



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/091

Judgment No.: UNDT/2012/164

Date: 5 November 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ANDERSSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. By his application submitted to the United Nations Dispute Tribunal on 26 December 2011, the Applicant requests the following:

- a. Rescission of the decision of the United Nations High Commissioner for Refugees (“High Commissioner”) not to promote him to the P-3 level during the 2009 annual promotions session;
- b. To be compensated for material and moral damage suffered.

Facts

2. The Applicant joined the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in November 2002, at the P-2 level, on a fixed-term contract, which was extended several times until November 2005. In February 2006, the Applicant was again recruited by UNHCR and has served, since then, on a fixed-term contract at the P-2 level.

3. By inter-office memorandum IOM/FOM/075/2003, dated 3 November 2003, UNHCR promulgated the Rules of Procedure and Procedural Guidelines of the Appointments, Postings and Promotion Board (“APPB”).

4. By inter-office memorandum IOM/FOM/043/2010, dated 16 July 2010, UNHCR transmitted to its entire staff the promotions methodology applicable to the 2009 annual promotions session as established by the APPB. It also informed all UNHCR staff that the number of promotion slots for 2009 had been decided as follows:

P-5 to D-1:	10
P-4 to D-5:	10
P-3 to P-4:	40
<u>P-2 to P-3:</u>	<u>35</u>
Total:	95

5. By inter-office memorandum IOM/FOM/068/2010 of 29 October 2010, the Director of the Division of Human Resources Management (“DHRM”) informed all UNHCR staff that the 2009 annual promotions session would be held at the end of November 2010.
6. The APPB convened from 23 November 2010 to 2 December 2010.
7. By inter-office memorandum IOM/013-FOM/014/2011 of 1 March 2011, the High Commissioner published the list of promoted staff. The Applicant was not among those promoted.
8. On 14 March 2011, the Applicant introduced a recourse before the APPB against the decision not to promote him at the 2009 annual promotions session.
9. The APPB reviewed the Applicant’s request at its recourse session held from 16 to 19 May 2011. It found that there was no additional or new element allowing finding the recourse receivable. The Applicant was consequently not recommended for promotion.
10. By inter-office memorandum IOM/046-FOM/047/2011 of 25 July 2011, the High Commissioner announced the results of the recourse session. The Applicant was not among the promoted staff members following the session.
11. On 3 August 2011, the Applicant received by email a copy of the minutes of the APPB deliberations regarding his recourse.
12. On 26 August 2011, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the High Commissioner’s decision not to promote him to the P-3 level at the 2009 annual promotions session.
13. By email of 5 October 2011, the Applicant was informed that it would not be possible to respond to his request for management evaluation within the mandatory time limit.

14. The Applicant filed his application with this Tribunal on 26 December 2011.

15. By Order No. 224 (GVA/2011) of 28 December 2011, the Tribunal granted the Applicant additional time, until 30 January 2012, to complete his application. By Order No. 24 (GVA/2012) of 30 January 2012, the Tribunal granted the Applicant a further extension until 29 February 2012.

16. By memorandum dated 13 February 2012, the Deputy High Commissioner responded to the Applicant's request for management evaluation by confirming that the decision not to promote him to the P-3 level had been taken in accordance with the Organization's rules and procedures.

17. The Applicant completed his application on 29 February 2012. The Respondent submitted his reply on 2 April 2012.

18. By Order No. 135 (GVA/2012) of 27 August 2012, the Tribunal requested the Respondent to produce the following documents:

- a. The minutes of the APPB deliberations relating to the 2009 annual promotions session;
- b. The list of candidates considered by the APPB during the session showing the ranking of eligible candidates, including the number of points allocated to each criterion (especially performance appraisal reports, manager's recommendations, seniority in grade, etc.);
- c. The list of candidates (matrix) as divided in groups that was considered by the APPB in the second round of analysis;
- d. The list of candidates considered by the APPB at its recourse session including the APPB recommendations.

19. On 4 September 2012, the Respondent submitted to the Tribunal the documents that had been requested on a confidentiality basis.

20. By Order No. 141 (GVA/2012) of 14 September 2012, the Tribunal transmitted to the Applicant those documents produced by the Respondent that were relevant to him, in a redacted form, so as to protect the personal information pertaining to other candidates.

21. On 3 October 2012, a hearing took place in which the Applicant participated by telephone conference, and in the presence of his Counsel as well as the Respondent's counsel.

22. On 8 October 2012, following a request made by the Tribunal during the hearing, the Respondent submitted additional information, via the Tribunal's eFiling portal, which was communicated to the Applicant.

Parties' submissions

23. The Applicant's contentions are:

a. The decision to move him on grounds of his performance from group 1 to group 2 in the second round of analysis is not in conformity with the rules and procedures of the Organization as promulgated in the inter-office memoranda IOM/FOM/043/2010 and IOM/FOM/068/2010. The performance of a candidate is not one of the criteria specified in paragraph 12 of annex 1 to memorandum IOM/FOM/043/2010 that the APPB can take into account in the second round when considering whether to move a candidate from one group to another;

b. Moreover, the procedures promulgated in IOM/FOM/043/2010 and IOM/FOM/068/2010 do not allow for a candidate to be moved to a lower group in the second or third round of analysis;

c. His managerial experience, exceptional achievements and rotation record have not been taken into consideration. He will therefore never be promoted in the future.

d. Given the outcome of the management evaluation, which acknowledged that his performance score had been miscalculated, it was incumbent on the Deputy High Commissioner to refer the matter back to the APPB;

e. In making its recommendation, the APPB relied on performance ratings that did not reflect the true nature of his performance.

24. The Respondent's contentions are:

a. The importance which the Staff Regulations and the UNHCR promotions methodology attach to performance in the context of a promotion exercise justifies an exceptional move of a candidate from one group to another during the second round of analysis;

b. Although the promotions methodology does not specifically provide for the possibility of moving a candidate from one group to another during the third round of analysis, it is incumbent on the APPB, in line with paragraph 15 of that methodology, to consider each candidate in detail, including on the basis of their performance appraisals. Moreover, moving the Applicant from group 2 to group 3 had no impact on the decision not to recommend him for promotion;

c. The most recent performance appraisal must be included at each annual promotions session. Contrary to what the Applicant asserts, it is possible that he may be promoted in the future;

d. In its Judgment *Bofill* 2011-UNAT-174, the Appeals Tribunal noted that where an irregularity has no impact on a staff member's chances for promotion, he or she is not entitled to rescission or compensation. In this instance, even with a higher performance score, the Applicant's chances of being promoted were small;

e. The Applicant's objections concerning his performance ratings should have been addressed through the appropriate recourse mechanisms.

Consideration

25. The Applicant contests the decision of the High Commissioner not to promote him to the P-3 level at the 2009 annual promotions session. With respect to promotions, and given the broad discretion of the High Commissioner in granting promotions, the Tribunal confines itself to examining whether the procedure established by the rules and regulations has been followed, whether a material error has not been committed and, finally, whether the High Commissioner has not committed an obvious error in the assessment of a staff member's status.

26. The Applicant contends that the APPB, in deciding not to recommend him, did not comply with the procedure promulgated by IOM/FOM/043/2010 of 16 July 2010.

27. He claims in particular that, since his total performance score ranked him ninth among eligible staff members and therefore qualified him for inclusion in group 1, the applicable texts did not allow the APPB to move him to group 2 and then to group 3 and that, moreover, to move a candidate between groups, the APPB could not rely on performance alone, as was evidently the case according to the minutes of its first session.

28. IOM/FOM/043/2010, which has not been translated into French, stipulates that:

8. The methodology will be based on several rounds of analysis using the criteria described below:

a) The first round will assess all eligible candidates against the criteria using the methodology described below. On the basis of this assessment, the [Board] will rank the candidates.

b) The [Board] will then divide the candidates per grade into groups and examine which candidates are substantially equally qualified, adjusting the groups as necessary.

c) The third round will distribute the slots for recommendation to the groups starting from top. If all the members of a group cannot be promoted due to the limited number of slots, the [Board]

will assess candidates' profiles in detail and fully document its analysis. ...

The Second Round of Analysis

12. The [Board] will then look at the overall result of the grouping and exceptionally move candidates from one group to another if, when taking into consideration the Managerial Experience, Exceptional Achievements, Languages, and Rotation History, it considers that the overall qualifications of a staff member show that he/she is substantially equally qualified to candidates to another group. The rationale for moving candidates into different groups will be fully documented in the minutes. Particular attention will be given to staff members appointed to a higher level post, staff members who are already serving on a higher level post and staff members on expert posts ...

29. First, contrary to what the Applicant contends, nothing in the afore-mentioned memorandum prohibits the APPB from moving a staff member from group 1 to the lower groups.

30. Secondly, the above-referenced memorandum provides that the transfer of a candidate from one group to another will occur only exceptionally and specifies exactly what criteria the APPB may rely on. The criteria, which are set out in very clear terms, are as follows: "Managerial Experience, Exceptional Achievements, Languages, Diversity in Performance Appraisals and Rotation History". The memorandum then defines what is meant by those terms.

31. Evaluation of overall performance is not included among those criteria, and the Applicant is entitled to maintain that the decision to place him in another group was made on the basis of a criterion other than those which can be used in the second round of analysis.

32. The Respondent legitimately contends that the memorandum as a whole makes it clear that performance is the key element to be taken into account by the APPB in arriving at its recommendations for promotion. However, the Administration must observe the rules which it itself has established. Accordingly, where the Administration has specified precise criteria which must be used in determining which staff members to recommend, it must strictly follow them, which has not been done in this case. Since the memorandum stipulates that only certain criteria could be used when, exceptionally, moving a candidate to another group, the APPB committed an irregularity by taking into consideration the Applicant's performance.

33. The Appeals Tribunal in its Judgments *Vangelova* 2011-UNAT-172, *Bofill* 2011-UNAT-174 and *Dualeh* 2011-UNAT-175 found that the circumstance of finding that the UNHCR promotions procedure had been flawed by an irregularity was not sufficient reason for the Dispute Tribunal to rescind a decision on non-promotion, and that the Dispute Tribunal should determine instead whether, in the absence of the irregularity committed, the Applicant had a significant chance of receiving a promotion.

34. In the present case, the Tribunal cannot but observe that moving a candidate to another group should be an exceptional occurrence and there is no reason to suppose that the Applicant would have been transferred to another group if the APPB had applied the sole criteria specified in the memorandum. The Tribunal therefore considers that if the APPB had followed the relevant procedure the Applicant would have had every chance of remaining in group 1. Since it is clear from paragraph 12 of the minutes of the 2009 annual promotions session that all the candidates in group 1, with a single exception, were recommended for promotion and that the High Commissioner promoted all the candidates recommended by the APPB, the Applicant would have had very high chances of being promoted if the applicable texts had been followed. The decision not to promote the Applicant should consequently be rescinded.

35. Under article 10.5 of the Statute of the Tribunal, the Judge shall, when ordering the rescission of a decision concerning promotion, set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision. In the present case, if UNHCR chooses this option, it should pay the Applicant CHF10,000.

36. The Applicant has requested compensation for the material harm resulting from the unlawful decision not to promote him to the P-3 level. However, the Administration, as stated previously, has the option of either implementing the Judge's decision to rescind the non-promotion decision or paying the amount specified above. In the former case, the High Commissioner will again have to make a decision on the Applicant's promotion. If the Applicant receives a promotion, it will be retroactive and he will not have suffered any material damage; if he is not promoted, he will not be able to claim any compensation unless he contests the new non-promotion decision before the Tribunal. In the latter case of the Administration electing to pay the amount set by the Judge instead of facing the consequences of rescission, that amount should be regarded as compensation for the remuneration lost as a consequence of the non-promotion in 2009, given that the Applicant will be able to assert his right to a promotion again, during the 2010 annual promotions session. Accordingly, in any event, his request to be compensated for the remuneration he should have received has to be rejected.

37. The Applicant also requested compensation for moral damage suffered as a result of the decision earlier herein declared unlawful. This request relates to the reparation of an injury which cannot be regarded as covered by the payment of the amount specified in paragraph 35 of the present Judgment. Given the circumstances of this case and the very significant chance he had of being promoted at the 2009 annual promotions session, the Applicant should be awarded compensation in the amount of CHF4,000 for moral damage.

Conclusion

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

- a. The High Commissioner's decision not to promote the Applicant to the P-3 level during the 2009 annual promotions session is rescinded;
- b. If, rather than implementing the decision to rescind the non-promotion, UNHCR chooses to pay compensation, it shall pay the Applicant CHF10,000;
- c. UNHCR is ordered to pay the Applicant CHF4,000 for moral damage;
- d. The above compensation shall include interest at the US Prime Rate as from the date on which this Judgment becomes executable until the date of payment. An additional five per cent shall be added to the US Prime Rate as from 60 days following the date on which this Judgment becomes executable and until payment of the said compensation;
- e. All other claims are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 5th day of November 2012

Entered in the Register on this 5th day of November 2012

(Signed)

René M. Vargas M., Registrar, Geneva
