



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1405

Case No. 1475

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Goh Joon Seng; 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 28 February 2006, and twice thereafter until 30 April;

Whereas, on 28 April 2006, the Applicant filed an Application, requesting the Tribunal, *inter alia*:

“8. On the merits ... to find:

...

(c) that [the] Respondent further denied the Applicant due process by delaying reply to his appeal for more than 16 months;

(d) that [the] Respondent further denied the Applicant due process ...

(e) that the selection process was tainted in favour of a candidate from the People’s Republic of China who possessed less competence and length of service than the other candidates, including the Applicant.

9. [And] ... to order:

(a) that the Applicant be immediately placed against the next available P-5 post in his field of competence;

(b) that the Office of Human Resources Management (OHRM) immediately produce records of the Central Review Board considering candidates for the vacancy [in question] ...

(c) that OHRM immediately produce statistical records on promotions in the Department of General Assembly Affairs and Conference Management (DGACM) for the period from July 1997 through September 2002 with breakdown by nationalities, units and level of posts;

(d) that the Applicant receive adequate compensation for the damage resulting from having been unjustly denied fair consideration for promotion to the P-5 post. ...”

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 3 October 2006, and once thereafter until 3 November;

Whereas the Respondent filed his Answer on 1 November 2006;

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] was recruited in February 1986 on a two-year fixed-term appointment (...) as an Associate Information Officer (P-2) in the Office of the Commissioner for Namibia (...). ... [At the time of the events which gave rise to the present Application, he was serving as a Political Affairs Officer, General Assembly and ECOSOC Affairs Division (GAEAD), DGACM, at the P-4 level.]

Summary of the facts

... On 9 September 2002, [a] vacancy announcement ... was issued for the P-5 post of Senior Political Affairs Officer/Secretary of the Special Political and Decolonization Committee [(Fourth Committee)] of the General Assembly, with a closing date of 8 November ... [The Applicant] submitted his application for the post in a timely fashion.

... [The Applicant] was interviewed for the post by a panel of three senior officers of the GAEAD. On 3 March 2003, [the] Chief of the Disarmament and Decolonization Affairs Branch, [the Applicant]’s direct supervisor and a member of the interview panel, announced that [another candidate] had been promoted to the P-5 post. [The Applicant] did not see written confirmation of this decision until early June 2003, shortly after his return from mission. He had, however, submitted a letter to the Secretary-General requesting an administrative review of the decision on 6 May ...

...”

On 22 August 2003, the Applicant lodged an appeal with the JAB in New York. The JAB submitted its report on 17 May 2005. Its considerations and recommendation read, in part, as follows:

“Considerations

...

13. ... [The Panel] ... agreed that [the] Appellant had produced no evidence or argument that would convince the Panel that there was a defect in procedure or failure in consideration. The Panel did find anomalous the rating in experience accorded Appellant - 35/50 for someone with [nine] years of relevant service who is, moreover, consistently cited in his more recent performance appraisals for 'his excellent background and experience' - while [the other candidate], with not quite [ten] years of [United Nations] service at the closing date of the vacancy announcement and three years of relevant service was given 45/50.

14. However, it was clear - and, indeed, emphasized by [the] Appellant - that the interview and evaluation panel gave great weight to what that panel characterized as [the] Appellant's 'limited political sensitivity and inadequate management capabilities'. The JAB Panel, recalling staff rule 111.2 (k), was not prepared to substitute its judgement for that of the interview panel. Moreover, the Panel found that [the] Appellant's claim that the assessment was not substantiated by his evaluation reports was not entirely in accord with the facts. On the [performance appraisal system (PAS)] forms for April 2002 to March 2003 and from April ... to December 2003 there are thirteen 'values and competencies' to be rated by the first reporting officer as 'unsatisfactory,' 'developing,' 'fully competent,' or 'outstanding'. [The] Appellant was rated as 'fully competent' in eleven, and as 'developing' in 'Planning and Organization' and 'Creativity'. Panel members assume that particularly the first of these, 'Planning and Organization', is relevant to evaluating management aptitudes. Both reports are signed [by the] first and second reporting officers, and by [the] Appellant.

15. The Panel then considered [the] Appellant's allegation of bias in favour of candidates of Chinese nationality or origin. The Panel noted that the *onus probandi* is both [the] Appellant's and a heavy one. The Panel did not find [the] Appellant's arguments or his statistics convincing.
...

16. Finally, the Panel considered [the] Appellant's request that it hear [a witness]. ... The Panel decided that it had no need of a hearing to arrive at a final decision in this case.
...

Recommendation

18. The Panel makes no recommendation with respect to this appeal."

On 5 September 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the JAB's findings and conclusions and had decided to take no further action on his case.

On 28 April 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB failed to make any recommendation in his favour in its report.
2. He was not duly and fairly considered for the vacancy.

Whereas the Respondent's principal contentions are:

1. The Applicant was properly considered for promotion in accordance with established procedures, and the selection of a candidate other than the Applicant was a valid exercise of the Secretary-General's discretion.

2. The JAB did not err by not making a recommendation in favour of the Applicant.
3. The Applicant failed to prove bias, arbitrariness or other improper motivation in the decision not to select him for the vacant post.
4. The Applicant did not suffer any injury as a result of the delay in this case.

The Tribunal, having deliberated from 1 to 25 July 2008, now pronounces the following Judgement:

I. The Application comes before the Tribunal as a result of the Applicant's challenge of a promotion exercise in which he was an unsuccessful candidate for the P-5 level post of Senior Political Affairs Officer/Committee Secretary, GAEAD, to which he timely applied in September 2002. He alleges that he was not fully and fairly considered and for this he seeks compensation and redress by the Tribunal.

II. In essence, the Applicant alleges that he was better qualified for the position than the Chinese national who was promoted; that there is a systemic bias in favour of staff members of Chinese origin in DGACM; and, that the Head of the Department, who is also a Chinese national, improperly induced the evaluation committee to "drop [the Applicant's] name from the short list and [to add the Chinese national's name]". In regard to this last allegation, the Applicant asserts that his rating for experience was "artificially lowered to ensure selection of the 'preferred' Chinese candidate", and to that end his supervisor "trumped up" deficiencies in a PAS, which was actually prepared *after* the promotion exercise and submitted to the evaluation committee as the relevant PAS. Instead, the Applicant alleges, the evaluation committee should have considered two earlier PAS reports that were, in fact, completed before he applied for the post in question and which were the relevant PAS reports for the promotion exercise. Those PAS reports were very strong, showed no deficiencies, and, in fact, reflected a rating of "frequently exceeds expectations" and included superlative comments by his second appraising officer. In addition, the Applicant alleges that the successful candidate did not meet the job requirements of the vacancy announcement. Finally, the Applicant charges the Respondent with a series of procedural violations.

III. The Respondent denies all charges, asserting that the Applicant did receive full and fair consideration in all respects in the promotion process. Specifically, the Respondent alleges that the Applicant was carefully considered and short-listed for the post but, ultimately, not chosen. In support of his decision not to promote the Applicant, the Respondent refers to the assessment of the evaluation committee, which considered all candidates, but found the Applicant lacking in certain managerial and political skills. In assessing the Applicant's competency, the evaluation committee determined that the Applicant had "a limited political sensitivity and inadequate management capabilities". The evaluation committee further noted that the Applicant had "not yet developed the political vision and strong management ability necessary to discharge the responsibilities of a Secretary of a Main Committee". In

addition, the evaluation committee noted that as the Applicant was only recently appointed to the P-4 post he encumbered, it felt that “he should be given more time at this level in order to enhance his managerial skills”. Finally, the evaluation committee assessed the Applicant’s communication skills and leadership qualities as “fair”. For these reasons, asserts the Respondent, the Applicant was not the best candidate for the job, and rightfully was not promoted.

IV. It is a well recognized tenet of the Tribunal’s jurisprudence that the Secretary-General enjoys great latitude in the selection and promotion of his workforce and that the Tribunal will not substitute its judgement for that of the Secretary-General in such matters “in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors”. (See Article 101 (1) of the Charter of the United Nations; staff regulation 1.2 (c); and, Judgements No. 362, *Williamson* (1986) and No. 834, *Kumar* (1997).) Where, however, a staff member asserts such allegation of abuse of discretion he or she must prove his or her case (see *Kumar (ibid.)*).

In addition, the Tribunal further recognizes another principle that it has applied consistently over decades of jurisprudence, i.e., that a staff member does not have a right to be promoted, but is entitled to be fully and fairly considered in any promotion process in which he or she engages. (See Judgements No. 828, *Shamapande* (1997); No. 1117, *Kirudja* (2003); and, No. 1209, *El-Ansari* (2004).) As the Tribunal held in *Shamapande*:

“The Tribunal’s jurisprudence emphasizes that it is not the Tribunal’s role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General’s duty to give each candidate full and fair consideration has been reasonably fulfilled. In Judgement No. 447, *Abbas* (1989), the Tribunal further specified that ‘reasonable’ and ‘measurable’ were the standards applicable in such cases: ‘...such consideration should to some measurable degree meet the criterion of ‘fullest regard’ in a reasonable manner”.

Further, the Tribunal notes that where the staff member has raised a challenge as to whether he or she has been fully and fairly considered, the burden of proving that such full and fair consideration has indeed taken place rests upon the Respondent. See *Williamson (ibid.)*, paragraph VII, where the Tribunal held: “If once called seriously in to question, the [Respondent] must be able to make at least a minimal showing that the [Applicant’s] statutory right was honoured in good faith in that the [Respondent] gave the ‘fullest regard’ to it”. Thus, the Tribunal will consider each of the Applicant’s claims in turn.

V. First, the Tribunal turns its attention to the overarching issue of whether the Applicant was fully and fairly considered in the promotion exercise. Specifically, the Tribunal addresses the issue of whether the materials presented to the evaluation committee were appropriate, or were, as the Applicant alleges, improperly before the committee. At the start, the Tribunal notes that the Applicant was one of five out of 15 candidates who were short-listed for the post. After his interview with the evaluation committee, which consisted of three members, two of whom were his immediate supervisors, the Chief, Disarmament and

Decolonization Affairs Branch, and the Director, General Assembly and ECOSOC Affairs Division, the Applicant was one of two staff members who were not recommended for the post.

In the course of the promotion exercise, the Tribunal assumes that the Applicant's relevant PAS reports were considered. As is the usual practice in such exercises, the Applicant would have submitted the last two PAS reports for the period immediately prior to his application. In the Applicant's case, that would have been the PAS reports he did submit, which covered the periods from 1 April 2000-31 March 2001 and 1 April 2001-31 March 2002. The Applicant received "frequently exceeds expectations" as his overall rating in those reviews. In addition, it is clear that he had extensive experience in the matters encompassed by the vacancy announcement for the post in question. Further to his overall exceptional rating, the editorial comments of his first and second appraising officers were exemplary. In fact, his second reporting officer added a handwritten note to his PAS report for the period from 1 April 2001-31 March 2002, indicating that the Applicant was "one of the most essential staff members in the Division". In addition, the second appraising officer also indicated that the Applicant had "very good team creating and leading skills"; i.e., management skills. The Applicant was also held to have developed "very good contacts in the Secretariat, both inside and outside the Department and with Member States' Missions". Finally, the second appraising officer indicated that the Applicant's "unique institutional memory in [the] decolonization field [made] him a key player in those issues within ... Headquarters and outside. The same is true for all other issues discussed in the Fourth Committee."

VI. The Tribunal notes that the two relevant PAS reports, as described above, were very consistent with each other and, in fact, with prior evaluations of the Applicant's performance. Nowhere in those PAS reports, which were submitted to the evaluation committee, is there any mention of a "limited political sensitivity" or "inadequate management capabilities". In fact, the Applicant's then-latest PAS report indicates exactly the opposite. The Applicant's "very good contacts in the Secretariat, both inside and outside the Department and with Member States' Missions" would lead one to believe he indeed had "political sensitivity" or he would not have been able to make such good contacts with such a diverse population, to which the PAS editorial alludes. That the Applicant did indeed possess political skills is further confirmed in a letter dated 10 July 2001 from the Chief, Decolonization Unit, Department of Political Affairs, to the Director, General Assembly and ECOSOC Affairs, which letter was placed in the Applicant's Official Status file, and which would have been before the evaluation committee when it considered the Applicant. Specifically, in that letter the Applicant was praised for his exemplary role and performance as the servicing officer of a seminar of the Special Committee of 24, serving, inter alia, as a "liaison with the Government in all matters regarding the seminar".

In addition, the Applicant's "very good team creating and leading skills" would lead one to conclude that the Applicant had good management skills, not "inadequate management" or "fair" leadership skills. Without more, then, the Tribunal is at a loss to understand how the evaluation committee reached its decisions with regard to the Applicant, as they do not comport with the official performance

evaluations of the Applicant. As the Tribunal has consistently recognized, official performance evaluations must be prepared in accordance with the proper rules, as set out in administrative instruction ST/AI/2002/3 of 20 March 2002. Thus, as the conclusion reached by the evaluation committee did not comport with the official performance evaluation of the Applicant, the Tribunal finds that the Applicant did not receive full and fair consideration in the promotion process.

VII. The Tribunal notes, however, that this is not the end of the story of the PAS enigma. There appears in the record another PAS, covering the period from 1 January 2002 to 31 March 2003, that includes apparent deficiencies on the part of the Applicant, and which, the Applicant asserts, was improperly considered by the evaluation committee. This additional PAS report is signed by the parties in April 2003, approximately one month *after* the promotion exercise had been completed and the successful candidate had been selected. The Tribunal notes that it is doubtful that the evaluation committee could have reviewed that PAS, as it apparently did not come into existence until long after the committee both reviewed the Applicant's application and selected the successful candidate. This is borne out by the record of the evaluation committee, which makes no mention of the deficiencies noted in the additional *post facto* PAS report. While the Tribunal recognizes that it is possible that the date is misleading and that the evaluation committee took into consideration these alleged deficiencies, the Tribunal finds that to be an unlikely scenario. Instead, it is more likely that it was the JAB, which erred in first considering and then relying on the information contained in that additional PAS report. Thereafter, the Respondent himself clearly did not notice the JAB's misplaced reliance on a *post facto* document and continued himself to argue erroneously the relevance of such PAS report and its noted deficiencies in the promotion exercise. Thus, notwithstanding the error on the part of both the JAB and the Respondent, the Tribunal concludes that, in the promotion exercise, the additional PAS report was most likely not, in fact, taken into account and, therefore, was most likely not the cause of any adverse effect upon the Applicant. As the Tribunal has held that the Applicant was not fully and fairly considered, the element of the additional PAS is, in effect, irrelevant to that issue, but only warrants discussion to explain the circumstances of this case.

VIII. The Tribunal next turns to the Applicant's charge that his experience rating was "artificially lowered to ensure selection of the 'preferred' Chinese candidate" and that the successful candidate did not meet the minimum requirements of the vacancy announcement. Again, the Applicant makes a strong argument. It is unclear from the record exactly how much relevant experience each candidate had. The JAB finds the Applicant had nine years of experience, but he alleges at least 12, and the Respondent is silent on this matter. As for the successful candidate, the JAB found he had only three years, but makes a reference to the fact that the candidate's "seniority in grade was correctly adjusted to include his period of service in the field". The evaluation committee found that the successful candidate had three years of intergovernmental experience and six years in the field. As the JAB noted that the seniority of the successful candidate had been properly adjusted to reflect his work in the field, it would appear that the

successful candidate had nine years of experience. Interestingly, the Tribunal notes, in assessing each candidate, other than the successful one, the evaluation committee did not state the number of years experience that each candidate had. Instead, the evaluation committee outlined the experience of each candidate, including dates for such experience. In the case of the Applicant, his experience commenced in 1986, when he joined the Organization. In the case of the successful candidate, and only the successful candidate, the evaluation committee very specifically laid out the number of years of each type of experience - field service and non field service, including the total number of years in the service of the Organization. Based on the record, it is difficult to find with certainty exactly how much relevant experience each candidate had, and it would appear that again, the JAB erred. As it appears to have misstated the seniority of each party, the Tribunal cannot rely on the JAB's findings in this regard, as they are not borne out by the record. Reviewing the records independently, the Tribunal finds that the Applicant had more than 10 years of experience while the successful candidate had only nine years of experience. While the Applicant had more years of relevant experience than the successful candidate, and his performance reviews make clear that such experience was extensive and substantial, the Tribunal will not substitute its judgement in regard to the relative weighing of such experience against that of the successful candidate. Years in service does not necessarily translate to a higher experience rating, and it is for the evaluation committee to accord whatever weight and significance it determines appropriate. Thus, the Applicant's claim relative to his score in the promotion exercise must fail.

IX. The Tribunal next considers the Applicant's charge that the successful candidate did not meet the minimum qualifications of the post. The Tribunal agrees with the Applicant. The Tribunal has previously held, in para. V of Judgement No. 1122, *Lopes Braga* (2003), that the failure of the Respondent to follow his own procedures, i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of a staff member's right to be fully and fairly considered for a promotion, which resulted in irreparable harm to the staff member. In the instant case, the Tribunal notes that by all accounts, the successful candidate had no more than nine years of relevant service, not the 10 years required. The Tribunal further notes that the Respondent has never made any assertions to the contrary. Thus, the Tribunal can only conclude that, in fact, the successful candidate did not meet the minimum requirements of the vacancy announcement. As the Tribunal similarly held in *Lopes Braga*:

“In reaching this decision, however, the Tribunal notes that it expresses no independent opinion as to whether the possession of an academic degree was essential to the performance of the tasks of the post in question. Had the Respondent advertised the post as preferring an undergraduate degree, rather than requiring one, the Respondent would have been free to give the possession of the degree, or lack thereof, whatever weight it chose. By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.”

Applying the same rationale to the facts at hand, the Tribunal concludes that, as the Respondent had advertised the post as one requiring “at least 10 years” relevant experience, his promotion of a candidate who did not have such experience was a violation of the Applicant’s right to be fully and fairly considered. For this, the Applicant is entitled to compensation.

X. The Tribunal next addresses the Applicant’s contention that he suffered as a result of the Respondent’s 16 month delay in submitting his Reply in the JAB proceedings. While the Tribunal notes that such a delay is indeed lengthy and could be avoided, the Applicant has failed to provide proof that he suffered as a result. As the Tribunal held in Judgement No. 1370 (2007),

“the delays were not imputable to any person or persons in particular, and were not specifically directed at the Applicant. Rather, they are the consequence of an over-burdened, under-resourced system. The United Nations is currently in the process of revising its system of administrative justice and, the Tribunal hopes, such delays as that suffered by the Applicant will not occur in the future. In the meantime, however, as these delays are not considered abnormal, the Tribunal will not award compensation under this heading. (See Judgements No. 1323 (2007) and No. 1344 (2007).)”

XI. Having established that the Applicant was not fully and fairly considered, the Tribunal need not address the other issues raised by the Applicant in his appeal, as they are simply in furtherance of his claim in this regard.

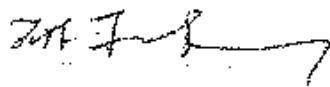
XII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant compensation in the amount of four months’ net base salary, 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**
Vice-President



Goh Joon Seng
Member



Agustín **Gordillo**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary