



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1364

Case No. 1442

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Julio Barboza; Sir Bob
Hepple;

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 31 January 2005 and periodically thereafter until 31 October;

Whereas, on 24 October 2005, the Applicant filed an Application containing pleas requesting the Tribunal, inter alia:

“7. ...

...

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

8. On the merits, ...

(a) *to rescind* the decision of the Secretary-General rejecting the findings of the Joint Appeals Board [(JAB)] ...

(b) *to find and rule* that the [JAB’s] recommendation for compensation [was not appropriate and adequate for the harm done];

(c) *to find and rule* that the [JAB] erred as a matter of law and equity in finding that the promotion exercise observed due process in substance;

- (d) *to find and rule* that the ... promotion exercise was tainted by the intrusion of extraneous considerations;
- (e) *to find and rule* that the decision of the Respondent on the recommendations of the [JAB] were tainted by conflict of interest and other improper considerations;
- (f) *to order* that the Applicant be promoted to the P-5 level with retroactive effect from August 2002;
- (g) *to award* the Applicant compensation in the amount of three years' net base pay as an exceptional measure for the actual, consequential and moral damages suffered by the Applicant to his career and reputation and for denial of due process as a result of the Respondent's actions and lack thereof;
- (h) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, 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;
- (j) *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 25 March 2006 and once thereafter until 25 April;

Whereas the Respondent filed his Answer on 25 April 2006;

Whereas the Applicant filed Written Observations on 26 July 2006;

Whereas, on 30 October 2007, 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] entered the service of the United Nations on 15 May 1974 on a fixed-term appointment (...) ..., as an Associate Auditor at the P-2 level with the Department of Management (...), Internal Audit Service (...). His [appointment] was further extended and on 1 April 1979, he was promoted to the P-3 level and, effective 1 December 1980, he was granted a permanent appointment. The [Applicant] obtained his promotion to the P-4 level on 1 October 1986. The [Applicant] served as Acting Chief, Headquarters Section, Internal Audit Division (IAD), [Office of Internal Oversight Services (OIOS)], from 20 August 2000 to 10 November 2002. ...

Summary of the facts

... On 7 July 2001, the [Applicant] applied for the post of Chief of Section at the P-5 level, IAD/OIOS (...).

... In a memorandum to the Chairperson of [Appointment and Promotion Panel, OIOS, (APP/OIOS)] dated 23 May 2002, the IAD Director recommended [another candidate] for promotion to the advertised P-5 post.

... The APP/OIOS met on 21 ... and 26 June 2002. The APP/OIOS, during its deliberations considered the recommendation of the IAD, but decided to recommend instead the promotion of the [Applicant] for the vacant post, after a two-to-one vote.

... On 5 July 2002, [the] Under-Secretary-General[, OIOS,] ... overruled the recommendation of the APP/OIOS. [The Under-Secretary-General] stated that he did not approve the ... recommendation, but instead endorsed the IAD recommendation to promote [the other candidate].

...

... On 8 July 2002, the [Applicant] simultaneously filed a request for suspension of action on [the Under-Secretary-General's] decision [with the JAB in New York] ... and also submitted a request for administrative review of the same decision.

... On 9 July 2002, the ... JAB held a summary hearing on the [Applicant]'s request. The JAB Panel found that the contested decision had already been implemented, as the selected candidate had already been notified in writing of her selection for the post at issue. It consequently decided not to grant the [Applicant's] request.

... On 18 July 2002, [the Applicant was informed that the Secretary-General had decided uphold the JAB Panel's recommendation.]

... On 10 September 2002, the [Applicant] submitted his statement of appeal [on the merits of his case to the JAB.]”

The JAB adopted its report on 17 June 2004. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

...

22. The Panel, without substituting its judgement for that of the Administration, took note that it was not clear from the APP/OIOS minutes which criteria had been used to select the best suited candidate for the post at issue. It also took note that the fact that the Appellant had been Acting Chief, IAD, from August 2000 to November 2002 did not seem to have been a determining factor in the promotion process.

...

25. The Panel ... took note that the Under-Secretary-General's decision not to heed the APP/OIOS recommendation was not reasoned. The Panel was troubled by such a failure on the part of the Under-Secretary-General, who it believed, had affirmative duty to provide an articulate reason in support of his decision. The Panel was of the view that such a failure was arrogant and bordered on arbitrariness as it not only belittled the promotion process and the APP/OIOS but also left the Appellant, APP/OIOS and the Organization in the dark and without a clue as to the rationale behind his reversal of the APP/OIOS' recommendation. In addition, the Panel was of the view that given the tightness of the race, and the Appellant's satisfactory performance at the P-5 level [with an special post allowance (SPA)] for more than two years, there was all the more reason for the Under-Secretary-General, OIOS, to explain his decision for the benefit of not only those involved but also of others such as the JAB. The lack of reasoning ... not only made a mockery of the principles of transparency and openness but also gave a perception of a lack of any reason.

26. The Panel also took note that the APP/OIOS had recommended that the Appellant's SPA be extended, should the Under-Secretary-General decide not to endorse the APP/OIOS recommendation to

promote the Appellant. However, this recommendation also was not upheld by the Under-Secretary-General. In view of the aforesaid, the Panel concluded that there was merit to this appeal in that the Appellant had suffered as a result of the Under-Secretary-General's unreasoned decision.

Conclusion and Recommendation

27. In light of the foregoing, the Panel *unanimously agrees* that the promotion exercise appeared to have been carried out in compliance with the requirements of ST/AI/1999/8, [of 17 August 1999, on the placement and promotion system] and ST/AI/401, [of 18 January 1995, on personnel arrangements for OIOS] which contained procedural safeguards for the full and fair consideration of all candidates. The Panel thus *unanimously agrees* that due process was observed in substance.

28. The Panel, however, *unanimously agrees* that due process was not followed in form and in spirit, as the Under-Secretary-General, OIOS, failed to substantiate his decision not to promote the Appellant. The Panel *unanimously concludes* that the Appellant suffered damages to his career expectations and morale, since he was declared suitable for the P-5 level, and moreover served at the P-5 level (SPA) for more than 2 years.

29. Accordingly, the Panel *unanimously agrees* that the Appellant be granted monetary compensation, equivalent to the difference between the SPA that he was receiving when performing at the P-5 level, and his current salary, effective 11 November 2002, until such time as he is promoted to a suitable P-5 post.”

On 23 November 2004, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General ... finds that he is unable to accept the JAB's conclusions or its recommendation. The Tribunal has consistently held that staff members have no right to be promoted and that the Secretary-General is free to choose among the various candidates recommended by the appointment body, the Department or [the Office of Human Resources Management] in making his decision. The discretionary decision of the Secretary-General may of course be challenged on the ground that prejudice, breach of procedure or other extraneous factors have vitiated the decision, however, that does not appear to have been so in this case. The Under-Secretary-General's decision to promote another candidate was made in the light of the IAD's recommendation. Moreover, it is noted that the APP/OIOS' decision to recommend you for promotion was not unanimous. The Secretary-General has therefore decided to take no further action on your appeal.”

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

Whereas the Applicant's principal contentions are:

1. The OIOS promotion exercise was tainted by the intrusion of extraneous considerations.
2. The decision of the Respondent on the recommendations of the JAB was tainted by conflict of interest and other improper considerations.

Whereas the Respondent's principal contentions are:

1. The Applicant had no expectancy or right to promotion.
2. The contested decision was not tainted by prejudice, improper motive or other extraneous factors.
3. The procedures applicable to the placement and promotion system were followed and the Applicant's due process rights were protected. His candidacy was given full and fair consideration.

The Tribunal, having deliberated from 30 October to 21 November 2007, now pronounces the following Judgement:

I. The present case revolves around a simple question regarding the discretion of the Secretary-General in promoting staff members and the limits to that discretion. It is well known that it is not unfettered and also that it may be vitiated by “the existence of bias, prejudice, discrimination, lack of due process or other improper motivation”. (See Judgement No. 1073, *Rodríguez* (2002).) The Tribunal additionally recalls its Judgement No. 792, *Rivola* (1996), wherein it stated “[i]t is clear to the Tribunal that it cannot substitute its judgement for that of the Respondent ... The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion.”

The Tribunal, thus, may not substitute its judgment for that of the Secretary-General. However, it is allowed to examine the promotion process in order to determine whether that process was vitiated by any of the above-mentioned vices.

II. The JAB found that the proceedings leading to the decision to promote a candidate other than the Applicant were made in formal accordance with the rules, but that they were vitiated in spirit: the APP/OIOS was consulted, it proposed one candidate to be selected (the Applicant) but the Under-Secretary-General, OIOS, instead of following the suggestion of the APP/OIOS, selected another candidate, namely the same one who had originally been recommended by the Director, IAD. The IAD had ranked this person, a female candidate, first and the Applicant third. According to the APP/OIOS minutes, one of the members motioned that the Panel advise the Under-Secretary-General, OIOS, to promote the Applicant. He noted that the female candidate was “young and ha[d] an excellent potential to advance quickly in the future”. Another member seconded the motion. The Tribunal took note that the dissenting member of the Panel had expressed the opinion that, in his estimation, both the Applicant and the selected candidate possessed equal merits, but that he was not ready to say that the Applicant was superior to the female candidate. The Panel left aside the external candidate who had been ranked second by the IAD.

III. The fact which seems to have decided the JAB against the validity of the selection made by the Under-Secretary-General, OIOS, is that he not only chose a different person for the post than the one recommended by the APP/OIOS, but primarily because he did not attach any comment or give any explanation for his decision. The JAB recommended monetary compensation for the Applicant equivalent to the difference between the SPA that he was receiving when performing at the P-5 level and his current salary, effective 11 November 2002 until such time as he is promoted to a suitable P-5 post. The Secretary-General decided not to follow that recommendation and the Applicant appealed his decision to the Tribunal.

The Tribunal, then, must decide whether the fact that the Under-Secretary-General, OIOS, failed to substantiate his decision amounts to, or proves the existence of, extraneous motivations, arbitrariness, undue process of law, or any such vice.

IV. The Tribunal is satisfied that the exercise of the discretion by the Under-Secretary-General, OIOS, is not adversely affected in this way. It finds no proof that he took an arbitrary decision as, apparently, the JAB believed. The Tribunal recalls, in this regard, Judgement No. 1344 (2007), paragraph V:

“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.”

The Tribunal is satisfied that the Applicant has not discharged the burden of proving his contention.

Indeed, the Applicant tried to cast a shadow of suspicion on the Under-Secretary-General, OIOS, by making reference to investigations of cases in which the Under-Secretary-General himself was accused of irregularities in the appointment and promotion of staff members. The Applicant most likely intended to prove that the Under-Secretary-General was responsible for a pattern of flawed appointments and that his case was somehow part of that pattern. However, the Tribunal notes that none of these investigations referred specifically to the case of the Applicant. It concurs with the Respondent’s submission that,

“even if the Applicant had supplied evidence in support of his allegations of misdeeds, such allegations would not be relevant to the present proceedings because they are in no way linked to the contested decision. Whether or not any aspect of the Oil-for-Food programme was properly handled by the Under-Secretary-General, OIOS, or whether or not other staff within OIOS may have had problems with the Under-Secretary-General, sheds no light on the Applicant’s allegation that he was directly affected and that the rules and procedures relating to promotion were violated in his case.”

Thus, the Tribunal concludes that the evidence adduced by the Applicant in this regard does not support his position in the present case.

V. In the Tribunal’s opinion, the mere fact that no explanation is provided when selecting a candidate for promotion is not sufficient to invalidate the Secretary-General’s discretion. The Tribunal, therefore, does not concur with the view taken by the JAB that the failure of the Under-Secretary-General to substantiate his selection of a candidate other than the one recommended by the APP/OIOS, justified payment of compensation.

It must be added that the Under-Secretary-General chose between two candidates who had both been examined by the APP/OIOS and who were closely ranked by that body. The selection by the Under-Secretary-General does not appear to be simply capricious, or far-fetched. In fact, the motives which had moved the APP/OIOS and the strengths and weaknesses of both candidates, as well as the reasons behind the APP/OIOS’s selection, were clearly reflected in the minutes. The Under-Secretary-General’s action is consistent with his having found that it was unnecessary to elaborate on the reasons for his own selection since he was simply taking into account the reasoning advanced by the APP/OIOS as stated in the minutes, but nonetheless coming to his own conclusions.

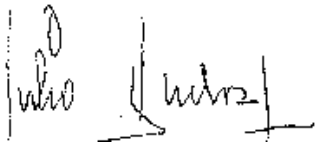
VI. The Tribunal finds that it would have been desirable, and more in line with the common courtesy which is normally displayed in the relationships between the different organs of the Organization, for the Under-Secretary-General to have expressly stated the reasons behind his decision to deviate from the recommendation of the APP/OIOS. However, it cannot but conclude that the lack of substantiation alone cannot vitiate his decision in this case.

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

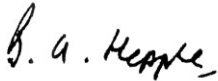
(Signatures)



Dayendra Sena **Wijewardane**
Vice-President



Julio **Barboza**
Member



Bob **Hepple**
Member



Maritza **Struyvenberg**
Executive Secretary

New York, 21 November 2007