



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BONANNO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Marisa Maclellan, OSLA

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a staff member of the Standing Police Capacity (“SPC”), United Nations Logistics Base (“UNLB”), in Brindisi, filed an application for suspension of action pending management evaluation, pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure, of “the decision not to select or proceed with [his] selection [for a post of Public Order Officer], the intention to cancel the recruitment, and the intention to convert recruitment of the post to a seconded post”.

## **Facts**

2. In April 2010, the Applicant was recruited through the French Permanent Mission and within the framework of the Formed Police Unit (“FPU”) pre-deployment training concept, and deployed to the United Nations Stabilization Mission in Haiti (“MINUSTAH”). Since 2012 he has served as Police Adviser (P4) with the Standing Police Capacity (“SPC”), UNLB, on the basis of a fixed-term appointment, which has been renewed twice. The Applicant currently is in his third year in this position and, pursuant to the Standard Operation Procedures for Selection and Recruitment Procedures for United Nations Personnel at the Police Division, Peacekeeping Operations and Special Political Missions (“Standard Operations Procedures”), his appointment in this position cannot be extended beyond four years.

3. On 15 November 2013, a (civilian) post of Public Order Officer (P3), UNLB, was advertised under vacancy announcement No. 13-ROL-DPKO-31538-R-BRINDISI (M) (“the Position”) and the Applicant applied for it on 13 December 2013. Following the undertaking of a number of tests, the Applicant was interviewed on 8 May 2014.

4. By email dated 22 October 2014, the Secretariat of the Field Central Review bodies informed the Selection and Recruitment Section (“SRS”), Police Division (“PD”), Department of Peacekeeping Operations (“DPKO”) that the Field Central

Review Committee (“FCRC”) had endorsed the list of recommended candidates for the Position; the Applicant was among the four endorsed candidates.

5. Upon request, by another email of 22 October 2014, the Chief, SPC, and Hiring Manager for the Position, indicated to SRS/PD that the Applicant was her preferred candidate, briefly stating the reasons for her preference. By return email of the same date, SRS confirmed its intention to “proceed accordingly”.

6. According to the Applicant, the SPC Special Assistant informed him by telephone in October 2014 that he had been selected for the Position. This fact is not demonstrated by any document. The Applicant has made a declaration as to the facts, which facts have not been challenged by the Respondent. The Respondent was given a chance to reply on any points of fact or of law of the application, the application in this matter having been transmitted to him on Friday, 27 February 2015, with a requirement for a reply by the close of business on 3 March 2015, being a reasonable time considering the time frame for the Tribunal to dispose of suspension of action applications. The Respondent filed a submission in the application, but did not rebut any of the facts as submitted by the Applicant. Thus, as currently informed and for the purpose of the suspension of action, the Tribunal has to rely on the facts as declared by the Applicant and not contradicted by the Respondent.

7. For the same reasons, the Tribunal has made analogous inferences concerning a number of subsequent unrecorded meetings and verbal communications. It is further observed that the documentary evidence made available to the Tribunal either corroborates or at least is not at odds with any of the facts stated by the Applicant.

8. In addition to the initial oral communication of his selection for the Position, the Applicant was forwarded by his Team Leader the above-referred trail of emails of 22 October 2014.

9. Upon his return from mission in Central African Republic, the Applicant was invited to meet the Chief, SPC, on 10 December 2014. During the meeting the latter informed the Applicant of his selection for the Position and advised that

the recruitment process would be finalized soon. This was also confirmed by the Applicant's Team Leader and the SPC Special Assistant.

10. On 19 January 2015, following an enquiry made by the Applicant, the SPC Special Assistant advised him that there was "a problem". The Applicant was later verbally informed by the Chief, SPC, that she had doubts about his attitude as a consequence of disciplinary action taken against him during his deployment in 2011 as an Individual Police Officer with MINUSTAH, which the Chief, SRS, had brought to her attention. The Applicant advised the Chief, SPC, that this was the first time he was made aware of any disciplinary action taken against him.

11. On 5 February 2015, upon return from official travel, the Applicant had another meeting with the Chief, SPC, in which she advised the Applicant that she had decided not to recruit him for the Position and that she had requested that the post be converted into a seconded post within SPC, alluding to the need for a Public Order Officer to be constantly up-to-date and fully aware of the relevant procedures, techniques and tactics in his/her own country.

12. At a further meeting convened by the Chief, SPC, on 25 February 2015, the Applicant informed her that he intended to request SRS/PD access to his personnel file. The Chief, SPC, stated her view that the disciplinary action had been given too much consideration, that she considered the incident that triggered it as a minor offence, to which she would have reacted differently. She added that she would propose that SRS remove that disciplinary action from the Applicant's personnel file. The Chief, SPC, reiterated that she had requested the conversion of the civilian post into a seconded post, while assuring the Applicant that he would remain the selected candidate for the Position if the Police Adviser was minded to keep it as a civilian post, provided that the disciplinary action, which purportedly implied that the Applicant was barred from being deployed in MINUSTAH, could be removed. As the Applicant recalled that he was still not aware of the content of the disciplinary action, the Chief, SPC, answered that, although she was in possession of his personnel file, she doubted that she could disclose it, but stated the file contained a reprimand letter.

13. On 26 February 2015, the Applicant requested management evaluation of the impugned decision, and filed the present application.

14. As directed by the Tribunal, the Respondent filed his reply on 3 March 2015.

15. Having reviewed both parties' written submissions, the Tribunal decided that no oral hearing was required.

### **Parties' contentions**

16. The Applicant's primary contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. Given that the suspension of action is only an interim measure and not the final decision of the case, the appropriate standard for the *prima facie* unlawfulness test is no more than serious and reasonable doubts about the lawfulness of the contested decision;

b. He was not given full and fair consideration because of the use of the disciplinary action against him. Although he was the top ranking FCRC-endorsed candidate recommended by the Hiring Manager, after the latter came to know about disciplinary action stemming from events which occurred in 2011, her opinion of the Applicant changed. It appears that this was the only change in circumstance and the Hiring Manager's reliance on this information has unlawfully interfered with the regular selection process and derailed the Applicant's selection;

c. The existence of adverse material in his personnel file, purportedly a disciplinary action, is unlawful and violates his due process rights. Administrative instruction ST/AI/292 (Filing of adverse material in personnel records) provides that adverse material may not be included in the personnel file unless it has been shown to the concerned staff member and he or she has been given an opportunity to make comments thereon. Not only was the Applicant never shown or made aware of any disciplinary or

administrative action taken with respect to an alleged breach of the chain of command in 2011, but at the time he was a Police member, and not a staff member. This fact raises the question of how this information was placed on the Applicant's personnel file once he subsequently became a staff member;

d. The Administration cannot stop or cancel the recruitment and must proceed with the Applicant's appointment, as he was the recommended candidate of the Hiring Manager after endorsement by the FCRC. There are limited grounds justifying the cancellation of an advertised vacancy announcement. According to the *Manual for the Recruiter on the Staff Selection System (Inspira)* ("Inspira Manual"), a vacancy announcement cannot be cancelled if a candidate has already been approved by the Central Review Body. Moreover, the Tribunal has held in the past that a vacancy announcement to which applications had been received cannot be cancelled on a mere whim and without a good reason. Also, a head of department/office should not cancel a selection process for the reason that he or she is not satisfied with the list of recommended candidates;

e. The Position cannot be converted to a secondment post after the recruitment has been completed and without the General Assembly's approval. Any changes to a position falling under DPKO would require to be submitted in the budget and approved by the General Assembly. There had been no previous mention or discussion at team meeting or among managers on the benefits of having the Position as a seconded post. Such proposal came only after the Applicant informed the Chief, SPC, that he deemed the use of the alleged disciplinary action unfair and was envisaging legal action. If the Hiring Manager had truly considered secondment to be a superior operation decision, she would not have proceeded to complete recruitment and notify the Applicant of his selection;

### *Urgency*

f. If the Administration is allowed to implement the contested decision, the recruitment for the Position will be effectively cancelled and stopped and the post converted to one which can only appoint someone on

secondment. The Chief, SPC, requested the conversion of the post already on or before 20 February 2015, as per her email of that date.

g. According to the Tribunal's case-law, urgency exists when an applicant might be denied the chance of regaining the position he was occupying or should be occupying despite being successful on the substantive case, especially if the position were to be filled;

*Irreparable damage*

h. Pursuant to the Tribunal's case-law, harm is irreparable if it can be shown that the suspension of action is the only way to ensure that an applicant's rights be observed and a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage inflicted. The Position is the only one of its kind and the last recruitment for it was in 2007; it represents a unique opportunity for the Applicant to secure a position which does not carry the finite extension limitations, as does his current position.

17. The Respondent's only contention is,

In effect, the Applicant seeks suspension of the recruitment process for the Position pending the outcome of the his management evaluation request. Since, on 3 March 2015, the Administration suspended this recruitment process pending management evaluation, the instant application is moot.

**Consideration**

18. The Tribunal's powers with respect to an application for suspension of action are strictly limited to suspending the implementation of the very decision(s) at issue during the pendency of its management evaluation. To this extent, it is essential to clarify, at the outset, which is the contested decision or decisions that the Applicant requests to have suspended.

19. The application identifies the impugned decision as "the decision not to select or proceed with the Applicant's selection [for the Position], the intention to

cancel the recruitment, and the intention to convert recruitment of the post to a seconded post”. While acknowledging that, the Respondent holds in his reply that “[i]n effect, [the Applicant] seeks suspension of the recruitment process for the position of P-3 Public Order Officer pending the outcome of his request for management evaluation”.

20. Based on this representation, the Respondent asserts that, since DPKO has suspended the recruitment process for the Position for the duration of the management evaluation, there no longer exists any decision to be suspended, and the application has therefore become moot.

21. It is the Tribunal’s view, however, that the Respondent has misinterpreted the subject-matter of the application, unduly narrowing the scope of this case and the actual terms of the application. Whether or not the Applicant sought suspension of the recruitment procedure, the Applicant’s challenge, upon proper examination, in fact goes well beyond this point.

22. Indeed, the Chief, SPC, informed the Applicant, on 5 February 2015, that she had decided not to recruit him for the Position and that she had instead decided to request the post be converted into a seconded one. Accordingly, she wrote in her email of 20 February 2015, that she had “stopped the recruitment process for the civilian post” and asked SRS to “transfer the civilian post to a seconded”. Further, on 25 February 2015, she reiterated that she did request the conversion of the civilian post into a seconded one.

23. It follows that the Chief, SPC, exercising her authority in this capacity, has made a decision to have the nature of the Position converted, which has manifested in her request to SRS to that effect. As such, this decision is not under consideration, nor is it in its preparatory stages. Rather, it is final insofar as it falls within the remit of the Chief, SPC. The latter has made this clear by stating, at the 25 February 2015 meeting, that only if her decision cannot be implemented, then the Applicant will remain the selected candidate (further subject to removal of the purported disciplinary action against him), conscious that, for the conversion to materialize, it necessarily entails the cancellation of the recruitment process by



which the Applicant was selected. This is the decision that the Applicant seeks to suspend.

24. This constitutes an administrative decision pursuant to the definition adopted by the Appeals Tribunal, that is, a unilateral act of the Administration of individual application carrying direct legal consequences (*Tabari* 2010-UNAT-030, *Al Surkhi et al.* 2013-UNAT-304). The decision at issue has legal effects for the Applicant, in that he has not been appointed to the Position; he thus does not enjoy the benefits and security that this should entail.

25. In this light, the Tribunal finds that the suspension of the recruitment process, as notified to the Applicant on 3 March 2015, certainly does not cover the full extent of the application at hand and, hence, does not render it moot.

26. Having concluded the above, the Tribunal needs to ascertain if the cumulative conditions required to grant a suspension of action are met in this case. In this regard, under arts. 2.2 of its Statute and 13 of its Rules of Procedure, the Tribunal may order the suspension, during the pendency of management evaluation, of the implementation of a contested administrative decision where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. Accordingly, the Tribunal will examine in turn if the cumulative conditions enunciated above are satisfied.

#### *Prima facie unlawfulness*

27. The contested decision raises legality concerns in several respects.

#### Cancellation after recommendation and endorsement of the Applicant

28. The Inspira Manual reads, at para. 6.10.7:

The Hiring Manager shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list who has passed the assessment exercise.

29. Its para. 11.3.2 further provides:

The Hiring Manager shall be aware that no job opening will be cancelled following submission to the Central Review body and endorsement of at least one (1) recommended candidate.

30. In the present case the Tribunal is satisfied that the Applicant had been recommended after successfully undertaking the relevant tests and interview, he had been endorsed by the CRC and even further recommended for selection by the Hiring Manager. In view of this, it is apparent that converting the Position and as a necessary consequence cancelling the vacancy announcement for the Position at this late stage runs contrary to the above-quoted provision of the Inspira Manual. In this respect, the Tribunal has ruled that the Administration is bound to apply the provisions of this manual, inasmuch as they do not contradict any higher rules (*Korontina* UNDT/2012/178; *Zhao, Zhuang, Xie* UNDT/2014/036). In any case, said provisions stem from the principles of good administration and fair dealing with staff members, as upheld in *Verschuur* UNDT/2010/153.

Reasons provided for the decision

31. The Tribunal has consistently held that a manager cannot cancel a vacancy announcement to which applications had been received without good reason (*Contreras* UNDT/2010/154; see also *Skourikhine* UNDT/2013/113, *Jannoun* Order (NBI/2013)).

32. In the present case, according to the Applicant's account of the facts, which facts have not been contradicted in the reply of the Respondent, he was first quite openly given to understand that the "problem" preventing his selection to be effected was the disciplinary action taken against him during his deployment with MINUSTAH. However, the Chief, SPC, later appears to have justified her decision by stating that now she considers it more convenient to have a seconded individual discharge the duties of the Position.

33. Given the circumstances of this case, the latter motive adduced is not supported by facts. The chronology of events shows that, upon putting on hold the Applicant's appointment to the Position, the only reason mentioned for this was

the information received by the Chief, SPC, on disciplinary action allegedly taken against the Applicant. Based on the information before it, the Tribunal could not find any indication that the idea of having the post converted into a seconded one was ever considered before this information came to the Hiring Manager's attention. In fact, it is worrisome that this reason was only conveyed after the Applicant had expressed his view that the Administration's course of action violated the terms of his appointment.

34. In addition, it is implausible that nearly one year and four months after the Position had been advertised, and after carrying out a selection process, that took about a year and mobilised significant resources of the Organization, did management undertake a thorough reflexion on the very nature of the concerned post. It is equally implausible that, if the Hiring Manager intended to reconsider the nature of the post, she went on to inform the recommended candidate that he had been successful in his application. Lastly, even assuming that this occurred in this manner, it still does not explain why, aware that bringing to completion the conversion of that post requires a series of approvals, including in the budget, that are likely to take considerable time, the Hiring Manager still opted to put on hold or cancel the recruitment for the Position. Rather, she could have appointed the incumbent, given that the funds were available and the selection process complete, while deciding to convert the post to one of secondment and then taking the administrative steps to implement that decision at a later stage.

35. Having said that, if the contested decision was indeed motivated by the disciplinary measures found in the Applicant's file, this comes down to relying on extraneous, and apparently unlawful, considerations, which would vitiate the resulting decision.

36. In this respect, the Tribunal notes that pursuant to sec. 2 of ST/AI/292:

Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.

37. The exact nature of the materials included in the Applicant's personnel file and relied on by the Hiring Manager is unclear and the Tribunal has not been provided with a copy of said materials by the Respondent, who holds this file. It has been reported to be some sort of disciplinary measure and/or a letter of reprimand. In either case, clearly, this would constitute "adverse material" pursuant to the definition cited above. Hence, the Applicant should have been not only informed about the existence of such documents and their placement in his personnel file, but he should have been shown these documents and given an opportunity to comment on them. The contrary amounts to a breach of the Administration's obligations under ST/AI/292.

38. In fact, it is apparent that the alleged disciplinary action occurred when the Applicant served as a police officer provided by his country at the service of MINUSTAH, and not as a staff member at all. The Tribunal may thus, in the alternative, ignore the applicable procedures to discipline an individual staff member. However, it is hardly credible that any set of applicable rules allow the imposition of punitive measures against a person without that person having had a right to be heard or, at the very least, be made aware of the measures taken. Further, and most importantly, precisely because the Applicant was not a staff member at the material time, the Tribunal is most concerned about how and on what legal basis the adverse material in question was included in his personnel file. Under the circumstances, the Hiring Manager could not rely on the relevant adverse material in taking the decision the Applicant seeks to suspend. For all the foregoing, the impugned decision appears *prima facie* to be unlawful on several grounds.

#### *Urgency*

39. In *Tadonki* UNDT/2009/016, the Tribunal considered there to be urgency when a contested decision, which could result in denying a staff member the chance of regaining the position that this person occupied or should have occupied, might be implemented before the consideration of the substantive appeal on the merits.

40. In the present case, the Chief, SPC, already requested the conversion of the Position at least two weeks ago, as she stated having done so in her email of 20 February 2015. It is hence to be expected that her request will be acted upon diligently and its implementation be undertaken shortly.

41. Indeed, if not suspended, the decision may well be implemented before the response to management evaluation is considered. The requirement of urgency is thus satisfied.

*Irreparable damage*

42. The implementation of the impugned decision would result not only in the cancellation of the selection procedure for the Position for which the Applicant had already been notified he would be selected, but, beyond that, in the Position being converted into a post for which only members of national police forces seconded by their respective countries were eligible. In other words, the Applicant, as a staff member of the Organization, would not even be able to compete for such post.

43. This loss of career opportunity is compounded by the fact that the post currently held by the Applicant has a limit of possible extensions. Specifically, the tenure on this post cannot extend beyond a total of four years (under para. 64 of the Standard procedures). Therefore, knowing that the Applicant has been in this position for over two and a half years, he will be forced to cease serving with the Organization unless he secures another post in barely one year and seven months. In addition, his chances seem further limited if, as he avers, positions like that of Public Order Officer are rare, and even further diminished if selection procedures, like that for the Position, often take a year to be completed (from its advertisement on 15 November 2013 to end of October 2014), and even longer to become effective.

44. With the foregoing in mind, the Tribunal holds that suspension of action appears as virtually the only way to ensure that the Applicant's rights are observed. In this sense, and consistent with the Tribunal's findings in *Corna*

Order (GVA/2010), *Fradin de Bellabre* UNDT/2009/004, *Tadonki* UNDT/2009/016, the Tribunal considers the irreparable harm condition met.

45. In view of the foregoing, it is ORDERED that:

The impugned decision as defined in paras. 22-23 above be suspended pending the outcome of the management evaluation.

*(Signed)*

Judge Rowan Downing

Dated this 6<sup>th</sup> day of March 2015

Entered in the Register on this 6<sup>th</sup> day of March 2015

*(Signed)*

René M. Vargas M., Registrar, Geneva