



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LEX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. On 22 October 2010, the Applicant filed an application with the Dispute Tribunal contesting the decision not to select her for a P-5 level post of Chief of Section in the Inspection and Evaluation Division (“IED”), Office of Internal Oversight Services (“OIOS”), United Nations Secretariat in New York.

2. The Applicant submits, *inter alia*, that the contested selection process was carried out with procedural violations and tainted by bias against her. She seeks rescission of the contested decision and retroactive promotion to the post of Chief of Section or to a suitable P-5 level post. In the alternative, the Applicant seeks compensation for pecuniary loss (i.e., difference in pay she would have received had she been promoted to the P-5 level) as well as two years’ net base salary for loss of opportunity, moral damages, damages to professional reputation, emotional distress, and loss of career opportunities.

3. The Respondent submits that the application is without merit and that the Applicant was fully and fairly considered for the post pursuant to the existing rules. The Respondent also submits that the Applicant has incurred no demonstrable loss or damages and the Tribunal should dismiss the application.

4. By Judgment No. UNDT/2011/177, the Tribunal found the application receivable. The parties requested that this case be disposed of on the papers before the Tribunal. Pursuant to Order No. 271 (NY/2012), the Applicant filed her closing submission on 4 February 2013, and the Respondent filed his closing submission on 11 February 2013.

Facts

5. The factual findings below are based on the parties’ joint statement filed on 5 April 2012 as well as their submissions and the case record.

6. Having started her career with the Organization in 1982, the Applicant joined OIOS in 1998 at the P-4 level.

7. Her performance for the periods of April 2006 to March 2007 and April 2007 to March 2008 was rated as “fully successful”. Although the Applicant and her supervisor initiated the electronic performance appraisal system (“e-PAS”) report for the period of April 2008 to March 2009 in July 2008, substantive comments and ratings were not added to it until March and April 2010. The Applicant’s overall performance was rated as “fully successful”. The Applicant’s assessment with respect to various core values and competencies ranged from “developing” to “outstanding”. The Applicant’s supervisors included positive as well as critical comments. The critical comments concerned the Applicant’s leadership, planning, and drafting skills.

8. It is unclear why the finalization of the e-PAS report for the period of 2008 to 2009 was delayed until 2010. The Applicant did not sign the final e-PAS report and instead filed a formal rebuttal on 25 October 2010, after the filing of the present application with the Tribunal (see also paras. 21–22 and 48, below).

Selection exercise

9. On 1 July 2009, a vacancy announcement was advertised for the post of Chief of Section in IED. The Applicant applied in July 2009. On 5 August 2009, the names of 14 candidates who applied by the 30-day mark after posting of the announcement and were eligible for consideration at that mark (“30-day candidates”) were released to the Acting Director of IED. The Applicant was among the 30-day candidates.

10. On 17 November 2009, seven candidates, including the Applicant, were invited to participate in a written test. The test was graded by a panel that included IED Acting Deputy Director (the Applicant’s first reporting officer); IED Acting Director (the Applicant’s second reporting officer); and an IED Chief of Section (the

Applicant's additional supervisor). The Respondent submits that the identities of the candidates taking the written test were not known to the graders (i.e., the test was "blind-graded"). The panel kept a written record of the grading process. The Applicant nevertheless contends that her identity must have been known to them because, having worked with her since 2005, they were familiar with her writing style.

11. The Applicant received a score of 185 out of a maximum of 300 for the written exercise. The highest score was 235. Among the seven 30-day candidates, the Applicant tied for third place.

12. Six 30-day candidates, including the Applicant, were interviewed for the post. The Applicant was interviewed on 11 February 2010. The interview panel included IED Acting Deputy Director; IED Acting Director; and the Head of Evaluation, United Nations Development Fund for Women ("UNIFEM"). The panel maintained a written record of its evaluations. The Applicant received total scores of 45, 43, and 67 by the three scorers for an average overall score of 52 out of 100, which was the sixth lowest score out of the six interviewed 30-day candidates.

13. Notably, the Applicant received her highest interview score (67 points) from the IED Acting Deputy Director. The IED Acting Director gave the Applicant the second highest score (45 points), and the panel member from UNIFEM gave the Applicant the lowest score of 43 points.

14. The "overall evaluation" section of the panel's comments based on the interview with the Applicant stated (emphasis in italics is added for reasons explained in para. 44 below):

Overall evaluation:

Competencies

Professionalism The candidate has a strong background working in the UN in different agencies and roles. Until recently (2008) she had not served in an Evaluation role, though she has had some similar

experience in the conduct of inspections, management reviews and self-evaluations. Her main and only direct experience in the conduct of evaluation was her involvement in the OIOS thematic evaluation on Coordinating Bodies in 2008. **Communication** The candidate communicates well, but tended to be too detail-oriented. She has a very frank manner in addressing questions, and readily volunteers information and in a lot of detail. However, while she had adequate technical knowledge, her ability to communicate them, while keeping

assessment of evaluation capacity and needs, and various inspections and management reviews conducted with OIOS/MIS. She has strong knowledge and experience of the UN system from the years of working in different UN agencies

16. By email dated 14 April 2010, the Acting Director of IED informed the Applicant that she was not selected for the post. The Applicant submits that shortly thereafter, in April 2010, she met with the Acting Director to discuss his email.

17. The grading of the test answers of the 60-day candidates was completed on 4 May 2010 by the same panel that graded the answers of the 30-day candidates. Three of the 60-day candidates were subsequently interviewed by the same panel that interviewed the 30-day candidates. The panel members agreed that one of the 60-day candidates was suitable and should be recommended. She was subsequently selected for the post.

18. On 14 June 2010, the Applicant requested management evaluation of “[her] non-selection for the P-5 [post], Chief of Section, IED/OIOS”.

19. On 21 July 2010, the Applicant was informed by the Management Evaluation Unit, in response to her request for management evaluation, that “the decision not to select [her] for the Post was appropriate in the circumstances”.

Scope of the case

20. The Tribunal finds that the scope of the case is limited to the issue raised in the Applicant’s request for management evaluation and in her application before the Tribunal, namely, her non-selection for the P-5 level post of the Chief of Section, advertised on 1 July 2009. In her subsequent submissions before the Tribunal, the Applicant raised a number of additional claims, such as her performance evaluation for the period of April 2008 to March 2009; her subsequent rebuttal thereof; her unsuccessful participation in other selection exercises; and various alleged notes to file regarding her performance. In the view of the scope of her case as articulated in her request for management evaluation and in the application before the Tribunal, both of which specifically identify the contested decision as her non-selection to the contested P-5 level post, the Applicant’s ancillary claims fall outside

the scope of this case. However, the Tribunal, in reviewing the present case, considered the relevant factual background as articulated by the parties in their submissions and supporting documents, as well as the arguments raised.

21. The Tribunal notes that in her submissions the Applicant made a number of references to her e-PAS report for the period of April 2008 to March 2009, alleging that it reflected bias against her on the part of her supervisors, who also participated in the contested selection process. In her closing submission, the Applicant referred to the Respondent's alleged failure to finalize the rebuttal process for the e-PAS covering the period of April 2008 to March 2009. The Respondent submits that no action can be taken on the Applicant's rebuttal request as she received the overall rating of "fully successful performance", and, as stated in sec. 15.1 of ST/AI/2010/5 (Performance management and development system), "[s]taff members having received the rating of ... 'successfully meets performance expectations' cannot initiate a rebuttal". The Applicant submits, in response, that since performance evaluation period of April 2008 to March 2009 pre-dated ST/AI/2010/5, it is to be governed by ST/AI/2002/3 (Performance appraisal system), sec. 15.1 of which permitted rebuttal of the "fully successful performance" rating.

22. The issue of the finalization of her e-PAS, as well as the rebuttal proceedings initiated by the Applicant, are separate administrative decisions that are not within the scope of this case. The Applicant's management evaluation request was submitted on 14 June 2010, and the present application was filed on 22 October 2010. The Applicant sought rebuttal of her e-PAS for the period of 2008 to 2009 on 25 October 2010, after the filing of the present case with the Tribunal. Therefore, the issue of the rebuttal proceedings (and possibility thereof under ST/AI/2002/3 and ST/AI/2010/5) and the finality of the e-PAS report are not part of the present case, although the Tribunal has taken the parties' submissions and related documents into account as background information in so far as they are relevant.

Consideration

Judicial review of non-selection cases

23. The Secretary-General has broad discretion in substantive determinations of eligibility and in matters of selection and promotion, and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General (*Abbassi* 2011-UNAT-110). As the Dispute Tribunal stated in *Rolland* UNDT/2010/095 (affirmed by the Appeals Tribunal in *Rolland* 2011-UNAT-122), an assessment of candidates in a promotion exercise involves a high degree of judgment and experience which will not be replicated by a judge; it is not the Tribunal's role to determine the outcome of a promotion or appointment process. However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedures were properly followed or were carried out in an improper, irregular or otherwise fl

26. The Tribunal finds that the Administration followed the correct procedures by first considering 30-day candidates. Based on the record before the Tribunal, at the time when 60-day candidates were considered by the panel, the 30-day candidates, including the Applicant, had already been considered and deemed not suitable. Therefore, the Applicant was afforded priority consideration as a 30-day candidate under the selection framework that existed at the time.

27. Although the Applicant questions the comparative assessment of 30-day and 60-day candidates, alleging that some of the 30-day candidates were better than the 60-day candidates, the Tribunal finds that the comparison of 30-day and 60-day candidates provides no useful guidance in this case as 30-day candidates were considered and deemed not suitable prior to the consideration of the 60-day candidates.

Written test

28. With respect to the written test, the Applicant alleges that the test graders were her direct line managers who reviewed reports prepared by her “since 2005” and were “very familiar with her writing”. She states that it is “practically impossible that, in reviewing the tests on topics that were being dealt with everyday, they would not have recognized her writing”. She concludes that “scoring could have been influenced—whether consciously or unconsciously—by their preconceptions about the Applicant and her work”.

29. There is no evidence before the Tribunal that would place in doubt the Respondent’s submission, supported by the record, that the names of the candidates were not known to the test scorers at the time of the written test and therefore the Applicant could not have been prejudiced by any alleged bias. Further, there is no evidence to suggest that the Applicant’s test was graded unfairly. Notably, she tied for third place among the seven 30-day candidates who sat the test.

Criteria considered during the interview

30. The Applicant alleged that the criteria used in the selection process were not pre-approved as required by sec. 7.4 of ST/AI/2006/3, which provides that “[t]he programme manager shall evaluate [candidates] ... on the basis of criteria pre-approved by the central review body”. The Applicant further submits that the criteria for selection “appear to have been arbitrarily imposed after the results were known in order to exclude internal candidates at the 30-day mark”.

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evaluation for April 2008 to March 2009, and that the Applicant did not seek a rebuttal of her e-PAS until October 2010. There is no evidence that, in the absence of a finalized e-PAS report for April 2008 to March 2009, the interview panel did not act upon the assumption that the Applicant's performance was fully successful (notably, her performance was also marked as "fully successful" in the subsequent e-PAS report).

39. The Applicant's claim of bias during the selection process is further weakened by the fact that the external

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was downloaded from Galaxy (UN's job website) and that the evaluation report attached to the reply "had been cut off in printing and transmission".

44. The Tribunal has examined the two versions of the evaluation report produced by the Respondent. In the first version, which appears to have been printed through one type of computer interface, the last several words on the right side of each line were cut off. Furthermore, part of the assessment section ("teamwork", "accountability", "commitment to continuous learning", "managing performance", "judgement/decision-making") were missing. (The missing section appears in block quotation in para. 14 above in italics.) The version produced on 4 February 2013 contained the full text of the evaluation report. Both versions contain identical scores (including the Applicant's overall score of 52 and individual scores under various sub-categories) and, exhe mant'bility", "cbet50p.0002 T.1499 Tw[(qfa75618)4(ntt1.6(3(ere cut off.)952(

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the interview, of the extent to which she was able to demonstrate the necessary competencies at the required level. Thirdly, as explained above, the Tribunal is not persuaded that the panel's consideration of her candidacy was marred by improper considerations vitiating the process.

Conclusion

49. The Tribunal finds that the Applicant was afforded priority consideration as a 30-day candidate. The Tribunal finds that the Applicant was evaluated fairly with respect to both the written test and the interview, which was based on appropriate criteria. The Tribunal finds that the selection process was not biased against the Applicant and that consideration of her candidacy was not marred by significant errors or procedural violations that would vitiate the selection process or result in a failure to give her proper consideration.

50. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of March 2013

Entered in the Register on this 20th day of March 2013

(Signed)

Hafida Lahiouel, Registrar, New York