



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1400

Case No. 1468

Against: The Secretary General
of the International Civil
Aviation Organization

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. Goh Joon Seng;

Whereas, on 7 December 2005, a staff member of the International Civil Aviation Organization
(hereinafter referred to as ICAO), filed an Application requesting the Tribunal, inter alia:

“9. ... [T]o order:

- (a) that the decision relating to the appointment of the Chief of the Chinese Section of ICAO be rescinded;
- (b) that the Respondent make compensation to the Applicant for the damage to career prospect, loss of income as well as negative impact to his mental well-being;
- (c) that the Respondent give the Applicant preference for future vacancies at the P-5 level for which he applies and is found equally qualified as other candidates; and,
- (d) that the Respondent pay [a] penalty to the Applicant for the excessive delay in handling the appeal.”

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 12 August 2006, and once thereafter until 31 August;

Whereas the Respondent filed his Answer on 15 August 2006;

Whereas the Applicant filed Written Observations on 13 November 2006;

Whereas, on 1 October 2007, the Respondent filed an additional communication;

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

“SUMMARY OF FACTS

... The [Applicant] was first appointed on a fixed-term contract effective 9 September 1994 to 31 December 1995 as a Language Officer (Interpreter/Translator) in the Language and Publications Branch (LPB) at the ... P-2, step I [level]. [At the time of the events which gave rise to the present Application, the Applicant was serving as a P-4 Language Officer (Interpreter/Revisor) on a permanent appointment.]

... On 6 October 2000, the Administration issued [a] Vacancy Notice ... for the post of Chief, Chinese Section. On 2 January 2001, the [Applicant] applied for the above-mentioned post. ... On 14 December ..., [the Chief, Recruitment Section, Personnel Branch, (...)] advised the [Applicant] that he had not been selected for the post although, as the memorandum stated, his candidature ‘was given very careful consideration’.

[According to the Applicant, on 12 December 2001, he met with the Secretary General and requested a review of the appointment decision. During that meeting, the Applicant states, the Secretary General said ‘that the appointment of the Chief of the Chinese Section was one of his most difficult decisions made in that year’ and that ‘he believed that [the Applicant] was very capable and was most suitable’. However, he was unable to appoint the Applicant because he had to follow the recommendations of the Appointment and Promotion Board (APB), whose decision was not in the Applicant’s favour.]

... By memorandum dated 14 January 2002, the [Applicant] requested the Secretary General to review the decision on the appointment of the Chief, Chinese Section. He also requested that the implementation of the decision be suspended. ...”

On 11 February 2002, the Applicant lodged an appeal with the AJAB. The AJAB adopted its report on 11 August 2005. Its findings and recommendation read, in part, as follows:

“FINDINGS OF THE BOARD

8.1 Access to documentation

...

8.1.7 ... [T]he Board maintained its decision, communicated to the Appellant in the Chairman’s memorandum of 7 March 2005, to reserve the minutes of the APB for its own use only. It was noted that all other personnel files had been made available to the Appellant.

8.2. [The] Appellant’s Pleas

...

8.2.2 The Board notes that the reviewing officer had included the Appellant as well as the successful appointee in the short list of candidates which was presented to the APB. The Board reviewed the work history of both of the short-listed candidates, as contained in the file records, and was unable to find any serious fault with the inclusion of either candidate on the short-list.

Mindful of the latitude accorded to the APB in measuring essential qualifications of the candidates, ... the Board finds the Appellant's claim that the appointee may have lacked the essential requirements in the Vacancy Announcement to be unfounded.

8.2.3 After reviewing the file records concerning the prior work histories and qualifications of the candidates, the Board is unable to find any discrepancy between the Respondent's decision and the requirements of Article 4.1 of the ICAO Service Code, which specifies 'the necessity for securing the highest standards of efficiency, competence and integrity' in the appointment and promotion of the staff.

8.2.4 In examining the administrative procedures, the Board considers that, in conformity with Annex IV-B of the ICAO Service Code, the reviewing officer provided the APB with a complete and balanced review of the Appellant as well as his assessment of the other candidates for the post. In his presentation to the APB, the reviewing officer indicated that he believed that the Appellant was the best candidate for the post. This indicates to the Board's satisfaction that the Appellant received the required full consideration from the reviewing officer.

8.2.5 The minutes of the APB reflect that the Appellant's application received full consideration in the APB's subsequent in-camera discussions. ... It is clear to the Board that the Appellant's candidacy was fully appraised by the APB by simply noting the APB's strong recommendation that the Secretary General promote the Appellant to the P-5 post. Accordingly, the Board is satisfied that the workings of the APB are transparent and well-documented in this case, and conform fully to the requirements of Annex IV-B of the ICAO Service Code.

...

8.2.8 The Board is satisfied, in considering the file records, that the Appellant's candidature received full consideration by the reviewing officer and by the APB. The Board wishes, however, to express its concern that no written records have been made available to it in support of the final decision taken by the Secretary General. ... Consequently, the Board finds itself unable to offer any opinion on the question of inappropriate use of discretionary authority by the Respondent.

...

8.2.11 The Board wishes to note that in its consideration of this appeal it has disregarded the reported discussion which took place on 12 December 2001 between the Appellant and the Respondent. This is due to irreconcilable discrepancies between the reported discussion and the file records. Since only one party to the discussion was available to the Board, the possibility of a misunderstanding could not be ruled out. As noted in paragraph 8.2.5 the deliberations of the APB were fully recorded on file and were, in fact, strongly supportive of the Appellant's candidature. Since the reported discussion with the Respondent took place subsequent to the decision which is the subject of this appeal, the Board could see no useful purpose in attempting to determine why, as claimed by the Appellant, the Respondent would subsequently misrepresent the APB's recommendations.

8.3 Recommendations of the Board

8.3.1 The intent of Staff Rule 111.1.16 should be clarified. The clause 'other than confidential documents related to the Staff Members request for review of, appeal against, the decisions, which were exchanged between legal and administrative units subsequent to the request for review or appeal' may give rise to reasonable expectation that the Appellant should have access to all other confidential documentation, including those related to the APB.

8.3.2 The wording of Article 4.5 of the Service Code should be strengthened to support more fully the goal of encouraging the promotion of staff members where they possess the requisite standards of efficiency, competence and integrity.

8.3.3 While recognizing the discretionary powers of the Secretary General, it is regrettable that the Board was unable to have insight as to the reasoning behind the decision of the Secretary General to decide against the almost unanimous recommendation of the APB, which had been based on a very strong recommendation of the reviewing officer. The Board recommends that in making future appointments where the APB has shown strong support for one candidate, and yet the Secretary General selects another candidate, a written record of the rationale for the decision, however informal, should be entered on file. This would not limit the discretionary power of the Secretary General in any way, and it would provide valuable information in the event questions are raised regarding possible extraneous factors in the appointment process.

8.3.4 As indicated above, the Board is unable to find in the file records conclusive evidence of errors or irregularities in the selection and appointment process. Accordingly, the Appellant's request that the appointment be rescinded or reconsidered, and that the Appellant be given priority for vacancies at P-5 level for which he applies are rejected by the Board. The latter request would not in any case have been considered positively by the Administration, as allowing such would result in denying the Administration its responsibility in selecting a candidate fairly.

8.3.5 The Board has given careful consideration to the claim of the Appellant that he be compensated in an equitable manner and finds that there is no justification.

...”

On 9 September 2005, the Secretary General of ICAO informed the Applicant, inter alia: “I am in full agreement with paragraphs 8.3.4, and 8.3.5 of the Board's Opinion. I have noted the [other] recommendations ... and will further consider what action, if any, to take”.

On 7 December 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His due process rights were violated when the Respondent rejected his request to access documents related to his case in accordance with paragraph 16 of ICAO Staff Rule 111.1.
2. The Respondent did not comply with ICAO Staff Regulation 4.5 relating to preference to internal staff in making the selection for appointment.
3. The decision of the Secretary General to appoint another candidate to the P-5 post of Chief, Chinese Section, was motivated by bias, prejudice and other extraneous factors.
4. The delays in the case caused him prejudice.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to have access to the files of the APB: it is sufficient for such files to have been made available to the AJAB.
2. The decision of the Secretary General to appoint a candidate other than the Applicant was a proper exercise of his discretionary powers and was not motivated by prejudice or other extraneous factors.
3. The Applicant is not entitled to any compensation or costs.

4. The Applicant's claims about delays in connection with his appeal to the AJAB should be rejected, because he had not made this claim before the AJAB and was in any case partially responsible for the delay.

The Tribunal, having deliberated from 30 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant joined ICAO in September 1994 as a Language Officer in the Language and Publication Branch, on a fixed-term contract at the P-2 level. From 3 November 2000, he held a permanent contract and, at the time material to this appeal, was serving as a Language Officer (Interpreter/Revisor) at the P-4 level. In October 2000, the position of Chief, Chinese Section, opened up at the P-5 level and a Vacancy Notice was issued for applications extending to both internal and external candidates. The Applicant applied for the post but was unsuccessful. An external candidate was selected. The Applicant believes he should have been appointed to the post. Hence, these proceedings.

II. Three issues arise for consideration. First, the substantive issue whether the Applicant's rights were violated in the decision made to appoint another candidate instead of him. The question is, whether the exercise of the admitted discretion vested in the Secretary General of ICAO could be said to have been abused on the evidence available. Second, whether the Applicant's due process rights were violated because he was not given access to "all documents relating to the appointment decision", including the APB minutes and, thirdly, whether the Applicant is entitled to compensation for "the excessive delay in handling the appeal". The Tribunal will consider these issues in this order.

III. The important issue in this case is whether the Applicant has discharged the burden of proof to establish that the exercise of the discretion by the Secretary General was vitiated by bias, prejudice or extraneous considerations. The Applicant does not pointedly make an allegation of bad faith on the part of the Secretary General, but the crux of the case relates to statements allegedly made by the Secretary General at a meeting with the Applicant on 12 December 2001. The Applicant claims (and this has not been refuted) that, at this meeting, the Secretary General informed him in effect that he could not appoint the Applicant to the post because he was obliged to follow the recommendations of the APB. In fact, the recommendation of the APB was in the Applicant's favour. On the basis of this, the Applicant has claimed that the Respondent has "deliberately misrepresented the APB recommendation" and asks the Tribunal to conclude that the "Respondent was arbitrary and ... used his discretionary authority inappropriately" and in an "unjustifiable manner". The Applicant maintains that the statements of the Secretary General "cast doubt on his integrity and put a question on his good faith".

IV. The meeting between the Applicant and the Secretary General took place one week after the actual decision had been made by the Secretary General to appoint someone else to the post and, accepting the Applicant's statement as correct, it clearly shows an error of fact on the part of the Secretary General. It is not clear why the Secretary General made such a statement if indeed he did. No clarification has been afforded by the Respondent as the Secretary General in question has left the Organization and has not responded to a request for clarification. It could be a simple error or a misunderstanding, but it could also well be a clumsy and disingenuous effort to shift responsibility from his shoulders to some other body in explaining a decision which the Applicant obviously found unpalatable. Be that as it may, the Tribunal cannot from this fact alone conclude that the decision - which had already been made by the Secretary General one week earlier - was made in bad faith. At the same meeting - requested by the Applicant and to which the Secretary General was not obliged to accede - the Secretary General is reported to have stated that the Applicant had "showed professionalism in [his] work", "was "very capable" and was "most suitable" for appointment to the post - be it noted, however, that the words used were not, "the most suitable". Furthermore, the Secretary General had also referred to the selection as "one of his two most difficult decisions" for that year. If these statements are correctly attributed, they reveal a degree of reflection in arriving at the decision and demonstrate consideration of many factors, including awareness of the Applicant's strengths rather than of bad faith against him. Elsewhere in the record, a reference can be found to the Applicant's age and no doubt many factors went into the making of this decision. In dealing with the Applicant's case, the AJAB opted to disregard the reported discussion and proceeded to consider the other arguments advanced by the Applicant in support of his case. The Tribunal cannot fault that approach given the available evidence. There is no question but that the Applicant succeeds in raising an element of doubt with regard to how and why the decision was made but, in the Tribunal's view, falls well short of being able to prove a case of bad faith so as to have the decision in question vitiated.

It is clear also that the Secretary General is not bound to give reasons for his decision and is not bound to follow the recommendation of the advisory body, even based on compelling grounds as to why a particular candidate is superior in terms of quality and overall performance. As the Tribunal recognized in Judgement No. 1117, *Kirudja* para. II (2003),

"the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General. Thus, 'qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion' (see Judgment No. 958, *Draz* (2001))."

The Secretary General's decision is not, as the Respondent has correctly categorized, a mechanical one but one that calls for a judgement which may prove correct or otherwise with the wisdom of hindsight. In making such a decision, many discrete considerations become pertinent.

V. There is positive evidence that, at the APB level, the Applicant had been carefully considered. Indeed, the APB, having weighed the relative merits, had actually recommended the Applicant for the post. In the absence of a finding by the AJAB that there was bad faith or prejudice or abuse of discretion in the process of selection, it is not for the Tribunal to interfere with the decision of the Secretary General, unless the findings of the AJAB were unsupported by the evidence. The Tribunal is not in a position to come to such a conclusion.

VI. Nor is the Tribunal in a position to conclude that, given the Applicant's qualifications as an internal candidate, he should have prevailed over the selected candidate. Staff Regulation 4.1 in the ICAO Service Code provides that the "paramount consideration in the appointment and promotion of staff shall be the necessity for securing the highest standards of efficiency, competence and integrity". Staff Regulation 4.5 states that: "Subject to the conditions in Staff Regulation 4.1 and giving due regard to the recruitment of fresh talent at all levels, preference in selection may be given first to staff members of the Organization". The language of that Regulation makes abundantly clear the competing priorities and the Tribunal is not persuaded by an argument that seeks to accord more weight to an internal candidate than is warranted by the clear language of the text. The Applicant's argument in this regard involves, as he himself acknowledges, a change in the existing language and, in the Tribunal's view, not just a change of "may" to read "shall" but in the structure of the Regulation as a whole. In order to interpret the language in the way the Applicant would wish, there has to be a compelling reason for such a construction in the relevant text itself. The Tribunal is not persuaded that there is argument for such a construction. It is rather a matter for the appropriate legislative body if it were to desire such a change. The Tribunal agrees with the submission that the Respondent was not obliged to give preference to internal candidates. A further difficulty with the Applicant's argument is the assumption that the Secretary General finally considered the Applicant and the selected candidate equally qualified for which there is no evidence on record.

VII. The next issue for the Tribunal's consideration is whether the Applicant's due process rights have been violated by not being given access "to all documents related to the appointment decision". This request, which was somewhat widely phrased, was denied by the Administration on the ground that it "needed to preserve the confidential nature of the APB proceedings ... to enable it to function properly and efficiently". The basis for that denial may be found in paragraph 8 of Annex IV-B to the ICAO Service Code. Paragraph 8 of Annex IV-B (which deals specifically with the APBs), provides that "Boards shall keep minutes which shall be confidential to themselves, the Secretary General, the Directors of Bureaux concerned and the President of the Council". The Applicant bases his claim that he should be provided with the minutes on Staff Rule 111.1.16 which, for better or worse, does not use peremptory language, is couched in more general terms and is a subordinate text. Faced with an ambiguity of intent, albeit not of construction, the AJAB called for greater clarity in these provisions, which is, at all times, a desirable ideal.

The Tribunal's position with regard to disclosure of APB minutes to staff members wishing to protest their non-promotion is set out clearly in Judgement No. 1056, *Katz* para. VI (2002), where, on the one hand, the "Tribunal [was] sympathetic to [the Applicant's] legitimate interest in obtaining information on how his candidacy was reviewed, particularly in light of the strong departmental recommendation to promote him and the contradicting final outcome", however, on the other hand, shared the "Respondent's concern, that these documents should be kept beyond the reach of the parties in order to preserve the confidential nature of the APB proceedings and to enable it to function properly and efficiently". As, in that case, the APB minutes had been made available to the JAB, the Tribunal found that the JAB "had before it all the necessary documents and information, enabling it to reach an informed conclusion".

In the instant case, the Administration also made the APB minutes available to the AJAB for inspection and the Tribunal notes that the AJAB was satisfied that the Applicant's candidature received full and fair consideration. In fact, the AJAB provided a summary of the minutes in its report. On the basis of a proper construction of the existing texts and the finding of the AJAB, the Tribunal concludes that the Applicant's due process rights have not been violated. The Applicant's claim on this ground therefore fails.

VIII. Finally, the Tribunal will consider the Applicant's claim that the appeals process suffered from excessive delays. The Tribunal noted that, in the instant case, the Applicant complains that his Appeal to the AJAB, which was filed on 11 February 2002, was not heard by the AJAB until 9 May 2005, more than three years later. The Respondent contends that the Applicant's claims about delays should be rejected as (a) he did not make such claim before the AJAB and (b) he was partly responsible for the delay. The Tribunal recalls that there are cases, in which delay, *ipso facto*, amounts to a denial of due process, and has held that:

"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* para. VI (1998); see also Judgement No. 1190, *Sirois* para. IV (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).)

The Tribunal cannot agree with the arguments of the Respondent. Obviously, the Applicant could not have raised this issue of delay before it actually occurred. Under the circumstances, the Tribunal finds that there was undue delay by the AJAB in deciding the case and that the three-year period during which this matter was before the AJAB was excessive. For this violation of the Applicant's due process rights, the Tribunal finds that the Applicant is entitled to compensation.

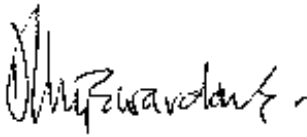
IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of US\$ 2,500, 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.

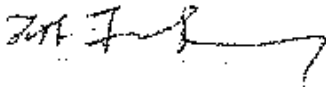
(Signatures)



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



Dayendra Sena **Wijewardane**
Second Vice-President



Goh Joon Seng
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary