



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

FINNISS

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:**

Anna Silfverstolpe, OSLA

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 3 June 2016, the Applicant seeks suspension of action of the decision not to select him for the post of Director (D-2), Investigations Division, Office of Internal Oversight Services (“ID/OIOS”), advertised under Job Opening No. 15-ING-OIOS-51498-D-NEW YORK (G).

## **Facts**

2. The Applicant started service with the United Nations at ID/OIOS in November 2004, and, after several assignments, he was promoted to his current post as Deputy Director (D-1), ID/OIOS, Vienna, on 1 August 2013.

3. Upon the departure of the former Director, ID/OIOS, the Assistant Secretary-General, OIOS (“ASG/OIOS”)—as Acting Head of OIOS, pending the appointment of the new Under-Secretary-General for Internal Oversight Services (“USG/OIOS”)—appointed the Applicant as Officer-in-Charge (“OIC”), ID/OIOS, from 8 October through 7 December 2015. Thereafter, the Deputy Director, ID/OIOS, Nairobi, was appointed as OIC, ID/OIOS, and remained OIC until today.

4. The new USG/OIOS commenced her term on 14 December 2015.

5. From 31 December 2015 to 28 February 2016, the post of Director, ID/OIOS was advertised under Job Opening No. 15-ING-OIOS-51498-D-NEW YORK (G). The Applicant applied for it and was interviewed, together with other candidates.

6. By interoffice memorandum dated 27 April 2016, the USG/OIOS submitted to the Chairperson, Senior Review Group (“SRG”), her recommendation of three candidates for the filling of the job opening, including the Applicant.

7. By interoffice memorandum dated 24 May 2016, the Chairperson, SRG, informed the Secretary-General that the SRG had endorsed the USG/OIOS' recommendation and submitted the three recommended candidates for the Secretary-General's consideration.
8. On 1 June 2016, the Executive Office of the Secretary-General informed OIOS of the Secretary-General's decision to select the Deputy Director, ID/OIOS, Nairobi, for the position at stake.
9. The USG/OIOS called the Applicant on 2 June 2016 to inform him about the Secretary-General's decision.
10. The Applicant sought management evaluation on 3 June 2016, and filed a request for suspension of action with the Tribunal on the same day. The application for suspension of action was served on the Respondent on the same day, who filed his reply on 7 June 2016.

### **Parties' contentions**

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

#### *Prima facie unlawfulness*

- a. His candidacy was not given full and fair consideration by the Secretary-General and the selection of the Deputy Director, ID/OIOS, Nairobi, resulted from the mere "lottery" that the latter happened to serve as OIC, ID/OIOS, at the time of the USG/OIOS' entry on duty; it is thus the result of an unfair advantage over the Applicant;

#### *Urgency*

- b. The contested decision has not yet been implemented; once implemented, no reversal is possible;

*Irreparable damage*

- c. Implementation would present a loss of a unique career opportunity with the United Nations and would cause him irreparable harm.

12. The Respondent's primary contentions may be summarized as follows:

*Prima facie unlawfulness*

- a. The selection decision was lawful and the Applicant's rights were respected; it was taken in accordance with the staff selection system, and the Secretary-General lawfully selected the candidate he considered most suited for the post, amongst the three recommended candidates;
- b. No candidate enjoyed an advantage as a result of service as OIC and the Applicant was given full and fair consideration;
- c. Upon the USG/OIOS' decision to refer the selection recommendation to the SRG, the former surrendered her authority to appoint at the D-2 level for the contested post; thus, the decision was lawfully taken by the Secretary-General;
- d. The Applicant failed to demonstrate the *prima facie* unlawfulness of the selection decision;

*Urgency*

- e. The urgency criteria is not met; the contested decision has been implemented, and cannot be suspended; according to sec. 10.2 of ST/AI/2010/3, a selection decision is deemed to have been implemented "upon its official communication to the individual concerned." On 2 June 2016, the USG/OIOS formally notified the selected candidate of the decision of the Secretary-General, and the successful candidate accepted his selection; this created a legal obligation on the part of the Organization to promote him;

*Irreparable damage*

f. The Applicant has not demonstrated how the implementation of the contested decision will cause him harm that the Tribunal will not be able to repair with an award of damages.

**Consideration**

13. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014); *Farrimond* Order No. 113 (GVA/2016)).

*Implementation of the contested decision*

14. As a preliminary matter, the Tribunal recalls that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

15. Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision (see *Wang* UNDT/2012/080, *Tiwathia* UNDT/2012/109 and *Nwuke* UNDT/2012/116), there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment (see *Quesada-Rafaraso* Order No. 20 (GVA/2013)). However, the Tribunal finds that such a procedure is reserved for selection decisions involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

16. With respect to selection procedures that entail promotion of internal candidates, like in the present case, the Tribunal recalls that sec. 10.2 of ST/AI/2010/3 clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

17. It follows from this provision that the implementation of the contested selection decision, which was taken on 2 June 2016, cannot be implemented before 1 July 2016. Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

*Prima facie unlawfulness*

18. The Tribunal recalls that the threshold required in assessing this first condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015); *Farrimond* Order No. 113 (GVA/2016)).

19. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it shall examine in particular—among other issues—whether the procedure laid down in the relevant provisions was followed (*Abbassi* 2011-UNAT-110; *Savadogo* 2016-UNAT-642).

Procedural irregularities

20. With these standards in mind, the Tribunal has to examine whether the contested selection decision was taken in accordance with the applicable procedures, and—in particular—whether the Secretary-General had the authority to make it.

21. This Tribunal and other international administrative tribunals have emphasized the outstanding importance of the issue of competence and delegation of authority (see *Gehr* UNDT/2011/178 quoting Judgment No. 3016 (2011) of the Administrative Tribunal of the International Labour Organization; see also *Hubble* UNDT/2014/069 and *Bastet* UNDT/2013/172). Competence of the decision-maker is a cornerstone of the legality of any administrative decision. When the exercise of discretionary power is under judicial review, any lack of authority leads inevitably to the rescission of the contested decision (*Nielsen* UNDT/2014/139).

22. The relevant law with respect to the particularities of selection decisions for posts at the D-2 level within OIOS and, thus, for the present application, is reflected in Judgment *Appleton* UNDT/2012/125:

*Charter of the United Nations*

46. Article 101.1 of the Charter states that United Nations staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Pursuant to Article 101.3 the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

...

*General Assembly resolution 48/218 B (Review of the efficiency of the administrative and financial functioning of the United Nations)*

47. By its resolution 48/218 B, art. 4, the General Assembly established OIOS which is to be headed by a USG. Article 5(a) specifically emphasises that OIOS shall exercise “operational independence” under the Secretary-General in the conduct of its duties.

*ST/SGB/273 (Establishment of OIOS)*

48. The establishment of OIOS was implemented by ST/SGB/273 according to the mandate of General Assembly resolution 48/218 B. Article 2 reiterates that OIOS shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties. Under Chapter VII (Budget and personnel), the Secretary-General is required to take into account the need for ensuring the operational independence of OIOS (sec. 30). The USG of the OIOS shall, in accordance with

the Staff Regulations and Rules, develop an appropriate office organisational structure (sec. 31). In keeping with the need for operational independence, the USG of the OIOS shall exercise a degree of latitude and control over the personnel and resources of the Office consistent with the Staff Regulations and Rules (sec. 34). Article 35 states that with respect to the OIOS staff, the USG of the OIOS shall have the powers of appointment, promotion and termination similar to those delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs, enjoying special status in these matters.

*ST/AI/401 (Personnel arrangements for OIOS)*

49. The scope of the responsibilities of the Secretary-General and the USG of the OIOS in personnel matters is defined in ST/AI/401, as amended by ST/AI/2003/4. It refers to the need for operational independence and repeats the wording of art. 35 of ST/SGB/273 concerning the USG of the OIOS's power of appointment. Under this Administrative Instruction, the Staff Regulations and Rules and administrative instructions promulgated by the Secretary-General apply to staff members serving with the OIOS.

23. Most relevantly, ST/AI/401 provides the following in sec. 5 (emphasis added):

Subject to the retention by the Secretary-General of his authority to promulgate and interpret the Staff Regulations and Rules ... full authority is delegated to the Under-Secretary-General for Internal Oversight Services by the Secretary-General, as specified below, thus giving the Under-Secretary-General the responsibility for administering, in the name of the Secretary-General, the Staff Regulations and Staff Rules in respect of staff members serving with the Office.

24. Sec. 6 of ST/AI/401, as amended by ST/AI/2003/4, provides (emphasis added):

To this end, the Secretary-General, in consultation with the Under-Secretary-General for Internal Oversight Services, shall establish an OIOS Review Body to advise the Under-Secretary-General on the appointment, promotion and termination of all staff members up to and including the D-2 level. The OIOS Review Body shall consist of:



(a) A chairperson and three alternate chairpersons selected by the Secretary-General on the nomination of the Under-Secretary-General for Internal Oversight Services after consultation with the staff of the Office;

(b) A member and three alternate members selected by the staff of the Office;

(c) A member and three alternate members nominated by the Under-Secretary-General for Management from his or her Department.

A representative of the Office of Human Resources Management shall serve as an *ex officio* non-voting member of the OIOS Review Body. A representative of the Office of the Special Adviser on Gender Issues and Advancement of Women shall be invited to participate in all meetings of the OIOS Review Body in an advisory capacity. The functions and procedures of the Review Body shall be generally comparable to those of other United Nations central review bodies.

25. Furthermore, sec. 9 of ST/AI/401 states (emphasis added):

Thus, in accordance with the relevant staff rules, the Under-Secretary-General for Internal Oversight Services will have authority to appoint all staff members whose appointments are limited to service with the Office up to the D-2 level.

26. Based on these provisions, the Tribunal concluded in *Appleton* UNDT/2012/125, with respect to selection processes at OIOS at the D-2 level, that:

91. The authority to make staff appointments is governed in the first place by the United Nations Charter, the highest authority of the United Nations legal hierarchy. It vests the responsibility for staff appointments with the Secretary-General.

92. However, General Assembly resolution 48/218B that founded OIOS, acknowledged the need for delegation of “operational independence” to OIOS and its head, the USG of OIOS.

93. The establishment of OIOS was implemented by ST/SGB/273, an instrument higher in the hierarchy of instruments than, for example, administrative instructions or policies. Under this Bulletin, the Secretary-General reiterated the “operational independence” of OIOS and noted that the USG of OIOS shall

have the power of appointment in OIOS similar to that delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs enjoying special status in this matter.

94. ST/AI/401 further specifies the powers of the USG of OIOS in personnel matters and the extent to which the Secretary-General retains authority in this regard. The Secretary-General's authority includes promulgating and interpreting Staff Regulations and Rules and having the final decisions in appeals, disciplinary cases and compensation. ST/AI/401 expressly stipulates that appointments up to the D-2 level are the responsibility of the USG of the OIOS.

95. As the areas of authority relating to OIOS retained by the Secretary-General were specifically defined by ST/AI/401, it follows that all other personnel responsibilities not so retained, including both the selection and the final appointment of staff up to the D-2 level, were deliberately and specifically transferred by ST/SGB/273 from the Secretary-General to the USG of OIOS.

96. The Tribunal does not accept the submission of the Respondent that, in relation to D-2 appointments in OIOS, staff regulation 4.1 limits the USG/OIOS' authority to organise the recruitment process and make a recommendation before the Secretary-General makes the final selection and appointment. That interpretation would deprive the relevant parts of General Assembly resolution 48/218 B and the related ST/SGB/273 and ST/AI/401 of meaning and effect.

27. The prevailing principle set down by the General Assembly, when it established OIOS by resolution 48/218B, was to provide for and ensure its functional independence. The relevant parts of General Assembly resolution 48/218B, of ST/SGB/273, and of ST/AI/401 leave no doubt that an essential element to ensure the functional independence of OIOS is the delegation of the full authority to make appointment decisions within OIOS, up to the D-2 level, to the USG/OIOS.

28. According to ST/AI/401, such decisions by the USG/OIOS are to be made upon the advice of the OIOS Review Body. The Tribunal is concerned that in the case at hand, the USG/OIOS submitted the recommendation for filling the post at stake to the SRG, governed by ST/SGB/2011/8, rather than to the OIOS Review Body under sec. 6 of ST/AI/401, as amended. This practice, although accepted under specific circumstances in *Appleton* UNDT/2012/125, stands in clear

contradiction with the unambiguous wording of ST/AI/401, as amended by ST/AI/2003/4. The latter explicitly provides for the establishment of a separate OIOS Review Body, to which such recommendations have to be submitted, for advice to the USG/OIOS, and not to the Secretary-General.

29. The Tribunal finds that a review of the respective composition and mandate of the OIOS Review Body and of the SRG shows that the two bodies are quite distinct.

30. While according to sec. 6 of ST/AI/2003/4 (amending ST/AI/401), the Secretary-General has a certain influence on the composition of the OIOS Review Body, that role is by far more limited than the Secretary-General's role in the composition of the SRG. Indeed, the OIOS Review Body is composed by the Secretary-General, in consultation with the USG/OIOS; its chairperson and alternate chairpersons are selected by the Secretary-General on the nomination of the USG/OIOS after consultation with OIOS staff; furthermore, a member and three alternate members are selected by OIOS staff and a member and three alternate members are nominated by the USG, Department of Management, from his or her Department (cf. sec. 6 of ST/AI/2003/4, amending ST/AI/401). Thus, the manner in which the OIOS Review Body is composed substantially limits the authority of the Secretary-General, while both the USG/OIOS and the staff of OIOS play a rather important role in the selection of its members. This, in the Tribunal's view, is one more clear demonstration of the operational independence of OIOS.

31. Quite distinctly, sec. 2 of ST/SGB/2011/8 provides with respect to the composition of the SRG that its members are all senior United Nations officials at the Under-Secretary-General and Assistant-Secretary-General levels and that "[a]ll members of the Senior Review Group, including the chairperson, are appointed by the Secretary-General". Thus, the authority with respect to the appointment of members of the SRG falls exclusively on the Secretary-General.

32. The respective mandate of the SRG and of the OIOS Review Bods is also substantially different. Indeed, the SRG's mandate, as per sec. 1 of ST/SGB/2011/8, is to "review and provide advice on recommendations to the Secretary-General for selections of staff to all positions at the D-2 level" (emphasis added). In contrast, the mandate of the OIOS Review Body, under sec. 6 of ST/AI/401, as amended by ST/AI/2003/4, is to advise the Under-Secretary-General on the appointment, promotion ... of all staff members up to and including the D-2 level" (emphasis added), within OIOS. The fact that under ST/AI/401 the mandate of the OIOS Review Body is to advise the USG/OIOS, and not the Secretary-General, is equally a clear expression of the functional independence of OIOS, and of the full authority delegated to the USG/OIOS in appointment matters.

33. In the same line of considerations, the full and exclusive authority of the USG/OIOS in selection decisions within OIOS up to the D-2 level, as conferred on her/him by ST/SGB/273, is an important safeguard to ensure the functional independence of OIOS. It follows that the USG/OIOS could not "surrender" that authority to the Secretary-General; indeed, such "delegation back" to the Secretary-General would clearly undermine the intention of the General Assembly. This is, however, exactly what happened in the case at hand. As a result, there are at least serious and reasonable doubts about whether in making the contested selection decision, the Secretary-General acted *ultra vires*.

34. It follows from the above, that the submission to the SRG as well as the role played by the Secretary-General in the present selection process seem to be not in line with the applicable rules, and to amount to serious procedural irregularities.

35. The Tribunal is mindful of the Appeals Tribunal's jurisprudence in *Vangelova* 2011-UNAT-172 and *Bofill* 2011-UNAT-174, according to which:

An irregularity in promotion procedures will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

36. In this respect, the Tribunal notes that, as one of three candidates recommended for final decision to the Secretary-General, there is no doubt that the Applicant would have had a significant chance for promotion had the correct procedure been followed.

37. In light of the foregoing, the contested decision appears to be *prima facie* illegal.

*Urgency*

38. Since the implementation of the contested decision is imminent, and since the urgency was not self-created, the criteria of urgency is satisfied.

*Irreparable damage*

39. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see *Saffir* Order No. 49 (NY/2013), *Farrimond* Order No. 200 (GVA/2013)). The implementation of the selection decision at this stage would damage the Applicant's career prospects in a way that could not be compensated through financial means.

**Conclusion**

40. In view of the foregoing, it is ORDERED that the implementation of the selection decision for the post of Director, ID/OIOS, advertised under Job Opening No. 15-ING-OIOS-51498-D-NEW YORK (G), be suspended pending the outcome of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 8<sup>th</sup> day of June 2016

Entered in the Register on this 8<sup>th</sup> day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva