



Administrative Tribunal

Distr. Limited  
30 September 2009

Original: English

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1457

Case No. 1538

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Sir Bob Hepple;

Whereas, on 26 May 2007, a staff member of the United Nations, filed an Application in which he requested the Tribunal, *inter alia*:

“PLEAS

1. [T]o intervene on [his] behalf to uphold and affirm the unanimous decision of the United Nations Joint Appeals Board [JAB] in [his] case No. 2005-056 and to order the Respondents to implement forthwith the recommendations thereto as contained in [the JAB] report No. 1855 ... namely: (a) [that he] be favourably considered for the next available P-4 post; and (b) payment of compensation ... in the amount of \$38,889.00 ...”

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 November 2007, and once thereafter until 12 December;

Whereas the Respondent filed his Answer on 12 December 2007;

Whereas the Applicant filed Written Observations on 12 January 2008;

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] first joined the United Nations on 12 September 1984 on a Short-Term Appointment (STA) as a Messenger at the G-1 level with the Office of General Services, CR+BSD/Communications Service, Mail Operations Section, Messenger Unit, New York. He received successive STAs. On 19 February 1985, the [Applicant] received a Fixed-Term Appointment (FTA). Thereafter, he received successive FTAs and on 19 December 1985, the [Applicant’s] appointment was converted to a probationary appointment. On 1 September 1986, he received a permanent appointment. On 1 October 1986, he was promoted to the G-2 level. On 1 April 1990, he was promoted to the G-3 level. In 1990, the [Applicant] passed the G to P examination. Subsequently, the [Applicant] was promoted to Assistant Economic Affairs Officer, P-1, and transferred to the Economic Commission for Latin America and the Caribbean (ECLAC), Economic Development Division, Santiago, Chile. On 1 May 1993, he was promoted to Associate Economic Affairs Officer, P-2. On 1 November 1993, the [Applicant] transferred from ECLAC to New York where he served as an Associate Finance Officer in the Peacekeeping Finance Division (PFD) of the Office of Programme Planning and Budget Accounts (OPPBA). From 1 January 1995 through 1 July 1999, he received a Special Post Allowance. On 1 August 1999, the [Applicant] was promoted to Finance Officer, P-3, within PFD, OPPBA. The [Applicant] is currently working at the same post.

***Summary of the facts***

... On 2 December 2003, a Vacancy Announcement (VA) was published for the post of Finance and Budget Officer, PFD, OPPBA, Department of Management, P-4 ... The [Applicant] applied for the position and was interviewed on 9 March 2004. Thereafter, the [Applicant] learned the VA was cancelled.

... On 1 December 2004, the post was re-advertised with some changes ... On 17 January 2005, the [Applicant] interviewed for this post. Soon thereafter, the [Applicant] learned that another candidate was selected for the post.

... Under cover of memorandum dated 15 April 2005, the [Applicant] sought an explanation from ... [the] Office of Human Resource Management [OHRM], regarding his applications for [both VAs], both for Budget and Finance Officer, P-4.

... [On] 25 April 2005, [OHRM] informed the [Applicant] that he was ‘...deemed eligible as a 30-day candidate (internal candidate seeking promotion one level higher) for both vacancy announcements. Your applications were forwarded at the 30-day mark for review by the Programme Case Officer in the Peacekeeping Financing Division, OPPBA, in accordance with the procedures described in administrative instruction ST/AI/2002/4.’ The [Applicant] was informed that OPPBA requested OHRM to cancel [the first VA]. The VA was later reissued [as the second VA] ‘with some changes.’ Lastly, [OHRM] suggested that the [Applicant] contact the Programme Officer in order to ‘clarify [his] status against these two vacancies.’

... [On] 23 May 2005, the [Applicant] filed a request for review of the administrative decision not to select him for the P-4 post, Finance and Budget Officer, [the second VA].

... [On] 21 June 2005, [the] Officer-In-Charge (OIC), Administrative Law Unit (ALU), acknowledged receipt of [Applicant’s] request for administrative review. [The OIC] attached a copy of a memorandum dated 17 June 2005 from ... OPPBA, addressed to ... ALU. [OPPBA] stated ‘[w]e find that these comments fully address the issue and hope they clarify the matter. Please consider this letter, with its attachment, the administrative review in accordance with staff rule 111.2 (a) (i).’ In [the] memorandum, [OPPBA] stated that [it] was refuting several claims made by the [Applicant] in the matter of [both VAs].

... By email dated 13 July 2005, addressed to the [Applicant] ... ALU, attached a copy of a second memorandum from [OPPBA] dated 28 June 2005 correcting inaccuracies in [the] initial memorandum of 17 June 2005.

... [On] 3 November 2005, [OPPBA] informed [ALU], regarding 'factual inaccuracies' in the [Applicant's] statement of appeal.

....”

On 31 August 2005, the Applicant filed an appeal with the JAB in New York. The JAB submitted its report on 10 January 2007. Its considerations and recommendation read, in part, as follows:

***“Consideration***

21. 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 as set forth in Staff Rule 111.2 (a).

22. The Panel agreed that the central question in this case was whether the Appellant was fully and fairly considered for the contested post. Two major considerations under review were: was due process adhered to during the evaluation and selection process and how to balance fairness, justice and the fact that another staff member was promoted to the contested post.

23. First, the Panel examined the parties' contentions.

24. Second, the Panel acknowledged that the selection and promotion for available posts are subject to the discretion of the Secretary-General and '...consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy.' (UNAT #312, Roberts (1983) and UNAT # 554, Fagan (1992)). Nonetheless, the Panel, noting that it cannot substitute its judgment for that of the Secretary-General, must scrutinize whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. (UNAT #447, Abbas (1989)). The Tribunal has held that '[i]f 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 honored in good faith in that the Administration gave 'the fullest regard' to it.' (UNAT #362, Williamson (1986) and see UNAT # 828, Shamapande (1997)).

25. Third, the Panel concluded that the Respondent did not establish the minimal showing that the Appellant's application was given the fullest regard. The Panel noted numerous inconsistencies which resulted in the violation of the Appellant's due process rights. In particular:

- i. the cancellation of [the first VA] without convincing or responsive justification but yet admitting to growth in the PFD, the need for more staff to meet said growth, and the re-issuance of [the first VA] one year later as [the second VA] 'with some changes';
- ii. two interview/selection panel members recused themselves but later concurred and influenced the other panel members to include the Appellant in the list of recommended candidates;
- iii. the exclusion of FMT [Fund Monitoring Tool] as a required criteria for [the second VA] although it was one of the principal defining competencies for the post and the determining factor against the Appellant's candidacy;
- iv. in the Appellant's PAS for the period 1 April 2002 to 30 June 2003 he was rated favorably for applying both FMT and RBB [Results-Based Budgeting] to the Mission's budget and monitoring activities and in the Appellant's PAS for the period 1 July 2003 to 31 March 2003, his supervisor stated '[the Appellant] is

proficient in the Fund Monitoring Tool and IMIS applications and is fully knowledgeable of the ... [RBB] methodology[,]’ said evaluations specifically contradicts the interview/selection panel’s assessment of the Appellant’s competencies; and

- v. [OPPBA’s] statement regarding the Appellant being ‘deluded’ was inappropriate, disrespectful, and unprofessional.

26. Fourth, based on the above cited inconsistencies, the Panel concluded that the Respondent did not submit reasonable prima facie evidence that the Appellant’s application for the contested post received full and fair consideration.

27. Fifth, the Panel points the Respondent’s attention to his response to the Panel’s interrogatories dated 7 August 2006 wherein in paragraph 3 the Respondent states in part:

‘... I wish to clarify the distinction between the participation of these two persons in the individual evaluation of [the Appellant’s] qualifications and as members of the interview panel. As indicated...the respective evaluations by [Mr. V.] and [Ms. D.] of [the Appellant’s] qualifications were not required nor sought by the rest of the panel members, as a result of their personal decision to recuse themselves from [the Appellant’s] interview. On the other hand, the reference...regarding the concurrence of these two individuals to the chairperson’s proposal to include [the Appellant] in the recommended list reflects their role in the overall discussion by the panel on the determination of the candidates to be included in the recommended list. Their concurrence to the chairperson’s proposal to include [the Appellant] in the recommended list was not based on their individual evaluations of [the Appellant] qualifications but was predicated on their role in the overall discussion by the entire panel on which candidates were to be included in the recommended list ...’

The Panel found this response to be full of inconsistencies. The Panel further found that the Respondent’s response raises questions regarding whether standard practices and procedures were followed during the evaluation/selection process.

28. Although the Panel does not substitute its judgment for the discretion of the Respondent, the Respondent must follow his own rules. The Panel concluded that the Respondent violated paragraphs 4.3 and 4.4 of ST/AI/2002/4 ... by intentionally omitting FMT as a requirement for the contested post. The Panel further concluded that the Appellant’s application was decidedly injured because of this omission.

29. The Panel was mindful that the contested post has been filled. The Panel was further mindful that said decision cannot be reversed. Nonetheless, the Panel concluded that the Appellant must be compensated for the above cited due process violations.

***Recommendation***

30. In light of the foregoing, the Panel unanimously found that the Respondent did not put forth a reasonable basis explaining the reasonableness of the decision not to select the Appellant to fill the P-4 post of Finance and Budget Officer, that there were conflicts of interest during the evaluation and selection process, that the Respondent deliberately excluded FMT from [the second VA] although it was a principal competency for the post, that the Appellant was appraised as competent in FMT and RBB, and that the interview Panel’s evaluation of the Appellant contradicts several years of performance appraisals wherein he was appraised highly for FMT, RBB and other competencies, and thus unanimously concluded that the Appellant’s due process rights were violated. It therefore unanimously decided to recommend that the Appellant be favorably considered for the next available P-4 post and further recommends compensation in the amount of \$38,889.00. The Panel rejected all other claims.”

On 23 May 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him 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 does not agree with the JAB’s conclusions for the following reasons. Firstly, the JAB’s finding that the cancellation of [the first VA] violated your rights is not correct. The Vacancy Announcement was cancelled and subsequently re-issued because of PFD’s increased workload and the need to strengthen the profile of Budget Officers. Accordingly, as there was an objective and valid reason for cancelling the VA, you were not treated unfairly. Secondly, as to the JAB’s conclusion that ‘there were conflicts of interest during the evaluation and selection process’, the JAB did not clarify the nature of these conflicts and how they violated your rights. Thirdly, with respect to the JAB’s conclusion that the Respondent ‘deliberately’ excluded FMT from [the second VA], it is not clear from the record as to how the JAB came to this conclusion and as to what facts it relied upon in coming to this conclusion. As ‘Other Skills’ stated that ‘[p]roficiency in use of information technology tools for financial analysis and monitoring of budgets [is] required’, the requirement for FMT is covered by this stipulation. Your rights were not violated by the exclusion of FMT because all candidates were applying for the position on the basis of the same vacancy announcement. Fourthly, with respect to the JAB’s conclusion that the interview panel’s evaluation of your candidature contradicts several years of performance appraisals wherein you were appraised highly for FMT and RBB and other competencies, the Secretary-General notes that an interview panel is not bound by the contents of a performance appraisal and may rely on the interview process. In light of the above, the Secretary-General has decided to take no further action in this case.”

On 26 May 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent violated sections 4.3 and 4.4 of ST/AI/2002/4, by intentionally omitting FMT as a requirement for the contested post.
2. The evaluation panel did not review his performance appraisals.
3. There were conflicts of interest and inconsistencies during the evaluation and selection process and as a result, he was treated with extreme prejudice in the selection process.
4. The first VA was cancelled without convincing or responsive justification.

Whereas the Respondent’s principal contentions are:

1. The Applicant had no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion and his rights were not violated by the decision not to select and promote him to the contested P-4 post.
2. There is no evidence of prejudice or other extraneous considerations in the Administration’s decision not to promote the Applicant.
3. The Applicant is not entitled to any compensation.

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

I. The present case involves the discretionary authority of the Secretary-General in promotion matters. The Tribunal has repeatedly found that while the Secretary-General has wide discretionary authority in promotion matters, his discretionary authority is not unfettered, and must not be vitiated by “the existence of bias, prejudice, discrimination, lack of due process or other improper motivation”. (See Judgement No. 1073, *Rodríguez* (2002)). The Tribunal recalls that in Judgement No. 792, *Rivola* (1996), it stated that:

“[i]t is clear to the Tribunal that it cannot substitute its judgement for that of the Respondent ... The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion.”

Therefore, the Tribunal’s task is to determine whether the Respondent’s decision not to appoint the Applicant to the contested post constituted a proper exercise of his discretionary authority or whether the decision was vitiated by prejudice or other extraneous factors.

II. The Tribunal has held that “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 honored in good faith in that the Administration gave ‘the fullest regard’ to it”. (Judgements Nos. 362, *Williamson* (1986) and No. 828, *Shamapande*, (1997)). However, the Tribunal in Judgement No. 834, *Kumar* (1997) noted that the burden of proof in matters where prejudice or discrimination is alleged rests upon the Applicant. (Cf. Judgements Nos. 554, *Fagan* (1992); No. 553, *Abrah* (1992); No. 312, *Roberts* (1983) and No. 428, *Kumar* (1988)). In Judgement No. 834, *Kumar* (ibid.) that Tribunal stated:

“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.”

III. The Tribunal took note that the JAB found that there were conflicts of interest during the proceedings leading to the decision to cancel and reissue the first VA and to select another candidate for the contested post. However, the Secretary-General determined that there was no such conflict as the VA was cancelled and subsequently reissued because of PFD’s increased workload and the need to strengthen the profile of the Budget Officers. Therefore, there was an objective and valid reason for cancelling the VA and beginning the selection process again.

IV. The Tribunal finds that the Administration is entitled to re-advertise a VA if it is in the best interest of the Organization. Based on the record, the Respondent has substantiated the reasons why the contested VA was reissued.

V. In its review of the record, the Tribunal noted that the Applicant was interviewed and evaluated against objective criteria established in both VAs. In the first recruitment exercise, the Applicant's education, languages, and other skills were evaluated at the interview stage. The Applicant's drafting exercise and communication competencies were considered average and consequently, the Applicant tied only in sixth place with another candidate. In the second recruitment exercise, the Applicant received a score of 75% for work experience because he was not able during the interview to demonstrate the expert command of resource planning, results-based budgeting, and financial analysis needed to independently review and finalize complex budgets, as was required in the second VA. The Respondent further submits that the Applicant's hard work and contribution to the Division at the P-3 level was recognized and appreciated as evidenced in the Applicant's performance appraisals. Nonetheless, the Respondent submits that regarding the P-4 post, the second interview panel concluded that the Applicant did not demonstrate the ability to fully meet the requirements of the evaluation criteria of the post and did not perform well in the competency-based interview. Therefore, the Tribunal finds that the Applicant was fully and fairly considered for the contested posts and that his non-selection constituted a valid exercise of the Administration's discretion on matters related to promotions and filling of vacancies.

VI. The Tribunal went on to consider whether extraneous factors or improper motivation were involved in the selection decision. With respect to the claim that FMT was deliberately excluded as a requirement from the second VA and that this constituted an improper motivation to downgrade the Applicant's candidacy, it is unclear from the record how the Applicant arrived at this conclusion. The Tribunal finds that the Applicant's rights were not violated by the exclusion of FMT and that all candidates who applied for the post were similarly situated on the basis of the same VA and its requirements.

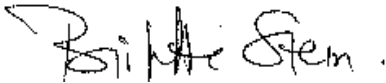
The Tribunal finds that the Applicant's only substantiated argument was that the interview panel consisted of two PFD staff and one staff member from DPKO. It should be noted that of the three candidates recommended with a score of 100, one candidate, who was eventually selected and promoted to the position, is the direct subordinate of one of the Section Chiefs who was heading the interview panel and another of the candidates was the direct subordinate to the Section Chief who was the focal point of RBB in the Division. This is the source of the Applicant's claim that he was treated with extreme prejudice in the selection process. It should be noted that the Section Chief and Budget Officer recused themselves from the previous interview panel but later concurred and influenced the other panel members to include the Applicant in the list of recommended candidates. In the Tribunal's judgement this indicates that the intervention of the Section Chief and Budget Officer was in fact to the Applicant's advantage. Accordingly, the Tribunal finds that the Applicant has failed to prove by convincing evidence that he was prejudiced in the selection process.

VII. For the foregoing reasons, the Application is rejected in its entirety.

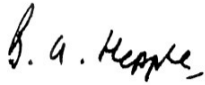
(Signatures)



Spyridon **Flogaitis**  
President



Brigitte **Stern**  
Member



Bob **Hepple**  
Member

Geneva, 31 July 2009



Tamara **Shockley**  
Executive Secretary