



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1285

Case No. 1392

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 18 February 2005, a staff member of the United Nations Development Programme (hereinafter referred to as UNDP) filed an Application containing pleas which read as follows:

“II. Pleas

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

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

...

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

- (a) *to rescind*, as necessary, the final decision of the Secretary-General based on the recommendation of the Joint Appeals Board [(JAB)];
- (b) *to find and rule* that the [JAB] erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff [Regulations and Rules];
- (c) *to order* that the Applicant be paid three years' ... net base salary as compensation for the harm to her career and reputation, in view of the exceptional circumstances of the case;
- (d) *to order* the Respondent to promote the Applicant to the D-2 level with retroactive effect from 1999;
- (e) *to fix* pursuant to article [10], paragraph 1 of the Statute [of the Tribunal], the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (f) *to award* the amount of six months' net base pay as additional compensation to the Applicant for the delays in processing her appeal;
- (g) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

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 10 September 2005 and once thereafter until 16 September;

Whereas the Respondent filed his Answer on 16 September 2005;

Whereas, on 8 December 2005, the Respondent submitted additional documentation;

Whereas the Applicant filed Written Observations on 14 February 2006;

Whereas, on 5 July 2006, the Tribunal decided not to hold oral proceedings in the case;

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

"Employment history

... The [Applicant] joined the United Nations in 1982. From 1982 to 1989[, she] worked for the United Nations Development Fund for Women (UNIFEM) first as a Programme Management Officer and then as Deputy Director of UNIFEM. The [Applicant] is a permanent UNDP staff member who has served UNDP since 1989. ... [I]n 1996[, she] was appointed at a D-1 post as Chief of the Eastern and Southern

Africa Division of the Regional Bureau of Africa in New York. From November 1998 to October 2003[, she] served as UNDP [Resident Representative] in Zambia. ...

Summary of the facts

... On 15 March 2000, the [Applicant] received and signed her Performance Appraisal Review (PAR) prepared by ... her immediate supervisor, covering the year 1999. In the Supervisor's Rating Section[, she] was given a rating '1' (Outstanding) and under Section 6[, her supervisor] noted that her 'promotion was long overdue'. On 20 March ..., [her supervisor] signed the PAR and forwarded it to the Regional Bureau for Africa (RBA) which downgraded the rating to a '2' (Exceeds the Expectations of the Performance Plan), with explanation, prior to submission to the Senior Management Review Group (MRG). The Senior MRG downgraded the PAR to a rating '3' (Satisfactory), providing the following explanation of its decision:

'The Senior MRG noted the supervisor's high rating and recognized the importance of the staff member's contributions. The MRG congratulated the staff member on these but considered it more appropriate to rate her performance as fully satisfactory in line of what is expected from a senior staff member of her level and endorsed a "3" rating.'

... By letter dated 20 September ..., the [Applicant] submitted a rebuttal on the downgrading of her 1999 PAR from '1' to '3' and expressed concern regarding her promotion to D-2 in light of the '3' rating. [She] also raised the procedural issue that the RBA did not inform her that it had downgraded her PAR from '1' to '2' prior to its submission to the Senior MRG.

... The Rebuttal Panel concluded in its report of 31 July 2001 that, since the [Applicant] was not informed of the initial rating change, the procedure was not followed at the level of the RBA. Therefore [her] original rating '1' was reinstated and her PAR was resubmitted for consideration by the Senior Career Review Group (CRG) (formerly MRG). ...

... On 16 November 2001, the Senior CRG reviewed the [Applicant's] 1999 PAR as it was initially prepared with a rating '1', and maintained a rating '3'. ... [T]he Senior CRG felt that [her] accomplishments were fully in line with expected requirements of the post and, moreover, found no critical incidents to justify a change in its original rating '3'.

... On 15 January 2002, the [Applicant] submitted a second rebuttal on her 1999 PAR rating and the Rebuttal Panel, upon [her] request, agreed to hear her case as a continuation of her original rebuttal.

... On 3 August 2002, the Rebuttal Panel unanimously found no 'sufficient justification to question the Senior CRG assessment in terms of overall performance balancing [critical] incidents with other priorities of the office'. The Rebuttal Panel found that the PAR rating for 1999 given by the Senior CRG should stand. The Rebuttal Panel was also satisfied 'that the promotion review was not affected by a different outcome of the rebuttal process'."

On 3 October 2002, the Applicant requested administrative review of the decision taken by the Rebuttal Panel and expressed concern regarding her promotion.

On 14 February 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 28 October 2004. Its considerations, conclusion and recommendations read, in part, as follows:

“Considerations

...

Appellant’s 1999 PAR

...

22. The Panel observed that the contested decision to maintain [the Applicant’s] 1999 PAR rating was flawed by procedural and substantive errors. Firstly, from the procedural point of view, her initial 1999 PAR was unilaterally changed by the RBA without informing her. This procedural flaw was apparently corrected by the acknowledgment of the RBA of the ‘1’ rating, but at the end, the Senior CRG still rated the Appellant’s performance with a ‘3’ without offering an explanation on how its assessment could differ so vastly from that of the Appellant’s supervisor and that of the RBA.

23. Secondly, from the substantive point of view, the Panel reviewed all the documentation provided by the parties ... [and] ... found that the Senior CRG overlooked critical or important aspects of [her] performance ... The Panel was of the view that the rating given to the Appellant in her 1999 PAR was not consistent with the [‘Award to the Excellence in Support of the Millennium Development Goals’] given to the UNDP Office in Zambia.

24. The Panel observed with concern that it appears that the Senior CRG while reviewing the overall appraisal of UNDP senior officials was more concerned about trying to fit the ‘bell curve’. ...

25. ... The Panel doubted the efficacy and efficiency of the implementation of the ‘bell curve’ system.

Promotion

26. The Panel then considered the contention made by the Appellant that there was a serious lack of transparency at the UNDP promotion exercises at the D level because all promotions at this level in UNDP were decided by the same Management Team of senior officials who served on the Senior CRG. ...

...

28. ... [T]he Panel ... recalled administrative instruction ST/AI/1999/9 dated 17 November 1999 on ‘Special measures for the achievement of gender equality’. ...

29. ... [T]he Panel doubted that, in this particular case, UNDP management [had taken] into account all the [relevant] provisions [on gender equality] as it did not find evidence that gender balance was a [criterion] under consideration while reviewing D-1 to D-2 promotions.

30. The Panel noted that the Appellant was included in the list for the 1999 promotion review. ...

31. The Panel was disturbed to see that at the subsequent promotion review held on 23 August 2001, the name of the Appellant did not figure among the typed list of the D-1 candidates to be considered. The Appellant's name appeared in a hand-written notation on the top corner. The Respondent offered no convincing explanation why the Appellant's name [was] not typed as the other candidates.

32. ... [T]he Panel found that the existence of the procedural and substantive flaws, including the flaws of the Senior CRG and the Rebuttal Panel, even if they may be held to affect the results of these bodies' work, did not mean that, had these advisory bodies taken into account all the important and critical aspects of the Appellant's performance, the Appellant would have been promoted to the D-2 level.

...

Conclusion and Recommendation

34. The Panel *unanimously concluded* that: a) the decision to maintain the Appellant's 1999 PAR rating was vitiated by extraneous factors as both the Senior CRG and the Rebuttal Panel overlooked the important performance achievements of the Appellant and the Office she used to head; and b) although it was impossible for the Panel to prove whether the Appellant's possibilities for promotion have or have not suffered as a consequence of the erroneous Appellant's 1999 PAR rating, the Respondent failed to demonstrate that the Appellant was given full and fair consideration for promotion during the 2000 promotion exercise which was conducted on 23 August 2001.

35. In light of the foregoing, the Panel *unanimously recommended* a) that the Appellant's 1999 PAR be properly evaluated to reflect consistency with her prior record of at least '2'; and, b) that UNDP make every effort to fully and fairly consider the Appellant in any future promotion exercise. The Appellant should in fact be given priority to any suitable vacant D-2 post which allows her ... further career development, taking into consideration the remaining time of service of the Appellant within the Organization before reaching retirement age.

36. The Panel decided to make no other recommendation with regard to the present appeal."

On 18 February 2005, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 14 March 2005, the Under-Secretary-General for Management informed the Applicant 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. He has decided to accept the JAB’s first two recommendations, namely that UNDP re-evaluate your 1999 PAR taking into account the JAB report, and that your candidature for any future promotion exercise be fully and fairly considered. However, he does not accept the third JAB recommendation that you be given priority to any suitable D-2 post since the JAB has not offered any legal basis for this recommendation.”

In view of the decision of the Secretary-General, the Rebuttal Panel again met to review the Applicant’s 1999 PAR. In its report of 25 October 2005, the Rebuttal Panel concluded that there was “no additional or new information on [the Applicant’s] performance pertaining specifically to [her] 1999 PAR assessment, which would justify a change in the PAR rating, from that originally given by the Senior CRG”. On 30 November, the Senior CRG decided to maintain the “3” rating given to the Applicant in her 1999 PAR.

Whereas the Applicant’s principal contentions are:

1. The Applicant has been denied full and fair assessment of her performance from 1999 onwards. As a result, she has been denied full and fair consideration for promotion.
2. The Applicant was subjected to ongoing harassment and discriminatory treatment.

Whereas the Respondent’s principal contentions are:

1. The Applicant had no right to promotion but only to consideration for promotion.
2. The Applicant’s rights were not violated by the decisions not to select and promote her.
3. The irregularity in the PAR process is being addressed and cured.
4. The Applicant’s allegations of discrimination are baseless.
5. The Applicant’s request for damages is without merit.

The Tribunal, having deliberated from 5 to 28 July 2006, now pronounces the following Judgement:

I. In this case, the Applicant contends that she was denied full and fair assessment of her performance from 1999 onwards which resulted in a denial of full and fair consideration for promotion to the D-2 level. She also claims that she was a victim of harassment and discrimination.

II. At the time of the events which gave rise to her Application, the Applicant was serving at the D-1 level, as Resident Representative for UNDP in Zambia. In her 1999 PAR, her supervisor rated her as “1” (Outstanding), noting that her “promotion was long overdue”. In turn, however, the Regional Bureau for Africa downgraded the rating to a “2” (Exceeds the Expectations of the Performance Plan) and the Senior Management Review Group downgraded it to “3” (Satisfactory). The Applicant proceeded to rebut the rating and, in July 2001, the Rebuttal Panel concluded that, as she had not been informed of the RBA rating change, procedure was not followed at that level and her original rating of “1” should be reinstated. When the PAR was submitted to the Senior Career Review Group, which had replaced the MRG, it decided to maintain the Applicant’s “3” rating and she initiated a second rebuttal, which proved unsuccessful as the Rebuttal Panel found that her rating should stand.

In response to the Applicant’s appeal to the JAB, that body concluded that the decision to maintain her “3” rating was vitiated by extraneous factors as both the CRG and the Rebuttal Panel had overlooked important performance achievements. The JAB recommended that the 1999 PAR be “properly evaluated” to reflect consistency with the Applicant’s prior record. The JAB also concluded that, whilst it could not verify whether the Applicant’s possibilities for promotion had suffered as a consequence of her 1999 PAR rating, the Respondent had failed to demonstrate that she was given full and fair consideration for promotion during the 2000 promotion exercise and recommended that “UNDP make every effort to fully and fairly consider the [Applicant] in any future promotion exercise”, continuing that she “should in fact be given priority to any suitable vacant D-2 post ... taking into consideration the remaining time of service ... before [she would reach] retirement age”. The Secretary-General accepted the recommendations that UNDP should re-evaluate the Applicant’s 1999 PAR and that her candidature for any future promotion exercise be fully and fairly considered, but did not accept that she should be given priority in promotion, on the basis that the JAB had not offered any legal basis for this recommendation. Thereafter, the Rebuttal Panel issued its third report on the Applicant’s 1999 PAR, finding that there was no new information regarding her performance

which would justify a change in the “3” rating, and the Senior CRG decided to maintain that rating.

III. Whilst the impugned administrative decision which initiated this Application was the finding of the second Rebuttal Panel, the Tribunal is of the opinion that the case before it is properly one of non-promotion as well as a case appealing lack of due process in the evaluation procedures. It notes that in her request for administrative review, the Applicant expressed her concern regarding promotion; the JAB considered the appeal in terms of both evaluation and non-promotion; the Secretary-General accepted recommendations made by the JAB under both headings; and, the Respondent has not raised the matter of receivability in its defence. The Tribunal recalls its Judgement No. 1237 (2005), in which it found that the Applicant’s performance evaluation and the decision regarding renewal of his contract were “inextricably linked”. Indeed, in that case, the Tribunal held that the appropriate award of compensation ought to recognize the harm suffered in the totality of the circumstances:

“[t]he compensation due to the Applicant then cannot be viewed as due only for a technical failure on the part of the Administration to afford due process during the [performance evaluation review] procedure and no more. In the Tribunal’s view, it was in order for the JAB to try and assess the harm that may have realistically ensued to the Applicant as a result of the failure to have what he was entitled to, viz an objective appraisal of his performance in accordance with the standards set by the Organization and upheld by this Tribunal. The remedial action must be proportionate to the harm which the Respondent himself has acknowledged.”

In the instant case, then, the Tribunal is satisfied that a clear nexus exists between the Applicant’s opportunities for promotion and her performance evaluation, and will proceed to consider the case accordingly.

IV. With respect to the Applicant’s claims concerning promotion, the jurisprudence of the Tribunal has consistently held that staff members have no right to promotion: the right is to be given full and fair consideration of their candidacy. (Judgement No. 592, *Sue-Ting-Len* (1993).) In Judgement No. 310, *Estabial* (1983), the Tribunal stated: “[t]he fact is that the Applicant did not have a right to promotion. While the Secretary-General was under the strict obligation to respect the rules of form and substance applicable in the case, he was free to choose among the various candidates.” The decision of the Secretary-General not to promote the Applicant is an exercise of his discretion and his decision therefore cannot be impugned unless it is actuated by

extraneous or improper motive. This is so in spite of good performance on the part of a staff member. The exercise is necessarily subjective and good performance on the part of the staff member does not *ipso facto* give rise to an expectancy of promotion:

“the Tribunal considers its duty to state once more that, as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General ... and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy.

... Such being the general rule, it follows that decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground.” (Judgement No. 312, *Roberts* (1983).)

Consequently, it is also the Tribunal’s position that it “would not substitute its view for that of the Secretary-General concerning the evaluation of the Applicant’s qualifications”. (Judgement No. 613, *Besosa* (1993); see also Judgement No. 470, *Kumar* (1989).) Equally emphatic is the dicta of the Tribunal in Judgment 134, *Furst* (1969), in which it held that “[a]ppointments and promotions are within the discretion of the Secretary-General, and unless there is a legal obligation on the Secretary-General, the Tribunal cannot enter into the merits of the same”.

In support of her claim to promotion to a D-2 level post, the Applicant states:

“[t]he lack of support from senior UNDP officials occurred despite an extremely heavy portfolio requiring servicing high level political missions, such as the Special Envoys of the [United Nations] Security Council Missions including on Angola Sanctions that she has had to coordinate. Neither the Administrator nor the Bureau Director recognized the quality and merit of her achievements under a very strenuous workload, notwithstanding the high level of appreciation by high level [United Nations] Missions to Zambia, the Government of Zambia as well as significant external sources ...”

In Judgement No. 594, *Del Rosario-Santos* (1993), the Tribunal stated that an Applicant

“is entitled to evaluate her own achievement and performance in any way she wishes (in spite of *nemo judex in sua causa*), but the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. Neither the Tribunal (nor the JAB, as indicated in its report) can substitute its evaluation for that of the Respondent.”

V. The Applicant challenges the decision of the Secretary-General on grounds that “bias reflected in the evaluation process imbued the promotion process”. This relates to the procedural flaws in connection with the PAR procedure. The Tribunal accepts that the PAR process was flawed, per the findings of the JAB which recommended “that the [Applicant’s] 1999 PAR be properly evaluated” and “that UNDP make every effort to fully and fairly consider the Applicant in any future promotion exercise”. These two recommendations of the JAB have been accepted by the Secretary-General. The acceptance does not detract from the fact that the Applicant had been subjected to such procedural irregularity which violated her rights to due process and justifies compensation.

VI. As part of the basis for the reliefs requested by the Applicant, she also alleges that “prejudice and discriminatory treatment ... adversely affected her appraisal and her chances for career advancement” and that her “treatment by UNDP at the culmination of her career reflects a pattern of harassment aimed at securing her departure from service”. There is no evidence before the Tribunal in this case substantiating such a serious allegation and it thus rejects the contention.

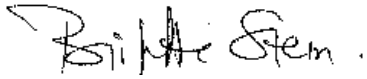
VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant US\$ 5,000 as compensation for the violation of her rights, 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,
2. Rejects all other pleas.

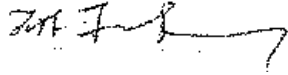
(Signatures)

A handwritten signature in black ink, appearing to read 'Spyridon Flogaitis', written in a cursive style.

Spyridon Flogaitis
President



Brigitte **Stern**
Member



Goh Joon Seng
Member

Geneva, 28 July 2006



Maritza **Struyvenberg**
Executive Secretary