



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/008

Judgment No.: UNDT/2015/095

Date: 14 October 2015

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ANDREEV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Case No. UNDT/NY/2015/008

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the Tribunal directed Counsel and the Applicant to attend a case management discussion (“CMD”) on 29 September 2015. Among the issues dealt with at the CMD were: (i) proposed consolidation of this case with another case involving the same selection exercise (Case No. UNDT/NY/2015/009, filed by Mr. Gaigbe-Togbe, also a P-4 level Population Affairs Officer); (ii) identification of the core issues in this case; (iii) outstanding document disclosure requests; and (iv) preparation for a hearing on the merits.

5. By Orders No. 232 (NY/2015) and 250 (NY/2015), the Tribunal directed by consent that Cases No. UNDT/NY/2015/008 and No. UNDT/NY/2015/009 be subject to an order for combined proceedings.

disposal. Accordingly, this judgment concerns only Case No. UNDT/NY/2015/008.

Facts

8. The contested P-5 post was advertised on 21 August 2013. The Applicant applied and was invited to written assessment. He scored 58 points on the written assessment. The successful candidate scored 72 points.

9. Four candidates, including the Applicant, were invited for competency-based interviews. The Applicant was interviewed on 15 April 2014 by a panel of three members: Mr. Cohen (the then Chief, Population Studies Branch, Population Division), who chaired the selection panel; Ms. Perucci (the then Chief, Demographic Analysis Branch, Population Division); and Ms. Tomita (Chief, Demographic and Social Statistics Branch, Statistics Division).

10. There was a conflict of evidence on whether the interviews were in person or by telephone. The Applicant called that the interviews were conducted in person, but Ms. Perucci thought they were by telephone. However, nothing turns on this point as no procedural breaches were alleged in this respect.

panel members. She seemed to recall reviewing the draft of the Comparative Analysis Report, but did not see its final version until shortly prior to the hearing. However, she confirmed that the Comparative Analysis Report was an accurate reflection of what was discussed during the interview and of the panel's evaluation of the Applicant's answers.

13. The panel found that the successful candidate was the only person who met all the requirements. Accordingly, he was the only candidate recommended for the post.

14. After the panel finalized its assessment and before the Comparative Analysis Report was transmitted to the Central Review Board ("CRB") for its review and endorsement, the panel's assessment was transmitted to Mr. Wilmoth, Director, Population Division, who was the hiring manager. Mr. Wilmoth testified that, upon receiving the panel's report and recommendation, he was surprised at the panel's finding that the Applicant did not fully meet all the competencies for the post. After the panel made its recommendation, he spoke separately on more than one occasion with two of the panel members, Mr. Cohen and Ms. Perucci. The panel members explained and justified the basis for their assessment of the candidates, including the grounds upon which they concluded that the Applicant did not meet all the competencies of the post. Mr. Wilmoth then conferred with the Executive Officer of DESA, who informed him that, as the hiring manager, he should accept the panel's recommendation unless he had strong grounds to challenge it. Mr. Wilmoth stated that following his discussions with the panel members and based on their explanations, he reached the conclusion that the panel was not incorrect in its assessment and recommendation.

15. By memorandum dated 26 May 2014, Mr. Wilmoth informed the Under-Secretary-General, DESA, of the outcome of the selection process,

including that only one candidate was recommended for the post.

The memorandum stated:

I am aware that the recommendation of a single candidate is contrary to the standard procedure followed by DESA in filling job vacancies. Nevertheless, having reviewed the pool of candidates and the procedure followed by the review panel, it seems that an exception is well justified in this particular case. Please note that all qualified candidates were invited to take the written test; of those, only 4 candidates wrote a passing exam; and of those, only one succeeded in demonstrating the full set of competencies required for this position.

In addition to the fair and thorough evaluation by the panel, this recommendation is guided by my personal familiarity with the work of [the successful candidate] over many years. He is a professional of the highest caliber, and his background and skills are especially well suited to the position in question. Given the highly specialized nature of the work, I believe there is no doubt that [the successful candidate] is uniquely qualified to fill this vacancy.

16. By memorandum dated 1 August 2014, Mr. Cohen, the chairperson of the selection panel, informed the CRB of the selection process and of the panel's decision to recommend the successful candidate for the post. Attached to the memorandum was the Comparative Analysis Report with the panel's assessment of the candidates' interviews.

17. Mr. Wilmoth testified that the CRB sent some comments, which was not uncommon as in Mr. Wilmoth's experience the CRB applied a high level of scrutiny when reviewing selection reports. Mr. Wilmoth could not recall what specific concerns were raised by the CRB in relation to this selection process. No further evidence was adduced at the hearing as to the nature of the CRB's enquires, but apparently those were in any event satisfied as the CRB approved the selection of the successful candidate.

Consideration

Alleged deficiencies in the selection process

22. The United Nations Appeals Tribunal has stated in a number of cases (see, e.g. *Zhao, Zhuang and Xie* 2015-UNAT-536) that, in matters related to selection procedures,

it is not the function of the Dispute Tribunal or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.

23. One of the Applicant's principal contentions is that he was unfairly treated during the interview and that the selection panel failed to properly carry out its functions. The Applicant alleged that not all of the relevant follow-up questions were asked of him during the interview to elicit further information, especially if the panel was not satisfied with his responses. The Applicant stated, in particular, that when he was answering the question about the competency of "managing performance", he was interrupted by Mr. Cohen, the Chairman of the panel, who said that it was "enough".

24. Ms. Perucci's evidence was to the effect that the Applicant provided an extensive answer to the question about the competency of "managing performance", concentrating on his experience serving on the board of a condominium. She did not recall Mr. Cohen or any member of the panel unfairly or improperly interrupting the Applicant during the interview. Each candidate was allocated an equal period of time to answer questions and the panel tried not to exceed the time allocated to each candidate. Ms. Perucci

stated that the example of service on the condominium board was fully explained by the Applicant but nevertheless did not demonstrate the competency of “managing performance” as required of UN staff in managerial positions.

25. The Tribunal observes that, generally, selection panels should refrain from adopting an overly rigid and narrow construction of the competency-based interview process and the assessment of relevant competencies. The Tribunal was concerned at the comment in the panel’s Comparative Analysis Report to the effect that the Applicant’s reference to his experience serving on the board of a condominium in response to the question on managing performance was “not relevant.” When questioned by the Tribunal,

the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member. A change in supervisor without a change in functions does not represent a lateral move. ... ;

...

Section 6

Eligibility requirements

...

6.3 Staff members in the Professional category shall have at least two prior lateral moves which may have taken place at any level in that category, before being eligible to be considered for promotion to the P-5 level, subject to the following provisions[.]

36. The successful candidate's first move at the P-4 level took place in April 2009, when his post was redeployed from the Estimates and Projections Section ("EPS") to the Population Policy Section ("PPS") of the Population Division. This redeployment (and related move) was formalized by an internal DESA memorandum dated 22 April 2009; the subject line of the memorandum was "Redeployment of post ... and assignment of [staff]". The successful candidate's second move took effect on 19 April 2010, when he was reassigned from PPS to EPS. This move was formalized by an internal DESA memorandum dated 22 March 2010; the subject line of the memorandum was "Reassignment of staff within the Population Division".

37. Surprisingly, the parties did not seek to adduce any evidence at the hearing regarding the issue of the successful candidate's lateral moves. Therefore, the Tribunal is left to draw its own conclusions on the basis of its best efforts at construing the documents.

38. From the record before the Tribunal, it appears that the successful candidate's functions did in fact change when his post was redeployed from EPS to PPS in 2009. When he was reassigned again in 2010 from PPS to EPS, his functions changed again, largely returning to what they were prior to 2009.

39. However, the issue of the lateral moves is complicated by the fact that the successful candidate's move in April 2009 was done by way of redeployment of his post from EPS to PPS. Thus, when he was moved from PPS to EPS one year later in April 2010, from OHRM's point of view he was not going back to PPS, as his post was no longer there, but was rather assigned to PPS laterally from EPS. This would mean that his assignment to PPS in April 2010 was a new lateral move as it included a change of functions as compared to his functions with PPS, where his post was now based.

40. The Tribunal also notes that sec. 15 of SI/AI/2010/3 states that "a lateral move will normally involve a change in functions with or without a change of supervisor" (emphasis added), which indicates a certain degree of discretion left to the Administration in assessing whether the conditions for recording of a lateral move have been satisfied.

41. OHRM found that the successful candidate satisfied the required two lateral moves needed for a promotion to the P-5 level. On the documents before the Tribunal, the Applicant has not persuaded the Tribunal that OHRM's determination was erroneous.

42. The Applicant submitted that the discrepancy in the dates of the memoranda formalizing the successful candidate's lateral moves and the dates on which the moves became effective indicated some impropriety. No evidence was introduced, however, to suggest that this indeed was due to some impropriety rather than administrative delay or inefficiency. The lateral moves were recorded several years prior to the selection exercise in question,

which renders it highly unlikely that the moves were made with the objective of conferring an unjustified benefit or privilege on the successful candidate in the context of this selection exercise. Based on the record, management of DESA had programmatic reasons for the lateral moves, although it has to be acknowledged that it gave rise to understandable suspicion on the part of the Applicant.

43. The Tribunal was concerned at the allegation that the successful candidate did not possess the two lateral moves as required under ST/AI/2010/3. It is understandable that the lack of absolute clarity about the successful candidate's eligibility may have given rise to suspicion on the Applicant's part, particularly considering that the Applicant was not placed on the list of recommended candidates despite his very good performance record and his prior service as Officer in Charge of his Section. However, on the evidence before it, the Tribunal is not persuaded that there was impropriety in connection with the successful candidate's record of lateral moves.

44. Finally, whether or not the successful candidate had two lateral m

candidate. However, not without some hesitation, the Tribunal concluded that, taking into account the Applicant's evidence that the interview record was more or less a fair summary, as well as Wilmoth's searching questions of the panel members, Mr. Wilmoth acted within the ambit of his responsibilities and judgment in endorsing the panel's recommendations.

46. Some staff members may have concerns about the use of competency-based interviews, particularly the rigid application of the interview guidelines. However, competency-based interviews are an integral part of the selection process in the Organization. Application of this interview method is an attempt to implement, insofar as it is possible to do so, a selection process that is free from bias and subjectivity. However, interviews are not a robotic exercise and some degree of flexibility during the interview is not only allowed but should be encouraged, provided it does not unfairly favour or disadvantage any specific candidate and that it is within the permissible boundaries of a legitimate and necessary procedure to assess fairly and properly whether a candidate satisfies a particular competency. Above all, the task of the panel is to identify suitable candidates who meet the highest standards of efficiency, competence and integrity as required by 101.3 of the Charter of the United Nations. In making these assessments, selection panels must take into account proper factors and disregard irrelevant considerations.

47. It is also important to keep in mind that even if a candidate is not successful in a particular interview selection process, it should not be viewed as a reflection of his or her overall competence and performance as a staff member. In this particular case, there is no doubt that the Applicant is regarded highly as a staff member, as reflected in his performance reports and in the evidence of the Director of the Population Division. It is hoped that the detailed examination of this selection exercise will have given the Applicant valuable insights into the way the promotion system is intended

to work, so as to benefit him and ~~the~~ with respect to future promotion opportunities.

Conclusion

48. The Tribunal is satisfied, from ~~the~~ documentary and oral evidence, that the Applicant was given full and fair ~~it~~ consideration and that it is not for the Tribunal to substitute its judgment for that of the selection panel and the hiring manager.

49. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 14th day of October 2015

Entered in the Register on this 14th day of October 2015

(Signed)

Hafida Lahiouel, Registrar, New York