

Case No.: UNDT/GVA/2009/84

Judgment No.: UNDT/2010/178

Date: 14 October 2010

English

Introduction

1. In an application submitted on 13 October 2009 to the United Nations Dispute Tribunal, the Applicant requests the following:

- a. The rescission of the decision by which the United Nations High Commissioner for Refugees refused to promote her to the P-4 level for 2008;
- b.

6. Through IOM/FOM No. 022/2009 of 28 April 2009, the High Commissioner published the list of promoted staff. The Applicant was not amongst those promoted.

7. On 22 May 2009, the Applicant filed recourse before the APPB against the decision not to promote her at the 2008 session.

8. By letter dated 5 June 2009, the Applicant submitted a request to the Secretary-General for management evaluation of the High Commissioner's decision not to promote her to the P-4 level at the 2008 promotion session.

9. The APPB reviewed the Applicant's recourse at its recourse session which took place from 22 to 26 June 2009. The Applicant was not recommended for promotion.

Translated from French

candidate was promoted whereas she was not even though she had been assigned to an expert post and had 46 points;

n. According to the APPB Procedural Guidelines and the promotions methodology, she meets the criteria for promotion, i.e., she is serving on an expert post, performs at a level higher than her own, is a woman and was not promoted the previous year.

17. The Respondent's contentions are:

a. The Applicant did not request management evaluation of the High

who have not been recommended but whose status has been examined by the APPB;

f. The distribution of promotions between the groups was carried out in a transparent manner and was in line with the promotions methodology;

g. According to paragraph 9 of the promotions methodology, additional criteria such as professional competence, fluency in languages and service in D and E duty stations are only taken into consideration during the second round of analysis. Promotions were awarded to candidates in the first group and there were no promotion slots left for the candidates of the other groups. The Applicant was therefore not considered during the second round;

h. Being in charge of the management evaluation function does not create a conflict of interest for the Deputy High Commissioner. Management evaluation is a procedure by which the Organization reviews its own decisions;

i. Although there was a mistake in the calculation of the points for performance of staff members at the P-3 level, the APPB acknowledged the mistake and all affected staff members were reconsidered at the recourse session. The Applicant, who was in group 3 with 46 points at the promotion session, was granted 57 points at the recourse session but remained in the same group;

j. The APPB has discretionary power to examine the status of candidates provided it does so according to the criteria contained in its Procedural Guidelines and the promotions methodology. Groups were formed according to the promotions methodology and the review of each candidate by the APPB. It divided the candidates into five groups on the basis of the points they scored and considered that candidates were equally qualified within each group;

k. Once the groups were established, candidates were placed in alphabetical order. No ranking took place within the groups;

session which took place from 22 to 26 June 2009, the APPB did not recommend her for promotion. On 16 July 2009, the Deputy High Commissioner informed the Applicant that her request for management evaluation was rejected and, on 28 July 2009, the High Commissioner confirmed his decision not to promote her following the outcome of the recourse session.

19. The Respondent maintains that, since only the decision of the High Commissioner of 28 April 2009 was submitted for management evaluation, then only this decision can be contested before the Tribunal by virtue of art. 8.1(c) of the Statute of the Dispute Tribunal which provides that an application shall be receivable if: “An applicant has previously submitted the contested administrative decision for management evaluation, where required...”.

20. However, in his response of 16 July 2009 to the management evaluation request, the Deputy High Commissioner took into account the review of the Applicant’s professional status by the APPB at the recourse session. Hence, although the Applicant did not expressly request management evaluation of the High Commissioner’s final decision of 28 July 2009 not to grant her a promotion

22. In any event, since the legality of a decision is assessed at the date at which it is taken, circumstances such as the ones above, which are subsequent to the contested decision, shall in no way vitiate the legality of the decision to refuse promotion.

23. Moreover, it is appropriate for the Tribunal to reaffirm that, given the

High Commissioner from deciding on a specific measure for the 2008 session, thus derogating from the rule by which 1 October is the cut-off date to determine seniority and eligibility. However, the principle that similar acts require similar rules required that the amendment measure be taken in accordance with the same procedure by which the Rules and Guidelines had been enacted. In this case, the basic legal instrument governing the promotions procedure at UNHCR was introduced by the High Commissioner in 2003, after consultation of the Joint Advisory Committee. Hence, another legal text adopted by the High Commissioner upon the advice of the Joint Advisory Committee could legally modify the preceding one. It follows that there is no need to uphold the illegality

decision, i.e., the rules followed, the methodology applied by the APPB, the number of points attributed to the Applicant by application of the methodology, and the minutes of the sessions held by the APPB.

31. The Applicant holds that the methodology used during the promotion session is wrongly based on subjective criteria, disregarding other criteria such as qualifications, languages, training, and geographical distribution. However, art. 101.3 of the Charter of the United Nations provides 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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

32. In addition, regulation 4.2 of the Staff Regulations provides that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

33. The APPB Procedural Guidelines applicable to UNHCR staff, issued in 2003, provide that, after it has been determined that a staff member meets the minimum seniority requirements for promotion, recommendations from supervisors, performance appraisals and seniority will be taken into consideration. Therefore, in accordance with the above-listed provisions, the Applicant cannot claim that competence is not the main criterion in granting promotions and the assessment of staff members' competence is inevitably affected by subjectivity, which cannot be considered unlawful.

34. The Applicant asserts that the number of promotion slots for each grade level was not set in a transparent manner and that it was modified by the High Commissioner in the course of the promotions procedure. Paragraph 141 of the APPB Procedural Guidelines clearly establishes that the number of promotion slots is determined each year by the High Commissioner, based on advice from the Joint Advisory Committee. The minutes of the meeting held on 19 January 2009 show that the Joint Advisory Committee suggested to the High Commissioner a number of promotion slots per grade and that the High

Commissioner established that number by decision of 3 February 2009. Thus, it cannot be maintained that the procedure for establishing the number of promotion slots was not adhered to, nor that the High Commissioner could not, upon his own initiative, subsequently modify the number of promotions to be granted.

35. It is also maintained that the methodology used during the 2008 session is not consistent with the Procedural Guidelines as priority consideration was not given to staff members who had been appointed to a post at a higher level.

36. Paragraph 150 of the APPB Procedural Guidelines stipulates that:

The APPB will present to the High Commissioner a ranked list of nominees for promotion, subject to the availability of promotion slots at each grade level. The APPB will give first consideration to eligible candidates who have been appointed to a post at a higher level, whether or not they are currently serving on that post.

37. The methodology adopted by the APPB for the 2008 promotion session specifies that, after having divided eligible staff members into groups on the basis of the number of points obtained by each of them according to the criteria defined in the methodology, when moving staff members from one group to another, the APPB will give particular attention to “staff members appointed to a higher level post, staff members who are already serving on a higher level post and staff members on expert posts. Eligible candidates on [e]xpert posts will be considered for inclusion in groups on a case-by-case basis with the above-mentioned methodology also used with the exception of [f]unctional [d]iversity and [r]otation criteria”. It is therefore clear from the above-mentioned provisions that the APPB can move into a higher group a staff member who meets the above conditions and thus give him/her priority consideration for promotion. Therefore, there is no contradiction on this point between the Procedural Guidelines and the methodology applied in the 2008 session.

38. The Applicant argues that, during the 2008 promotion session, the APPB committed an irregularity by not taking into account the recommendation made by the APPB at its 2007 session, asking that the Board give her priority consideration at the next promotion session. The minutes of the 2008 promotion session show that the APPB had been informed of the recommendation made by the Board in 2007 and that it deliberately chose not to consider it. Although this assessment

cannot be considered irregular since the APPB cannot be bound by the opinion of the previous APPB, it should be noted that such comments, which are binding neither on the APPB nor on the Administration, are unnecessary and cause frustration for the affected staff member, in particular considering that in 2008 the APPB made the same mistakes than in 2007 in refusing to recommend the Applicant for promotion while advising DHRM to regularise her status by granting her a promotion through a parallel path, which proved impossible to carry out as acknowledged by the Respondent at the oral hearing.

39. The Applicant objects to the fact that a staff member who was granted 44 points, i.e., less than herself, after calculation by the APPB of the points to be awarded to each candidate by application of the 2008 promotions methodology, was moved from group 3 to group 1 and subsequently recommended and promoted. However, it is not up to the Tribunal to substitute its own appreciation of the merits of staff members with either that of the APPB or of the High Council.

Appli

43. Pursuant to art. 10.5 of the UNDT Statute, when the Tribunal orders the rescission of a decision concerning promotion, the judge also sets an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision. In this case, if UNHCR chooses this option, it will have to pay the Applicant the sum of CHF8,000.

44. The Applicant has asked to be compensated for the material damage resulting from the loss of the additional salary she would have received if she had been promoted to the P-4 level. However, as stated above, the Administration may choose either to carry out the judge's order to rescind the decision denying the Applicant's promotion or to pay the amount specified above. In the first case, the High Commissioner will have to take a new decision on the promotion of the Applicant who, if she is promoted, will be able to claim promotion retroactively and thus will not have suffered any material damage; however, if she is not promoted, she will not be able to claim any compensation unless she files an application before the Tribunal contesting the new decision to deny her a promotion. In the second case, should the Administration choose to pay the compensation set by the judge rather than take the action arising from the rescission order, that sum must be considered as compensation for the loss of salary due to the denial of promotion in 2008, since the Applicant will again be able to exercise her right to seek a promotion during the 2009 promotion session. Hence, in either of the two cases, her request for compensation for the salary she would have received must be rejected.

45. The Applicant has also requested compensation for the moral damage caused to her by the decision herein declared to be unlawful. This request refers to damage that cannot be deemed to be compensated by payment of the amount indicated in paragraph 43 of this judgment. However, the Applicant is not entitled to compensation for such damage unless the judge considers, as was decided by the Appeals Tribunal in its judgments dated 1 July 2010, Solanki 2010-UNAT-044 and Ardisson 2010-UNAT-052, that she would have had a real chance of being promoted if the Administration had applied the existing rules.

46. In the case in question, the Applicant firstly argues that the APPB did not consider the fact that she is serving on an expert post at the P-4 level, higher than

her own. However, the minutes of the first session show unquestionably that the APPB reviewed her status taking into account that she is an expert assigned to a P-4 level post.

47. Although she contests the number of points attributed to rotation by claiming that her assignments outside UNHCR should have been taken into account, she does not specify which rules the Administration has violated in applying to all eligible staff the same criteria to calculate the number of rotations.

48. In order to set the compensation for the moral damage suffered by the Applicant, the Tribunal shall, as recalled above, assess her chances for promotion should a regular procedure have been applied. Although the Applicant was ranked only in the third group after having received 57 points, the fact that she was

(signed)