. The Applicant's rights of due process were violated both in the making of the impugned decision and in the appeals system.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to consideration for promotion and was properly considered.
2. The Administration's decision was reached on reasonable and rational grounds, within the scope of its authority, and was fair and free from prejudice.
3. The Applicant failed to demonstrate that her qualifications were substantially equal or superior to those of the selected candidate.
4. The Applicant's pleas for compensation are unfounded.

The Tribunal, having deliberated from 6 to 28 July 2006, now pronounces the following Judgement:

I. These proceedings arise from the Applicant's request for administrative review of the Respondent's decision not to appoint her to the P-4 level post of Secretariat Services Officer in the Secretariat of the Commission on Narcotic Drugs, UNODC. The post in question was awarded to a male candidate who filled the post by lateral transfer and whose appointment had been recommended.

II. The competition for the appointment to the post was governed by the provisions of ST/AI/1999/9 which, inter alia, provides that where there are both male and female candidates competing for a post and the qualifications of the best male and the best female candidates satisfy the core requirements for the post and are substantially equal, the post should be awarded to the female candidate. In other words, it essentially provides that where each such candidate satisfies the core requirements for the post, the female candidate should be appointed unless the qualifications of the male candidate are in some *demonstrable* and *measurable* way superior to those of the best qualified female candidate. The Tribunal has chosen to use the words “demonstrable” and “measurable” advisedly for, since appointment and promotion decisions are amenable to administrative review under the Organization’s internal justice system and under the Statute of the Tribunal, and since the body carrying out such review - be it a JAB or other appropriate body or the Tribunal itself - should act on identifiable facts and on evidence, there should be evidence which can be examined and assessed by the body carrying out the review from which it can be determined if the affirmative action requirements have been fully complied with. This is an essential requirement if there is to be a meaningful review and if the policy of ST/AI/1999/9 or other affirmative action policy is to be enforced as an imperative. Otherwise, such policies become mere shibboleths or mere set pieces of lip service invoked in the pretence of achieving their objectives.

The Tribunal takes this opportunity to recall Judgement No. 671, *Grinblat* (1994), in which it stated:

“[t]he Tribunal recognizes that the various resolutions for improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past 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 ...". (See also Judgement No. 1056, *Katz* (2002).)

III. In these proceedings, the Applicant claims that her qualifications insofar as they related to the core requirements for the post as set out in the vacancy announcement were at least equal to those enjoyed by the ultimately successful male candidate. Accordingly, she argues that the decision to appoint the male candidate to the P-4 post was made in violation of the affirmative action privileges which she enjoyed as of right under the said Administrative Instruction and of the policy to strive for gender equality in relation to such appointments. She also claims that she suffered as a result of alleged procedural irregularities in the course of the competition for the said post and that she was disadvantaged or denied proper consideration by reason of such irregularities.

The Respondent contends that the Applicant carries the burden of establishing that her qualifications were at least equal to those of the successful male candidate and the burden of establishing non-compliance with the requirements of ST/AI/1999/9, and claims that she has failed to discharge the burden of proof on either essential matter. It is undoubtedly correct to point out that, as a general principle well-established from the jurisprudence of the Administrative Tribunal, the party who makes an allegation ordinarily bears the burden of establishing the correctness of the proposition and of the fact alleged, and that this is particularly so when the allegation made is one of irregularity or of wrongdoing. However, this general proposition must require modification where the relevant evidence is solely in the hands of the Administration so that the Applicant cannot even challenge the presumption of regularity because he or she is denied access to the evidence as to what has actually occurred. Whilst, in this case, some redacted papers generated by the APC and the APB in the course of their deliberations were made available to the Applicant under the doctrine of equality of arms or of equal treatment, what was made available had been redacted in the interests of protecting other candidates' rights to confidentiality and privacy in accordance with the time-honoured practises of the APB and also in accordance with the well-established jurisprudence of the Tribunal. Consequently, the Applicant was denied access to information as to what qualifications or experience was claimed by the successful male candidate, so that she was unable to make any comparative analysis between her claimed qualifications and those which she might have argued were enjoyed by the successful male candidate. In these circumstances, it would be improper and unprincipled to maintain that her claim must be defeated because she failed to discharge what the Respondent claims as her burden. Should that principle be accepted, it would necessarily result in the perpetuation of injustice, for meaningful administrative review would

be unavailable to any Applicant if deemed to carry an onus of proving matters when the evidence was in the hands of the Administration and kept beyond the reach of the aggrieved staff member.

In these circumstances, the Tribunal believes that where the relevant information is in the hands of the Administration and not available to an Applicant, the onus of proof in certain matters should be viewed as neutral rather than as resting on the Applicant; that the evidence and the available facts should be placed where possible before the body carrying out the review; and, that the review body should decide for itself from the evidence if the process was fair and regular, without reference to which of the parties might be seen as carrying the onus of proof. These matters were dealt with, *in extenso*, in the statement appended to Judgement No. 1245 (2005).

IV. The Tribunal stresses that this modification to the ordinary general principle should apply only where necessary and where the application of the general rule would perpetuate unfairness. If, for instance, it had been appropriate to have provided the Applicant in this case with full particulars of the male candidate's claimed qualifications and with full details as to how the APB had gone about the measurement and evaluation of each candidate's respective qualifications, then the Applicant would have carried the onus of proving that the exercise was carried out in an improper or irregular or otherwise flawed manner and that the resulting decision was consequently infirm or invalid. It follows that if competition for appointment or promotion was not governed by an affirmative action policy, and the APB or other body was merely required to establish that it gave proper consideration to a candidate's application and that its decision was not demonstrably irrational, biased or unfair, the person alleging irregularity would carry the burden of establishing it (*cf* Judgement No. 828, *Shamapande* (1997)). The Respondent has quite properly referred to the Tribunal's oft-repeated jurisprudence that the selection of a candidate for an appointment must often be carried out on a subjective evaluation and not by the application of arid or sterile formulae or rules. Accordingly, the Tribunal will seldom interfere with the decisions of the relevant bodies as they are the bodies entrusted by the Respondent to make the assessment and the Tribunal will not seek to substitute its own assessment for theirs. However, somewhat different considerations arise in cases such as this one, for reasons which will now be explained.

V. In the instant case, it was accepted from the outset that the Applicant possessed qualifications which would have entitled her to be deemed qualified for the post. This has

never been denied by the Respondent. He claims merely that she has not established that her qualifications were substantially equal to those of the successful male candidate and that she has not established that her candidature was not given reasonable consideration. In the view of the Tribunal, that she enjoyed adequate qualifications is implicit from the naming of the Applicant as the alternative candidate as, by reason of this designation, she was deemed worthy of appointment to the post had the successful male candidate, for whatever reason, been unavailable to take it up.

VI. ST/AI/1999/9, paragraph 1.8 (d) provides:

“[w]hen the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended”.

It seems clear that this requirement was imposed so that the APB in question could make a proper examination and comparison of the parties' respective qualifications and arrive at its own conclusions based on a transparent examination of the materials in the case. Since the APB's evaluations are likewise amenable to administrative review, it is equally desirable that it should identify in a similar, clearly visible and measurable way the manner in which it carried out its evaluation and how it concluded that the qualifications and experience of the recommended male candidate were substantially superior to those of the top female candidate, when a male candidate is recommended for the post. This is so that when, in turn, its evaluations and conclusions are being reviewed, it can be determined on an evidentiary basis if the policy of affirmative action has been honoured, and the factual basis for the decision can be readily ascertained.

VII. Some documents from the APB were furnished to the JAB in relation to this case. The Tribunal is satisfied that under staff rule 111.2 (l), the JAB was entitled to provide redacted or edited editions of the documents to the Applicant in the interests of transparency and fairness.

Try as it might, the JAB was unable to ascertain or identify the factual basis upon which the APB concluded that the qualifications of the male candidate in relation to the core requirements of the post could be said to have been substantially superior to those of the Applicant. Accordingly, with relentless logic, the JAB concluded that in the absence of any demonstrable or measurable superiority in the successful male's qualifications or experience, it

should find that both the Administration and the APB had failed to establish that the affirmative action requirements of ST/AI/1999/9 had been complied with. It therefore recommended to the Respondent that the Applicant should be paid the difference in salary she would have enjoyed had she, rather than the male candidate, been appointed to the P-4 position and that her name should be placed on the "Galaxy roster" so as to aid and accelerate her promotion prospects.

In all of the circumstances, the Tribunal must accept the JAB's conclusions that, since there was no demonstrable or measurable evidence to support a conclusion that the successful male candidate enjoyed substantially superior qualifications when compared with those of the Applicant, a breach of ST/AI/1999/9 has been established.

VIII. With respect to the Applicant's complaints of procedural irregularities, whilst the Tribunal accepts that she was most probably upset and aggrieved by the chopping and changing of the arrangements made for her interview, it is not satisfied that she suffered any measurable disadvantage arising therefrom or that it resulted in a failure to have her candidacy given proper consideration. She had prepared for the interview and there is no evidence that she was actually taken short or actually disadvantaged by the changes made in the arrangements. Furthermore, the Tribunal does not accept that these changes were evidence of any *mala fides* on the part of the Administration or that they were designed to unsettle her or to operate to her disadvantage. Accordingly, her claim under this heading is rejected.

IX. The Tribunal has considered the reasons advanced by the Respondent for failing to accept the unanimous recommendation of the JAB. In light of the Tribunal's decision as already enunciated, the Tribunal does not consider that there were any adequate reasons in either principle or policy which would have justified departure from the Respondent's oft-announced policy, but it does not consider that his decision not to accept the JAB's recommendation could be said to have infringed any right of the Applicant or could give rise to an entitlement to compensation.

X. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant as compensation for the violation of her rights, the difference between her salary at the P-3 level and the P-4 salary she would have received had she been appointed to the post in question, reckoned from October 2002, for the lesser of a period of two years or until her

promotion to the P-4 level, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;

2. Orders the Respondent to place the Applicant on the “Galaxy roster” until she secures a suitable post at the P-4 level; or, should the Secretary-General decide within 30 days following the distribution of this Judgement in the interest of the United Nations not to take any further action on this matter, to pay the Applicant two months’ net base salary at the rate in effect at the date of this Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

3. Rejects all other pleas.

(Signatures)



Spyridon Flogaitis
President



Kevin Haugh
Member



Brigitte Stern
Member

Geneva, 28 July 2006



Maritza Struyvenberg
Executive Secretary