



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1458

Case No. 1540

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 at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 April 2007, and twice thereafter until 15 August;

Whereas, on 20 June 2007, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“PLEAS

...

8. ...

(a) *to rescind* the decision of the Secretary-General accepting the Findings of the Joint Appeals Board [JAB] in the Applicant’s case making no recommendation in his case;

...

(d) *to order* that the Applicant be promoted to the D-2 level with retroactive effect from 8 March 2004;

(e) *to award* the Applicant compensation in the amount of three years’ net base pay as an exceptional measure for the actual, consequential and moral damages suffered by the Applicant to his career and reputation and for denial of due process as a result of the Respondent’s actions or lack thereof;

(f) *to fix* pursuant to Article 9, paragraph I of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at the difference between the rate of pay he received and what he would have received had he been promoted, through the date of his retirement with interest at the rate of 8% per annum.

(g) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements.”

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 24 January 2008, and once thereafter until 25 February;

Whereas the Respondent filed his Answer on 29 January 2008;

Whereas the Applicant filed Written Observations on 30 March 2009;

Whereas, on 7 July 2009, the Tribunal decided not to hold oral proceedings in the case;

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] joined the Office for Internal Oversight Services (OIOS) on 25 October 2001 as Deputy Director for [the] Internal Audit Division (IAD) at the D-1 level. He was IAD’s Acting Director from 1 August 2003 through 7 March 2004, with an SPA to the D-2 level from 1 November 2003 through 7 March 2004. [The Applicant] retired from service on 30 April 2006.

Summary of Facts

... On 4 August 2003, a vacancy announcement (VA) was issued for the post of the IAD Director at the D-2 level, inviting applications from interested individuals. [The Applicant] applied for the post on 1 September 2003. However, this VA was subsequently re[-]advertised.

... On 11 November 2003, the vacant post of IAD Director was re-issued...

... According to the parties, sometime before 8 March 2004, [the Applicant] was informally advised that his application was not successful and that another candidate would be appointed to the D-2 post. On 8 March 2004, [Ms. A.] became the new Director for IAD. According to [the Applicant], [Ms. A.] had joined OIOS in October 2003 for a temporary position for the purpose of a specific project at the P-4 level. She was separated on 7 March 2004 and reappointed at the D-2 level effective 8 March 2004.

... On 15 April 2004, the Staff Union called on the Secretary-General to investigate and examine inter alia ‘recent decisions of ... the USG [Under-Secretary-General] for Internal Oversight Services [(USG/OIOS)] for violations of the delegation of authority granted to him, especially in the recruitment and promotion of staff.’ The Secretary-General subsequently requested [the] then Under-Secretary-General for Management [(USG/M)], to undertake an internal investigation of the allegations. [The USG/M] found inter alia that no Staff Regulations or Staff Rules had been violated in the appointment and promotion of staff in OIOS. She recommended that no further action was necessary in the matter. On 16 November 2004, the Secretary-General issued a press release, stating that he had reviewed the report and accepted the findings and recommendations of the investigation. According to Respondent, on 1 December 2004, a meeting was held with the Chef de Cabinet, [the USG/M], ... the Deputy Chef de Cabinet

and senior members of the Staff Union. According to Respondent's reply members of the Staff Union were informed that no 'formal investigation' had been undertaken into the matters raised by the Staff Union in its resolution of 15 April 2004, but that a less extensive audit of personnel records had instead been conducted.

... On 29 December 2004, [the Applicant] wrote to the Secretary-General requesting review of his decision to take no action in respect of the alleged abuse of delegated authority by [the USG/OIOS], on the basis of the findings and recommendations of the USG for Management.

... On 17 February 2005, the President of the United Nations Staff Union submitted a number of concerns to [the] Chef de Cabinet, regarding violations of the Staff Rules by [the USG/OIOS] vis-à-vis particular staff members, including [the Applicant].

... On 22 February 2005, [the] JAB Secretariat [in New York] received a Statement of Appeal from [the Applicant] dated 18 February 2005, alleging denial of fair consideration for promotion and failure to conduct proper investigation into charges of violations by OIOS.

... In August 2005, the Secretary-General decided that an investigation would be conducted by two outside investigators serving as 'Experts on Mission.' On 26 April 2006, the investigators submitted a report ([the Report]) with their findings and conclusions in the matter."

On 7 November 2006, the JAB submitted its report to the Secretary-General. Its considerations, conclusions, and recommendation read, in part, as follows:

"Considerations

23. Appellant contends that he was not given full and fair consideration for selection to the post he had encumbered for three years. The Panel notes that, generally, a staff member has no right to promotion. UNAT Judgement No. 870 *Choudhuri/Ramchandani*, (1998), No. 411 *Al-Ali* (1988). By the authority delegated by the Secretary-General in ST/AI/401 and ST/AI/2003/4, OIOS has broad discretion in regard of promotion. See Judgment No. 275 *Vassiliou*; No. 375, *Elle* (1986); No 390, *Walter* (1987); No. 1998, *Randall* (1998). However, the Panel, emphasizing that it cannot substitute its evaluation of candidate qualifications for that of the Secretary-General, [it] must nevertheless examine whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. See Judgement No. 447, *Abbas* (1989). In line with this, the Panel also notes that, 'once called seriously into question, the [Respondent] must be able to make at least a minimal showing that the [Appellant's] statutory right was honoured in good faith in that the [Respondent] gave the 'fullest regard' to it'. Judgement No. 362, *Williamson* (1986), para. VII. In line with this, the Panel first reviewed the case for any evidence of the full and fair consideration that Respondent gave to Appellant himself in the process, and thereafter considered Appellant's contentions regarding [the USG/OIOS]'s efforts to subvert the process and violate the staff rules in favouring the selected candidate.

24. In terms of the consideration given to Appellant himself, Respondent includes a note to the Secretary-General by [the USG/OIOS] dated 1 March 2004 on behalf of the interview panel. This note contains a brief assessment of the six short-listed candidates. With regard to Appellant, the interview panel considered that he lacked the requisite leadership and managerial qualities for the post. The Panel finds the report to be in compliance with sect. 7.6 of ST/AI/2002/4, requiring programme managers to prepare a reasoned and documented record of the evaluation of proposed candidates. All candidates interviewed were asked the same questions.

25. Appellant claims that his candidacy was hampered by an undisclosed opinion provided by the USG that he lacked leadership and managerial qualities, an opinion to which he was given no opportunity to respond through a rebuttal process for the selection panel's consideration. With regard to the issue of an undisclosed opinion, there is no evidence of this. As stated above, the

note conveying the interview panel's consideration states this, but states that the interview panel as a whole had this view on the basis of Appellant's interview. With regard to the PAS issue his contention here raises, in this respect, the Panel notes his claim that he had no report for 2004 covering the period during which he encumbered the D-2 post or, for that matter, for the previous year. Appellant attributes this lapse to OIOS's 'negligence, if not ... outright bad faith.' At the same time, the Panel observes that Appellant's PAS cycle for the period during which he served as Acting Director was scheduled to end only on 31 March 2004, approximately three weeks after the selected candidate took up her functions as D-2, and approximately one month and a half after his interview for the post. Even assuming he had commenced his PAS for 2003-04, OIOS can hardly be blamed for the fact that the selection process was finalized prior to the end point of his PAS cycle.

26. Moreover, the evidence shows that he himself had not, in fact, commenced a PAS for that period. Although under sect. 5 and 4 respectively of ST/AI/2002/3 the primary responsibility for the timely execution of the PAS rests with the head of department and responsibility for setting the work plan with a staff member belongs to the first reporting officer, the technical procedures on the UN's electronic PAS system require initial action by the staff member at crucial points in the process, including initiation of the PAS itself. Appellant did not initiate his 2003-04 PAS cycle until 12 June 2004. To the degree the absence of his 2002-03 PAS hampered his chances before the interview panel, the evidence shows that he had not initiated his PAS for that period until late December 2004, over ten months after his interview for the post. The Panel also observes the evidence that at various times Appellant was reminded of the need to initiate his PAS, and that the Organization's computerized PAS system itself issues reminders of pending action. Therefore, it is unnecessary to delve into whether these efforts on the part of his supervisors were sufficient, as the Panel notes that Appellant himself was at least partially responsible for the lapses.

27. Moreover, the Panel recalls that selection and promotion for available posts are subject to the discretion of the Secretary-General and that, 'consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General ...' (Cf. United Nations Administrative Tribunal (UNAT) Judgements No. 312, *Roberts* (1983), para. II and No. 554, *Fagan*, (1992), para. VIII). It is entirely plausible that Appellant was indeed considered to be performing satisfactorily, but that another candidate appeared better qualified. Based on the foregoing, the Panel finds Appellant's contentions in this regard to lack merit.

28. Appellant puts forth several contentions of bad faith and lapses in due process by [the USG/OIOS] in order to favour a predetermined candidate. In this regard, the Panel notes that '[t]he *onus probandi* regarding discrimination, arbitrariness, improper motivation or undue process of law falls on the Applicant.' Judgement No. 1278 ... (2005), para. VI. In that light, the Panel will look at each specific claim in turn.

29. Firstly, Appellant contends that, upon applying for the post in 2003, he received 'repeated and unsolicited' assurances from the USG for Internal Oversight Services that he was satisfied with the manner in which the Appellant had been doing his job and that he supported the Appellant's candidacy for Director. The Panel is aware of the evidentiary difficulties raised in proving remarks made in the corridors of the Organization. However, in the absence of any evidence beyond the contention itself, the Panel cannot find the allegation that [the USG/OIOS] assured him of his support to be substantiated. Indeed, even accepting the wording Appellant uses here, the Panel cannot determine whether [the USG/OIOS's] alleged assurances amounted to or otherwise created a binding legal obligation to promote him.

30. Secondly, Appellant points out that the VA, without explanation, was re-advertised. Appellant contends that this appears to be more than a coincidence: with the recirculation, Appellant's support within OIOS evaporated in favour of the selected candidate, who had only recently been recruited into a P-4 post a few months earlier, and had not applied in the first round. As an initial matter, with regard to Appellant's frequent use of the phrase 'without explanation,' the Panel can find no rule establishing an obligation to explain in such circumstances. In addition,

the Panel notes that [the Report], upon which Appellant relies variously in his submission, itself found no evidence directly supporting that the re-circulation was engineered to give the candidate ultimately selected an opportunity to apply. Moreover, to the degree that Appellant was not considered eligible when the VA was first advertised, he himself benefited from the re-advertisement.

31. Appellant claims that these anomalies recall Judgment No. 1117, *Kirudja* (2003). However, that case does not stand for the proposition that a re-circulation of a post is in itself an abuse of discretion; rather the Tribunal there found abuse on the basis of evidence lacking in the instant case ...

...

34. In the instant case, there is no evidence of inconsistency or manoeuvring. Respondent contends that the VA was recirculated in order to broaden the pool of qualified candidates. The Panel considers this, if proven, constitutes both an appropriate and necessary rationale for the recirculation. Respondent's stated intention is corroborated by the fact that following recirculation the Organization undertook to advertise the post in at least three national/international publications where the Organization normally publishes vacancies for senior-level posts. The trouble and expense involved in such efforts seem too extensive unless the Organization truly wished to widen the scope of the selection exercise, and tend to negate the existence of the ill-motivated manoeuvres outlined by Appellant. The Panel therefore finds no evidence of ill-motivation in the recirculation itself.

35. Thirdly, Appellant contends that the inclusion of [the USG/OIOS] on the interview panel was a blatant conflict of interest in the selection process. Respondent argues that, as the OIOS Review Body (ORB), constituted in accordance with ST/AI/401 (as amended by ST/AI/2003/4), had no one serving above the D-1 level, [the USG/OIOS] attained the agreement of the Secretary-General to convene an *ad hoc* Selection Board. Here, [the Report] contains a number of relevant factual considerations regarding [the USG/OIOS's] motivations and the contention that the governing AI was violated.

36. As an initial matter, the Panel notes that the investigator's discussion of the case is rather circumspect. This, presumably, was due to their stated view of the need to 'remain sensitive to the pendency of parallel internal administrative proceedings initiated by persons involved in the inquiry and avoid, to the extent possible, the expression of opinions as to the interpretations of staff regulations, staff rules or other issuances within the jurisdiction of any UN internal administrative body.' However, if they were loath to make such interpretations, their considerations are expressed in what Appellant qualifies as 'carefully chosen and diplomatic language' in a number of passages in the report. This language makes it difficult to reconcile facts found with the otherwise contradictory conclusions drawn.

37. [The Report] points out that 'the sequence of events leading to that D-2 appointment indicated that [the USG/OIOS] appeared to have predetermined the outcome of the selection process before the ad hoc OIOS Panel, which he chaired, unanimously recommended her as the best candidate. In this connection, we perceive no question as to the ad hoc Panel's judgment regarding [Ms. A.'s] qualifications for the D-2 appointment.' The Report poses something of a caveat to this, however, stating that 'Yet, had all interested parties been fully acquainted with the sequence of events, they might well have perceived something less than transparency in the process.'

38. The sequence of events described in the Report discusses [the USG/OIOS's] knowledge of the selected candidate, from comments about her by a colleague in OIOS, from his service on an interview panel for an analogous D-2 post at UNDP where he apparently was impressed by her qualifications, and from his awareness of her work generally as a P-4. The Report also stated that one member of the interview panel in the OIOS selection process claimed [the USG/OIOS] made

known his service on the UNDP panel process, was impressed by her UNDP interview, and wished to ‘move before the UNDP process resumed.’ The investigator’s conclusions in this regard seem to be summed-up in the following: ‘As shown by [Ms. A.’s] [and other] cases, [the USG/OIOS] presumably selected the person he thought to be the best candidate but, in doing so, appeared to by-pass the process in place to guide and inform his decision making.’

39. It remains unclear what aspect of the process [the USG/OIOS] ‘appeared’ to by-pass. It seems this is probably a reference to the allegation that ST/AI/2002/4 and ST/AI/2003/4 was violated. This is discussed below. With regard to [the USG/OIOS’s] motivation and active role in the process, the Report concludes that there was no evidence of ill-motivation.

‘One might infer from these facts that [the USG/OIOS] wished the result of the OIOS process to be the selection of [Ms. A.] for the post. This may be seen as constituting an irregularity in the OIOS process. However, [there was] no indication that the interview process was otherwise distorted or manipulated to produce a desired outcome.’

The evidence from [the Report] only suggests [the USG/OIOS’s] enthusiasm for the selected candidate’s qualifications. Even assuming, therefore, that he moved with ‘unusual speed’ to arrange the interview panel schedule, this does not in itself indicate a predetermined outcome, but only a determination to include within the pool of D-2 candidates a candidate whose work impressed him. The motivation tends to accord with the mandates under Article 101 of the Charter and Staff Regulation 4.2 which provide that ‘the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity’. As [the Report] stated, ‘... it may be that a manager who is aware of a very promising candidate for an existing vacancy acts in the best interest of the Organization if he takes steps to accelerate the process that might lead to that candidate’s appointment.’ In the absence of some indication of conflict of interest, [the USG/OIOS’s] enthusiasm for the selected candidate’s competencies does not in and of itself indicate a conflict or otherwise manifest bad faith any more than what Appellant contends was [the USG/OIOS’s] expression of satisfaction with Appellant’s work and accompanying vow to support him for the job. Moreover, wherever [the USG/OIOS’s] preferences might lie, it still remained for all members of the panel to agree on the candidate best qualified for the post. As discussed below, the Panel finds no basis to impugn the independence of the interview panel membership, or to believe that the unanimous decision taken in the process was anything less than genuine. In light of the foregoing, the Panel finds no evidence to suggest that [the USG/OIOS] improperly influenced the process.

40. Appellant also claims [that] another conflict of interest existed in that another member of the interview panel, who was not a staff member and was in line for a paid consultancy with OIOS, was a personal acquaintance of the selected candidate. Here again, Appellant puts forward no evidence beyond the contention itself apparently made on the basis of ‘information and belief’. It seems that reference here is to [Mr. M.], who is a retired staff member, formerly Director of OLA. Regardless, Appellant puts forth no evidence of either the existence of an acquaintance or its nature. Moreover, Appellant has shown no proof of the kind of *quid pro quo* implied in the claim of a paid consultancy.

41. With regard to whether the investigators made any findings as to any violation of [STAI/2003/4] in this case, as [...], this is a question of law for the JAB since there are no pertinent facts in dispute. The investigators questioned the rationale underlying OIOS’s stated basis for utilizing an ad hoc interview panel instead of the ORB. However, the Panel notes that, normally, panels are required to consist of staff at higher levels than those being interviewed. The Panel finds that this was one factor which reasonably could have hampered OIOS. In addition, there is no indication that the decision to convene the interview panel was unchecked, insofar as [the USG/OIOS] received the approval of the Secretary-General. Finally, the panel included senior representatives from agencies and offices outside OIOS – UNICEF, DM and OLA – such that the membership did not create the appearance that it lacked independence. Based on the note

on the selection process to the Secretary-General and the findings of the investigators above, the Panel finds no reason to question the unanimity of the interview panel's conclusion that the selected candidate was the most qualified candidate for the post.

42. Appellant also argues that the selected candidate lacked the specific qualifications in the job description ('twenty years of extensive experience and progressively increasing responsibility in auditing or closely related fields, including several years in audit management.') However, Respondent replies that the selected candidate possessed the qualifications to compete for posts above the P-4 level, although prior to the selection she had taken a P-4 assignment in the absence of any at a higher level. The facts found in [the Report] tend to confirm this, insofar as the selected candidate was also a candidate in the D-2 selection exercise at UNDP, and presumably found to be qualified to do so.

43. With regard to the issue of whether Respondent violated AI/2002/4, it is clear that sect. 5.6 of that instruction allows 'all candidates, including external candidates' to be considered for vacancies. Likewise, it is clear from the VA that external candidates were eligible to apply to that particular post. The 1 March Note to the Secretary-General regarding the selection process states that the selected candidate was competing as an external. Appellant challenges the selection on the grounds that it breached the Organization's rules governing grade and step. The Panel notes, however, that, under se[c]t. 5.6 of AI/2002/4,

'[t]ime-in-grade eligibility requirements formerly in use shall no longer be applicable. However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.'

The Panel therefore finds no violation of this AI.

44. There are a number of contentions raised that the Panel will deal with only in passing. With regard to Appellant's contentions initially submitted in his Statement of Appeal that Appellant and similarly situated colleagues were entitled to a meaningful inquiry into the charges that OIOS's promotion procedures, and with regard to Respondent's challenge to the receivability of this issue, the Panel considers these moot in light of the subsequent events leading to [the Report]. Likewise, the Panel finds the issue (to the degree it is an issue) of whether Appellant was eligible to apply for the post when the first VA appeared is also irrelevant, given that he was considered eligible in the second round. To the degree that any claim lingers on this, for the purposes of thoroughness the Panel notes that AI/2002/4, sect. 5.1 makes it clear that OHRM may consider granting an exception where it is 'satisfied that the period should be reduced due to the needs of service, for instance when a staff member was sent on mission detail.' Thus, discretion in this regard is a) limited to OHRM rather than OIOS and b) narrowed by the language of the provision.

45. The Panel notes that, while it finds no violations of due process and fair dealing in the instant case, OIOS could have taken greater efforts to ensure the process appeared above-board. Indeed, the tone of [the Report] seems to imply integrity issues within OIOS (e.g., in OIOS's inconsistent responsiveness to the investigator's request for documentation, which, if true, appears entirely consistent with what such an office is meant to represent), but nevertheless the investigators found no facts clearly relating to violations in the present appeal. As mentioned above, however, the Report refers to the fact that all interested parties (presumably the candidates) might well have perceived something less than transparency in the process had they been fully acquainted with the sequence of events. The Panel observes the importance of safeguarding the appearance of integrity in selection process[es]. For this purpose, it would seem that OIOS should consider forming part of the Secretary-General's mechanism for the recruitment of staff at D-2 level, although the Office's capacity for this may be an issue. At any rate, it seems clear that some form of standing mechanism should be established to ensure transparency.

Conclusions and recommendation

46. In light of the foregoing, the Panel *unanimously concluded* that Appellant's rights were not violated in the selection process for the D-2. It therefore *unanimously decided* to make no recommendation."

On 11 April 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The JAB unanimously concluded that your rights were not violated in the selection process for the D-2 and it therefore decided to make no recommendation. The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case, and is in agreement with the JAB's findings. He has therefore decided to take no further action in this case. The Secretary-General nevertheless takes note of the JAB's observations with regard to the importance of safeguarding the appearance of integrity in the selection process."

On 20 June 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in law and fact in finding that the promotion exercise observed due process and the Applicant's rights were not violated.
2. The OIOS promotion exercise was procedurally flawed and tainted by the intrusion of extraneous considerations.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to full and fair consideration. The Applicant was properly considered for promotion, and his rights were not violated by the decision not to select and promote him to the D-2 post he sought.
2. The Applicant's due process rights were fully respected during the promotion exercise. There is no evidence of irregular procedure, prejudice, or other extraneous considerations in the Administration's decision not to promote the Applicant.
3. The Applicant's pleas for monetary compensation are without merit.
4. There is no basis for the award of legal fees, costs, and disbursements.

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

- I. The Applicant requests the Tribunal to review the sufficiency of the conclusion of the JAB in its report with a view of determining if its recommendation is well founded in law and in fact. The principal questions are: whether the Applicant was fully and fairly considered for the promotion; whether the Applicant's due process rights were violated; and, whether the promotion exercise for the post of Director

of the IAD/OIOS was vitiated by irregular procedure, prejudice, or other extraneous factors instead of being in compliance with the requirements of the relevant Administrative Instructions, notably ST/AI/2004 and ST/AI/401.

II. Article 101(1) of the Charter of the United Nations provides that “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly”. In this framework the Tribunal has consistently upheld the position that “the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General”, and that “qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion”. (See Judgements No. 1209, *El-Ansary* (2004), para. II; No. 1193, *Chow* (2004), para. IV; No. 1117, *Kirudja* (2003), para. II; and No. 958, *Draz* (2001), para. II).

However, the Tribunal in Judgement No. 1117, *Kirudja* (2003), para. II, sets out the limits on that authority:

“This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not absolute; the Administration’s discretion shall be reviewed when there are allegations of abuse of discretion. (See Judgement No. 870 *Choudhury and Ramchandani* (1998)). Article 101 of the Charter and staff regulation 4.2 provide that ‘the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity’. In order to achieve this purpose, it is imperative that ‘full and fair consideration’ be given to all applicants for a post. (See Judgement No. 828, *Shamapande* (1997) para. VI.) In *Shamapande*, the Tribunal stated:

‘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.’ Full and fair consideration has previously been defined by this Tribunal as consideration that, “to some measurable degree meet[s] the criterion of ‘fullest regard’ in a reasonable manner’.”

The burden of establishing that the Administration has failed to fully and fairly consider the Applicant’s candidacy, however, does not entirely fall on the Applicant. Rather, as the Tribunal held in Judgement No. 362, *Williamson* (1986), para. VII:

“If once called seriously into 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. In the case at hand, the Respondent claims that the Applicant’s candidacy was given full and fair consideration throughout the process and that it was not interfered with by the Administration. However, the Tribunal is skeptical as to whether the Applicant received, in several respects and in several instances,

full and fair consideration of his candidacy. In other words, the Tribunal has to review whether a manager who is aware of a very promising candidate for an existing vacancy is entitled to take steps to accelerate the process that might lead to that candidate's appointment in the best interest of the Organization or whether this kind of involvement from the manager in the selection process conceals favouritism for the candidate and therefore discrimination against the others.

IV. In the instant case, the Tribunal finds that there was an irregularity in the OIOS process. Pursuant to ST/AI/2003/4:

“the Secretary-General, in consultation with the Under-Secretary-General for Internal Oversight Services, shall establish an OIOS Review Body to advise the Under-Secretary-General on the appointment, promotion and termination of all staff members up to and including the D-2 level. The OIOS Review Body shall consist of:

- (a) A chairperson and three alternate chairpersons selected by the Secretary-General on the nomination of the Under-Secretary-General for Internal Oversight Services after consultation with the staff of the Office;
- (b) A member and three alternate members selected by the staff of the Office;
- (c) A member and three alternate members nominated by the Under-Secretary-General for Management from his or her Department.”

The present case concerns the selection of a candidate for a D-2 position. It was irregular that an ad hoc panel was established and that the process as provided in the Administrative Instruction was not pursued.

V. Replying to this argument, the Respondent brings forward the staff rule 104.14 regarding central review bodies, the Secretary-General's bulletin ST/SGB/2002/6, as well as the ST/AI/2002/4, that members of review bodies providing advice on the appointment or promotion to a post, must be at the same or a higher level than the post under review. In this respect, the Respondent notes the JAB Panel's statement that “normally, panels are required to consist of staff at higher levels than those being interviewed”.

VI. It is of course possible that the selected candidate for the position of D-2 was better qualified and more suitable for the position of D-2. However, taking the aforementioned regulations into consideration and the findings of the Ackerman Report, the Tribunal notes that the ad hoc panel was comprised not only of D-2 members but there was also one member, then a retired staff member, who had been at the D-1 level when he retired. Furthermore, the Tribunal observes that by establishing an ad hoc panel, the Respondent overlooked the requirement of staff representation provided for in ST/AI/2003/4 with reference to OIOS Review Bodies.

VII. As previously held in Judgement No. 1122, *Lopes Braga* (2003), the Tribunal finds that:

“formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence to which is strictly and solely within the

power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated." (See also Judgement No. 1047, *Helke* (2002)).

VIII. As far as the other pleas are concerned, the Tribunal finds firstly that the decision to re-advertise the position falls under the discretion of the Administration and the Tribunal cannot enter into the question whether "there was need to re-advertise it in order to attract a wider pool of qualified candidates". Moreover, the re-advertisement of the position was published, as usual, and all interested candidates could apply or re-apply.

IX. The Tribunal has consistently held that the burden of proof is on the Applicant where allegations of extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al* (1998); Judgement No. 1069, *Madarshahi* (2002)). In reference to the process followed by the members of the Panel, the Tribunal finds that the Applicant has failed to prove that he was discriminated.

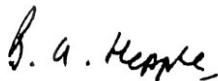
X. In view of the foregoing, the Tribunal:

1. Awards the Applicant compensation in the amount of 3 months' net base salary with regard to the violation of his rights, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected.
2. Rejects all the other pleas.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary