



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/066

Judgment No.: UNDT/2011/113

Date: 24 June 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BOUCHARDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Anne-Marie Demmer

Counsel for Respondent:
Shelly Pitterman, UNHCR
Elizabeth Brown, UNHCR

Introduction

1. The Applicant contests the decision dated 24 September 2009 by which the United Nations High Commissioner for Refugees failed to appoint him to the P-4 position of Senior Regional Local Reintegration Officer in Kyiv, Ukraine.
2. He requests compensation for the injury suffered.

Facts

3. The Applicant entered the service of the Office of the United Nations High Commissioner for Refugees ("UNHCR") in January 1996 at the P-3 level in Geneva. He was promoted to the P-4 level in 1997 and obtained an indefinite appointment in 2000. From June 2005 to June 2009, the Applicant served in the field, first in Armenia and then in Iran. Since July 2009, the Applicant has been a staff member in between assignments ("SIBA").
4. On 27 March 2009, the compendium of vacant positions was sent to all staff. On 9 April 2009, the position of Senior Regional Local Reintegration Officer, number 10014734, was advertised by IOM/FOM No. 016/2009/Add.1 in an addendum to the March 2009 compendium.
5. On 5 May 2009, the Applicant, who at that time was working in Iran, applied for the position in question. On 27 May 2009, he sent an e-mail to the UNHCR Representative in Ukraine ("the Representative") to inform her of his interest in the position.
6. The Division of Human Resources Management ("DHRM") forwarded the applications of eligible candidates, including that of the Applicant, to the Representative for their review. The Representative recommended to the Appointments, Promotions and Postings Board (APPB) the names of three candidates, but not the Applicant.
7. At its session from 29 June to 1 July 2009, the APPB considered the candidates recommended by the Representative and declined to make a

recommendation in favour of one of them on the grounds that none was at the P-4 level. The APPB requested DHRM to provide the Representative with the list of suitable SIBA candidates at the P-4 level, and decided to reconsider the vacancy at its next session.

8. DHRM prepared the list of eligible candidates, adding second tier candidates. Among the first and second tier candidates, DHRM identified two candidates as fulfilling the requirements for the position, namely the Applicant and the candidate finally selected. The Representative again considered all the applications and made two recommendations, in order of priority, which did not include the Applicant. At its session on 2 and 3 September 2009, the APPB recommended one of those two candidates for appointment by the High Commissioner.

9. By e-mail on 24 September 2009, the High Commissioner announced to all staff his decisions on appointments and postings in relation to the March 2009 compendium of vacant positions. The Applicant was not amongst those appointed. The High Commissioner appointed to the position in question the candidate recommended by the APPB.

10. Following his request addressed to the Secretary of the APPB on 20 October 2009, the Applicant received a copy of the Representative's negative opinion regarding his application.

11. On 23 October 2009, the Applicant submitted to the Assistant High Commissioner for Protection a request for a management evaluation of the High Commissioner's decision not to appoint him to the position of Senior Regional Local Reintegration Officer.

12. On 18 December 2009, the Assistant High Commissioner for Protection sent to the Applicant the outcome of her management evaluation, i.e., that the decision not to appoint him to the position in question had been taken in accordance with the Organization's rules and procedures.

13. On 3 February 2010, the Applicant filed an application before the United Nations Dispute Tribunal. On 8 March 2010, the Respondent submitted its reply to the application. On 12 May 2010, the Applicant submitted his observations.

14. On 4 May 2011, a hearing was held in the presence of the Applicant and the Counsel for the Respondent. Following the hearing, the Respondent submitted supplementary information to the Tribunal on 6 May 2011 and the Applicant responded to that information on 13 May 2011.

Parties' contentions

15. The Applicant's contentions are:

a. He met the criteria identified in the job description and his application should have been seriously considered by the Representative and the APPB members, especially during the July 2009 session of the APPB;

b. During that session, contrary to the regulations, the Representative recommended only P-3 candidates for a position at the P-4 level. She then did not include his name when the APPB asked her to submit another shortlist;

c. The second tier list of candidates was made available to the Representative when there were sufficient first tier eligible candidates. This runs counter to the memorandum sent by DHRM to all staff members on 1 December 2008, as well as with the documents requesting the APPB to be very attentive to SIBA. It is in the interests of UNHCR to give positions to SIBA as quickly as possible;

d. The response of the Assistant High Commissioner for Protection to his request for a management evaluation contradicts the summary of decisions of the High Commissioner on Appointments and Postings;

e. He was qualified for the position and the Career Management Support Section supported his application. The APPB should have

recommended him for the position in July 2009 instead of requesting the Representative to take second tier candidates into account;

f. The rule that provides that a staff member cannot be reassigned from a category H duty station to a category A duty station, unless there are no other suitable candidates, was not observed, since the successful candidate was from a category H duty station;

g. The Representative was wrong to consider that he had only technical experience, without taking into account his field and managerial experience, which was reflected in his Performance Appraisal Reports. His work in Armenia was not taken into account and his competencies were not correctly assessed;

h. The application of the successful candidate was submitted late.

16. The Respondent's contentions are:

a. The Representative recommended three candidates for the position in question and the APPB, during its session from 29 June to 1 July 2009, concluded that the recommended candidates were not suitable for the position. It requested DHRM to provide the Representative with names of suitable SIBA who were at the P-4 level and asked the Representative to consider those applications. The APPB decided to defer its consideration of candidates for the vacancy to its next session;

b. After having considered the applications again, the Representative recommended two candidates, not including the Applicant. The APPB considered the Representative's recommendations at its session on 2 and 3 September 2009 and recommended one of those candidates to the High Commissioner. That candidate was subsequently appointed to the position by the High Commissioner;

c. The second tier list of candidates was released only after the vacancy had already been considered once by the APPB and no candidate from the initial list had been deemed suitable for the position. The second

tier candidates were considered under the same conditions as if the APPB had held a special postings session;

d. Contrary to what is maintained by the Applicant, managers are not required to give priority to candidates at the level of the vacant position. According to paragraph 11 of IOM/FOM No. 40/2006, managers are required only to give them a certain amount of priority consideration and the Representative could therefore recommend only P-3 candidates if she considered that they were more suitable for the position;

e. Neither the Representative nor the APPB were unaware that the Applicant was a SIBA but that did not give him absolute priority. The successful candidate was also a SIBA;

f. The successful candidate was included in the second tier list of candidates because he did not fulfil the rotation requirement. However, he was recommended by the APPB since he was the most suitable candidate for the position;

g. The Representative had the discretion to freely give her opinion on the Applicant's candidacy and she did not commit an error in her assessment of the Applicant's experience and skills;

h. While the Applicant points out that the Representative's judgement had already been criticized in a Joint Appeals Board case, that does not relate to the case at hand.

Consideration

17. The Applicant, in order to contest the decision by which the United Nations High Commissioner for Refugees failed to appoint him to the position of Senior Regional Local Reintegration Officer in Ukraine, contends that the UNHCR Representative committed an error in failing to recommend him for the said position.

18. According to paragraph 24 of the APPB Procedural Guidelines, of which there is no official translation in French:

(a) Staff members submit their applications to the APPB Secretariat, DHRM within three weeks of publication of the Compendium/Addendum.

...

(c) Managers submit their recommendations to the APPB Secretariat (through the Director concerned for P-4 posts and above) within four weeks of receipt of the list of candidates.

19. The facts as set forth above show that the Representative, who performed the role of manager within the meaning of the provisions cited above, initially failed to recommend the Applicant for the position in question and recommended three other staff members. However, the APPB, having decided at its session from 29 June to 1 July 2009 not to recommend any of the candidates proposed by the Representative, resolved that the vacancy would be considered at its next session.

20. Although DHRM again informed the Representative that it considered the Applicant to meet all the requirements for the position, the Representative again refused to recommend him, and recommended two other candidates, including the one who was eventually appointed to the position.

21. While it follows from the APPB Procedural Guidelines, on the one hand, that the APPB may recommend to the High Commissioner the appointment of an eligible candidate not recommended by the manager and, on the other hand, that the High Commissioner, in accordance with his discretionary power, is not bound to follow the recommendation of the APPB and may appoint a staff member to the position provided that he or she is eligible and that his or her application has been considered by the APPB, it is clear that the Representative's refusal to recommend the Applicant is the main reason why he was not appointed.

22. The Tribunal has only minimum oversight authority in respect of a manager's assessment of the candidacy of a staff member who will report to him or her. It is not for the Tribunal to substitute its own assessment for that of the Administration.

23. In the case under consideration, the Tribunal can therefore only verify that the Representative did not commit a factual error or an obvious error of judgment with regard to the Applicant's experience and professional skills. The Applicant contends that the Representative committed errors in the evaluation of his candidacy in the negative recommendation that she made, which was sent to him by e-mail on 20 October 2009. The Representative considered that candidates such as the Applicant, who had prior exposure only to one or two areas of work, were insufficiently qualified. She then stated that, while he was an expert in geographic information systems, his field experience dated only from June 2005. She also indicated that the Applicant's PARs left doubts about his managerial and team-working competencies. While the Applicant is entitled to maintain that, contrary to what the Representative understood, he had in fact worked in three different field duty stations, it appears to the Tribunal from the Representative's assessment as a whole that the main grounds for her refusal to recommend the Applicant were his limited experience in the field and her doubts about his managerial and team-working competencies. For that reason, the few inaccuracies in the Representative's assessment of the Applicant's situation were not the decisive reason for her negative recommendation.

24. To contest the legality of the decision not to appoint him to the position in question, the Applicant held, particularly at the hearing, that the successful candidate had submitted his application late. It is not contested by the Administration that the staff member who obtained the position in question had not submitted his application by the closing date of 5 May 2009, as specified in IOM/FOM No. 016/2009/Add.1.

25. However, based on the documents in the file, it is clear that the APPB, at its session from 29 June to 1 July 2009, did not recommend any candidates for the position and asked DHRM to send to the Representative the list of SIBA who were likely to be suitable for the position and whose situation would be reviewed at the next session of the APPB, in accordance with paragraph 3 of IOM/070/FOM/072/2008/corr.1, entitled "Policy and transitional measures to identify suitable assignments for staff members in the International Professional category in-between assignments and the consequences of refusal", of which there

is no official translation in French. The above-mentioned IOM/FOM provides as follows:

3. Measures to identify a suitable assignment

The Appointments, Postings and Promotions Board (APPB), working with DHRM and in consultations with managers, has the authority to identify suitable vacant positions, consult staff members on such positions and recommend staff members' appointments to said positions to the High Commissioner. The APPB can propose three suitable positions to a SIBA, provided that the positions in question have been determined as being suitable. The staff member has 15 working days ... to inform the APPB ... of either his/her agreement or refusal to the suggested position. The response of the staff member will be reviewed by the APPB. In case of a negative response, if the APPB accepts the staff member's response, then it will not be counted as an offer. If the APPB decides to proceed with the offer, this recommendation will be included in the relevant Minutes and sent to the High Commissioner for approval...

26. Thus, contrary to what is maintained by the Applicant, it was proper for the APPB to consider the application of the successful candidate when he submitted it between the two sessions of the APPB, after he had been sought by DHRM for the position in question.

27. It follows from the foregoing that the Applicant has not established the illegality of the decision not to appoint him to the position in question and his application should therefore be rejected.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 24th day of June 2011

Entered in the Register on this 24th day of June 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva