



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

FAKIRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Nicole Wynn, AAS/ALD, OHR, UN Secretariat
Maureen Munyolo, AAS/ALD, OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant is a Field Security Assistant with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”). He holds a fixed-term appointment at the G-3 level, and is based in Laayoune.
2. On 25 August 2020, the Applicant applied to the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to not to select him for the position of FS-5 Security Officer (Job Opening No.126389) with the United Nations Assistance Mission for Iraq (“UNAMI”) in Baghdad.
3. The Respondent filed his reply to the application on 25 September 2020.

Facts and Submissions

4. On 19 November 2019, UNAMI issued Job Opening No.126389. The position was advertised as a recruit-from-roster job opening exclusively open to roster candidates.
5. A total of 243 applications were received. 240 applications, including the Applicant’s, met the published evaluation criteria.
6. Two candidates were recommended for selection following the prescribed process.
7. On 9 March 2020, the Applicant was informed that his application for the position was not successful.
8. The Applicant, who is a rostered candidate, argues that the impugned selection decision was tainted by extraneous factors, and that it has caused him such stress as to require medical attention.
9. In fact, the Applicant alleges that the preferred candidate was selected mainly to satisfy guidelines for gender parity and balance.
10. The Respondent takes the position that the Applicant was given full and fair consideration in what was a properly administered competitive process between

rostered candidates.

Considerations

11. The question before the Tribunal is whether the Respondent acted lawfully when he declined to recommend the Applicant for Job Opening No.126389.

12. The Secretary-General of the United Nations is vested with wide discretion to select staff members for positions within the Organization. It is within the discretionary authority of the Secretary-General to evaluate the applications and the candidates' qualifications for positions.¹

13. Selection for a position is a competitive process; even between rostered candidates.²

14. It is settled law that a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives like bias or discrimination.³ A candidate, however, has no right to a promotion.⁴ Specifically, in relation to priority or preference in the promotion exercise, the United Nations Appeals Tribunal ("the Appeals Tribunal") has ruled that 'priority consideration' cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for; and that to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.⁵

15. In matters of selection of staff, the role of the Dispute Tribunal is to review the challenged selection process to determine whether a candidate has received fair

¹ See *Safwat*, UNDT/2010/066, paragraph 39 (holding that it was within the discretionary authority of the Respondent to evaluate an applicant's qualifications for the post); *Dumornay*, UNDT/2010/004 (dismissing the application of a staff member that was not selected to a position when the panel found that the Applicant lacked the required skills or competencies). See also *Sicat*, UNDT-2013-018, paragraph 25 and *Simmons*, UNDT-2011-084, paragraph 79.

² Staff regulation 4.3.

³ See *Ross* UNDT/2019/005.

⁴ *Andrysek* 2010-UNAT-070, in *Charles* 2013-UNAT-286, para. 27; *Hersh* 2014-UNAT-433, para. 30; *Wang* 2014-UNAT-454, para. 41; *Luvai* 2014-UNAT-417, para. 32.

⁵ *Megerditchian* 2010-UNAT-088, at para. 28; See also *Charles* 2012-UNAT-242, at para. 33.

consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration⁶. The Dispute Tribunal will not substitute its own judgment for that of the Secretary-General.⁷

16. The Appeals Tribunal has held that:

There is always a presumption that official acts have been regularly performed. But this presumption is a rebuttable one. If management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.⁸

17. The presumption of regularity is rebutted by evidence of a failure to follow applicable procedures, bias in the decision-making process, and consideration of irrelevant material or extraneous factors.

18. Following careful review of the facts as they appear in the pleadings, and the accompanying documentary evidence, the Tribunal is unable to conclude that the presumption of regularity in the selection process has been rebutted.

19. The Applicant's allegation that the preferred candidate was selected mainly to satisfy guidelines for gender parity and balance is not factual since the candidate was also better qualified for the post than the Applicant, based on the records of the candidates submitted in response to the job opening.

20. The Applicant makes an allegation that he cannot find evidence of some of the successful candidate's reported training. It is also not enough to make unsubstantiated allegations about the successful candidate's qualifications. The Applicant must show that this allegation is factual. The allegation that he cannot find the candidate's name among a list of person who attended The Moshi

⁶ *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540.

⁷ *Sanwidi*, UNAT-2011-084 and *Krioutchkov*, UNDT-2010-065.

⁸ *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595 (both quoting *Rolland*, 2011-UNAT-122). See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

International Police Training School is not convincing. Therefore the Tribunal will not permit further disclosure to pursue this matter since even if it constitutes misconduct, it should have been reported to the relevant authorities.

21. While the Tribunal understands that repeatedly not succeeding at a selection exercise, when one is considered “pre-qualified”, causes immense frustration, challenging the process as biased or impartial or irregular requires more by way of evidence than has been presented in this case.

22. There is nothing to suggest that the Respondent acted improperly in selecting the recommended candidate, or that he was motivated by any extraneous factors in not selecting the Applicant.

Conclusion

23. The application is dismissed.

(Signed)
Judge Francis Belle

Dated this 23rd day of July 2021

Entered in the Register on this 23rd day of July 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi