



ADMINISTRATIVE TRIBUNAL

Judgement No. 1344

Case No. 1427

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, Vice-President; Mr. Julio Barboza;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 28 February 2005 and twice thereafter until 31 August;

Whereas, on 15 July 2005, the Applicant filed an Application containing pleas which read as follows:

“II Pleas

8. The Administrative Tribunal is respectfully requested to find:

...

(b) [the] appeal (...) is not moot, despite the fact that I was finally promoted to the D-1 level ... on 1 August 2003 under the new staff selection system, and it has to be considered on its own merits, bearing in mind in particular the fact that my pension rights have been negatively affected by improprieties in the consideration of my application for the vacant post, and by the rejection of the grounds of my subsequent appeal to the Administration.

9. Under the terms of article 7, paragraph 3 (a) of its Rules, the Administrative Tribunal is respectfully requested to order the Administration to make available to the Tribunal for its examination [a number of documents.]

...

10. ... [T]he Tribunal is respectfully requested to find and rule that:
- (a) The placement and promotion process established by ST/AI/1999/8 [of 17 August 1999, entitled 'Placement and promotion system', was not] properly followed ... [and] ... recruitment [to the post in question was] improperly terminated by the Administration after the first-ranked candidate [withdrew] her application, [thus:]
 - (i) My statutory rights for due process with respect to my application ... were denied, and my rights to receive full, fair and objective consideration of my application ... under the terms of staff regulation 4.4 and staff rule 104.14 were violated; and,
 - (ii) The [Appointment and Promotion Board (APB)] was prevented from exercising the full scope of its responsibilities under the terms of staff rule 104.14 and section 8 of ST/AI/1999/8 for selection of the best-qualified candidate for the post from the short list of candidates recommended by the ... Review Panel;
- ...
- (c) The 22-month delay by the Respondent in submitting his reply to my appeal filed with [the Joint Appeals Board (JAB)] has infringed my rights for the adequate conditions of service and my future pension level, for which I should be compensated;
 - (d) The JAB recommendation ... to establish my seniority at [the] D-1 level on a retroactive basis should be upheld ...;
 - (e) The decision by the Secretary-General dated 24 January 2005 to reject the JAB's recommendation ... represents a failure by the Respondent in his responsibilities to adhere to and respect his own policies, rules and procedures, resulting in violations of my rights for due process under the terms of staff regulation 4.4, for which I should be adequately compensated.
11. [T]he Administrative Tribunal is respectfully requested to order the Respondent:
- (a) To establish my seniority at the D-1 level, with appropriate within-grade increments, on a retroactive basis with effect from 6 July 2001 ...;
 - (b) To further recalculate my salary, allowances and other entitlements with appropriate within-grade increments for the period from 1 August 2003 onward, ... ;
 - (c) To establish my pension rights at the D-1 level from July 2001 onward ...
12. ... [S]hould the Secretary-General decide that I be compensated without further action being taken in my case, the Administrative Tribunal is respectfully requested to order the Respondent to pay to me compensation for the injury sustained equivalent to ... two years' net base salary at the D-1 level, step 11, as well as the actual equivalent of the loss of pension rights as of July 2001.
13. In addition, ... the Administrative Tribunal is respectfully requested to order the Respondent to pay me compensation equivalent to six months' net [base] salary at the D-1 level and grade as of the date of the judgement for the moral injury sustained and delay due to the Respondent's failure to respond to the appeal *in a timely manner*."

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 20 December 2005 and once thereafter until 15 January 2006;

Whereas the Respondent filed his Answer on 21 December 2005;

Whereas, on 10 July 2007, the Tribunal requested documentation from the Respondent and, on 12 July, the Respondent furnished the requested documents;

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

“Employment history

... The [Applicant] joined the United Nations on 2 July 1983 as [a] Budget Officer at the P-3 level in the Political, Legal and Common Services Service (PLCSS) of the [Programme Planning and Budgeting Division (PPBD)] on a two-year, fixed-term appointment. His appointment was subsequently extended several times and then converted to a permanent appointment in May 1990. The [Applicant] was promoted to the P-4 level in April 1986 ... [and to the P-5 level] in September 1990 [as] Senior Programme Budget Officer/Deputy Chief of the Economic, Social and Human Rights Service (ESHRS) in the PPBD. Effective 1 August 2003, the [Applicant] was promoted to the D-1 level in ... PPBD. ...

Summary of the facts

... On 13 November 2000, ... VA No. 00-A-DOM-001453-E-NY was advertised relating to the D-1 vacant position (post No. UNA-41832-E-D-1-001) of Chief, [Political, Legal and Humanitarian Service (PLHS)]/PPBD. ... The [Applicant] applied for the vacant post on 29 December 2000.

...

[According to a chronology of events prepared on 30 May 2002 for the Administrative Law Unit by the Executive Officer, Department of Management, the interview and selection panel initially considered that three candidates - one external and two internal, one of whom was the Applicant - met the requirements of the vacancy announcement (VA). Following interviews with the candidates, the panel agreed to rank the external candidate as first choice. During a departmental meeting on 20 June 2001, the programme manager indicated that the Applicant could be considered as the second-ranked candidate and the departmental panel subsequently indicated in its report that ‘based on the ranking order of the internal candidates, the Head of Office may also wish to exercise the option of recommending alternate candidates’. On 6 July, however, when the Head of OPPBA submitted his recommendation to the APB, he recommended only the first-ranked candidate, indicating ‘I do not wish to exercise the option provided for under paragraph 9.6 of ST/AI/1999/8 to recommend alternate candidates for the post’. In November, during the course of the APB process, the external candidate withdrew her application for the position.]

... Following the withdrawal of the application of the external candidate, no steps were taken by the Head of OPPBA to continue the process of filling the vacancy.

... During the first three months of 2002, the [Applicant] made several verbal inquiries ... about the plans [for] the vacant post. The [Applicant] understood from those discussions that the OPPBA management had no intentions to complete the filling of the vacancy under the placement and promotion system established by ST/AI/1999/8. Rather, its intention was to re-advertise the post under the new staff selection system, which came into effect on 1 May 2002.

... ... On 12 April 2002, the VA was cancelled.”

On 19 April 2002, the Applicant requested the Secretary-General to review the administrative decision to terminate the process of placement and promotion against the vacant D-1 post and cancel the vacancy announcement.

On 18 June 2002, the Applicant lodged an appeal with the JAB in New York.

On 16 January 2003, OHRM issued a new VA for two vacant D-1 posts in PPBD: Chief, PLHS, and Chief, ESHRS. On 20 January, the Applicant submitted an appeal to the JAB requesting suspension of action with respect to filling the post of Chief, PLHS, until the JAB had considered the merits of his appeal. On 31 January, the JAB recommended that the request for suspension of action be approved but, the same day, the Under-Secretary-General for Management advised the Applicant that the Secretary-General did not agree with this recommendation. Thereafter, the Applicant applied for both advertised positions and, effective 1 August, was promoted to the D-1 level position of Chief, ESHRS.

The JAB adopted its report on the merits of the Applicant's case on 31 August 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

20. The Panel noted the Respondent's contention that the present Appeal is moot. The Panel disagreed with the argument of the Respondent and noted that although the Appellant was promoted to the D-1 level, effective August 2003, the Appellant was not contesting the decision to promote or not to promote him, but the way in which the procedure to fill ... the vacant post was handled. The Panel thus agreed to consider this case on the merits.

...

22. The Panel turned to consider the contention made by the Appellant that the established process as detailed in ST/AI/1999/8 was not properly followed from the stage when the Head of OPPBA failed to make a recommendation of the applicants in ranking order to the APB, as required under paragraph 7.5 of ST/AI/1999/8. In this regard, the Panel recalled paragraph 7.5 of ST/AI/1999/8 which reads as follows: ‘The head of department or office shall consider the preliminary recommendation and the advice received from the departmental panel and decide on his or her recommendation of the applicants, **in ranking order**, for submission to the appropriate appointment and promotion body’. (JAB's emphasis.)

23. From the records of this case, the Panel noted that the Head of OPPBA, in his memorandum dated 6 July 2001 addressed to the Chairperson of the APB, recommended the first ranked candidate and further stated that he did not want to exercise the option provided under the administrative instruction to recommend alternate candidates for the post. He did not state any reason why. The Panel noted that if recommendations would be sent in this fashion, and if the APB were always to follow the Head of Department's recommendations, this would result in the APB having no role to play in the promotion process. The Panel agreed with the Appellant, that the applicable procedure spelled out in ST/AI/1999/8 for placement and promotion was not followed. ...

...

26. As for the contention made by the Appellant that he was singled out and was discriminated [against], the Panel noted that the Appellant, on whom the burden of the proof lies, has failed to provide evidence of discrimination. The Panel however, as stated in paragraph 23 above, found that the Appellant's due process rights were violated due to the procedural irregularities in the promotion process. This is

evident from the following facts: a) the decision of the Head of OPPBA not to submit in ranking order the recommended candidates, as mandated under paragraph 7.5 of ST/AI/1999/8; b) the fact that the Head of OPPBA did not provide any rationale why he did not recommend alternates when, in the view of the departmental panel, there were at least two internal candidates who met the requirements for the vacant post; and, c) the late cancellation in April 2002 of the vacancy announcement with no valid reason even when transitional measures were put in effect in the new Staff Selection System to allow those promotion exercises governed by ST/AI/1999/8 to continue under the old promotion system after 1 May 2002.

Conclusion and Recommendation

27. In light of the foregoing, the Panel *unanimously agrees* that this case was not moot and that there was enough evidence proving that the contested decision to terminate the placement and promotion process and to cancel the VA ... violated the Appellant's due process rights. The fact that the Appellant was promoted to the D-1 post in PPBD in 2003 ...upholds his appeal, as it make[s] clear that he had a high probability to be selected for the post already in 2001 under the old placement and promotion system.

28. The Panel therefore *unanimously recommends* that the Appellant's seniority at the D-1 level be retroactively established with effect from November 2001.

29. The Panel makes no other recommendation with respect to this Appeal.”

On 24 January 2005, 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 regrets that he is unable to accept the JAB's findings. Contrary to the JAB's view, the decision by the Head of the [Office] not to recommend more than one candidate to the APB did not violate your rights, nor did it deprive the APB of its option not to endorse the recommendation of the head of the department. Similarly, the programme manager's decision to cancel the vacancy announcement and re-advertise at a later date did not violate your rights as a staff member. You had a right to be duly considered for the post and you were so considered. In the circumstances, the Secretary-General does not accept the JAB's recommendation for retroactive implementation of your promotion and has decided to take no further action on your case.”

On 15 July 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to recommend only one candidate to the APB excluded him from the promotion process, violating his right to full and fair consideration.
2. The Administration violated its own rules regarding appointment and promotion.
3. The Applicant suffered financial and moral harm, entitling him to compensation.
4. The Respondent further exacerbated the Applicant's injury by delaying the JAB procedures.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the process of placement and promotion with respect to the vacant D-1 post and to cancel the VA did not violate the Applicant's due process rights.
2. The Applicant was not entitled to promotion to the D-1 post.

The Tribunal, having deliberated from 6 to 27 July 2007, now pronounces the following Judgement:

I. This Application arises in the context of a promotion exercise for a D-1 position, Chief, PLHS, PPBD, for which the Applicant unsuccessfully applied. The Applicant was subsequently promoted to a different D-1 position, approximately 19 months later, but he challenges the impugned promotion exercise, accusing the Organization of failing to properly follow its own promotion procedures, thereby denying him full and fair consideration for the position and denying his rights to due process. Specifically, the Applicant alleges that the Head of OPPBA only submitted one candidate, the external one, to the APB and, therefore, the APB did not have any true input into the promotion process, as required by ST/AI/1999/8. The Applicant also specifically challenges as improper the Administration's decision to terminate the recruitment against the post when the external candidate withdrew her candidacy, rather than to next consider his candidacy, then only to re-issue the vacancy announcement a year later. Finally, the Applicant asserts that the 22 months it took the Administration to respond to his complaint before the JAB was excessive, and, again, violated his rights to due process.

II. The Applicant requests the Tribunal to establish his seniority as of 6 July 2001, the date when, allegedly, the single external candidate was recommended to the APB, and, in essence, to restore him to the position - in terms of salary, seniority, pension contributions and benefits - that he would have been in had that alleged violation of ST/AI/1999/8 not occurred and had he been promoted as he believes he would have been. In the alternative, he seeks compensation from the Administration in the amount of 2 years' net base salary at the D-1, step 11, level as well as the "actual equivalent of loss of pension rights as of July 2001". Finally, the Applicant seeks compensation "equivalent to six months' net [base] salary at the D-1 level and grade as of the date of the judgement for the moral injury sustained and delay due to the Respondent's failure to respond to the appeal *in a timely manner*". (Original emphasis.)

In response, the Administration asserts that since the Applicant has already been promoted to a D-1 position, his claims are moot. In the alternative, the Administration's position is that the Organization was well within its discretion to terminate the VA and reissue it, and that the Applicant was not entitled to promotion to the D-1 level.

III. The Tribunal's first consideration is whether the Applicant's claim is moot, the Applicant having already been promoted to the D-1 level at the time of his Application. It is a long-held tenet of the Tribunal's jurisprudence that

"formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated." (Judgement No. 1122, *Lopes-Braga* (2003); see also Judgement No. 1047, *Helke* (2002).)

The Applicant, as a staff member, was entitled to be fully and fairly considered for any position for which he was eligible and applied. Any failure by the Organization to accord him that right, be it as a result of discrimination, extraneous motives or, as allegedly in this case, procedural violations, violated his rights to due process at the time of the alleged failure. The fact and timing of his promotion to another post at the D-1 level does not negate the violation; it is only relevant in terms of the severity of the consequences of such violation, in terms of compensation awarded therefore. Thus, the Tribunal finds that the Application is not moot and turns its full attention to the allegations raised by the Applicant.

IV. The Tribunal next turns to the question of whether the Applicant was fully and fairly considered for the post in question. The gist of the Applicant's concerns in this regard stems from his belief that the Head of Office submitted to the APB only the name of the external candidate whom he endorsed, rather than the names of all the candidates on the short list, in violation of ST/AI/1999/8, thus depriving the APB of its mandated role in the promotion process. The Applicant, however, is mistaken in this regard. While only one candidate was *recommended*, the Tribunal is satisfied by the documentation provided by the Respondent, at its specific request, that the Head of Office did indeed submit the names of the short-listed candidates to the APB. In fact, he also submitted a list of all applicants, the comparative evaluation worksheets, applications and the most recent performance appraisal reports of the short-listed applicants as well as the same documentation for non-listed applicants. In addition, the Tribunal notes that the APB, *sua sponte*, requested additional information about another candidate, not the Applicant, in order to fulfil its duties of evaluation pursuant to ST/AI/1999/8. Therefore, the Tribunal is convinced that the APB fully exercised its responsibilities, up until the time the vacancy announcement was withdrawn. Notwithstanding its conclusion, the Tribunal appreciates how the Applicant could have been mistaken about the role of the APB and recognizes that this matter might never have come before it, if the Administration had earlier made more transparent the circumstances of the promotion process.

As to the Applicant's correlative argument, that the promotion process was further flawed because the Head of Office refused to identify an alternate candidate, the Tribunal cannot agree. Paragraph 9.6 of ST/AI/1999/8 specifically grants discretionary authority to the head of department or office who may, but need not, identify an alternate candidate in the event the chosen candidate is unable or unwilling to take up the post:

“9.6 Should the selected candidate decline or fail to take up the functions for which he or she has been selected within two months, or vacate the post for any reason within six months of the Secretary-General's decision, one of the other candidates on the short list may be selected by the Secretary-General on the recommendation of the head of department or office”.

Thus, the Head of Office's choice not to exercise the option of alternate identification was a valid exercise of his discretion in accordance with ST/AI/1999/8.

Therefore, in light of its conclusions, the Tribunal finds that the Applicant was fully and fairly considered during the promotion exercise in question and that his rights of due process were not violated.

V. Next, the Tribunal turns to the issue of whether the Administration's decision to withdraw the vacancy announcement for the D-1 post in question and to later re-issue that announcement was a violation of procedure such that it violated the Applicant's rights to due process. In this regard, the Tribunal notes the wide latitude enjoyed by the Secretary-General in matters of promotion, filling posts, etc. The Tribunal will not substitute its judgement for that of the Secretary-General in such matters, indeed:

“[its] jurisprudence recognizes the broad discretion enjoyed by the Secretary-General in matters of personnel, including the decision of whether to maintain a staff member in the employ of the United Nations. As the Tribunal found in Judgement No. 1163, *Seaforth* (2003),

‘the Respondent ... generally enjoys broad discretion in making decisions of this kind. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation. (See Judgement No. 981, *Masri* (2000), para. VII.)’”

(Judgement No. 1231 (2005).)

However, such discretion is not unfettered:

“The Tribunal recognizes that it is not within the purview of its authority to substitute its judgement for that of the Secretary-General in such matters, unless his decision is tainted by prejudice, bias, improper motive or other extraneous factors, or otherwise vitiated. (See Judgements No. 541, *Ibarria* (1991); No. 828, *Shamapande* (1997); No. 1131, *Saavedra* (2003); and, No. 1209, *El-Ansary* (2004).)” (Judgement No. 1231 (*ibid.*))

In such cases, where the Applicant alleges that actions by the Administration were motivated by discrimination, extraneous motives or factors, or prejudice, “[t]he Tribunal has consistently held that the *onus probandi*, or burden of proof, is on the Applicant”. (Judgement No. 1069, *Madarshahi* (2002).) In the instant matter, the Applicant has failed to meet that burden of proof: the mere failure of the Respondent to proffer a reason for withdrawal of the vacancy is insufficient to satisfy the burden. The Tribunal, therefore, finds that his rights to due process were not violated.

VI. Finally, the Tribunal addresses the Applicant's contention that his rights were violated by the unduly protracted period of 22 months it took the Administration to file its response before the JAB. While the Tribunal is sympathetic to the apparently excessive length of time it took for the Respondent to answer at the JAB level, particularly given the sketchy nature of the final product, this delay was not, unfortunately, a deviation from standard practice within the administration of justice system.

There are cases, in which delay, *ipso facto*, amounts to denial of due process, and the Tribunal has held:

“The Applicant does not have to show any specific damage resulting from the undue delay. As the Tribunal has held, an inordinate delay ‘not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant.’ (Cf. Judgements No. 353, *El Bolkany* (1985) and No. 414, *Apete* (1988)).” (Judgement No. 880, *MacMillan-Nihlén* (1998); see also Judgement No. 1190, *Sirois* (2004), in which the Tribunal held “[t]he Tribunal ... cannot agree with the Respondent's argument that it has not been shown that the delay was injurious to the Applicant. Such a delay is injurious *in itself*”. (Original emphasis).)

Under the circumstances of this case, however, the Tribunal does not consider the delay to be “undue” or “inordinate” and, thus, declines to find that compensation is merited.

VII. In view of the foregoing, the Application is rejected in its entirety.

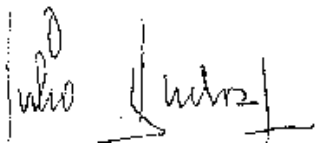
(Signatures)



Spyridon Flogaitis
President



Jacqueline R. Scott
Vice-President



Julio Barboza
Member

Geneva, 27 July 2007



Maritza Struyvenberg
Executive Secretary