



ADMINISTRATIVE TRIBUNAL

Judgement No. 1312

Case No. 1401

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Julio Barboza; Mr. Goh Joon Seng;

Whereas, on 27 September and 28 November 2004, a former staff member of the United Nations, filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 February 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“II. PLEAS

...

9. On the merits, the Applicant respectfully requests the Tribunal to:

(a) Reverse the JAB’s conclusions and recommendation; and,

(b) Find that ...:

(i) the Administration failed to carry out proper review procedures by not abiding with organizational policies set out in Secretary-General Bulletin ST/SGB/267 [dated 15 November 1993, entitled ‘Placement and Promotion’], and procedures set out in administrative instruction ST/AI/1999/8 [dated 17 August 1999, entitled ‘Placement and Promotion System’];

(ii) the Administration’s deviation from the promotion review procedures in section 6 through 8 of administrative instruction ST/AI/1999/8 was

committed by continuation in multiple instances from 17 May 2001 to 10 April 2002; and,

(iii) [the Applicant was deprived of his] entitlement to [...] full and fair consideration [...] for promotion ...

10. ... [T]he Applicant most respectfully requests the Administrative Tribunal to order the payment of compensation in the amount of two years' net base salary."

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 August 2005 and twice thereafter until 31 October;

Whereas the Respondent filed his Answer on 21 October 2005;

Whereas the Applicant filed Written Observations on 5 November 2005;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

... The [Applicant] entered the service of the United Nations on a fixed-term appointment with the Security and Safety Service [(SSS)], on 12 February 1981, as a Security Officer, at the S-1 level. On 1 March 1982 the [Applicant] was promoted to the S-2 level. On 12 May 1982 the [Applicant]'s fixed-term appointment was converted to probationary. He received a permanent appointment on 1 March 1983. Effective 1 January 1985 the [Applicant] was upgraded to the S-3 level. Effective 1 April 1986, the [Applicant] was promoted to the S-4 level. On 1 July 1992, the [Applicant] was promoted to the S-5 level with the title 'Fire Lieutenant.' On 1 July 1995, the [Applicant] was promoted to the S-6 level and his title changed to 'Fire Captain'. From 3 September 1999 to 20 July 2001, the [Applicant] was on mission with the United Nations Mission for the Referendum in Western Sahara (MINURSO). On 20 August 2001, the [Applicant] returned to Headquarters in the Fire Unit, Security and Safety Service at the S-6 level. The [Applicant] retired at the end of October 2003.

Summary of the facts

... On 10 March 2000, the [Applicant] submitted an application for two vacancies that were advertised through Vacancy Announcement 00-G-OCS-918-S7, hereinafter the 'subject posts'.

... By email dated 16 August 2000 to ... [the] Chief, Common Services Activity, [Office of Human Resources Management (OHRM)], the [Applicant] requested information regarding the status of the subject posts. By email dated 16 August 2000, OHRM informed the [Applicant] that his enquiry had been forwarded to ... [the] Executive Officer, Department of Management.

... By email dated 11 December 2000 to ... [the] Assistant Secretary-General, OHRM, the [Applicant] made another inquiry concerning the Security Officers' promotion exercise.

... By email dated 12 December 2000, ... OHRM informed the [Applicant] that 'a large number of vacancies were advertised at the same time for posts in the Security Group, [and that] the review process [was] still ongoing'. ... 'It [was] hoped that applications for the promotion to the advertised S-6 and S-7 positions [would] be considered in January 2001 ...'

... In accordance with ST/AI/1999/8 ..., on 25 April 2000, OHRM submitted ‘three applications ... to the [SSS] for evaluation’.

[On 10 May and on 19 October 2001, the Applicant inquired as to the status of the Security category promotion exercise.]

...

... On 15 February 2002 the [Departmental] Panel conducted its Promotion review for the subject post. The Panel did not recommend the [Applicant] ...

... The Appointment and Promotion Panel [(APP)] at its 136th meeting, held on 5 April 2002, considered the recommendation submitted by the Departmental Panel and recommended the promotion of a candidate other than the [Applicant] to the S-7 post of Security Inspector. It appeared from the record that the second post was not filled by the Department.

... On 17 April 2002, the [Applicant] submitted a request for suspension of action asking the [JAB] to suspend the recommendation of the [APP] in its review of the internal vacancy announcement By letter dated 17 May 2002 ... [the] then Under-Secretary-General for ... Management, informed the [Applicant] that the Secretary-General had decided not to grant his request for suspension of action.

...”

On 10 December 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 5 May 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

22. The Panel first addressed the issue of receivability raised by the Respondent. The Respondent submitted that the Appellant failed to appeal a specific identifiable administrative decision as required under staff regulation 11.1...

24. The Panel took note that the ... appeal was based on intended action by the Chief of the [SSS] to delay the promotion process for the two S-7 posts at issue ... [T]he Panel was satisfied that there was an implied administrative decision that was appealable. The Panel thus decided to consider the merits of the case.

25. The main issues before the Panel were to determine whether the delay in the promotion exercise was purposeful and affected the Appellant’s right to be fully and fairly considered, and whether he would be entitled to any damages as a result of any impropriety with respect to the promotion exercise.

27. The Panel took note of the length of the promotion exercise (approximately two years). However, based on the evidence provided, the Panel was of the opinion that there was no element leading to the conclusion that the process was purposefully delayed. The Panel thus concurred with the Respondent that there was no evidence that the delay in the promotion process at issue was an attempt to prejudice the Appellant’s opportunities for promotion.

28. Regarding the Appellant’s contention that his application was not fully and fairly considered, the Panel ... recalled that it had no statutory competence to review the Appellant’s claim of his superiority as opposed to the other candidate. ...

29. It was the Panel's considered opinion that ... the promotion process had been carried out in compliance with the requirements of ST/SGB/267 and ST/AI/1999/8, which contained procedural safeguards for the full and fair consideration of all candidates. The Panel found unconvincing the reason put forward by the Appellant, as the basis for his refusal to cross-train as a Security Supervisor. The Panel felt that, had the Appellant taken advantage of that opportunity, he would have had better standing for the post for which he had applied.

30. ... The Panel was of the view that the delay in the promotion exercise had no bearing on the Appellant's non promotion, as he was found not qualified for the post. The Panel was also of the view that there was no discrimination, as others in similar situation were also affected. Consequently, the Panel concluded that the length of the promotion exercise did not violate any of the Appellant's rights that could entitle him to compensation.

Conclusions and recommendation

31. In light of the foregoing, the Panel *unanimously concluded* that there was no evidence showing that the Respondent had not complied with the placement and promotion procedure[s] of ST/SGB/267 and ST/AI/1999/8.

32. The Panel *unanimously agreed* that the Appellant was not promoted because he was found not qualified for the posts under consideration. The Panel also *unanimously agreed* that the delay in the promotion exercise was not a factor and that it did not affect the Appellant's rights as a staff member.

33. The Panel accordingly found no basis to make any recommendation in support of this appeal."

On 9 November 2004, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 24 February 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Administration failed to abide by the policies set forth in ST/SGB/267 and to carry out the procedures in accordance with ST/AI/1999/8.
2. The Administration has denied the Applicant full and fair consideration for promotion.

Whereas the Respondent's principal contention is:

The Applicant's rights were not violated by the manner in which the promotion exercise was carried out.

The Tribunal, having deliberated from 31 October to 22 November 2006, now pronounces the following Judgement:

I. The Applicant challenges the decision of the Respondent to deny him a promotion from his position as Fire and Safety Officer and Officer-in-Charge of Security Operations, MINURSO, at the S-6 level to either of two vacancies in the SSS at the S-7 level. He alleges procedural violations and irregularities on the part of the Respondent, by the programme manager and by both the Departmental Panel and the APP, including extreme delay in the filling of one of the vacancies, as well as the failure to fill the other vacancy at all, thus denying him full and fair consideration in the promotion exercise.

II. In March 2000, the Applicant submitted his application for both S-7 vacancies which had been advertised by VA 00-G-OCS-918-S7. These vacancies were two of 38 vacancies in the Security category, ranging from the S-3 level to the S-7 level, which were all posted on the same date. The Applicant was deemed eligible to apply for the posts by OHRM.

On 28 April, three additional vacancy announcement lists were published, announcing 18 additional vacancies in the SSS at the S-3 level.

During the period from 16 August 2000 to May 2001, the Applicant made several inquiries about the status of his candidacy. During that same period, approximately 53 posts were filled. On 4 May 2001, eight new posts at the S-3, S-4 and S-5 level were also announced in the SSS, thus bringing the total number of vacancies announced to 64.

According to the Applicant, on 17 May 2001, the programme manager sent a memorandum to the Executive Office of the Department for Management, stating that the Applicant was ineligible to be considered for one of the S-7 vacancies, citing the Applicant's earlier refusal to cross-train as a Security Supervisor. In that same memo, the programme manager stated that the Applicant had failed to sign his PAS before going on mission.

III. The Tribunal first turns to the allegations by the Applicant that the delay in filling one S-7 vacancy and the failure to fill the other S-7 vacancy violated the Staff Regulations and Rules as well as ST/SGB/267 and ST/AI/1999/8, and was intended by the Respondent to prevent him from promotion. The Tribunal cannot agree and, in this regard, finds itself in accord with the conclusion reached by the JAB. While the Tribunal notes that the promotion exercise did extend over more than 21 months, the Applicant has failed to provide evidence that the delay was either intentional or excessive or designed to prevent his promotion. As the Applicant himself concedes, the SSS posted 64 vacancies within a three-month period. At least 55 of those posts, between the levels of S-2 and S-6, were filled within approximately one year from the date of the related vacancy announcements. Given the significant time demands of filling so many posts, the Tribunal is surprised at the speed with which the Administration acted in filling these 55 vacancies. The Tribunal has long recognized the considerable latitude of discretion enjoyed by the Secretary-General in matters of appointments and promotions. (See Judgements No. 362, *Williamson* (1986) and No. 958, *Draz* (2000), citing Judgement No. 411, *Al-Ali* (1988).) Thus, it was well within the Administration's discretion to decide to fill these other 55 positions first, before addressing the S-7 vacancies. While the Tribunal

recognizes that such discretion is not unlimited, the Applicant has failed to adduce sufficient evidence required to prove that the Respondent's actions in this regard were discriminatory, improperly motivated or based on extraneous factors. In fact, all three candidates for the S-7 positions were placed in the same position by the inevitable fact that the S-7 vacancies were considered after the other 55 S-2 to S-6 vacancies.

Similarly, the Respondent enjoys broad discretion not only as to when but also as to whether to fill a vacant post. Again, as the Applicant has failed to provide evidence of such a nature as to prove that the Respondent's actions were improperly motivated, discriminatory or arbitrary and capricious, the Tribunal will not substitute its judgement for that of the Secretary-General. As the Tribunal has consistently held, "the *onus probandi*, or 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); and, No. 870, *Choudhury et al.* (1998).)" (See Judgement No. 1069, *Madarshahi* (2002).) Thus, the Tribunal rejects the Applicant's claim in this regard.

IV. The Tribunal next turns to the Applicant's allegations of procedural irregularities in the promotion process, both by the Departmental Panel and the APP, including the misrepresentation of the Applicant's eligibility to be considered for promotion to the S-7 level by the programme manager and the two review bodies. The Tribunal will determine whether such procedural irregularities denied him the right to be fully and fairly considered. In reviewing the evidence, it is clear to the Tribunal that, as the Applicant alleges, significant procedural irregularities did in fact occur. In this regard, the Tribunal disagrees with the findings, or lack thereof, on the part of the JAB. While the JAB made a passing reference to the possibility of irregularities, it concluded that the Applicant was fully and fairly considered. In light of the evidence before it, the Tribunal is hard pressed to understand how the JAB reached that conclusion. First, the Tribunal notes the programme manager's inaccurate representation to the Departmental Panel regarding the Applicant's eligibility for the S-7 vacancy. As the Applicant alleges and the JAB also found, OHRM had previously short-listed the Applicant, along with two other candidates, as being eligible to be considered for the vacancy. Thus, any representations by the programme manager that the Applicant was ineligible were false and inappropriate and were prejudicial to the Applicant. In that same vein, the programme manager's allegation that the Applicant failed to sign his PAS before going on mission was also unsubstantiated by the Respondent; indeed, the Applicant has provided convincing evidence that it was the programme manager who failed in his duty to properly process the PAS. As a result, the Tribunal finds that the Applicant's candidacy was not fully and fairly considered.

Of even greater impact, however, in persuading the Tribunal that the Applicant was not fully and fairly considered were the two letters written by members of the Departmental Panel and the APP, respectively, in an attempt to reveal the extent to which procedural irregularities occurred in the context of the Applicant's candidacy. As these letters both confirm, an *ex-officio* representative of OHRM hijacked the promotion proceedings, at both the Departmental Panel and the APP, in order to undermine the

Applicant's candidacy. While the *ex-officio* representative of the Departmental Panel conceded that OHRM was the office that determined eligibility and that the Applicant had indeed been determined to be eligible by OHRM, she nonetheless proceeded in the promotion exercise as if the Applicant were not eligible. In both review bodies the Applicant's qualifications were not discussed, including his performance evaluations while on mission, which, allegedly, were strong, and, apparently, any attempts by the concerned member of the Departmental Panel or his counterpart at the APP to put forward the Applicant's candidacy were stone-walled by the *ex-officio* member of the Panel and the APP, respectively. According to the two dissenting members, each was prohibited from entering their opinions into the report. In addition, according to both dissenting members, the reports of the promotion review bodies were misleading - they appeared to be unanimous in result when, in fact, the reports were drafted over the strong objections of the two individual dissenting members, who were not allowed to report their concerns. In light of these letters, it is difficult for the Tribunal to understand how the JAB could have reached its conclusion that the Applicant was fully and fairly considered.

V. In light of the evidence presented, the Tribunal finds that the Applicant was not given full and fair consideration in the promotion proceedings even though he was eligible for such consideration. As it has noted in many of its previous Judgements, the Tribunal offers no opinion as to whether the Applicant was the best qualified person for the positions or should have been promoted. Had the Administration acted in a fair and transparent fashion so that the Applicant had been fully and fairly considered yet not promoted, the Tribunal would not substitute its judgement for that of the Administration, regardless of the outcome of the promotion exercise. In Judgement No. 828, *Shamapande* (1997), the Tribunal stated:

“The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. In Judgement No. 447, *Abbas* (1989), the Tribunal further specified that 'reasonable' and 'measurable' were the standards applicable in such cases: '... such consideration should to some measurable degree meet the criterion of "fullest regard" in a reasonable manner'.”

However, since the Administration failed to fully and fairly consider the Applicant, even if he might not be the best candidate, the Applicant is entitled to compensation. (See generally Judgement No. 1031, *Klein* (2001).)

VI. While the Applicant alleges several other instances of procedural irregularities in the impugned promotion process, the Tribunal need not delve into these claims, as they are not necessary to sustain its finding that the Applicant was not fully and fairly considered.

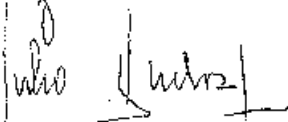
VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of six months' net base salary at the rate in effect at the date of 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,
2. Rejects all other pleas.

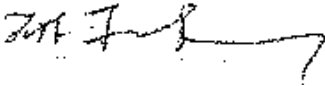
(Signatures)



Jacqueline R. Scott
Vice-President

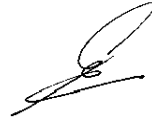


Julio Barboza
Member



Goh Joon Seng
Member

New York, 22 November 2006



Maritza Struyvenberg
Executive Secretary