



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/036

Judgment No.: UNDT/2013/104

Date: 16 August 2013

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AWAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Officer with the Security and Safety Service (“SSS”) of the Department of Safety and Security (“DSS”) in New York, contests the decision not to select him for an S-4 level position. He seeks financial compensation as well as placement on the roster for S-4 positions and placement on a special post allowance at the S-4 level. The Respondent submits that the application is without merit as the relevant selection rules were properly followed.

2. On 24 April 2013, the Tribunal rendered Judgment No. UNDT/2013/071, finding the application receivable and stating that further directions would be issued as to the future conduct of the matter. On the same day, the Tribunal issued Order No. 106 (NY/2013), directing the parties to attend a hearing on the merits on 15 May 2013. However, at the request of the parties the hearing was rescheduled for 22–23 July 2013.

3. Prior to the hearing on the merits the Applicant indicated his intention to call the following witnesses:

- a. Mr. TK, Security Officer;
- b. Mr. LD, Security Officer;
- c. Mr. KG, Security Officer.

4. At the hearing the Applicant confirmed that he would not be calling Mr. LD. Mr. TK was unavailable to testify in person and did so by telephone.

5. The Respondent called the following two witnesses:

- a. Mr. CS, former Executive Officer, DSS;
- b. Mr. MB, Deputy Chief, SSS.

6. Prior to the hearing, the Respondent objected to all of the Applicant's witnesses being called, stating that calling all four witnesses would be "repetitious" and would not "serve to fairly and expeditiously dispose of the case". The Respondent requested that the Tribunal limit the number of witnesses to "no more than two". The Tribunal recalled para. 8 of *Awad* UNDT/2013/071 regarding the need to have oral hearings particularly where there are disputed issues of fact. Furthermore, in accordance with art. 9 of the Tribunal's Statute, the Tribunal shall decide whether the personal appearance of the Applicant or any other person is required at oral proceedings. The Tribunal therefore directed that the Applicant be permitted to present his case and place all relevant and admissible facts before the Tribunal, any objections as to admissibility being taken at the time the evidence was being tendered. Furthermore, the Tribunal directed that Counsel would undertake, and the Tribunal would ensure, that there was no abuse of proceedings.

7. At the conclusion of the hearing the parties were granted leave to file closing submissions by 26 July 2013, which were duly filed.

Scope of the case

8. As the Tribunal established in *Awad* UNDT/2013/071, the scope of the case is limited to the issue raised in the Applicant's request for management evaluation and in his application before the Tribunal, namely, his non-selection for the S-4 level post advertised on 3 November 2010. At the commencement of the substantive hearing, I therefore highlighted the previous findings and directed further that all references to other selection exercises, including those to which the Applicant applied during the period of 2004 to 2008, would constitute background material insofar as they are relevant.

Facts

9. A generic vacancy announcement for S-4 level posts of Security Sergeant was issued on 3 November 2010, listing five competencies: "professionalism",

“communication”, “teamwork”, “leadership”, and “judgement/decision-making”.

The job opening also stated:

Assessment Method

A written assessment test will be administered to eligible applicants and a competency-based interview conducted [with] short-listed candidates.

10. By an internal SSS administrative bulletin circulated on 4 November 2010, the staff members of SSS were informed that candidates “[would] be evaluated based upon a completed application (including meeting the required education and work experience), performance record, a written assessment test, and a competency-based interview”. The bulletin further listed a number of mandatory requirements, including various training courses, licences and permits. The Applicant testified that, at the time of the events, he was aware of and received the internal administrative bulletins issued by SSS.

11. Thirty-six staff members applied for the vacancy announcement. The SSS management conducted a preliminary evaluation of all candidates, including the Applicant, which included review of applications, personal history profiles, and performance evaluation reports. Thirty staff members, including the Applicant, were determined to be eligible for further consideration.

12. On 19 March 2011, SSS management advised all eligible candidates, through another SSS bulletin, to avail themselves of a copy of the Written Assessment Guidelines and the Assessment Workbook that could be used to assist candidates in preparing for the written assessment. These materials contained detailed descriptions of all the elements and steps of the promotion exercise, as well as the Standard Operation Procedures for answering questions on the written test.

13. Six of the thirty-six candidates did not meet qualification criteria and were found ineligible. A written assessment was held for 30 eligible candidates, including the Applicant, on 16 April 2011. Twenty-three candidates, including the Applicant,

passed the test and seven failed. The Applicant was notified on 20 May 2011 that he had successfully taken the test, having scored 77.5 per cent.

14. Mr. CS testified that, following extensive discussions during the preparation for the promotion exercise, management of SSS decided that all 30 candidates who took the written test, including those who failed it, would be invited for interviews. The interviews were held in June and July 2011.

15. On 15 June 2011, the Applicant was invited to participate in a competency-based interview to be held the following day. The email invitation requested the Applicant to “confirm [his] attendance by replying to this email”. The Applicant confirmed his attendance and was interviewed on 16 June 2011. The Applicant’s witness, Mr. KG, confirmed that he received more than one day’s notice, and from the general tenor of all the evidence, it is clear that no set notice period was applied consistently, and not all interviewees received the same notice period. The Applicant testified that he did not ask for a change in date or time as he was not aware at the time that normally a five-day notice was to be given for interviews.

16. Upon completion of the interview process, the interview panel prepared a report, which was signed by all members of the panel on 10 October 2011 and in which the panel included its scores and comments regarding the suitability of the Applicant. The Applicant was marked as “meets the competency” (4 points) with respect to the competencies of “professionalism” and “leadership”. He was marked as “fully meets the competency” (5 points) with respect to the competency of “judgment/decision-making”. However, he received the mark of “does not meet the competency” (3 points) with respect to the competencies of “teamwork” and “communication”. In relation to these last two competencies, the panel made the following comments in its report:

Professionalism – 4 [points]

...

Leadership – 4 [points]

...

Judgment/Decision-making – 5 [points]

...

Teamwork – 3 [points]

[Panel member 1] – 3 [points]

[Panel member 2] – 3 [points]

[Panel member 3] – 3 [points]

[Panel member 4] – 3 [points]

... Although [the Applicant] mentioned soliciting feedback from his team, he was unable to provide any specific examples. When asked about resolving conflict within the team, he was unable to explain how he accomplished this. In addition, he did not provide any specific ways in which he assisted team members and helped the team work in a collaborative manner. Does not meet the competency.

Communication – 3.1 [points]

[Panel member 1] – 3.5 [points]

[Panel member 2] – 3 [points]

[Panel member 3] – 3 [points]

[Panel member 4] – 3 [points]

The candidate gave an example of creating a PowerPoint presentation. However, he did not fully answer the question regarding communicating operational information. When asked how he communicates with non-English speakers, he tended to rely on DSS to provide interpreters. Throughout the interview, the candidate did not listen closely to questions posed by the assessment panel. In addition, he spoke quickly and often mumbled. Does not meet the competency.

17. The Applicant received a total score of 19.1 points for his interview out of a maximum of 35. As the Applicant was found not meeting two of the required competencies, he was found not suitable for the position.

18. Of all the interviewed candidates, five were found suitable and recommended for selection by memorandum dated 27 October 2011. The interview scores for the five recommended candidates were 21.1, 22.2, 22.4, 22.6, and 27.4 out of 35.

The final selection recommendation was approved by the Central Review Committee (“CRC”) on 17 November 2011. Four of the nine advertised posts remained unfilled.

19. The Applicant was informed of the decision not to select him on 1 December 2011. He then met with Mr. MB, Deputy Chief of SSS, on 15 December 2011, to receive feedback on his candidacy. Mr. MB testified that, although the Office of Human Resources Management (“OHRM”) had advised SSS management that such meeting was not obligatory, he met with approximately 17 candidates, including the Applicant, to provide feedback on their interviews as a “positive initiative”.

20. The Applicant requested management evaluation of the contested decision on 13 January 2012 and received a response to it on 13 February 2012.

Consideration

Judicial review of non-selection cases

21. 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). 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 flawed manner, as well as assess whether the candidate was given full and fair consideration or whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Abbassi, Charles* 2012-UNAT-242).

22. Full and fair consideration means that the persons evaluating the Applicant’s qualifications assess them rationally, fairly, and reasonably, taking into account and appropriately weighing up all relevant matters free of improper and irrelevant considerations and based upon relevant information and considerations (*Sefraoui* UNDT/2009/095).

Consideration of the Applicant's candidacy

Written test

23. The Applicant conceded at the hearing that he had no contentions with respect to the written test component of the selection process, so this matter is not in issue.

Interview notice

24. The Applicant submits that he received less than 24-hour notice of his interview, whereas the Instructional Manual for Hiring Managers (“Hiring Manual for Managers”), requires advance notice of “at least five working days”, and thus he was unable to adequately prepare for the interview.

25. It is common cause and a matter of record that the notices for the interviews requested that candidates confirm their availability for the scheduled time. Mr. MB testified that had the Applicant requested a rescheduling, he would have been facilitated as such requests were routinely made and granted during the promotion exercise. He further testified that, during the interview process, he as the chair of the panel greeted each interviewed staff member at the door, ensured they were comfortable during the interview, and, immediately prior to commencing it asked whether the staff member was ready to proceed. He recalled no objections or complaints from the Applicant. This evidence was not rebutted by the Applicant.

26. The Respondent submits that the Hiring Manual for Managers relied on by the Applicant is an internal guide for managers, not candidates, and is not a mandatory document creating rights and obligations or establishing any rules. The Respondent further submits that parts of the Hiring Manual for Managers provide that candidates convoked for interview “are *normally* notified at least five working days in advance” (emphasis added), whilst the provision of “at least five working days” relates to the notice for the assessors or panel members.

27. It is unclear whether the Hiring Manual for Managers may be properly relied on as providing a firm notice period for interviews. The Tribunal notes that, while some provisions refer to the notice period of “at least five working days”, it appears that other provisions state that the notice should “normally” be no less than five working days, which would indicate a certain degree of discretion. However, even if the Hiring Manual is an internal guide for managers, one must ask what purpose it serves. Surely it is to enable best practices on the part of management to ensure the equal and consistent application of any requirements or recommendations contained therein. A day’s notice period is quite distinct from a five-day notice period for preparation for an interview. In any selection or promotion exercise, management should always seek to ensure that best practices are adhered to and any requirements or recommendations are applied equally to all candidates.

28. Nevertheless, in this instance, the Applicant confirmed his attendance by replying to the email invitation for the interview. Albeit the interview notice received by the Applicant may have been shorter than that received by some of the other candidates and certainly less than five days, the Applicant in his written submission conceded that he “had diligently prepared for the interview following the OHRM guide on ‘Effective Job Interviewing Performance’ and practiced [his] answers with colleagues who had served on interview panels in other departments” (see para. 8 of the Applicant’s application). Moreover, the short notice did not appear to affect the Applicant’s preparedness for the three competencies that he did pass. Furthermore, the Applicant raised no objection as to his preparedness either prior to or on arrival for the interview. The Tribunal therefore finds that the one-day notice, which the Applicant accepted without objection, did not vitiate the interview process such as to render it unlawful.

Duration of the interview

29. In his oral evidence, the Applicant raised an entirely new matter, not traversed at management evaluation or in his application before the Tribunal, regarding the allotted time spent on his competency interview. The Applicant

testified that, although the interview was supposed to commence at 10:00 a.m. and end at 10:45 a.m., it started at 10:30 a.m. and ended at 11:00 a.m., thus he was denied full and fair consideration.

30. Mr. MB testified that during the period of June–July, he may have participated in more than 60 selection panel exercises for the S-4, S-5 and S-6 posts, but he had no recollection of the Applicant’s interview starting late, and even if the interview were delayed it would have been due to the earlier interview running overtime. He said as chair he would have ensured the panel made up for the lost time if they overran. He testified that, at the outset of each interview, he asked each candidate, including the Applicant, whether they were ready to start. The Applicant did not object either at the commencement or conclusion of the interview, or at any time thereafter that he had been allotted insufficient time for the interview.

31. The Tribunal finds that, even taking the Applicant’s claim at its highest, i.e., that the interview commenced late and lasted 30 minutes instead of 45 minutes, there is no evidence of any protest being made by the Applicant in this regard until the hearing, and that this is, in and of itself, insufficient evidence that the panel’s findings regarding his suitability were flawed. Furthermore, the evidence of the Respondent’s witness Mr. MB was not challenged by the Applicant’s Counsel in many material particulars, including this one.

Preparation material

32. The Applicant submits that he was found not meeting the competencies of teamwork and communication because he “lacked the time to prepare” and “lacked the relevant documents necessary for his preparation”. He alleges that the Administration was required to provide him with “study material” for the interview, although the Applicant did not articulate in his written submissions or at the hearing which *particular* material was not available to him. The Applicant refers to the Hiring Manual for Managers, which states:

- a. Nature of each assessment – indicates the method that will be used such as interviews and simulation exercises, with an indication of the number of questions;
- b. Duration of each assessment – indicates the expected duration of the whole exercise and request that each assessor set aside the adequate timeframe;
- c. Location of the assessment – indicates the location where the assessment will take place, and
- d. Scoring/ratings to be used – indicates how the applicants will be scored.

33. The job opening circulated on 3 November 2010 stated that “[a] written assessment test will be administered to eligible applicants and a competency-based interview conducted [with] short-listed candidates”. Therefore, when the Applicant was notified on 20 May 2011 that his test was successful, it was apparent that the next step in the selection process would be a competency-based interview. The five core competencies that would be covered during the interview and the specific job responsibilities were known to the Applicant since the date on which the job opening was first posted (3 November 2010).

34. On the evidence before it, the Tribunal finds that the Applicant was aware since November 2010 that he would have to participate in an interview as part of the selection process, reiterated in several subsequent administrative bulletins of SSS. The information regarding the nature of the interview and the competencies to be covered was also provided, including in the job opening.

35. The Tribunal finds that the Applicant was notified prior to the interview of the method of assessment (i.e., interview), its location, and approximate duration. It was also apparent that, in accordance with the standard procedures applicable to selection exercises in the United Nations as provided for in the relevant administrative issuances, the Applicant would be scored by the interview panel based on the answers given by him during the interview on the core competencies set out in the job opening.

36. The Tribunal finds that the information published and circulated since November 2010 (more than seven months prior to the interview), including the job opening announcement and various SSS administrative bulletins (which the Applicant acknowledged he received at the time), was available well ahead of time to all candidates, including the Applicant, allowing them to adequately prepare for the interview. The Applicant submitted that he needed additional material to prepare, but was unable to clearly identify any specific documentation. The Tribunal again notes, in particular para. 8 of the Applicant's own application, in which he conceded that he "had diligently prepared for the interview following the OHRM guide on 'Effective Job Interviewing Performance' and practiced [his] answers with colleagues who had served on interview panels in other departments".

Other allegations

37. In his application and in particular at the hearing the Applicant raised a number of additional claims and allegations. In the Tribunal's view, these allegations were raised primarily as circumstantial evidence with a view to illustrating the panel's alleged lack of full and fair consideration of the Applicant.

(a) Alleged disciplinary record of other candidates

38. The Applicant alleged that three of the recommended candidates had disciplinary records tainted with, or at least were investigated for, serious offences (including brandishing a gun and domestic violence), and should thus have been disqualified. Mr. MB testified that, to his knowledge, none of the five selected candidates had any disciplinary record. Mr. CS, when asked to opine on the Applicant's evidence, stated that he was not aware of any disciplinary measures barring any candidates from participation in the contested promotion exercise. He added that, generally, he was of the view that staff members generally could be seen to have been rehabilitated depending on the nature of the offences over time. In any event, the Tribunal finds that the panel's determination that *the Applicant* did not meet the competencies of teamwork and communication being the reason for his

non-selection, the disqualification of any other candidates would not have ensured the Applicant's selection. In all, the Tribunal found that the Applicant's evidence together with that of Mr. TK appeared to be of a more general criticism regarding the alleged promotion of Security Officers with some disciplinary history over those with a clean disciplinary record.

(b) Post-interview feedback

39. The Applicant raised another new issue at the hearing, also canvassed by Mr. TK, that although the response to Applicant's request for feedback was positive and encouraging, insufficient feedback was provided at the post-interview meeting with Mr. MB in December 2011. Mr. MB testified that such post-interview meetings were held as a matter of courtesy only, in order to provide the staff member with guidance on how to improve for future interviews. The Tribunal was not referred to any legal provision requiring any post-interview feedback. The Tribunal found that the general tenor of the evidence led on this point expressed general disgruntlement with the promotion exercise rather than a breach of any legal rights.

(c) Geographical representation

40. The Applicant further challenged that one of the core values of the UN system calling for geographical balance in staff recruitment has been persistently ignored by managers within DSS particularly at the supervisory levels resulting in geographical disparity. He stated at the hearing that 20 supervisors are from the Caribbean, 22 from the United States of America, two from Europe, and one each from Portugal, South Africa, Egypt, Italy, and Africa. This geographical bias, he contended, worked against him as a Middle Easterner. The Respondent submitted that SSS employs nationals of more than 48 countries and the relatively high number of staff from the Caribbean is due to the larger proportion of applicants being of English-speaking background from a region within close proximity to the Headquarters, particularly as candidates have to pay their own travel costs when attending job interviews in New York. The Applicant submitted that there are "tens

of thousands” of English-speaking candidates from other countries who are in New York. Mr. CS testified that the geographical imbalance did strike him as well when he took over as Executive Officer in DSS, and he endeavoured to address the issue by giving instructions for a better geographical balance to be ensured, including a fair procedure for selection. Even if the Applicant’s contention has merit, the Tribunal is constrained to deal with the issue before it, i.e., whether in his *given case* the interview panel committed fatal flaws in assessing him as not meeting two key competencies. In this regard, the general allegation regarding the geographical imbalance in SSS is insufficient, in the absence of evidence of bias or discrimination, to reach a conclusion that the panel’s decision regarding the Applicant’s failure to meet two of the required competencies was unlawful.

(d) Use of roster

41. The Applicant queried whether it would have been fairer for SSS to promote those Security Officers who were on the existing roster of Security Officers pre-approved for similar functions (such as the Applicant), thus excluding other Security Officers from consideration. This claim too did not form part of the management evaluation or the Applicant’s application, and if it had merit, it should have been addressed from the outset when the job was advertised and/or the candidates shortlisted. In any event, the Tribunal was not referred to any regulation or rule demonstrating that the approach chosen by the SSS with respect to this exercise was in breach of the Applicant’s rights.

(e) Other circumstances alleged by the Applicant

42. The Applicant further referred to general dissatisfaction as to how selections and promotions are handled in SSS. (This was also to a large degree the essence of the testimonies of Mr. KG and Mr. TD.) In particular, the Applicant referred to an email apparently circulated within SSS in January 2009, which allegedly included a pre-determined promotion list. Mr. CS testified that the email was not a pre-determined promotion list but rather a promotion planning document. The matter

was apparently investigated by representatives of management and the Staff Union and no wrongdoing was found. Although the Applicant's reference to the email of January 2009 has no direct bearing on the interview panel's determination of him as not meeting the competencies of teamwork and communication, there was no explanation by the Respondent regarding four question marks which had been placed in handwritten text by persons unknown against the Applicant's name on the print-out of the email. The general tenor of the allegations by the Applicant (and also by Mr. TK, who had similar markings against his name), together with other general allegations, was that the Applicant did not receive full and fair consideration.

43. There are some elements of the selection exercise that warrant further discussion in this judgment. Firstly, all candidates, including those who failed the written test were invited for the interview. Mr. MB explained that it was felt that all candidates should obtain experience in competency interviews as this was the first time this process was used in DSS. There was certainly no possibility of selecting any of those who had failed the written test, even if they performed excellently in the competency interview. Secondly, although Mr. CS testified that as the Executive Officer, DSS, he gave instructions that all efforts be made to assuage any mistrust or perception of geographical bias, two of the four members of the competency interview panel came from the allegedly geographically overrepresented countries. Mr. MB explained that he ensured as panel chair that there was no bias against any interviewee. Furthermore, apart from the general comment on geographical bias, the Applicant did not allege that the panel showed bias against him. Finally, the Applicant submitted that in its assessment the panel found in its comments to the competency of "Communication" that "throughout the interview, the candidate did not listen closely to questions posed by the assessment panel. In addition, he spoke quickly and often mumbled". However, the Applicant submits that he demonstrated during his testimony before the Tribunal that, far from being the mumbling and inarticulate person who cannot answer simple questions, he was "a picture of professionalism, competence and rectitude" by "answer[ing] questions put to him [during the testimony] forcefully, competently and comprehensively".

The Applicant questions how, given that he articulated well in court, he could have passed three of the five competencies and yet failed the other two. Mr. MB, however, explained that the panel found that although the Applicant passed three competencies, he did not demonstrate his abilities in regard to the two other competencies to the required level, which had to be reflected in the report.

44. Accordingly, upon careful weighting of the evidence in its entirety, on a balance of probabilities, the Tribunal cannot come to the conclusion that the consideration of the Applicant's candidacy was marred by significant errors or procedural violations such as to result in a failure to give him proper consideration.

45. Overall, the Tribunal notes that the non-selection in the exercise in question was not a reflection of the Applicant's overall performance, nor should it be viewed as such. To the contrary, there is no doubt that the Applicant is a valuable staff member with over 20 years of service with the Organization and diverse experiences within SSS. He has been in the Secretary-General's detail and travelled to over 46 countries. In the particular exercise in question, although the Applicant "diligently prepared ... and practiced [his] answers with colleagues" prior to the interview, the panel found that his answers were not satisfactory with respect to two competencies. Although the Applicant raised a number of allegations as described above, the Tribunal finds that the panel's substantive finding regarding the two competencies were not effectively challenged by the Applicant.

46. As indicated above, the general tenor of the evidence of all of the Applicant's witnesses appears to be a long-standing dissatisfaction with recruiting and promotion exercises within DSS. Indeed, in his written closing submissions the Applicant states that he "displayed great courage in taking on the festering matter of unfair selection procedures in DSS that has apparently bedeviled a fair number of security officers for a number of years". The Applicant's witness Mr. TK, a Staff Union representative, commented that procedures and criteria need to be developed cooperatively. The Tribunal is satisfied from the candour of the witnesses, including

the Respondent's witnesses, that these matters are being addressed with a view to assuaging any perceptions whether real or imagined.

Conclusion

47. The Tribunal finds on the evidence before it that the Applicant has been unable to prove that the selection process was biased against him and that the consideration of his candidacy was marred by significant errors or procedural violations such as to vitiate the selection process or result in a failure to give him proper consideration.

48. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 16th day of August 2013

Entered in the Register on this 16th day of August 2013

(Signed)

Hafida Lahiouel, Registrar, New York