



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/21
Judgment No.: UNDT/2009/047
Date: 16 October 2009
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

JOSHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Sten Bornee

Counsel for respondent:
Shelly Pitterman, DHRM/UNHCR

Notice: The format of this judgment has been modified for publication purposes in accordance with article 31 of the rules of procedure of the United Nations Dispute Tribunal.

Introduction

1. In his appeal to the Joint Appeals Board (JAB), registered on 15 December 2008, the applicant requested it to recommend that the decision of the United Nations High Commissioner for Refugees refusing to promote him to a P-4 post during the 2007 annual promotion session should be rescinded.
2. In its resolution 63/253, the General Assembly decided that all cases pending before the Joint Appeals Board as at 1 July 2009 would be transferred to the United Nations Dispute Tribunal.

Applicant's submissions

3. The applicant contends that his appeal is receivable because the Joint Appeals Board granted him an extension to 15 December 2008 of the deadline for submitting it.
4. The information given to the Appointments, Promotions and Postings Board (APPB) during the first session was incorrect, because it omitted his five years with the Department of Peacekeeping Operations in category D and E duty stations. His performance from January 2004 to June 2005 was not mentioned and he was considered to be a staff member in between assignments, whereas he had been working as Senior Regional Telecommunications Officer at the P-4 level in Nairobi since 2004.
5. When he applied for a promotion in 2006, he had insufficient points and it was not taken into account that, since he was an expert, his possibilities of rotation were limited. The decision to reject his appeal did not take into consideration the fact that he performed specialized functions resulting in limited mobility or that English is the only language used in telecommunications.

Respondent's observations

6. The appeal is not receivable because the applicant received the Secretary-General's reply to his request for administrative review on 9 October 2008, but did not ask the Joint Appeals Board for an extension of the deadline until 10 November 2008.
7. The applicant joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in July 1998 and in January 2000 was promoted to the P-3 level. In UNHCR promotions are governed by the rules of procedure and Procedural Guidelines of the Appointments, Postings and Promotions Board, especially sections IV and VII thereof. The Methodological Approach was designed to create an objective and transparent mechanism as requested by the Joint Appeals Board and did not change the previous rules. Consequently, there was no need to consult the Joint Advisory Committee. The Joint Appeals Board's recommendation that the new evaluation criteria should be published one year before they came into force had not developed into a rule that the UNHCR Administration was bound to observe.
8. The applicant had received all the information he needed to appeal, and had been informed of the reasons why his appeal had failed.
9. The Staff Council's decision to withdraw its confidence in the Co-Chair of the Appointments, Postings and Promotions Board had not affected the validity of his appointment by the High Commissioner and the conflict of interest mentioned did not exist; in any case, it could not have influenced the decision not to promote him.

10. The High Commissioner may award whatever promotions he decides, provided that the performance of the people promoted is outstanding and that the decisions are taken in the best interests of the Organization and thus are not arbitrary.

11. Contrary to the applicant's assertion in the recourse session the Appointments, Postings and Promotions Board did take his five years with the Department of Peacekeeping Operations into account. If the Board had taken into account the missing performance appraisal, he would have had the same number of points. The Appointments, Postings and Promotions Board had also taken into account the fact that he had worked in a post classified at a higher level than the one he occupies. The slight mistake in the Board's minutes did not prove that an error had been made in calculating his points, and the Board had also taken into account the reason for the limited number of rotations.

12. A hearing was held on 24 September 2009 during which the applicant and the Chief of the UNHCR Legal Affairs Section, representing the High Commissioner, presented oral arguments.

Judgment

13. In his appeal to the Joint Appeals Board, registered on 15 December 2008, the applicant requested it to recommend that the High Commissioner's decision not to grant him a promotion to a P-4 post during the 2007 promotion session should be rescinded.

14. Although the applicant attached to his appeal to JAB his request for administrative review by the Secretary-General dated 21 August 2008, he did not refer to the arguments which he had used in that request. Consequently, the judge has to reply only to the arguments specifically raised in the appeal to the Joint Appeals Board and in subsequent submissions to the Board or to this Tribunal, and to the arguments presented orally at the hearing.

15. UNHCR maintains that the appeal is time-barred, because the applicant received the answer to his request for review on 9 October 2008 and did not request an extension of the deadline until 10 November 2008. However, since 10 November 2008 was a Sunday, he did meet the one-month deadline for requesting an extension of the deadline, in accordance with staff rule 111.2, and the Joint Appeals Board granted him an extension until 15 December 2008. Thus, contrary to the respondent's assertion, the appeal submitted to the Joint Appeals Board was receivable.

16. While the applicant claims that the UNHCR promotion system lacks transparency for the staff, a general argument such as this, even if correct, cannot be used before the Tribunal to obtain rescission of a decision refusing promotion, since the UNHCR Administration, firstly, informed the applicant of the Appointments, Postings and Promotions Board's reasons for refusing to recommend his promotion to the High Commissioner and, secondly, in this case has provided the judge with all the evidence he needs to rule on the merits of the application.

17. A study of the file shows that, following the applicant's appeal, the Appointments, Postings and Promotions Board considered that his situation should have been examined taking into account the periods during which he had occupied a P-4 post, and that it was appropriate to add 12 points for the weighted criteria under the Methodological Approach. Nevertheless, the Board decided not to recommend him for promotion, for the sole reason that, compared to the other staff recommended in the same category, he had had few assignments, and his knowledge of the official languages of the

United Nations and his experience in other functions were limited. Thus, the applicant's personal situation was examined taking into account the errors committed during the first promotion session. In addition, contrary to the applicant's assertions, particularly during the hearing, the Board did examine his case taking into account his situation as a telecommunications specialist.

18. While the judge must rule on the correctness of the promotion procedures and on the factual errors committed by the Administration, he cannot substitute himself for the High Commissioner to evaluate the merits of staff. Consequently, the control exercised by the judge over the appropriateness of the High Commissioner's decision is limited to an obvious error of evaluation. In this case the applicant, who limits himself to affirming that his speciality does not require him to learn a language other than English and prevents him from having numerous assignments, has not demonstrated this obvious error.

19. Accordingly, the application for rescission of the decision by which the High Commissioner refused to grant the applicant a promotion to the P-4 level during the 2007 promotion session must be rejected.

20. For these reasons, the Tribunal DECIDES:

The application is rejected.

Judge Jean-François Cousin

Dated this 16th day of October 2009

Entered in the Register this 16th day of October 2009

Víctor Rodríguez, Registrar, UNDT, Geneva