



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1437

Case No. 1509

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 18 September 2006, a staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 October 2006, the Applicant, after making the necessary corrections, filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

8. ...[To] find that:

(a) the JAB [Joint Appeals Board] Panel erred in law and fact to award adequate compensation to the Applicant having failed to give due consideration to the fundamental difference and legal implications of the mutually exclusive violations of the Applicant's basic contractual rights as UN [United Nations] staff member to have her performance properly, regularly and timely evaluated and the separate violation of her due process rights to have her candidature fully and fairly considered for filling the P4 vacant post for which she applied;

(b) the Respondent failed to comply with [his] own Regulations and [R]ules [including] failure to ensure the timely preparation and completion of the Applicant's evaluation on a regular basis, and in a manner consistent with the provisions of the [R]ules of the Organization;

(c) the Respondent further violated the [Applicant's] due process rights by not affording full and fair consideration of her candidacy for promotion and to fill the advertised vacant post in OPPBA [Office of Programme Planning, Budgets and Accounts];

(d) the Applicant has been subjected to a prolonged period of improper, vindictive and discriminatory treatment by her supervisors and others in OPPBA. She has been exposed to work place harassment in a hostile working environment [which has harmed her career growth];

(e) the officials in OPPBA have contrived to sabotage the Applicant's career prospects and reputation. The decision of the officials of OPPBA not to complete her performance appraisal and not to recommend her candidacy for the consideration of the CRC [Career Review Committee] have prevented her from realizing the legitimate expectations of career development ... and she continues to suffer immeasurable and irreparable harm to her career, confidence and general peace of mind;

....

9. ...[To] order that:

(a) the Respondent accept and honor the findings of the JAB Panel and award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the violation of the Organization's Staff Regulations and [R]ules and the staff [member's] basic contractual right of having her performance evaluated regularly, timely and properly;

(b) the Respondent accepts the unanimous findings and recommendation of the JAB that the [Applicant's] due process rights have been violated as she was not provided with full and fair consideration of her candidacy to fill the vacant post in OPPBA and therefore should be awarded adequate and appropriate compensation....;

(c) the Respondent pay the Applicant compensation ... for the serious breaches of the Applicant's rights and for [his] failure to provide the Applicant with appropriate training, exposure and promotion opportunities, and for the consequential and moral anxiety and suffering endured by the Applicant due to the harassment, intimidation and hostility which she has been exposed to over the last 6 years;

(d) the Respondent be required to pay punitive/exemplary damages consistent with the provision of Staff Rule 112.3;

....”

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 7 May 2007; and once thereafter until 7 June;

Whereas the Respondent filed his Answer on 7 June 2007;

Whereas the Applicant filed Written Observations on 27 June 2007;

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 Organization with a probationary appointment in May 1995 at the P-2 level as an Associate Internal Auditor with the Office of Internal Oversight Services (OIOS), Auditing Managing Consulting Division-European Section, Geneva, Switzerland. In May 1997, she was granted a permanent appointment. In December 1998, the [Applicant] was promoted to the P-3 level as Programme Budget Officer, with [OPPBA], at the United Nations Secretariat in New York. The [Applicant] was assigned to the Political, Legal and Humanitarian Service (PLHS) of the Programme Planning and Budget Division (PPBD), OPPBA, and has been working in this position since November 2001.

Summary of the facts

... Incomplete PAS and Non-Selection for Vacant Post

... From January 1997 through December 1998, the [Applicant’s] PAS [Performance Appraisal System] was completed by the first appraising officer of the European Section.... The [Applicant] was assessed as frequently exceeding performance expectations.

... Once the [Applicant] transferred to the United Nations Secretariat in New York, the new appraising officers varied, including [the Director, PPBD/OPPBA; the Chief, Budget; the Applicant’s then immediate supervisor; the Officer-In-Charge [OIC], PPBD/OPPBA; and, the Chief, Economic, Social and Human Rights Services, OPPBA].

... The [Applicant’s] PAS report from January 1999 to March 2000 was completed and signed by the [Applicant] and the [OIC, PPBD/OPPBA], as first appraising officer, on 24 April 2001. The [Applicant] and [OIC, PPBD/OPPBA] signed the acknowledgment of the work plan section on 1 May 2000, but neither signed the mid-year review acknowledgment. The [Applicant] was assessed as fully meeting performance expectations.

... In July 2000, the [Applicant] commenced applying for various vacant positions within OPPBA and throughout the Secretariat. On 9 September 2000, 29 December 2000, 9 April 2001, 22 May 2001, 31 October 2001 and 2 November 2001, the [Applicant] was informed via letter that her candidacy was under review and consideration for the [posts to which she had applied]. Most letters from OHRM read in part:

‘However, we have found your application incomplete pursuant to Section 5.2 of ST/AI/1999/8, which requires that a staff member provide a copy of his/her PAS for the latest two cycles of appraisal. Please note that there should not be a gap of six months or longer from the end of the proceeding PAS cycle to the time of submitting an application. In addition, a valid PAS must bear the signatures of the staff member and the first and/or second appraising officer.’

Please forward a copy of your PAS for the latest two cycles of appraisals to the Executive Office of the Department/Office where the vacant post exists.

Furthermore, by copy hereof, your Executive Officer or Chief of Personnel Section is requested to assist in completing the PAS requirements. Should you have further questions about the PAS requirements, please see Section 5.2 of ST/AI/1999/8 for details.” [Citation omitted. Emphasis in the original].

... On 10 November 2000, the [Applicant] emailed [the Director, PPBD/OPPBA] addressing her concerns regarding the preparation of her PAS, her job performance; overall career development within OPPBA, and stating that she did not possess a job description.

... During the year 2001, the [Applicant] applied for several vacant positions, as cited [above].

... On 15 March 2001, the [Applicant] emailed [the Director, PPBD/OPPBA] requesting the finalization of the 1999-2000 PAS report. [The Director] replied and requested a copy of the 1999-2000 PAS. The [Applicant] emailed [the Director] on 5 April 2001, requesting an update on the status of the PAS Report. [The Director] replied requesting a meeting with the [Applicant]. The [Applicant] and the Respondent disagree regarding whether the requested meeting took place.

... The [Applicant's] PAS for the period April 2000 to March 2001 is incomplete. The [Applicant] did not sign the PAS report because she disagreed with the appraisal. The [Applicant] prepared a work plan dated 28 June 2001, which was signed on 2 August 2001, by or on behalf of the three supervisors [the Chief, Economic, Social and Human Rights Services, OPPBA; the Officer-In-Charge, PPBD/OPPBA; and, the Chief, Budget] during the applicable period. There was no mid-year review acknowledgement. The [Applicant] received an assessment of partially meeting performance standards.

... On 12 July 2001, the [Applicant] emailed ... [the] Special Assistant to the Director, PPBD/OPPBA, requesting an update on the status of her 2000-2001 PAS report. [The Special Assistant] responded and suggested that the [Applicant] contact the three supervisors directly. On the same day, the [Applicant] emailed two of the three supervisors seeking a discussion regarding her incomplete PAS reports before the [Applicant's] departure on home leave that same month. The requested discussion did not take place.

... The [Applicant's] PAS for the period of April 2001 to March 2002 is incomplete. The [Applicant] was assessed as partially meeting performance standards. The [Applicant] did not sign the PAS report because she disagreed with the appraisal of her performance and her concerns regarding the fairness of the evaluation proceedings.

... On 12 April 2002, the [Applicant] prepared a work plan. [The Applicant's then immediate supervisor] signed said work plan but it was not dated. [Her then immediate supervisor] also signed the mid-year review acknowledgment, but it too was not dated.

... The [Applicant's] PAS for the period of April 2002 to March 2003 is incomplete. The [Applicant] was assessed as partially meeting performance standards. The [Applicant] did not sign the PAS report because she disagreed with the appraisal of her performance and again her concerns regarding the fairness of the evaluation proceedings.

... On 14 April 2003, the [Applicant] received an email from ... [the] Senior Programme Budget Officer, OPPBA, responding to her inquiry regarding the status of her application to post VA# 02-ADM-DM-300584-R-NEWYORK. The [Applicant] was informed that the Central Review Body (CRB) had reviewed the 30/30 and 30/60 candidates and that the [Applicant] was not placed on a roster.

... On 16 October 2003, the [Applicant] prepared a work plan but it was not signed by the first appraising officer, [her then immediate supervisor]. [He] signed but did not date the year-end appraisal section.

... On 16 December 2004 ... the [Applicant] requested that her PAS reports for the period of 2000-2003 be completed and requested a time frame for the finalization to be provided via return mail.

... In January 2005, [the Applicant's then immediate supervisor] requested that the [Applicant] contact him regarding the finalization of the PAS reports. On 17 January 2005, the [Applicant] informed [the Director, PPBD/OPPBA] that she would be unable to set a date for a

meeting with [her then immediate supervisor] until she had obtained advice from the staff union and legal counsel.

... On 25 January 2005 ... the [Applicant] informed [the Director, PPBD/OPPBA] that she was ready to meet and finalize the outstanding PAS reports for the period from 2000-2003. The [Applicant] requested that a third party be selected jointly to complete the PAS reports in substitution of [her then immediate supervisor], because [he] was no longer a staff member (retired) and because of the strained relationship between the [Applicant] and [her then immediate supervisor].

... On 24 May 2005, the [Applicant] emailed [the Senior Programme Budget Officer, OPPBA], responding to a request that a meeting be arranged with [her then immediate supervisor] to finalize the outstanding PAS reports. The [Applicant] referenced her letter addressed to [the Director, PPBD/OPPBA] on 25 January 2005, where she requested [that] a third party be selected for the completion of the PAS reports. At this time, [Senior Programme Budget Officer, OPPBA] sought the advice of OHRM regarding the [Applicant's] request and informed the [Applicant] via email dated 28 June 2005, that she was awaiting OHRM's response.

... On 30 June 2005, [the] Legal Officer, PMSS/OHRM, responded to [the Senior Programme Budget Officer, OPPBA's] email query and stated in part:

'PAS provides tools to the managers and staff to address potential problems throughout the reporting cycle, as well as to safeguard the integrity of the process. One such safeguard is in section 4 of ST/AI/2002/3 which outlines the reporting structure. This structure offers a level of guarantee that the process would be carried out fairly and consistently, and this particular responsibility is, amongst other things, entrusted to the second reporting officer...ST/AI/2002/3 does not provide for or contemplate a possibility of designating a 'replacement' reporting officer. This approach would not be consistent with the concept of the PAS, as the whole point is to document the working relationship between the supervisor and the staff member.

In the case where a staff member believes that a strained relationship with the 1st reporting officer could have adverse impact on the performance assessment, the matter should be raised and discussed by the 2nd reporting office and, if necessary, the head of the office. Consideration could be given to having the 2nd reporting officer or additional supervisors, if any, participating in the performance discussion together with the 1st reporting officer. If the staff member still disagrees with the final ratings, s/he has an option of rebutting the PAS in accordance with section 15 of ST/AI/2002/3.

In summary, providing 'replacements' for supervisors in the event of strained relationships is not 'standard' and not possible under PAS procedures.'

Consequently, in an email dated 1 July 2005, [the Senior Programme Budget Officer, OPPBA] advised the [Applicant] of the provisions of ST/AI/2002/3 above and requested that the [Applicant] indicate availability dates in order to discuss her PAS report with the first reporting officer, [the then immediate supervisor], via videoconference or teleconference, because [the supervisor had] returned to Geneva, Switzerland.

... On 7 July 2005, the [Applicant] responded [to the Senior Programme Budget Officer, OPPBA] email, declining the proposal to meet with [the Applicant's then immediate supervisor] on the basis that both [he] and [the Director, PPBD/OPPBA] are opposing parties to the present JAB case involving the matter of her incomplete PAS reports and the [Applicant's] concern regarding the objectivity of meeting with [them].

... [On] 12 July 2005, [the OIC/ALU], OHRM, provided copies of the email correspondence between the [Applicant], [the Senior Programme Budget Officer, OPPBA] and [the Legal Officer,

PMSS/OHRM], regarding the completion of the [Applicant's] PAS reports, to [the OIC, PPBD/OPPBA]. [The OIC, PPBD/OPPBA] affirmed that '[i]n order for these pending PAS reports to be finalized, PPBD has tried to arrange for the staff member to meet with the first reporting officer, and, as per advice given by OHRM, to have the second reporting [officer] present as well if the staff member so wishes, but the staff member declined to meet with either party.' Thus, the [Applicant's] PAS reports from 2000 to the present remain incomplete.

... **Intimidation and Harassment**

... The [Applicant] claims that relations in the office changed to her detriment once she requested home leave in 1999 in order to conduct her wedding in [the] summer 2000. On 16 October 1999, [the Director, PPBD/OPPBA] requested that the [Applicant's] home leave for 1999 be deferred to the following year due to 'pressing exigencies of service,' in this case, the preparation of the proposed programme budget 2000-2001. The [Applicant] accepted [the Director, PPBD/OPPBA's] decision and postponed her home leave and her wedding. On 26 September 2000, the [Applicant] requested her annual leave from 22 January 2001 to 4 February 2001. On 10 October 2000 ... [the Director, PPBD/OPPBA] issued a procedures and principles directive pertaining to leave request[s] for 2000-2001.

... The [Applicant] maintains that after she returned from home leave in 2001, she was informed that she would be reassigned. The [Applicant] claims that she was later told that she 'didn't fit in the Division anymore' and should consider transferring to the Accounts Division. On 26 September 2001, the [Applicant] emailed [the Director, PPBD/OPPBA] regarding her request to meet and discuss reassignment within OPPBD. The [Applicant] claims [he] did not respond to her request for a meeting.

... On 15 October 2001, the [Applicant] emailed ... the Controller, informing him that her performance appraisals were incomplete from 1999 to the present, her concerns regarding the 'post-facto manner in which evaluations are handled' and the 'unusual feelings of resentment' she felt from others in the department since she returned from her wedding and especially after she announced her pregnancy. The [Applicant] was subsequently assigned to the office PLHS/OPPBA under the supervision of [her then immediate supervisor].

... The [Applicant] alleges that she was subjected to harassment by [her then immediate supervisor], and that he was 'highly critical' and subjected her daily to yelling and tossing [of] paper. The Respondent denies all claims of harassment, intimidation and improper conduct. According to [her then immediate supervisor], the [Applicant's] poor attitude and performance were substandard for a professional staff member of her education and experience. Thus, the unsatisfactory nature of [Applicant's] performance was reflected in the PAS reports from 2001 through 2003, which the [Applicant] has declined [to sign].

... On 7 May 2002, the [Applicant] emailed ... [the] Senior Programme Budget Officer, PLHS/OPPBA, requesting to attend a training in Washington, D.C., on "the Performance-based Budgeting and Activity-Based Costing" from 20-21 May 2002. [She] responded stating that if there was space, the [Applicant] would be included. The [Applicant] contends that she was deliberately excluded from attending this training session.

... On 9 July 2002, the [Applicant] and [her then immediate supervisor] exchanged emails pertaining to 'DPI's [Department of Public Information] Library Consortium.' The [Applicant] expressed her disappointment because she was not involved in the revised text. [The Applicant's then immediate supervisor] stated that the version the [Applicant] drafted had to be rewritten and that after the rewrite the Office decided to await the outcome of the review by the Committee on Information.

... On 13 May 2004, the [Applicant] applied for the [contested] post P-4 VA #04-ADM-DM-403792 of Programme Budget Officer in the OPPBA and was granted an interview on 28

June 2004, without the finalization of her PAS. The [Applicant] claims that her application was not given fair and full consideration and that the interview was 'extremely hostile and intimidating' due to the presence of [two Senior Programme Budget Officers, OPPBA]. The [Applicant] maintains that based on her experience with OPPBA, the decision not to short-list her for consideration was arbitrary and was influenced by discrimination. Additionally, the [Applicant] alleges that she was not informed that another candidate was selected for the position but only noted it when she reviewed her account in the Galaxy system.

... On 13 December 2004, the [Applicant] wrote a note to her file where she maintains that she was excluded from participating in activities directly related to her functional area and in the summer of 2004, she was excluded from training which included one of the [Applicant's] clients, the International Court of Justice. The [Applicant] claims that unlike other staff members who partook in site visits, she was not involved in the exchange of communications and was not part of the visiting team. On 20 January 2005, [the] Coordinator, Results-Based Budgeting, PPBD/OPPBA, responded to the [Applicant's] note stating that the [Applicant] was not included in the activity because of budgeting limitation on the number of UN staff who could attend.

... On 8 April 2005, the [Applicant] submitted a request to the Secretary-General for administrative review of the decision not to select her for the [contested] post [of] Programme Budget Officer in the OPPBA. On 11 May 2005, [the OIC/ALU, OHRM], responded to the [Applicant's] request for an administrative review pursuant to Staff Rule 111.2. ... [On] 20 May 2005, the [Applicant] responded to [the OIC's] letter [and contested] the Administration's evaluation of the administrative decision"

On 24 May 2005, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 25 May 2006. Its considerations and recommendation read, in part, as follows:

“Considerations

48. The Panel first considered the preliminary issues of competence and receivability. The Panel found itself competent to consider this case and found also that this appeal complied with the time-limits set forth in Staff Rule 111.2 (a).

49. First, the Panel noted that the issue in this case is whether the Appellant was afforded full and fair consideration to her applications for promotion and in particular for [the contested post] and whether having several incomplete PASs violated the Appellant's rights as a staff member and affected her opportunities for promotion.

50. The Panel noted that staff members do not have a right to promotion. It also noted that wide discretion is given to the Administration with regard to staff selection. This, however, does not preclude the Panel's jurisdiction over selection and promotion cases. Staff Regulation 4.4 establishes an obligation on the Administration to give 'the fullest regard...in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations, subject to the provisions of Article 101 (3), of the Charter and without prejudice to the recruitment of fresh talent.' UNAT No. 362, *Williamson* (1986), para. II (*citing* UNAT No. 310, *Estabial* (1983)). The Tribunal has determined that certain rights attach to staff members by virtue of this Regulation. *Ibid.*

'The Tribunal notes ... that staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in staff rule 104.14 and related secretariat issuances. These rules and procedures, while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member ... The Tribunal considers that these rules and procedures are part of the conditions of

service of staff members, and therefore they should be respected, correctly interpreted and properly applied, as long as they are in force.’

UNAT No. 411, *Al-Ali* (1988), para. III. By virtue of the Appellant’s rights created under this Regulation, the Panel finds [that] it is competent to consider the case for any violations of due process that may have tainted the decision not to select the Appellant.

51. The Panel recognized that its review of due process considerations is restricted under Rule 111.2 (k) which prohibits the JAB from substituting its judgement for that of the Administration on the substantive question of the relative efficiencies of the competing candidates. The Tribunal has concluded that: ‘[Q]ualifications, 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 UNAT No. 312, *Roberts* (1983), UNAT No. 428, *Kumar* (1988) and UNAT No. 1118, *Khuzam* (2003)). However, in this regard, the Tribunal has stated that:

‘...discretionary decisions, such as the one now under review in these proceedings, are not made by the application of sterile formulae nor are they a mechanical or mathematical process. The discretion to be exercised is the discretion of the Respondent or those to whom he delegates same, and not that of a JAB, the Tribunal or other such body as may be asked to review the decision made. On such a review, the review body would review the contested decision and ask: was it reached on reasonable and rational grounds; was it within the scope of the authority of the person or the body which made it; and, was it fair and free from prejudice.’ UNAT No. 1110, *Sha’Ban* (2003), para. IV.

In this context, the due process principle requires that the Administration give full and fair consideration to a staff member’s qualifications and experience. When a staff member raises the question of lack of consideration, the Respondent bears the burden of proving that due consideration was afforded to the Appellant. *Williamson*, (1986), para. VII, UNAT No. 447, *Abbas* (1989), para. VII, UNAT No. 828, *Shamapande* (1997) para. VI.

52. The Panel examined the contentions of the parties. It noted the Appellant’s contention that she was not afforded full and fair consideration for her applications to several vacant posts in particular VA 403792 as set forth in ST/AI/2002/4. According to the Appellant, the selection process was flawed because she was subjected to intimidation and harassment by [two Senior Programme Budget Officers, OPPBA]. The Appellant also contended that she experienced intimidation and harassment by [the Director, PPBD/OPPBA], [the Chief, Budget], and [the Appellant’s then immediate supervisor]. Additionally, the Appellant maintained that her due process rights were violated by the first and second reporting officers, [the Appellant’s then immediate supervisor] and [the Director, PPBD/OPPBA], respectively, when they violated PAS implementation requirements as established in ST/AI/2002/3. The Appellant submitted that her PASs are incomplete since April 2000 [and that this constituted] a violation of her due process rights and has affected her opportunities for promotion. The Respondent, however, maintained that the Appellant was fully and fairly considered for the post but was not recommended because she received a lower score (63) than the three candidates recommended who received scores between 78 and 88. The Respondent contended that the Appellant’s claim of intimidation and harassment were unsubstantiated and without merit. Additionally, the Respondent submitted that it was the Appellant who halted the PAS process by not signing her PASs because she disagreed with the rating. In the alternative, the Respondent maintained that during the period where the Appellant’s PASs were incomplete, she was deemed as fully meeting performance expectations.

Incomplete PAS and Non-Selection for Vacant Post

53. In the instant case, the Panel found that the Appellant’s due process rights were violated in regards to the Appellant not having complete PASs during the period she interviewed for VA

403792. However, the Panel found that the Appellant failed to provide *prima facie* evidence of harassment and/or intimidation during the interview for the [contested] post. For example:

- (1) First, the Panel considered whether the absence of the Appellant's completed PASs precluded her application from receiving full and fair consideration for VA 403792. The Panel noted Section 6.6 of ST/AI/2002/4 which prescribes that when the Appellant's PASs are incomplete, she will be deemed as fully meeting performance expectation. The Panel further noted the Respondent's assertion that this allowed the Appellant to be short-listed for the interview stage. Notwithstanding the Administrative Instruction and the Respondent's assertions, the Panel determined that without the Appellant's completed PASs, the interview panel did not have a complete picture of the Appellant's overall job performance and competencies, and that this hindered the full consideration of the Appellant's candidacy. (See UNAT #899, *Randall*, citing to UNAT #198, *Lane* (1975), UNAT #412, *Gross* (1988), and UNAT #539, *Bentaleb* (1991)). However, the Panel acknowledged that it could not determine whether the completed PASs would have made a favorable difference for the Appellant in the selection process for the considered post. (See UNAT #412, *Gross* (1988)).
- (2) Second, the Panel examined the detailed interview evaluation for both the Appellant and the selected candidate. The Panel noted that the candidates were appraised for competencies, education, experience, languages, and other skills. The Panel further noted that the Appellant received an overall score of 63 and the selected candidate received an overall score of 88.
- (3) Third, regarding the Appellant's claim of improper motive, the Panel noted that '...the burden is on the Applicant to produce evidence to prove such claims.' UNAT No. 1126, *Byaje* (2003), para. VII (citing UNAT No. 554, *Fagan* (1992) and UNAT No. 1085, *Wu* (2002)). 'The Tribunal notes that the burden of proof in matters where prejudice or discrimination is alleged rests upon the Applicant.' UNAT No. 834, *Kumar*, (1997) (Cf. UNAT No. 554, *Fagan* (1992); UNAT No. 553, *Abrah* (1992); UNAT No. 312, *Roberts* (1983) and UNAT No. 428, *Kumar* (1988)). The Panel was mindful of the Appellant's claim of hostility and intimidation during the interview, in particular by panel members [two Senior Programme Budget Officers, OPPBA]. The Panel noted that most interview panel members were the Appellant's supervisors and/or OPPBA colleagues, and that there existed a great deal of discord between the Appellant and most of the interview panel members. Nonetheless, the Appellant did not produce any cogent evidence of said ill-will and/or intimidation or substantiate her claims of improper motive.

54. In light of the foregoing, although the Panel found that the Respondent produced a reasoned basis for the decision not to select the Appellant for the vacant post, that that decision was taken by the competent authority under the staff selection system, and that there was no evidence of bias or prejudice in taking that decision, the Panel further found that the Appellant's incomplete PASs hindered the full consideration of her candidacy. Consequently, the Panel concluded that the Appellant was not afforded full and fair consideration for the [contested] post.

55. The Panel noted the excessive delay on the part of the Respondent in completing the Appellant's PAS (2000-present). It thus concluded that the Appellant's due process rights were violated. For example:

- (1) First, the Panel considered that on numerous occasions the Appellant initiated the process to have her PASs (2000 to [the] present) completed by communicating with among others [the Applicant's then immediate supervisor], [the Director, PPBD/OPPBA, and [the] then Assistant Secretary-General, OPPBA. From the documentation submitted, the Panel noted that there was no mid-term review of the Appellant's performance during the PAS period 2000-2004. The Panel further noted that the PASs were signed but not dated by the appraising officers for the period 2001-2003. The Panel examined the Appellant's

contention that for the PAS period 2001-2003, the Appellant prepared her own work plans. The Panel expressed its concern regarding the full and fair assessment of the Appellant's candidacy by failure of having complete PASs and its influence, especially when some members of the interview panel were aware of the Appellant's PAS situation. The Panel was mindful that the Appellant did not sign her PASs for the period 2000 to present. The Panel was further mindful that the PAS process was already delayed by almost one year before the Appellant refused to sign the first contested PAS.

- (2) Second, the Panel examined the Appellant's memorandum dated 16 December 2004, addressed to [the Director, PPBD/OPPBA] requesting both the completion of her PASs (2000-2003) and the time frame for said finalization. The Panel expressed its concern that [the Appellant's former supervisor] retired before completing the Appellant's PASs, in violation of Section 3 of ST/AI/2002/3. The Panel was disturbed by the fact that after his retirement, [the Appellant's then immediate supervisor] sought, with [the Director, PPBD/OPPBA] approval, to complete the Appellant's outstanding PASs. The Panel noted the Appellant's request for a third party to complete her PAS in substitution of [the Appellant's then immediate supervisor]. The Panel further noted that [the Legal Officer, PMSS/OHRM] cited to Section 4 of ST/AI/2002/3 and stated that it did not provide for or contemplated the possibility of designating a 'replacement' reporting officer. Thereafter, [the Senior Programme Budget Officer, OPPBA] advised the Appellant to indicate dates of availability to discuss her PASs with [her then retired supervisor], via videoconference or teleconference. The Panel understood [the Legal Officer's, PMSS/OHRM] interpretation of ST/AI/2002/3, but was perplexed regarding [the Senior Programme Budget Officer's, OPPBA] insistence that [the Appellant's former supervisor] complete the Appellant's PAS even though he retired from the service of the Organization. Based on the foregoing, the Panel finds that the Appellant's rights as a staff member were violated by the inexcusable delay in completing her PASs for the period 2000 to the present.
- (3) Third, the Panel noted that the Appellant applied for six posts between September 2000 and November 2001. The Panel further noted that OHRM's letters to the Appellant regarding her application for these six posts stated in part '...your application is incomplete...[p]lease note that there should not be a gap of six months or longer from the end of the proceeding PAS cycle to the time of submitting an application. In addition, a valid PAS must bear the signatures of the staff member and the first and/or second appraising officer. **Please forward a copy of your PAS for the latest two cycles of appraisals to the Executive Office of the Department/Office where the vacant post exists.** Furthermore, by copy hereof, your Executive Officer...is requested to assist in completing the PAS requirements.' [Citation omitted]. [Emphasis in the original]. The Panel found that [the Director, PPBD/OPPBA] and [the Appellant's former supervisor] did not comply with these Administrative requests.
- (4) Fourth, the Panel found that it was the second and first reporting officers' responsibility to ensure the completion of all PASs in accord with ST/AI/2002/3. Pursuant to ST/AI/2002/3, [the Appellant's former supervisor] was responsible for completing all outstanding PASs before his retirement but he did not fulfill his duty as the Appellant's first reporting officer. Among others, the Panel found that [the Director, PPBD/OPPBA] also failed to comply with his obligations as second reporting officer, in conformity with ST/AI/2002/3. The Panel concluded that the excessive delay in completing the Appellant's PASs of over four years adversely affected her rights as a staff member. Thus, the Panel recommends that the Appellant receive compensation. The Panel further concluded that *ex post facto* appraisals would not serve its purpose nor do justice for the Appellant.

56. The Panel acknowledged that the inordinate delay in completing the Appellant's PASs has caused unnecessary anxiety to the Appellant. The Panel urges the Administration to comply with its own [Regulations and Rules] and complete the Appellant's current outstanding PAS.

Intimidation and Harassment

57. The Panel acknowledged the conflict resulting from discord among the Appellant, [the Director, PPBD/OPPBA; the Appellant's then immediate supervisor; the Chief, Budget; the Chief, Economic, Social and Human Rights Services, OPPBA; the [OIC], PPBD/OPPBA; and, the Senior Programme Budget Officer, OPPBA].

58. The Panel noted that on 16 October 1999, the Appellant's home leave was deferred upon the formal request by [the Director, PPBD/OPPBA] due to 'pressing exigencies of service (preparation of the proposed programme budget 2000-2001).' The Panel further noted that on 26 September 2000, the Appellant emailed [the Director, PPBD/OPPBA] requesting home leave for 22 January 2001 to 4 February 2001, in order to get married. The Panel examined [the Director's] directive issued on 10 October 2000 regarding home leave requests for the period covering 2000-2001. The Panel was mindful that the request to defer the Appellant's home leave in October 1999 and the requirement of prior approval for home leave (for the period covering early January 2001 through 31 March 2001) from [the Director, PPBD/OPPBA], might have caused the initial friction between the Appellant and [the Director, PPBD/OPPBA], and the perception of intimidation and/or harassment. The Panel was further mindful that the Appellant was without an assignment for an extended period of time in 2001 and this might have deepened the discord between the Appellant and her supervisors. The Panel considered that these experiences might have heightened the Appellant's sensitivities regarding the perception of intimidation and harassment of her person by her supervisors.

59. The Panel examined the Appellant's email dated 15 October 2001 addressed to [the then Assistant Secretary-General, OPPBA] wherein she expressed her frustration and discontent regarding her incomplete PASs, lack of functions budget or other assignment for over three months, and the '...unusual feeling of resentment towards [her].' The Panel found that the conflict between the Appellant and the individuals cited in paragraph 57 above warranted management's adherence to an informal resolution process wherein the conflict should have been dealt with and concluded. Nonetheless, the Panel expressed its concern and acknowledged that the lines of communication between the Appellant and these individuals had deteriorated.

60. Although the Panel noted the friction cited by the Appellant and the Appellant's discontent, the Panel found that the Appellant did not substantiate her claims of intimidation and harassment.

Conclusion and Recommendation

61. In light of the foregoing, the Panel *unanimously found* that although the Respondent put forth a reasoned basis on which not to select the Appellant for the considered post, the Appellant's incomplete PASs hindered the full consideration of her candidacy, and thus *unanimously concluded* that the Appellant's due process rights were violated in the [contested] selection exercise. Additionally, the Panel *unanimously found* that the Respondent's excessive delay in completing the Appellant's PASs (2000-present) adversely affected the Appellant's rights as a staff member. Based on the foregoing, the Panel *unanimously recommends* the Respondent to pay the Appellant twelve months net base salary at the rate currently in effect. The Panel rejects all other claims."

On 18 October 2006, the Applicant filed the above-referenced Application with the Tribunal.

On 2 November 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case and regrets to inform you that he has decided not to accept the conclusions and recommendations of the JAB. The Secretary-General does not accept that the Respondent is to blame for your not having complete PASs, which, according to the JAB, hindered the full consideration of your candidacy. In this connection, the Secretary-General notes both the finding by the JAB that the Respondent produced a reasoned basis for the decision not to select you for the vacant post, and the acknowledgement by the JAB that it could not determine whether it would have made a favourable difference in the selection process if the performance evaluations had been complete and up-to-date. The Secretary-General also notes that the JAB specifically referred to the fact that you did not sign your PASs for the period ‘2000 to present’. The non-completion of your performance evaluations was due to delay and inaction on your behalf in fulfilling your obligations with respect to the PASs in question. The Secretary-General further notes that you did not utilize the rebuttal procedure available to staff who disagree with the performance ratings that they are given. Accordingly, the Secretary-General has decided not to take any action in this case.”

Whereas the Applicant’s principal contentions are:

1. Her due process rights have been violated as she was not fully and fairly considered for the contested post.
2. Her rights were also violated by the Respondent’s failure to complete her performance appraisals in a timely manner.
3. She has been subjected to harassment, intimidation, discriminatory treatment, among other wrongdoing.
4. Certain aspects of the Staff Selection system are unlawful.
5. She should be adequately compensated for the violation of her due process rights and her rights as a staff member.

Whereas the Respondent’s principal contentions are:

1. The Applicant is mostly responsible for the delay in the completion of her performance appraisals.
2. The lack of her most recent performance appraisal was not a significant factor in the post selection process and the Applicant was fully and fairly considered for the contested post.
3. The Applicant’s rights were not violated as she had no expectancy or right to a promotion.
4. The contested decision was not tainted by bias or other extraneous factors.
5. The Applicant’s challenge of the Staff Selection system is not receivable.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The issues in this case are the following:

(1) Was the Applicant fully and fairly considered for the contested post? In the affirmative, was there a violation of the Applicant's due process rights by not affording full and fair consideration of her candidacy to fill an advertised vacant post?

(2) Did the Respondent fail to ensure the preparation and completion of the Applicant's performance evaluations in a timely manner, on a regular basis, contrary to the provisions of the staff regulations 1.3 (a) and staff rules 101.3 (a), (b), and (c)?

(3) Was the Applicant subjected to discriminatory treatment and harassment?

II. These three issues need to be considered together because, in the Applicant's words, "the quintessential point is that the Applicant believes that her application to fill the contested post did not benefit from full and fair consideration". She contends that the fact that her PAS has not been completed for an extended period is one of the main factors which contributed to the alleged absence of full and fair consideration. Moreover, she contends that the alleged discriminatory treatment and harassment contributed to a hostile and intimidating environment in which her application could not be fairly considered. In considering these issues, the Tribunal has had regard to its well-established case law. In Judgement No. 828, *Shamapande* (1997), the Tribunal stated the following:

"...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".

At the same time, it is not for the Tribunal to decide whether or not the staff member should have been short-listed or appointed to the vacant post. In Judgement No. 834, *Kumar* (1997) the Tribunal stated the following:

"The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. It has noted that the Applicant's performance evaluation reports have consistently assessed his performance as 'very good' or 'good' and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case".

In *Shamapande* (ibid.), the Tribunal reiterated:

“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.”

III. The Tribunal first considers whether the absence of the Applicant’s completed PASs precluded her application from receiving full and fair consideration. The findings of fact by the JAB that the Applicant’s PASs for the periods 2001-2002, 2002-2003, and 2003-2004 were incomplete are not in dispute. The point in contention is whether this was the fault of the Respondent or that of the Applicant. In its careful Report, the JAB concluded that the fault lay with the Respondent because of “inexcusable” and “excessive” delays in completing the Applicant’s PASs for a period of over 4 years, and that this had adversely affected her rights. The JAB firstly noted that on numerous occasions the Applicant initiated the process to have her PASs completed by communicating with various supervisors and the Assistant Secretary-General, OPPBA; that there was no mid-term review of her performance during the PAS periods 2000-2004; that the PASs were signed but not dated by the reporting officers for the periods 2001-2003; that for the periods 2001-2003 she prepared her own work plans; and that the PAS process was already delayed by almost one year before the Applicant refused to sign the first contested PAS. The JAB expressed its concerns about the impact the absence of completed PASs possibly had on the selection procedure. In this regard, the JAB specifically noted that some members of the interview panel “were aware of the [Applicant’s] PAS situation”. The JAB secondly examined the Applicant’s memorandum dated 16 December 2004, asking the Director PPBD/OPPBA to complete her PASs for the periods 2000-2003, and to advise her of the time frame for such completion. In this respect, the JAB found that it was the first and second reporting officers’ responsibility to ensure the completion of all PASs in accordance with ST/AI/2002/3. They found that the first reporting officer did not fulfill his duty in accordance with section 3.3 of ST/AI/2002/3 which provides that a supervisor who is separated from service must make the appraisal for the period between the beginning of the performance year and the separation from service. The JAB was “perplexed” by the Administration’s insistence that this appraising officer complete the Applicant’s PAS even though he had retired from the services of the Organisation. The JAB also found that the Director had failed to comply with his obligations as second reporting officer. The JAB stated that ex post facto appraisals would not serve its purpose nor do justice to the Applicant and concluded that the Applicant’s rights as a staff member were violated by the “inexcusable” and “excessive” delay by the Administration in completing the Applicant’s PASs for the periods from 2000 to 2004.

IV. In the letter to the Applicant dated 2 November 2006, the Under-Secretary-General for Management informed her that the Secretary-General had decided not to accept these conclusions of the JAB and its recommendation that she be paid compensation.

V. The first reason posited by the Respondent is that he produced a reasoned basis for not selecting the Applicant for the post, as the candidates were appraised for competencies, education, experience,

languages, and other skills. The Tribunal notes that the Applicant received an overall score of 63 and the selected candidate received an overall score of 88. In the Tribunal's judgement, this does not constitute a sufficient answer to the JAB's conclusions that the Applicant's procedural rights were violated as the JAB correctly relied on the interpretation by this Tribunal of staff regulation 4.4, in Judgement No. 362, *Williamson*, (ibid.) and numerous other cases, to the effect that the rules and procedures "contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member", and "are part of the conditions of service of staff members, and therefore they should be respected, correctly interpreted and properly applied, as long as they are in force". The need to follow the correct procedures was all the more important in the present case because, as the JAB noted, the Applicant has made claims of hostility and intimidation during the interview, and most of the interview panel members were the Applicant's supervisors and/or OPPBA colleagues. There undoubtedly existed a great deal of discord between the Applicant and most of the interview panel members.

VI. The second reason advanced by the Respondent is that it would not have made a favourable difference in the selection process to the Applicant if the performance appraisals had been completed in a timely manner. The Respondent submits that the Applicant could only be favourably impacted by the absence of PASs because, in accordance with section 6.6 of ST/AI/2002/4, a candidate for a post is deemed to have fully met performance expectations if his or her PAS is delayed or absent. In the Tribunal's judgement, this argument is flawed. The Respondent has not produced any evidence that section 6.6 was actually taken into account by the interview panel. Moreover, the Tribunal accepts the Applicant's contention that section 6.6 was meant to be a "stop gap" where performance appraisals could not be completed for justifiable reasons. In this case the delay was, as the JAB found, both "inexcusable" and "excessive". The deeming provisions of section 6.6 allowed the Applicant to be short-listed for interviews, but, the JAB found as a fact that "without the [Applicant's] completed PASs, the interview panel did not have a complete picture of the [Applicant's] performance and competencies, and...this hindered full consideration of the [Applicant's] candidacy". It is a matter for speculation whether timely PASs would have made a difference. Once it was found that there was a clear violation of the Applicant's procedural rights, the JAB correctly declined to make any determination on this point. The Tribunal also rejects the Respondent's argument that, in the absence of proof of an improper motive, the procedural irregularity was of a minor nature. The case of *Janitschek*, Judgement No. 449 (1989), on which the Respondent relies in this respect, must be distinguished because that case concerned an extension of a contract for which production of a PAS is not an essential requirement.

VII. The third reason advanced by the Respondent was that the Applicant was primarily responsible for the delay in completion of her most recent PASs. Section 15 of ST/AI/2002/3, provides that staff members who disagree with the performance rating given at the end of the performance year, may invoke the rebuttal process within 30 days of signing the completed review. It is alleged that the Applicant's refusal to sign

and rebut the contested PASs, and her refusal to meet with her former (retired) supervisor to discuss the appraisals, was a breach of her obligations as a staff member. The Respondent claims that by refusing to sign and by avoiding the rebuttal processes “the Applicant was able to hold the Organisation hostage, ensuring that the Organisation did not have the power to comply with its Rules and complete the PAS process”. The Tribunal is unable to accept these contentions. The JAB found that it was the Applicant who was regularly pressing for completion of her PASs, and that she did not sign the documents because she “considered that ex post facto performance appraisals would not serve any useful purpose and would not be in keeping with the spirit and letter of the Regulations and the Rules of the Organisation”. For the period 2002-2003 the officer’s signature was affixed to the PAS almost two years’ late; similarly the mid-term review was documented long after the review period had elapsed. Had the Applicant simply been dissatisfied with the rating, the correct procedure would have been for her to sign the document and invoke the rebuttal process. However, the Tribunal notes that the JAB found that her rationale for not signing was her genuine and well-founded belief that the Administration had violated her procedural rights by the belated and untimely preparation of the PAS by a recalled retired reporting officer whom she considered had always been hostile to her. The effective cause of the violation of her rights to have the performance review conducted in a timely and appropriate manner was the “inexcusable” and “excessive” failure of the first and second reporting officers to complete the appraisal within the period of six months from the end of the preceding performance year. The Applicant’s failure to sign was not the effective cause of this delay which violated her procedural rights. Accordingly, the Tribunal rejects all the Respondent’s reasons for not accepting the conclusions and recommendations of the JAB. The Tribunal agrees with the JAB that in all the circumstances it would be just to award the Applicant twelve months’ net base salary in respect of the injury to her career development, and the stress and anxiety caused to her.

VIII. The Tribunal considers next the Applicant’s contention that she was not given full and fair consideration for appointment because she had been subjected “to a prolonged period of improper, vindictive and discriminatory treatment by her supervisors and others in OPPBA” and that this had created a “hostile working environment”. She argues that the JAB erred in law in arriving at the conclusion that the Applicant had failed to substantiate this claim. The JAB examined the allegations of conflict and discord between the Applicant and almost every high-ranking member of her department. The JAB directed itself correctly as to the burden of proof, in the light of the case law of this Tribunal. The Tribunal can see no ground on which to overturn the JAB’s findings of fact in respect of the alleged discrimination and harassment. There is no prima facie case of discrimination. It is not disputed that the successful candidate received a higher score than the Applicant in the assessment of competences, education, language, and other skills. Furthermore, the Tribunal is not satisfied that the alleged “discord between the [Applicant] and most interview panel members” would be sufficient to prove improper motive and/or intimidation. Accordingly, the JAB was correct to reject the Applicant’s plea in this respect, as was the Secretary-General.

IX. In view of the foregoing, the Tribunal:

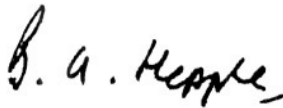
1. Awards the Applicant compensation in the amount of twelve months' net base salary in respect of the violation of her rights relating to the PASs for the period 2001-2004, payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected.

2. Rejects all other pleas.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary