



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MORALES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Cornelius Fischer, LPAS, UNOG

Introduction

1. On 30 October 2019, the Applicant, a staff member of the United Nations Office at Vienna (“UNOV”), filed an application for suspension of action (“SOA”) with the Tribunal requesting the suspension of the decision not to select him for the position of “Documents Management Assistant (Correspondence and Distribution)” at the G-6 level in the Reproduction and Distribution Unit (“RDU”), Planning Coordination and Meetings Section (“PCMS”), Conference Management Service (“CMS”), Division for Management (“DM”), UNOV (“the position”).
2. On 31 October 2019, the application was transmitted to the Respondent, who was instructed by the undersigned Judge, to file his reply by 4 November 2019, and to refrain from taking any further decision or action in relation to the impugned decision for the duration of the SOA procedure.

Facts

3. The Applicant joined UNOV on 1 January 1994, on a fixed-term appointment as Correspondence Clerk at the G-3 level in the CMS following his transfer from the United Nations Industrial Development Organization (“UNIDO”). He is currently serving as Documents Assistant at the G-5 level in the CMS, holding a permanent appointment.
4. On 7 March 2019, job opening (“JO”) 113076 was advertised for the position. The deadline for applications stipulated in the JO was 5 April 2019. The Applicant applied for the position on 18 March 2019.
5. Following a preliminary evaluation by the Hiring Manager, that is, the Chief, CMS, DM, a total of one hundred and two candidates were released as eligible for further assessment. Eleven candidates, including the Applicant, were invited to take the written assessment which took place in May 2019. However, this test was subsequently cancelled, and a new test was scheduled in July 2019 for all short-listed candidates, including the Applicant.

6. Five candidates including the Applicant successfully passed this second written assessment. While the Applicant scored 79.1, the successful candidate scored 87.4.

7. All candidates who passed the written examination were invited to a competency-based interview held on 22 and 29 August 2019.

8. Following the competency-based interview, the assessment panel recommended two candidates for the position “on the basis of their qualifications, experience and performance during the assessment test and interview”. One of these candidates was the Applicant.

9. By email dated 3 October 2019, the Hiring Manager recommended that the Applicant be placed on the roster and that the other candidate be selected for the position.

10. On 15 October 2019, the recommendation was reviewed by the Human Resources Management Service (“HRMS”) in Vienna and submitted to the Director, Division for Management, UNOV and United Nations Office on Drugs and Crime (“UNODC”) for his selection decision.

11. On 15 October 2019, the Director, Division for Management, UNOV/UNODC selected the successful candidate for the position and the Applicant was placed on the roster.

Parties’ contentions

12. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The contested decision is unlawful as it violates ST/SGB/2002/5 (Introduction of a new staff selection system);
- b. The selection procedure was not properly conducted and his right to a “fair competition” was violated;

c. The selected candidate has less experience than the Applicant. In fact, she was trained by him for only four months and, following her selection to the position, she will be assigned to provide guidance to him.

Urgency

d. The selected candidate was to officially start her functions in the position on 1 November 2019;

Irreparable damage

e. The services rendered by the Correspondence Team will be affected if the Team is headed by a less experienced staff;

f. Staff will lose faith in the fairness of the selection process. It will decrease the morale of staff due to “apparent discrimination and undeterred office politics and favouritism”; and

g. Managers could get away with “abuse of power under the pretence of good supervision”.

13. The Respondent’s primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The application for suspension of action is without merit. The successful candidate was selected for the position as she was considered the “strongest candidate” following a selection exercise in full accordance with the applicable rules”. The Applicant’s candidacy received full and fair consideration;

b. The selection decision was made by the responsible official based on the recommendation by the Hiring Manager. It was at the Hiring Manager’s discretion to propose any of the recommend candidates for selection. The Hiring Manager decided to recommend the successful candidate for selection as she had displayed superior substantive and technical knowledge;

c. The successful candidate had outperformed the Applicant during the written assessment with a score of 87.4 while the Applicant reached a score of 79.1; and

d. The Applicant has provided no evidence of favouritism or discrimination.

Consideration

14. 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 cases of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must all be met in order for a suspension of action to be granted.

Prima facie unlawfulness

15. The Tribunal recalls that the threshold required in assessing this 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)).

16. In the present case, the Applicant argues he was not given full and fair consideration. He claims that the contested decision is unlawful as it violates ST/SGB/2002/5. The Applicant points out that his FRO supported his candidacy and that his SRO had recommended him based on his experience, seniority, technological skills and proven performance as OIC of the Correspondence Team and his more than 24 years of service in processing formal correspondence.

17. The standard of review of administrative decisions regarding appointments and promotions has been consistently defined. The Administration has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has confirmed that, in reviewing such decisions, it is the role of the Tribunals to

assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. The Tribunals' role is not to substitute its decision for that of the Administration (see *Kinyanjui* 2019-UNAT-932).

18. The Appeals Tribunal has also held that the burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (see *Nwuke* 2015-UNAT-506).

19. Consequently, it is for the Applicant to demonstrate that the contested decision was influenced by improper motives, that it was biased, or that proper procedures were not complied with.

20. The Tribunal notes that the Applicant has failed to properly identify the substantive or procedural flaws in the selection process.

21. The Tribunal recalls that Section 9.2 of ST/AI/2010/3 on the Staff Selection System is applicable to the present case and it provides as follows:

The selection decision for positions up to and including at the D-1 level shall be made by the head of department/office on the basis of proposals made by the responsible hiring managers (for position-specific job openings) and occupational group managers (for generic job openings) when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed.

22. The evidence on file shows that the decision was taken by the Director, Division for Management, UNOV/UNODC based on the recommendation of the Hiring Manager.

23. The evidence shows that the decision was based on the results of the written test and the competency-based interview of the short-listed candidates.

24. It also results from the available evidence, that the written assessment was anonymous, and that the Applicant scored 79.1 whereas the selected candidate scored 87.4. The Applicant was rostered for the position while the other candidate was selected.

25. At this stage, the Tribunal finds no evidence of bias, improper motives or of any procedural flaws. Consequently, the Tribunal concludes that the contested decision is not *prima facie* unlawful.

26. Having reached this conclusion, the Tribunal will not analyse the other requirements of urgency and irreparable damage since these requirements are cumulative.

Conclusion

27. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Teresa Bravo

Dated this 7th day of November 2019

Entered in the Register on this 7th day of November 2019

(Signed)

René M. Vargas M., Registrar, Geneva