



Case No.: UNDT/GVA/2009/93

Judgment No.: UNDT/2010/189

Date: 19 October 2010

English

Introduction

1. In an application submitted on 19 November 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 D-1 level for 2008;
 - b. To be promoted to the D-1 level with effect from 1 November 2008;
 - c. To be awarded compensation for the damage suffered.

Facts

2. The Applicant joined the United Nations High Commissioner for Refugees (“UNHCR”) in 1993.
3. Through IOM/FOM No. 010/2009 of 3 February 2009, the Director of the Division of Human Resources Management (“DHRM”) informed all UNHCR staff that the 2008 annual promotion session would be held in March 2009 and that the number of promotion slots for 2008 had been decided as follows:

P-5 to D-1: 10
P-4 to P-5: 20
P-3 to P-4: 42
P-2 to P-3: 38
Total: 110

4. By email dated 10 March 2009, the Director, DHRM, sent to all staff the promotions methodology for the 2008 session, as developed by the Appointments,

7. On 8 May 2009, the Applicant filed recourse before the APPB against the decision not to promote her at the 2008 session.

8. The APPB reviewed the Applicant's recourse at its recourse session which took place from 22 to 26 June 2009 and confirmed its first recommendation.

9. Through IOM/FOM No. 035/2009 of 28 July 2009, the High Commissioner announced the results of the recourse session. The Applicant was not amongst the staff members who were promoted after the session.

10.

- a. The decision not to promote her due to the existence of two written reprimands is a retaliatory measure and an additional sanction. This is unfair and amounts to an abuse of authority;
 - b. She is performing at the D-1 level with a special post allowance granted to her by the Administration, which was aware of the written reprimands. She is fulfilling her functions satisfactorily. Therefore, the written reprimands cannot be used to justify the decision not to promote her to the D-1 level. The High Commissioner's decision not to promote her is arbitrary;
 - c. The High Commissioner promoted two non-eligible staff members to the D-1 level whereas she was not promoted, despite having been recommended by the APPB. This demonstrates bias against her;
 - d. Her low standards of integrity are put forward by the Respondent to justify not having promoted her. However, this was not taken into consideration when it was decided that she would fulfil functions at the D-1 level, a duty that she performed efficiently;
 - e. The actions for which she received two written reprimands do not amount to misconduct according to former staff rule 11;vMMIaSFíY-YyHzInSp-Hp,YpI SY-,MvM
- re lrimands is

- a. The APPB Rules of Procedure allow the High Commissioner to decide upon appointments, postings and promotions. The APPB has merely an advisory function;
- b. The High Commissioner had the right not to follow the recommendations of the APPB and not to promote the Applicant;
- c. The High Commissioner justified his decision not to promote the Applicant due to her level of integrity. The Applicant received two written reprimands in 2007 and 2008. These reprimands constitute administrative measures issued at the end of a disciplinary process. They follow the Applicant's failure to uphold the highest standards of integrity expected of an international civil servant;
- d. The High Commissioner took his decision on the basis of the number of candidates eligible for promotion and the number of available promotion slots;
- e. The Applicant fails to substantiate her allegations of bias. The High Commissioner's decision to promote non-eligible candidates to the D-1 level is independent from the decision not to promote the Applicant.

Judgment

18. Firstly, it is appropriate for the Tribunal to reaffirm that, given the discretionary nature of promotion decisions, the control it has over the legality of those decisions is limited to assessing the regularity of the procedure followed to take the decision.

date to determine the seniority and the eligibility of staff members at the 2008 session.

20. It is therefore important to ascertain whether the High Commissioner was in a position to modify the APPB Rules of Procedure and Procedural Guidelines.

Rules of Procedure provide that it is established to advise the High Commissioner on appointments, postings and promotions of staff members. Hence, the Applicant is correct in asserting that the High Commissioner may not promote a staff member if his/her situation has not been examined previously by the APPB.

24. It is clear from the judge's review of the file, with regard to promotions to the D-1 level, that the High Commissioner promoted two non-eligible staff members who, because they were not eligible, had not been considered by the APPB. In granting promotions without such consultations, the High Commissioner committed an irregularity which vitiates necessarily the legality of the decision to deny the Applicant a promotion, since there were a limited number of promotion slots.

25. The Tribunal must therefore rescind the decision not to promote the Applicant for 2008.

26. 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 CHF10,000.

27. The Applicant has asked to be compensated for the material damage resulting from the unlawful refusal to promote her to the D-1 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

- 2) If rather than rescind the decision, UNHCR chooses to pay compensation, it shall pay the Applicant CHF10,000;
- 3) The above compensation shall include interest at five per cent per annum as from 60 days following the date on which the judgment becomes executable and until payment of the said compensation;
- 4) All other claims are rejected.

(signed)

Judge Jean-François Cousin

Dated this 19th day of October 2010

Entered in the Register on this 19th day of October 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva