



ADMINISTRATIVE TRIBUNAL

Judgement No. 1407

Case No. 1477

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, on 9 May 2006, a staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II: *PLEAS*

...

7. On the merits, the Applicant respectfully requests the Tribunal to find that the vacancy filling exercise, which resulted in non-promotion of the Applicant to the D-1 vacancy in the Russian Translation Service, was:
 - a) characterized by lack of due process and by violations of staff regulation 1.2 (b);
 - b) influenced by extraneous factors affecting the administrative decisions, which resulted in violation of Article 100 of the United Nations Charter and staff regulation 1.1 (b).
8. Whereafter the Applicant most respectfully requests the Administrative Tribunal to order:
 - to award to the Applicant monetary damages in the amount equal to the higher salary he would have received from 1 April 2004 (the effective date of appointment of the alternate candidate) until his retirement, had he been promoted, together with a lump-sum reflecting the actuarial difference in his future pension in view of his non-promotion.”

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 October 2006, and once thereafter until 12 November;

Whereas the Respondent filed his Answer on 6 November 2006;

Whereas the Applicant filed Written Observations on 20 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] first joined the United Nations on 9 October 1977 under a five-year fixed-term appointment (...), as a Translator at the P-3 level ... [Having received a number of promotions, effective] 1 April 1991, his fixed-term appointment was converted to permanent status. The [Applicant]'s functional title was modified to Senior Reviser effective 1 January 1999. The [Applicant] is currently at the P-5 level ...

Summary of the facts

... On 14 September 2003, the [Applicant] applied for the D-1 vacant post of Chief, Russian Translation Service, [Department for General Assembly Affairs and Conference Management (DGACM)] ...

... On 10 March 2004, the Staff-Management Committee held its first meeting which discussed, *inter alia*, the 'Selection policy for post of Chief of the Russian Translation Service'. The staff representatives presented their position and [the Under-Secretary-General, DGACM,] stressed in his reply that the D-1 post was a post subject to geographical distribution and that the main consideration would be whether the person selected was capable of leading the entire team.

... Also on 10 March 2004, the Central Review Board (CRB) endorsed the selected candidate as proposed by DGACM. ...

... On 26 March 2004 the [Applicant] was informed that he had been unsuccessful in his application for the vacant post. ...

...

... By letters dated 5 ... and 12 April 2004, the [Applicant] filed a request for administrative review of the contested decision ...

...”

On 21 June 2004, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 27 February 2006. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

19. ... From the records of this appeal, the Panel observed that the Appellant's candidature was fully and fairly considered by the Administration. The Administration has demonstrated by reasonable and measurable means the veracity of this assertion. The Appellant had in fact been short-listed and interviewed and he had been one of the six candidates recommended to the CRB.

...

21. The Panel also considered the contention made by the Appellant that '[he] had overwhelming superiority over the selected candidate as a linguist and also as a manager'. ... [T]he Panel observed from the comparative worksheets that there were two other candidates who scored 94 points, two points higher than the Appellant who scored 92 points.

22. The Panel further considered the allegation made by the Appellant that the Administration had not taken into account his [four] years additional experience as a Translator and that he served as Officer-in-Charge several times. After reviewing the Official Status (...) file of the Appellant, the Panel observed that DGACM had indeed omitted to include in the comparative worksheet the fact that the Appellant worked from 1977 until 1981 for the United Nations. The Panel also acknowledged that the Appellant had served as Officer in Charge of the Russian Translation Service for several periods of time. In connection with this issue, the Panel found that although the Appellant's assertions were true, he had not suffered any injury from this oversight as he scored 35 points for experience which is the highest or maximum score which may be awarded for experience.

...

24. The Panel found that the Appellant had been properly considered by both DGACM and CRB. The Panel also found that the selection process for the post in question had been properly handled. There was no evidence in the record showing that the Appellant had been treated in a discriminatory manner.

Conclusion and Recommendation

25. In light of the foregoing, the Panel *unanimously concluded* that the candidature of the Appellant for the post in question had been given full and fair consideration.

26. The Panel *also unanimously concluded* that the decision not to select the Appellant for the post in question had not violated his rights including the right to due process. The CRB had before it all the necessary documentation to assess the Appellant's merits in respect of the vacancy, the selection process had been correctly handled and the Appellant had been properly considered.

27. Accordingly, the Panel *unanimously decides* to make no recommendation in support of this appeal."

On 9 May 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's findings and conclusions with respect to the decision not to select him for the post in question and, in accordance with its unanimous recommendation, decided to take no further action in his case.

Also on 9 May 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He had overwhelming superiority over the selected external candidate as a linguist and also as a manager.

2. The contested decision was tainted by unacceptable external political pressure on the United Nations Secretariat, making the whole selection process basically unfair and conforming to the rules of due process only on the surface.

3. By selecting the external candidate and rejecting a candidate already in the service of the Organization, the Administration violated Article 100 and Article 103, paragraph 3, of the United Nations Charter, staff regulation 4.4 and several provisions of administrative issuances ST/SGB/2002/5 of 23 April 2002, on “Introduction of a new staff selection system” and ST/AI/2002/4 of the same date, entitled “Staff Selection System”.

Whereas the Respondent’s principal contentions are:

1. The Applicant had no expectancy or right to promotion, and the selection of another candidate did not violate his rights. Full and fair consideration was given to the Applicant’s candidacy for the contested post.

2. The contested decision was not tainted by extraneous considerations.

3. The procedures applicable to the placement and promotion system were followed and the Applicant’s due process rights were protected.

4. The Applicant’s plea for monetary compensation is without merit.

The Tribunal, having deliberated from 2 to 25 July 2008, now pronounces the following Judgement:

I. The Applicant brings his appeal to the Tribunal following a promotion exercise for the post of Chief, Russian Translation Service, DGACM. The Applicant was an unsuccessful candidate for the post, and he challenges the promotion exercise. In essence, he alleges that his candidacy was not fully and fairly considered. To that end, he asserts that the Organization violated its own procedures in the context of the promotion exercise, and that the decision not to promote him was tainted by extraneous factors; namely, undue political pressure by the Russian Mission on the Organization to select the successful candidate. Moreover, he alleges that the guidelines for geographical distribution were misconstrued in order to justify the selection of the successful external candidate. Finally, the Applicant asserts that the promotion process was flawed, as, he alleges, the successful candidate was less qualified than he. The Respondent denies all such allegations.

II. 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 alleges 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”.

III. The Tribunal considers the Applicant’s claim that he was not fully and fairly considered for the post in question, due to both procedural and extraneous factors. The first issue addressed by the Tribunal is whether the Organization failed to conduct the promotion exercise in accordance with its procedures, such that any failure resulted in the Applicant not being fully and fairly considered. The Tribunal notes that the first procedural violation asserted by the Applicant is that the Respondent allegedly deliberately omitted certain information from the comparative worksheet, which was used to evaluate the candidates for the post, and, as a result, the Applicant was not fully and fairly considered. At the time of the promotion exercise in question, the Applicant had served approximately 24 years with the Organization, in two separate terms, all service being in the Translation Division, Russian Service. In the course of the promotion exercise, however, according to the JAB, the DGACM had indeed omitted to include in the comparative worksheet the time that the Applicant had served in his first term of service and the fact that the Applicant had served as Officer-in-Charge of the Russian Translation Service for several periods of time. The JAB did not conclude that the omission was deliberate, and the JAB further found that the omission did not harm the Applicant. The Tribunal is in accord with the JAB’s findings in this regard. While the omission was improper, there is no evidence to support the Applicant’s contentions that it was

deliberate. Moreover, the Applicant admits that he corrected the information in his application. Finally, and most importantly, the Applicant received the highest rating in both of the relevant categories, “Experience” and “Background, Knowledge/Professionalism”. Thus, it is clear that the Applicant was not harmed in any respect in this regard.

IV. The Tribunal next turns to the Applicant’s contentions that the decision to promote the successful candidate was the result of extraneous factors, in the form of undue political pressure by the Russian Mission to promote a candidate of its choosing, i.e., the successful candidate. In this regard, the Applicant submits several examples which, he asserts, prove that such undue pressure was indeed exercised upon the Organization in the promotion process. Specifically, he directs the Tribunal’s attention to the fact that in the history of the Russian Translation Service, no internal candidate has ever been appointed to the post of Chief of the Service; the selected candidate has always been an external candidate, whom, he alleges, has always been “chosen” by the Russian Government. That this is proof of extraneous interference by the Russian Government, he contends, is reinforced by the fact that 46 out of the 48 members of the Russian Translation Service signed a petition requesting that one of the qualified internal candidates be chosen. In addition, the Applicant relies on correspondence from the Russian Government to the Organization, complaining about the quality of the translation services, which correspondence, he submits, was sent only when the post of Chief of the Russian Translation Service was vacant. According to the Applicant, after the post was filled by a given Russian Government candidate, such correspondence and the included complaints ceased. Finally, the Applicant asserts that the Organization has misapplied its guidelines regarding geographical distribution, resulting in overrepresentation of Russia. This, the Applicant asserts, allows the Russian Government to have undue power in the Organization and to monopolize certain senior posts with its nationals. The Applicant relies on all of this as proof that the Russian Mission did put undue pressure on the Organization and improperly influenced the selection process.

V. While the Tribunal notes the difficulty of proving something as invidious as undue political pressure, especially in the face of a powerful and influential Member State, as is the case here, and while the Tribunal finds it almost unbelievable that the Russian Translation Service has never been led by an internal candidate, the Tribunal is, nonetheless, unable to conclude that the decision not to promote the Applicant was improper. To this end, the Tribunal recalls the procedure which governs the promotion process and the ultimate selection of the successful candidate. According to ST/AI/2002/4, once the review committee presents to the head of the department a short list of the candidates who meet the qualifications for the post, the department head is then free to choose any short-listed candidate who “he or she considers to be best suited for the functions”, taking into account the goals and objectives of the Organization, and with due regard to internal candidates. The Tribunal notes that this is a marked change in procedure from past procedure, where the promotion review committee ranked the candidates and recommended one over the others. Now, the review committee provides a short-list of those candidates who meet the

qualifications of the post, and the department head has significant discretion to make the ultimate choice. While the head of the department should give “fullest regard” to internal candidates, this does not mean that the department head must choose an internal candidate over an external candidate. Instead, the department head has discretion to determine who he or she believes is best suited for the post. Thus, for example, in the case where two candidates are equally qualified, the department head would be free to choose that candidate whose personality he or she prefers, or whose management or work style is more akin to his or her style, or, as could be the case in the instant matter, a candidate who had more recent exposure and experience in his native country and with his native language, especially in light of the recent changes in the political and social fabric of that country, than did the Applicant. This is so, even if the unsuccessful candidate was qualified and could have been chosen instead, and even if the successful candidate was external. The Tribunal notes here that the successful candidate, while technically an external candidate, had, in fact, 11 years of service within the Organization. In addition, he had a higher overall score based on the evaluation criteria, than did the Applicant.

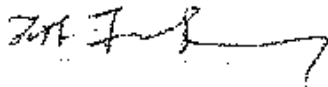
VI. In the instant case, the Applicant and the successful candidate were both fully and fairly considered and short-listed for the D-1 post. The head of the department determined that the successful candidate was best suited for the post, given all the circumstances. The Tribunal will not substitute its judgement for that of the head of the department. As a result, the Applicant’s claims in this regard must fail.

VII. In light of the foregoing, the Tribunal rejects all pleas.

(Signatures)



Jacqueline R. Scott
Vice-President



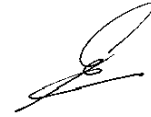
Goh Joon Seng
Member

AT/DEC/1407



Agustín **Gordillo**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary