



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1390

Case No. 1455

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.
Agustín Gordillo;

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 October 2005, and once thereafter until 24 December;

Whereas, on 22 December 2005, the Applicant filed an Application, requesting the Tribunal, *inter alia*:

“**TO ORDER** the Respondent to ensure that the Applicant is given priority consideration for any future vacant P-4 post;

TO ORDER the Respondent to pay to the Applicant two years’ net salary for the serious procedural violations committed during the selection process for the four P-4 reviser posts as well as for the grave damage done to her professional reputation, both as a result of the invalid [performance evaluation system (PAS)] report for the period 1996-1999 that had been placed surreptitiously in her official status file and in the consideration of her application for the aforementioned P-4 reviser posts;

TO ORDER the Respondent to pay to the Applicant, on an exceptional basis and where the above-mentioned provisions are not implemented, the equivalent of three years’ net base salary, in accordance with article 9.1 of the Statute of the Tribunal;

...”

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 13 June 2006, and once thereafter until 13 July;

Whereas the Respondent filed his Answer on 13 July 2006;

Whereas the Applicant filed Written Observations on 8 August 2006 and, on 23 August, the Respondent commented thereon;

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] joined the Organization on 17 February 1992 on an initial fixed-term appointment for two years as Translator (P-3) in the French Service of the Translation Division, Conference Services, [in New York]. Following several extensions of her fixed-term appointment, effective 1 November 1997, the [Applicant] was granted a permanent contract.

...

Summary of the relevant facts

... On 14 November 1996, the [Applicant]'s performance evaluation report (PER) for the period 1 January 1994-31 March 1996 was prepared. ... The report rated the [Applicant]'s performance for the period as 'very good'. Nevertheless, on 10 March 1997 the [Applicant] filed a rebuttal against the said PER ... to upgrade one individual rating from C to B and [to] include a comment clarifying difficult personal circumstances mentioned in the report. On 26 June ... the Rebuttal Panel ... recommended to accept the proposed comment but to maintain the individual rating unchanged. ... On 28 July, ... the Panel's recommendations were approved on behalf of the Head of the Department and on 10 September ... the amended PER was forwarded to ... [the Office of Human Resources Management (OHRM) to be] placed into the [Applicant]'s Official Status file.

... On 18 February 2000 and on 21 November 2001, respectively, the [Applicant] applied for [several] P-4 posts of (French) Reviser in the French Translation Service ... Also, according to the [Applicant], in October 2000, while on extended sick leave, she applied for some posts in Geneva.

... According to the [Applicant], 'sometime in approximately mid-2000', she sought assistance of ... OHRM in connection with a significant gap in her performance evaluation records.

... On 26 June 2001, ... the ... Chief of the French Translation Service and the [Applicant]'s First Appraising Officer prepared and completed the [Applicant]'s PAS report for the period April 1996-March 1999. The report rated the [Applicant]'s performance as 'fully meets performance expectations'. The report, however, contained no signatures and/or initials of the [Applicant] in any of its parts.

... On ... 15 August 2001, ... the [Applicant's unsigned] PAS report for the period April 1996-March 1999 ... [was, unbeknownst to her,] placed into [her] Office Status file ...

... On 25 September 2001, Section A (Work Plan) of the [Applicant]'s PAS report for the period 25 September 2001-March 2002 was prepared. This report was finalized by the First Appraising Officer and by the [Applicant] on 21 March 2002. The Second Appraising Officer

signed this report only on 15 July ... The report rated the [Applicant]’s performance as ‘fully meets performance expectations’.

... On 11 December 2001, the [Applicant examined her Official Status file and discovered that her file] contained, inter alia, the incomplete and unsigned PAS report covering the period ... April 1996-March 1999.

... On 14 December 2001, the [Applicant] submitted to the Secretary-General a ‘request for suspension of action and other measures due to major irregularities regarding [her PAS report for the period April 1996 - March 1999]’ (hereinafter ‘request for administrative review’). ...

...

... [The Applicant]’s PAS report for the period April 2002-March 2003 ... rated [her] performance as ‘frequently exceeds performance expectations’.

... On 13 May 2002, the Deputy Executive Officer, [Department of General Assembly Affairs and Conference Services (DGAACS)], wrote to the [Applicant] apologizing for the manner, in which the [Applicant]’s PAS report for the period April 1996-March 1999 was handled, and offering [her] two options: either to sign the report and avail herself of the rebuttal process or to remove the report and any reference to it from [her] Official Status file without a formal rebuttal procedure. The Respondent’s memorandum emphasized that the [Applicant]’s record for the period in question would be ‘fully satisfactory’.

... [In her reply of] 18 April 2003, the [Applicant] ..., without prejudice to her pending appeal, declared that ‘the whole process surrounding [that] PAS report - its preparation, its content and the manner it was placed into [her] Official Status file - [was] invalid’ and categorically refused to sign it *post facto* and avail herself of the rebuttal process, claiming that ‘the damage ha[d] been done’. The [Applicant] emphasized that the invalid PAS report should be removed from her ... file and that the Respondent did not have any options to that effect. The [Applicant] requested that a note be inserted into her ... file in lieu of the removed PAS report with the contents ‘as was discussed at [a meeting] on 2 April 2002’. ...

...”

On 20 February 2002, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 31 January 2005. Its conclusions and recommendations read as follows:

“Conclusions

43. ... [T]he Panel concluded the following:

- a) the Respondent committed **serious** violations of the established due processes by (i) preparing the Appellant’s performance appraisal report for the period April 1996 to March 1999 without consultations with the staff member; and (ii) placing the performance appraisal report that was not duly completed in the Appellant’s Official status file;
- b) the above-mentioned violations did not prejudice, however, the consideration of the Appellant’s application for four vacant posts of French Reviser in the French Translation Service and her performance for that period for the purposes of those considerations was deemed to be fully satisfactory.

Recommendations

44. The Panel decided to make the following recommendations:
- a) the contested PAS report be declared null and void and be removed from the Appellant's Official Status file;
 - b) in lieu of the void report, a note for the Appellant's Official Status file should be prepared by the Respondent to confirm that the Appellant's performance during the period 1 April 1996 to 31 March 1999 was fully satisfactory.
45. The Panel made no other recommendations on the appeal."

On 16 May 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General has ... decided to accept the JAB's recommendations: (a) that the PAS report for the period 1 April 1996 to 31 March 1999 be declared null and void and be removed from your [Official Status file]; and (b) that a note for your [Official Status file] should be prepared by your Department confirming that your performance during the relevant period was fully satisfactory".

On 22 December 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Her supervisor's unilateral decision to prepare and sign an invalid PAS report for the period from 1996-1999 and then forward this report to OHRM for placement in her Official Status file and for consideration during the selection process for P-4 posts was in violation of the Charter of the United Nations, the Staff Regulations and Rules, and the regulations governing the performance appraisal system.
2. The deliberations and recommendations of the Appointment and Promotion Committee rejecting the Applicant's candidacy for the P-4 reviser positions, should be declared invalid, null and void on the grounds that they were based on invalid documents.
3. The presence of the contested report in her Official Status file violated her right to be fully and fairly considered for promotion.
4. There were no ongoing discussions, her performance was not evaluated and no PAS reports were prepared for her for "almost 6 years".

Whereas the Respondent's principal contentions are:

1. The decision to remove the contested PAS and to replace it with a note confirming that the performance of the Applicant was fully satisfactory is an adequate and sufficient remedy.
2. The Applicant had no right to promotion, but only to be fully and fairly considered for promotion, and her due process rights were respected.
3. The contested decision, concerning the promotion processes, was not vitiated by prejudice, discrimination or other extraneous factors.

4. The Applicant did not prove that her qualifications were substantially above and beyond those of the selected candidates.

The Tribunal, having deliberated from 4 to 25 July 2008, now pronounces the following Judgement:

I. It is an uncontested fact that a single PAS was prepared for the Applicant for the period 1996-1999 - during which time the Applicant was first on maternity leave and then on extended sick leave, convalescing from a debilitating treatment - and that this evaluation was prepared without her participation and subsequently added to her Official Status file without her being notified. According to the Applicant, in 2000, when she applied for a number of vacancies, she noted a gap in her performance evaluation and raised the matter with the Administration. Apparently, the Applicant only discovered the un-signed and incomplete PAS in her Official Status file on 11 December 2001, when examining her file again in connection with two further job applications. She protests both the unlawful insertion of the document in her file, claiming that this denied her the right of a timely rebuttal, violating her due process rights, and the negative comments made therein, despite the overall rating of “fully meets performance expectations”.

II. Upon her complaint, the Applicant was offered two alternatives: to sign the report and file a rebuttal or to have the document expunged from the file. The Applicant opted for the latter alternative, stating that the first option was “useless”, since the damage had already been done.

III. The JAB agreed with the Applicant, that the Respondent committed serious due process violations by “(i) preparing the Appellant’s performance appraisal report ... without consultations with the staff member; and (ii) placing the performance appraisal report that was not duly completed in [her] Official Status file”. Notwithstanding its findings of fact in favour of the Applicant, however, the JAB accorded the Applicant no compensation for such violations on the ground that she had not proven to have suffered damage as a result of said flawed evaluation. In particular, the JAB noted that the Respondent “admitted his fault and apologized to [the Applicant] for his actions on several occasions”. The JAB also noted that the Applicant’s request that the evaluation be declared “null and void” and that it be removed from her Official Status file, was already offered to her by the Respondent “as early as 13 May 2002”. Moreover, the JAB found that these violations did not “prejudice the consideration of the Applicant’s application for four vacant posts” as her performance for that period for the purposes of those considerations was deemed to be “fully satisfactory”. It recommended that the contested PAS report be declared null and void and be removed from her file.

IV. The Tribunal does not concur with the JAB’s reasoning. The performance evaluation was prepared in flagrant violation of the rules by denying the Applicant the right to participate in the evaluation

process and preventing her from rebutting the appraisal. As the Tribunal held in Judgement No. 1087, *El-Charaoui* para. VI (2002,) “[t]ime and timing are crucial considerations in conducting an efficient and fair system: ‘primary responsibility for the timely execution of the PAS, including completion of the PAS forms, rests with the Supervisor’. The Respondent failed to fulfill this responsibility.” Moreover, the placement and use of the contested PAS evaluation in her Official Status file at the time she was considered for posts to which she had applied, may well have damaged her career development. In the Tribunal’s view, the negative and unfavourable individual comments made by her supervisors in the evaluation contradict the overall rating of “fully meets performance expectations”. As these comments were part of her official record at the time, it must be concluded that they were taken into account when she was considered for the four posts to which she had applied, thus decreasing her chances for promotion.

While the Tribunal recognizes that the Applicant might or might not have been selected for any of the posts for which she applied and she might or might not have been successful in her rebuttal of her performance evaluation, the Tribunal cannot but conclude that she was deprived of her rights. It recalls in this regard Judgement 828, *Shamapande* (1997), in which it held:

“VI. The Tribunal has held repeatedly that ... it is indispensable that ‘full and fair consideration’ should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No 362, *Williamson* (1986), the Tribunal held that:

‘... since the staff member has a statutory right to have ‘the fullest regard’ given to his candidature, the burden of establishing the Administration’s failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member’s statutory right was honoured in good faith in that the Administration gave its ‘fullest regard’ to it.’”

V. In the instant case, the Tribunal finds that the Respondent has not carried his burden in this regard. The implementation of the evaluation process is, in large measure, in the hands of the Respondent, who has the obligation to carry out his responsibilities. The Respondent cannot produce any evidence that he acted in accordance with the appropriate personnel evaluation procedures. Instead, he merely attempts to rely on the fact that the offensive document was removed from the file, that he apologized to the Applicant for the violation and that, most significantly, because the evaluation gave her a “fully meets expectations” overall rating, no harm was done to her. This, the Tribunal finds, is entirely disingenuous. The Tribunal is convinced that any reasonable promotion review panel would have had serious concerns about promoting a candidate about whom it was said: “*Quality of work still uneven*”, “*Very good passages sometimes marred by errors or omissions*”, “*Difficulty in concentrating*”, “*Does not manage her time well*”, “*Has difficulty meeting deadlines*”. In addition, having had her professional reputation besmirched, the Applicant was afforded no opportunity to rebut and possibly correct the negative comments made about her performance. Furthermore, the Tribunal agrees with the Applicant that removing the tainted evaluation, after the fact, does nothing to ameliorate the damage done to her. For these violations of the Applicant’s due process rights, then, she deserves to be compensated.

VI. In addition, the Tribunal here notes that it is not simply the Applicant who is harmed when the Administration fails to follow its own rules, as it is required to do. (See Judgement No. 1275 para. X (2005), citing Judgement No. 943, *Yung* (1999).) The whole administrative process, in fact, has a diminished value when a staff member is substantially deprived of due process. The Tribunal underlines this point, for the consistent and unfailing respect of the due process of law by the Administration is the first and foremost part of any successful and satisfactory system of administrative justice. Thus, the Tribunal underscores the grave importance of adherence by the Respondent to the PAS system, specifically, and the basic principles of due process of law, generally.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant compensation in the amount of six months' net base salary, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgment until payment is effected; and,
2. Rejects all other pleas.

(Signatures)



Spyridon Flogaitis
President



Jacqueline R. Scott
Vice-President



Agustín Gordillo
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary