



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/067

Judgment No.: UNDT/2010/180

Date: 14 October 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

SOLANKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Amal Oummih

Counsel for respondent:
Shelly Pitterman, UNHCR

Introduction

1. In an application submitted on 8 February 2010 to the United Nations Dispute Tribunal, the Applicant requests the following:
 - a. That the Tribunal order the amendment of the promotions procedure;
 - b. To be promoted retroactively to the P-5 level for the 2008 promotion session;
 - c. To be awarded compensation for the damage suffered.

Facts

2. The Applicant has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since June 1994.

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
<u>P-2 to P-3:</u>	<u>38</u>
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, Postings and Promotions Board (hereafter referred to as “the APPB”).

5. The APPB convened from 15 to 21 March 2009 for the 2008 promotion session.

6. Through IOM/FOM No. 022/2009 of 28 April 2009, the High Commissioner published the list of staff promoted to the P-5 level. The Applicant was not amongst those promoted.

7. On 20 May 2009, the Applicant filed recourse before the APPB against the decision not to promote him 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. The Applicant was not recommended for promotion.

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. By letter dated 23 September 2009, the Applicant submitted a request to the Secretary-General for management evaluation of the High Commissioner's decision not to promote him to the P-5 level at the 2008 promotion and recourse sessions.

11. By memorandum dated 4 December 2009, the Assistant High Commissioner for Protection, on behalf of the Deputy High Commissioner, sent to the Applicant the outcome of her management evaluation, i.e., that the decision not to promote him to the P-5 level had been taken in accordance with the Organization's rules and procedures.

12. On 8 February 2010, the Applicant filed an application before the United Nations Dispute Tribunal.

13. By letter dated 8 September 2010, the Tribunal informed the parties that it intended to raise on its own motion the issue of the legality of the 2008 promotion session and requested that the Respondent provide comments in this regard. The Respondent submitted his comments on 15 September 2010.

14. On 1 October 2010, an oral hearing took place in which Counsel for the Applicant and Counsel for the Respondent participated.

Parties' contentions

15. The Applicant's contentions are:

a. The response to his request for management evaluation is late. It was not issued within the deadline provided for in staff rule 11.2(d);

b. The 2008 promotions procedure was applied in an irregular manner and was therefore prejudicial to him since he was not promoted. Out of the

26 candidates promoted, only 21 had been recommended by the APPB. The High Commissioner promoted some staff members without obtaining first the advice of the APPB. The High Commissioner arbitrarily increased the number of promotion slots without the agreement of the APPB. Three candidates with fewer points than himself were promoted;

c. His candidacy was not fully considered. His seniority, rotation history and functional diversity were not properly assessed;

d. Seniority: The Applicant has nine years above the requisite seniority for a promotion to the P-5 level. The methodology is in contradiction with paragraph 152 of the APPB Procedural Guidelines with regard to priority consideration to be given to candidates with the most seniority. He has worked for UNHCR for 15 years at the P-4 level. He should have received 10 points instead of 9 for seniority. His seniority should have been calculated since June 1994 when he joined UNHCR;

e. Functional diversity: The APPB did not consider his functional diversity. He held various responsibilities in posts at a higher grade than his own. To have granted him 1 out of 5 points is not justified;

f. Rotation: He was granted only 5 out of 7 points for rotation despite having held 10 assignments in hardship duty stations;

g. Supervisors' recommendations: The APPB minutes mention that the Applicant was recommended for promotion three times while in fact he was recommended four times;

h. The Deputy High Commissioner could not legally respond to his request for management evaluation since he is under the direct supervision of the High Commissioner.

16. The Respondent's contentions are:

a. At the 2008 promotion session, a total of 324 candidates were eligible for promotion at the P-5 level. All candidates were placed on an initial ranking list. The APPB divided them into seven groups on the basis

of the points they had scored. The Applicant was ranked 92nd having received a total of 64 points. He was placed in the third group, i.e., for candidates with 60 to 64 points. The APPB then reviewed each candidate to determine whether they were equally qualified to those in other groups. Following this review, the Applicant remained in the third group. Promotions were awarded to the candidates of the first group;

b. The delay in responding to his request for management evaluation was not prejudicial to him;

c. Twenty promotion slots were available at the P-5 level. The APPB recommended 21 candidates for promotion. In addition to those 21 recommended candidates, the High Commissioner promoted five more candidates who were all eligible and who had been reviewed by the APPB without being recommended;

d. Even though the number of promotion slots is determined upon advice of the Joint Advisory Committee, the High Commissioner has discretionary power to increase the number of promotion slots, since the Committee has an advisory function only;

e. A candidate with fewer points than the Applicant was recommended since he was deemed equally qualified to the candidates of a higher group;

f. The Applicant's candidacy was carefully examined by the APPB. The Applicant's seniority was duly taken into account and he correctly received 9 points. With regard to functional diversity, the Applicant received 1 point as he had always worked in the field of security. To calculate rotation, only assignments for a period of one year or more are taken into account. The Applicant correctly received 5 out of 7 points for rotation;

g. Management evaluation is an internal procedure by which the Administration reviews its own decisions. Within UNHCR, the Deputy

High Commissioner is responsible for the management evaluation function.

Judgment

17. Although the Applicant is entitled to contest before this Tribunal the legality of the decision not to promote him to the P-5 level for 2008, his request that the Tribunal order UNHCR to amend the procedure for granting promotions can only be rejected since the UNDT Statute does not authorise the Tribunal to substitute itself to the Administration in enacting the rules applicable to the staff.

18. The Applicant holds that the Deputy High Commissioner, to whom the management evaluation function has been delegated in UNHCR, cannot duly carry out this function since he is responsible for assessing a decision taken by his supervisor, the High Commissioner. The Tribunal can only reject this argument since the management evaluation function provided for in the Staff Rules is a procedure by which the Administration is able to correct its own mistakes if necessary and the Deputy High Commissioner, due to the delegation of this function to him by the High Commissioner, can in no way be considered in a conflict of interest.

19. 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.

20. Contrary to what is alleged by the Applicant, the fact that the Deputy High Commissioner was late in responding to his request for management evaluation could in no way have been prejudicial to him.

21. Moreover, 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 and the factual errors in the review of the staff member's career.

22. By letter dated 8 September 2010, the Tribunal informed the parties that it intended to raise on its own motion the issue of the legality of the 2008 promotion

session: indeed, contrary to paragraph 11 of the APPB Rules of Procedure and paragraphs 140 and 144 of the Procedural Guidelines, published in 2003, that provide that the annual promotion session takes place in October and that staff seniority is calculated up to that date, the High Commissioner accepted the proposal of the Joint Advisory Committee to fix 31 December 2008 as the cut-off date to determine the seniority and the eligibility of staff members at the 2008 session.

23. It is therefore important to ascertain whether the High Commissioner was in a position to modify the APPB Rules of Procedure and Procedural Guidelines. Firstly, it should be noted that under the letter from the Joint Advisory Committee, dated 27 January 2009, the decision to modify the date of October is a provisional measure that applies only to the 2008 session.

24. Regulation 8.2 of the Staff Regulations then in force provides that:

The Secretary-General shall establish joint staff-management machinery at both local and Secretariat-wide levels to advise him or her regarding personnel policies and general questions of staff welfare as provided in regulation 8.1.

25. Thus, the above-mentioned provision authorises the Joint Advisory Committee, a UNHCR body on which both the staff and the Administration are represented, to suggest to the High Commissioner any changes to the rules concerning the staff. Even though the APPB Rules of Procedure and Procedural Guidelines are the legal instruments that govern the promotions procedure at UNHCR, neither the Rules and Guidelines, nor any other legal text preclude 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

of the decision of the High Commissioner to fix 31 December 2008 as the cut-off date to determine the seniority and the eligibility of staff members.

26. The Applicant holds that the methodology applied at the 2008 promotion session is in contradiction with the Procedural Guidelines with regard to consideration of seniority. Paragraph 152 of the APPB Procedural Guidelines specifies very clearly that, in recommending staff members for promotion, the APPB shall give priority consideration to performance, before seniority. With regard to promotion to the P-5 level, paragraph 4(a) of the methodology specifies that seniority in grade is taken into account and that points are awarded on this basis. Therefore, this argument cannot be upheld.

27. Although the Applicant asserts that the High Commissioner approved promotions in an irregular manner without obtaining first the advice of the APPB, it is clear from the judge's review of the file, with regard to promotions to the P-5 level, the only grade that could affect the Applicant's situation, that the High Commissioner did not promote non-eligible staff members. The High Commissioner, who is not bound to follow the recommendations of the APPB, could promote with good reason officials who were eligible and who had been examined by the APPB without having been recommended.

28. 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.

29. The Applicant objects to the fact that several staff members, who obtained fewer points than himself after calculation by the APPB of the points to be

awarded to each candidate by application of the 2008 promotions methodology, may have been recommended by the APPB and subsequently promoted. However, it is not for the Tribunal to substitute its own appreciation of the merits of staff members with either that of the APPB or of the High Commissioner.

30. Lastly, it is alleged by the Applicant that the APPB made mistakes in the calculation of the points he should have been awarded by application of the methodology. Firstly, it is maintained that the APPB did not take into account the fact that he had been recommended by his supervisors during the past four years. However, the methodology applied specifies that only the recommendations of the past three years are taken into account, which was the case as he was attributed 9 points.

31. With regard to rotation, the APPB rightly took into consideration only the assignments for a period of one year or more, since this requirement is contained in administrative instruction ST/AI/2007/1; therefore 5 points were correctly attributed to him in this regard. Regarding functional diversity, the fact that the Applicant worked only in the field of security is not contested and he cannot seriously maintain that the mere change in his functional title implied a change in the nature of his functions. It is therefore with good reason that one point only was attributed to him in this regard.

32. With regard to the calculation of his seniority, the Applicant holds that the APPB should have taken into account the period from June 1994 to January 1995 during which he was working for UNHCR, and therefore add six months to the 14 years of seniority that were considered in his case. Assuming the allegations of the Applicant are correct, the number of points he would have received in this case would have remained unchanged, i.e., 9 points, since the methodology applied provides that only the entire year is taken into consideration.

33. Hence, the Applicant has not established that the APPB had mistakenly calculated the points allocated to him through the application of the 2008 promotions methodology.

34. It follows from the foregoing that the Applicant has not established the illegality of the decision not to promote him for 2008 and his application should therefore be rejected.

Decision

35. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 14th day of October 2010

Entered in the Register on this 14th day of October 2010

(signed)

Victor Rodríguez, Registrar, UNDT, Geneva