



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1315

Case No. 1414

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Kevin Haugh;

Whereas, on 28 February 2005, a staff member of the International Trade Centre, United Nations Conference on Development and Trade/World Trade Organization, (hereinafter referred to as the ITC) filed an Application, requesting the Tribunal, inter alia, to find:

“8. On the merits ...

(a) That the Chef de Cabinet of the Secretary-General had procured a change in recommendation of the preferred candidate for a D-2 vacancy in the United Nations Office at Geneva (UNOG), thereby excluding all other candidates, including the [Applicant], who was the originally preferred candidate of the Under-Secretary-General, Department of Management (...) and the candidate preferred by the Director-General, UNOG, from fair consideration by the Senior Review Group (SRG);

(b) That the [SRG], by restricting its recommendation to the Secretary-General only to the candidate recommended by the [Under-Secretary-General, after the Chef de Cabinet] had procured the change in the recommendation, prevented all other candidates, including the [Applicant], from the opportunity of being given full and fair consideration by the Secretary-General;

(c) That the SRG failed to give full and fair consideration to all applicants for the same post and ... prevented the Secretary-General to exercise his discretionary authority in the selection process;

(d) That the Administration, by proceeding to a selection for the D-2 post ... in the absence of published and publicized procedures, failed to give full and fair consideration to all applicants for the post;

(e) That the Administration, by proceeding to a selection for the D-2 post ... in the absence of published and publicized procedures failed to adhere to [General Assembly] resolution 51/226 of April 1997 ... and, as a consequence, violated the [Applicant's due process rights];

(f) That the Respondent further denied the findings of the UNOG Joint Appeals Board [(JAB)] ... and refused the granting of the compensation recommended by the JAB ...

9. ... [and] *to order* the payment for the period February 2002 to his retirement expected to be in April 2006 of the salary differential between the one currently paid to him by the ITC and the salary that would have been paid had he been selected for the post, including contributions to the [United Nations Joint Staff Pension Fund] and other allowances and benefits linked to the grade and step, and a compensation to be determined by [the] Tribunal on the basis of prior decisions on similar matters.

...”

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 21 October 2005;

Whereas the Respondent filed his Answer on 21 October 2005;

Whereas, on 31 October 2006, the Tribunal put questions to the Respondent and, on 3 November, the Respondent replied thereto;

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

*[The] Applicant's Professional Record*

... The [Applicant] entered the service of the Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia, on 20 October 1974, as [an] Associate Economic Affairs Officer at the P-2 level, in the Socio-Economic Research and Planning Division, Socio-Economic Survey and Analysis Section. His probationary appointment was converted into a permanent appointment on 1 October 1976.

... [Following a series of assignments at different duty stations and having received a number of promotions, the Applicant] was appointed Director, Information Technology Services Division, Department of Management, New York, at the D-2 level, on 1 March 1999.

... On 1 April 2001, he was granted a two-year fixed-term appointment on secondment as Director, Division of Administration, [ITC], Geneva, at the D-1 level (step 9). This appointment was renewed on 1 April 2003 for a further three-year period.

... In his most recent Performance Appraisal System [(PAS)] reports, the staff member's performance has been evaluated as consistently exceeding expectations.

**Summary of Facts**

... Vacancy announcement N° 01-A-UNG-400675-E-GE for the position of Director, Division of Administration, UNOG, was issued on 12 June 2001. The deadline for application was 12 August ...

... The [Applicant] applied for the position on 7 August 2001.

... The [Applicant] was interviewed by the Under-Secretary-General for Management, New York, and the Director-General, [UNOG], on 28 September 2001.

... Secretary-General's bulletin ST/SGB/2001/9, announcing the creation of a new [SRG] and cancelling previous instructions on the subject, was published on 16 October 2001. Information circular ST/IC/2001/81, announcing the membership of the [SRG], was issued two days later, on 18 October ...

[In a memorandum dated 6 November 2001 to the SRG, the Director-General, UNOG, and the Under-Secretary-General for Management summarized the findings of interviews conducted with eight short-listed candidates, seven internal and one external.]

... The [SRG] met on 13 December 2001, and transmitted its recommendation to the Secretary-General on 14 December ...

... By information circular IC/Genève/2002/10 dated 5 February 2002, the Director-General, UNOG, informed staff at Geneva of the appointment of the new Director, Division of Administration, UNOG.

... On 4 March 2002, the [Applicant] wrote to the Secretary-General, requesting him to review the decision of 5 February 2002 'not to appoint [him] to the post of Director, Division of Administration, UNOG'.

... By letter dated 10 April 2002, the [Applicant] transmitted to the Secretary of the [JAB in Geneva] a copy of his letter to the Secretary-General ...

...

... On 2 June 2002, the [Applicant] submitted his complete statement of appeal [to the JAB]

...

...”

The JAB adopted its report on 7 April 2004. Its considerations, conclusions and recommendations read, in part, as follows:

**“Considerations**

...

*Merits*

...

35. The Panel ... decided to focus on potential evidence that the decision was tainted by lack of due process, a breach of procedure or the influence of extraneous factors, such as prejudice and discrimination. On the basis of the material provided by the Respondent, it sought to establish

whether the Appellant had been duly and fairly considered for promotion to the post of Director, Division of Administration, UNOG.

36. On the question of procedure, the Panel considered whether all the applicable rules and procedures had been duly applied and properly followed during the examination of the applications for the post. ...

...

40. Although the [SRG] did not specify that it was acting pursuant to administrative instruction ST/AI/392 [of 27 January 1994, specifying the procedures applicable for filling posts at the Director (D-2) and higher levels,] which was in force when the vacancy announcement was issued, the Panel inferred from its examination of the material before it that this must be the case. The Secretary of the [SRG] confirmed the point by memorandum of 10 March 2004 to the JAB Secretary.

41. The Panel next turned to the Appellant's arguments relating to due process ... The Panel considered that, unless the Respondent was able to show that all applicable procedural requirements had been fully complied with, the burden of proof would not be discharged.

...

43. The procedure to be followed by the [SRG] in the present case is detailed in administrative instruction ST/AI/392, paragraphs 4 to 7. It is clear and unambiguous. In particular, paragraph 7 of the instruction states that **'after deliberation, the [SRG] will prepare a short list of all fully qualified candidates in ranking order** and submit it to the Secretary-General for final decision'. (...) The information made available to the Panel shows, however, that the prescribed procedure was manifestly not followed at the [SRG] meeting held on 13 December 2001.

44. The Group had before it for consideration the memorandum dated 6 November 2001 from the Director-General, UNOG, and the Under-Secretary-General for Management. This summarized the findings of interviews conducted with eight short-listed candidates, seven internal and one external. From these findings it was clear to the Panel that the candidates were not all equally well qualified. Three are described as "strong" or "exceptionally strong"; one does not have "an essential requirement" of the position he has applied for. Two have not won final approval, pursuant to ST/SGB/213/Rev.1, from the Controller and Assistant Secretaries-General concerned. The administrative backgrounds and experience of three candidates are found wanting in various ways.

45. Instead, however, of identifying the 'fully qualified candidates' and presenting them 'in ranking order' for a final decision by the Secretary-General, as required by paragraph 7 of administrative instruction ST/AI/392, the Group 'unanimously agreed with the choice of the Under-Secretary-General for Management'. There is no evidence that it deliberated at all, far less exercised any discretion or judgement of its own. As mentioned above, the burden of proof on this point rests with the Respondent.

46. Paragraph 7 of ST/AI/392 also stipulates, moreover, that 'should the names put forward by the [SRG] not include the candidate recommended by the department or office concerned, the recommendations of the Group, together with the views of the head of the department or office, will be forwarded to the Secretary-General for a decision'. Paragraph 13 of the memorandum dated 6 November 2001 emphasizes that 'the Director-General of UNOG and the Under-Secretary-General for Management were not able to reach consensus on a joint recommendation for a preferred candidate'. The Panel noted in this connection that the [SRG]'s recommendation of 14 December 2001 makes no mention of the Director-General's recommended candidate.

47. The Panel considered that strict respect for established procedure is the only guarantee

that all candidates will be given full and fair consideration. The function of the [SRG] was not to rubber-stamp the declared 'choice' of the Under-Secretary-General for Management, but to furnish the Secretary-General with more information on the relative merits of all fully qualified candidates, and to draw his attention to a dissenting recommendation by the office or department concerned. In failing to do so it also failed to ensure that staff members aspiring to such posts could be satisfied that their candidacies would be given adequate consideration.

48. The Panel then turned to the other arguments adduced by the Appellant to prove a lack of due process. With regard to the information at the disposal of the [SRG], the Appellant claimed that his application was considered by the [SRG] on the basis of incomplete and partly inaccurate information. The Respondent stated that the Group was given the 'applications prepared by the candidates and the comparative analysis and evaluations done by the two managers'.

49. The Panel was provided, in confidence, with copies of the information made available to the [SRG] when it considered the candidates for the appointment at issue. In the light of that information, it could not agree with the Appellant's contention that the Group reached a decision on the basis of incorrect or incomplete data.

50. The Appellant further contended that the candidate selected by the Group 'only marginally met the requirements' for the post, and was selected owing to 'interference in the selection process'.

51. ... The comparative merits of the short-listed candidates were set out in a memorandum dated 6 November 2001 to the Chairperson, [SRG], which described the Appellant and one other as 'strong' candidates, and the candidate ultimately appointed as an 'exceptionally strong' and 'the first choice of the Under-Secretary-General for Management'. That memorandum was drafted jointly by the Director-General of UNOG and the Under-Secretary-General for Management.

52. The Panel further noted from the documents provided that, with two exceptions, all candidates for the position at issue, including the Appellant and the ultimately successful candidate, had, in accordance with Secretary-General's bulletin ST/SGB/213/Rev.1 dated 30 April 1991, been vetted and approved by the Assistant Secretaries-General for Human Resources Management and for General Services and by the Controller. This being so, the Panel could not agree with the Appellant's contention that the selected candidate 'only marginally met' the requirements for the post.

53. On the assumption that the procedure followed by the [SRG] was that laid down in ST/AI/392, the Appellant also contended, however, that there was nothing in that bulletin to justify interference in the selection process by the Executive Office of the Secretary-General. Any such interference would therefore invalidate the selection process.

54. The Panel noted the Appellant's allegation that he was passed over for the appointment at issue as a result of pressure from the Executive Office of the Secretary-General. There is nothing in the documentary record to support such an allegation; more important, the Appellant provided the Panel with no means of verifying it without disclosing information, which he had enjoined the Panel to keep confidential. In the circumstances, the Panel had to withhold judgement on this point.

...

### Conclusions and Recommendations

56. In view of the foregoing, the Panel **concludes** that the Respondent failed to adhere to the relevant procedural rules, and to discharge the burden of proving that full and fair consideration was given to all applicants for the post. This represents an irregularity and amounts to a violation of the Applicant's right to due process. The Appellant should therefore be compensated.

57. Hence the Panel **recommends** to the Secretary-General that the Appellant be granted three months' net base salary, at the D-2 level, step 3, in compensation for the violation of his rights caused by procedural irregularities on the part of the Respondent.

...”

On 30 November 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case, and finds that he is unable to accept the JAB’s conclusion concerning the consideration of your candidature by the [SRG]. The evidence on file clearly indicates that your candidature was fully and properly taken into account during the selection process. The [SRG] had before it all the relevant information, namely the applications and the comparative analysis and evaluations of the candidates, when making its determination as to which candidate would be recommended. The Secretary-General, therefore, cannot accept the [JAB’s] recommendation for compensation in your case.”

On 28 February 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. As at the date when the SRG met to examine applications for the appointment at issue, it had not yet established and published its own procedures, the final decision lacks “the necessary legal foundations to be applicable” and “fair, proper and due process could not be guaranteed”.
2. The procedures in force at the time the vacancy announcement was issued were not respected.
3. The selected candidate only marginally met the requirements of the post as compared with several other candidates.
4. The submission of incomplete and incorrect information to the SRG prevented him from enjoying “fair, proper and due process”.
5. Lastly, the Applicant asserts that the whole process lacked transparency.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s due process rights were not violated.
2. The Applicant had no right to be selected for any particular post.
3. The SRG had before it all relevant documentation pertaining to the Applicant’s candidacy.
4. The Applicant’s candidacy received full and fair consideration.
5. The Applicant’s request for compensation is without merit.

The Tribunal, having deliberated from 8 to 22 November 2006, now pronounces the following Judgement:

I. The issues arising in these proceedings have been thoroughly analyzed and considered by the JAB which issued an exemplary report.

II. On 7 August 2001, the Applicant applied for appointment to the vacancy which had been announced for the post of Director of Administration, UNOG, a D-2 level post. On 16 October 2001, the Respondent issued ST/SGB/2001/9 announcing the creation of a new Senior Review Group intended, *inter alia*, to assist or advise the Secretary-General on the filling of vacancies at the D-2 level or above. As had been stated by the Joint Inspection Unit in its report on senior level appointments (document JIU/REP/2000/3), the SRG was established by the Secretary-General in 1991 to serve a threefold purpose: “to provide the Secretary-General with more structured advice in the consideration of candidates [for posts at the D-2 level]”; “to ensure consistent implementation of personnel policies and recruitment guidelines”; and “to satisfy members aspiring to such posts that their candidacies are given adequate consideration”.

The JAB, in its report relating to this case, indicated that by “more structured advice” it had understood that the SRG was intended to provide “an independent and impartial evaluation of the suitability of all short-listed candidates, along the lines more clearly set out for appointments at levels below D-2 in section 6 of administrative instruction ST/AI/1999/8”. The Tribunal is satisfied that the JAB’s understanding was correct.

III. By ST/SGB/2001/9, the newly-established SRG was to establish and publish its own procedures, and previous texts relating to the about to be wound up SRG were thereby repealed or abolished.

When the newly-established SRG met to consider the selection for the said Director of Administration post and to consider those who had applied for appointment, it had not yet determined or published its procedures, so, according to what had been stated by the Secretary of the SRG to the JAB in a memorandum of 10 March 2004, it had, as a temporary measure or transitional arrangement, kept on implementing the procedure which had been in force at the time when the vacancy announcement had been published, so as to ensure legal certainty and to respect the principles of non-retroactivity of law. Those procedures were to be found in ST/AI/392 and required that the SRG would, after deliberation, prepare a short list of all fully qualified candidates in ranking order and submit it to the Secretary-General for final decision.

IV. Having carefully examined and considered all available documents, the JAB quite properly concluded that instead of identifying “all qualified candidates” and “presenting them in ranking order” as required by ST/AI/392, the SRG had merely unanimously expressed agreement “with the choice of the Under-Secretary-General for Management” being the candidate who was ultimately appointed to the post,

and concluded that there was no evidence that the Group had deliberated at all, let alone exercised any judgement or discretion in relation to the matter. The report of the JAB further observed that:

“[p]aragraph 7 of ST/AI/392 also stipulates, moreover, that ‘should the names put forward by the Senior Review Group not include the candidate recommended by the department or office concerned, the recommendations of the Group, together with the views of the head of the department or office, will be forwarded to the Secretary-General for a decision’. Paragraph 13 of the memorandum dated 6 November 2001 emphasizes that ‘the Director-General of UNOG and the Under-Secretary-General for Management were not able to reach consensus on a joint recommendation for a preferred candidate’. The Panel noted in this connection that the Senior Review Group’s recommendation of 14 December 2001 makes no mention of the Director-General’s recommended candidate.”

In the view of the Tribunal, the JAB’s said findings were yet again fully justified.

V. The JAB then turned to the Applicant’s other arguments. It satisfied itself from the evidence before it that the SRG had been provided with “the applications provided by the candidates and a comparable evaluation done by two managers” so that it rejected the Applicant’s contention that his application had been considered on the basis of incomplete and partly inaccurate information. The Tribunal accepts the JAB’s finding on this aspect as it does on the JAB’s rejection of the Applicant’s contention that there had been interference in the selection process, and it is satisfied that this conclusion was properly reached on a thorough consideration of the evidence. For similar reasons, the Tribunal agrees with the JAB’s rejection of the Applicant’s contention that the selected candidate “only marginally met” the requirements for the post and the Applicant’s contention that he had been passed over as a result of pressure from the Executive Office of the Secretary-General. The JAB found that there was nothing in the documentary record to support such an allegation and that the Applicant had provided no means of verification without disclosing information which he had enjoined the Panel to keep in confidence. Thus, in the circumstances, the JAB withheld judgement on that particular point.

VI. The JAB finally concluded that because the SRG had failed to adhere to the relevant procedural rules (being the procedures required by ST/AI/392) the Respondent had failed to discharge the burden of establishing that full and fair consideration had been given to all applicants for the post, one of these being the Applicant. The JAB found that, rather than exercising its own judgement and discretion in consideration of the candidates and rather than short-listing them in ranking order, the SRG had in effect merely expressed unanimous agreement with the recommendation of the Under-Secretary-General for Management as to who should be recommended or, in effect, rubber-stamped his recommendation. It concluded that this represented a procedural error or an irregularity which constituted a violation of the Applicant’s rights to due process and recommended that he be paid the sum of three months’ net base salary at the D-2, step 3 level for this violation.



The desirability and benefit of requiring compliance with predetermined and published procedures is, in the opinion of the Tribunal, obvious and self-evident. Such requirements foster uniformity of process, thus providing for equality of treatment or measure as between individual candidates and the requirement to comply with a uniform process provides safeguards against a recommendation or a decision being arrived at on a capricious or arbitrary basis.

The Tribunal concurs with the JAB's conclusion that it was appropriate that the provisions of ST/AI/392 should have been followed by the SRG as a transitional measure until new procedures had been agreed and published, and readily accepts the JAB's findings that, since those provisions had not been followed, there had been a violation of the Applicant's rights. The Tribunal has repeatedly confirmed that the discretionary power of the Secretary-General in relation to appointments must be exercised following established and publicized procedures which contain safeguards to ensure fairness and objectivity. (See Judgements No. 1056, *Katz* (2002), No. 1122, *Lopes Braga* (2003), and No. 1217, *Loriot* (2004).) The omission which occurred in the instant case deprived the Applicant of what was intended by ST/AI/392 to be such a measure and the Tribunal shares the JAB's assessment as to what constitutes appropriate compensation for this breach.

VII. The Respondent had declined to accept the JAB's conclusions, stating that the record showed that the SRG had had before it all relevant information and that it had fully taken the Applicant's candidacy into account during the selection process and when making the determination as to which candidate would be recommended for appointment. Whilst that may be true, there is nothing to establish that it had made an independent evaluation and it did not list the qualified candidates in ranking order as required by the Administrative Instruction, which it claimed to have followed in this case. In these circumstances, the Tribunal is not satisfied that the SRG followed an established and publicized procedure which contained safeguards to ensure fairness and objectivity as is required.

VIII. The Tribunal finally considered the Respondent's submission that the SRG had found only one of the short-listed candidates to have been "fully qualified" for the post and five others to have been found "less qualified" and his submission that, accordingly, the SRG had complied with the requirements of the Administrative Instruction when it furnished just one name to the Secretary General. This submission gives rise to a number of problems, for not only does it raise the impenetrable question as to what is the difference between a qualified candidate and a fully qualified one, but in addition there is absolutely no evidence to support the factual basis for the proposition so advanced. Whilst the Administrative Instruction does indeed specify that it is fully qualified candidates who are to be listed in ranking order, in the opinion of the Tribunal, to make any sense of the wording this must be construed as all qualified candidates, for if they are not fully qualified candidates they are not qualified at all. The concept of partial qualification makes no sense in any reasonable construction or consideration of the scheme. The Respondent's submission on this particular aspect of the case is a very fragile edifice, built on an unstable foundation. It

goes like this - the concept **fully qualified candidate** is synonymous with **best qualified candidate**, so that if there is but one outstanding candidate enjoying qualifications superior to all others, that person's name, and it alone, should be furnished by the SRG to the Secretary-General. However, should the SRG conclude that two or more persons tie for the title of **best qualified candidate** by enjoying equal qualifications and qualifications superior to the rest, then the names of such persons should be furnished by the SRG to the Secretary-General. Perhaps, unsurprisingly, the submission does not go on to explain how in that event they are to be listed in ranking order.

The Tribunal must reject this submission, for to accept it would not only do violence to language but would fly in the face of reason and common sense. Had the framers of the relevant Administrative Instruction intended that the SRG was to sieve out only the best, this would have been easily stated. The Tribunal has examined the SRG's submission to the Secretary-General and is satisfied that the JAB was correct when it found that the SRG had merely endorsed the recommendation of the Under-Secretary-General for Management instead of exercising its own discretion and judgment in consideration of all of the fully qualified candidates and listing them in ranking order as required. The Tribunal is, accordingly, satisfied that contrary to what had been asserted by the Secretary of the SRG to the JAB in his memorandum of 10 March 2004, the SRG had not followed the requirements of the relevant Administrative Instruction.

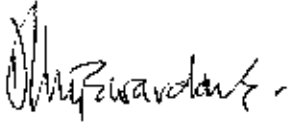
IX. Accordingly, the Tribunal:

1. Orders the Respondent to pay the Applicant three months' net base salary at the D-2, step 3 level, at the rate in effect on 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,
2. Rejects all other claims.

*(Signatures)*

A handwritten signature in black ink, appearing to read 'J. R. Scott', written in a cursive style.

Jacqueline R. **Scott**  
First Vice-President

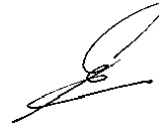


Dayendra Sena **Wijewardane**  
Second Vice-President



Kevin **Haugh**  
Member

New York, 22 November 2006



Maritza **Struyvenberg**  
Executive Secretary