

UNITED NATIONS D

Introduction

1. The Applicant, a Russian Translator (P-3) at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), contests his “non-consideration/selection” for a vacancy of Russian Reviser (P-4), Russian Translation Section (“RTS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”).

2. As remedies, he requests to be “afforded the UN obligations of good faith and due process in the full and fair consideration of [his] case”, as well “as any relief customary in such instances at the discretion of the Tribunal”.

Facts

3. The post at issue was advertised through Internal Vacancy Announcement (“IVA”) DCM 4/2014 from 25 July to 7 August 2014. The message from the Executive Office, DCM, UNOG, circulating the IVA stated that it was “for lateral movements of staff only”. The Applicant applied by email of 28 July 2014, reading: “If I do not qu[a]lify for the lateral move on [that IVA], please disregard my application and let me know”.

4. By memorandum of 11 August 2014, the Officer-in-Charge, RTS, recommended to the Director, DCM, the selection of another candidate, stressing that, out of the two candidacies received, that of the Applicant had not been considered due to his grade (P-3) whereas the other candidate met all the criteria for the post.

5. By memorandum of 14 August 2014, the Director, DCM, requested the Under-Secretary-General, Department for General Assembly and Conference Management (“DGACM”), New York, to approve the lateral transfer of the recommended candidate from DGACM to UNOG. He approved it on 4 September 2014.

6. After the Applicant inquired, on 25 September 2014, on the outcome of the recruitment exercise, the Executive Office, DCM, advised him, by email of 10 October 2014, that the post was limited to lateral moves only and, "because [he was] at the P-3 level, [he] was not eligible for a P-4 under a lateral move arrangement".

7. The Applicant requested management evaluation of the impugned decision on 3 November 2014. The Management Evaluation Unit ("MEU") replied by letter of 19 January 2015, upholding the decision.

8. The instant application was filed on 17 March 2015. The Respondent replied on 17 April 2015, annexing a number of documents recording the process leading to the contested decision.

9. Pursuant to Orders Nos. 122 (GVA/2015) of 18 June 2015, 176 (GVA/2015) of 21 September 2015 and 209 (GVA/2015) of 22 October 2015, this case, together with a number of other cases filed by the Applicant, was referred to mediation, and the proceedings before the Tribunal were suspended for that purpose. However, mediation efforts were unsuccessful, and the proceedings before the Tribunal resumed on 2 November 2015.

10. By Order No. 88 (GVA/2016) of 3 May 2016, the parties were invited to file comments, if any, with respect to the Tribunal's view that a judgment could be rendered without holding a hearing. The Respondent made no comments. The Applicant filed additional submissions on 14 May 2016, raising in particular that the advertisement of the litigious post though an IVA was a deviation from the rules governing lateral moves, and moving for a hearing on the merits.

11. By Order No. 105 (GVA/2016) of 26 May 2016, the Respondent was instructed to file written comments on the above-mentioned issue raised by the Applicant in his last submission, which the Respondent did on 2 June 2016.

12. On 12 June 2016, the Applicant filed comments on the Respondent's response to Order No. 105 (GVA/2016), which the Tribunal took into consideration despite being unsolicited.

Parties' submissions

13. The Applicant's principal contentions are:

- a. The decision contradicts art. 101.3 of the Charter and staff regulation 4.2, providing that the paramount consideration in the staff's appointment, transfer and promotion "shall be the necessity of securing the highest standards of efficiency, competence and integrity". These provisions cannot be respected by covertly selecting candidates instead of conducting

d. There was no “extraordinary emergency situation” at the post’s unit at the material time. As a matter of fact, the General Assembly’s session was in full swing and the New York Russian, Translation Section required

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the Chief, RTS, wished to hire, he believes to have suffered from personal retribution by the latter. The pattern of using various techniques to prevent the Applicant's selection is indicative of personal bias and prejudice against him;

k. The Applicant has been repeatedly rostered for promotion to the P-4 level since 2008. This created a legitimate expectation of being promoted within a reasonable average period on a par with other rostered Russian Translators; and

l. While being a P-3 translator, the Applicant has been translating and self-revising his work, which by the Organization's own standards corresponds to tasks at the P-4 level, without granting him in return any practical recognition or real chance of promotion; and

m. The text of the Applicant's email applying for the post does not estop him from contesting the decision. DCM acknowledge receipt of his candidacy by email of the same day, and for that he assumed that it had been accepted.

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course of action to fill the position. The second option was chosen for the effective delivery of services, given the demands of RTS, since the procedure required much less time and the staff member could then begin work upon transfer and without much oversight. It was lawful and reasonable;

c. The wording of sec. 2.5 of ST/AI/2010/3 does not oblige to issue an IVA, but does not prohibit either to internally advertise posts. It is thus allowed. The IVA was issued to assess internal DGACM internal staff's interest for the position, which is a reasonable measure in the exercise of delegated authority. The Applicant incorrectly claims that the IVA was advertised under ST/AI/2010/3; its sec. 4 requires that job openings be published either

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h. The allegations about personal retribution, bias and duty station-based discrimination are unsupported.

Consideration

20. That being said, the Applicant's argument that a mere acknowledgment of receipt of his candidacy led him to conclude that he would be further considered is implausible. An acknowledgment of receipt is no more than notice that a communication has attained its addressee; it is generally known to entail no

25. The claim that lateral transfers are, as a matter of pri

Conditions for resorting to lateral transfers

29. The Applicant's assertion that the transfers constitute an exception to the rules, therefore subject to the conditions spelled out in staff rule 12.3(b), is misguided. An exception to the Staff Rules as envisaged in staff rule 12.3(b) is an *ad hoc* departure from the prescriptions set out in the rules. By contrast, the possibility of transferring a staff member already in service instead of following the standard competitive procedure is, as seen above, built in the staff selection system. As such, far from being a departure from the rules, it amounts to their plain regular application. Accordingly, it is irrelevant to examine whether the conditions to make an exception to the Staff Rules were met.

30. Similarly misconceived is the submission that lateral transfers should be confined to "surge needs, with established procedures for recruitment being waived only in exceptional cases". In claiming so, the Applicant relies on General Assembly resolution 61/244. As the Applicant himself concedes, said resolution does not refer to lateral moves, but to pre-screened rosters; hence, it is such pre-screened rosters that the General Assembly intends to limit to surge needs and exceptional cases only. Extending this clearly defined and limited request to lateral transfers is an inappropriate extrapolation of a statement aimed at a significantly different situation. As the Applicant rightly points out, neither ST/AI/2010/3 nor any other related provision set out criteria for resorting to lateral moves, rather than to a competitive selection process. The UN legislator could have confined the use of lateral moves to certain hypothesis but, as a matter of fact, he chose not to establish any such condition. Had he wished to introduce some, he would have done so explicitly. Therefore, restrictions that were intended for different mechanisms cannot be applied to lateral transfers.

Alleged violations of sec. 2.4 of ST/AI/2010/

31. The Applicant holds that, in any event, the disputed transfer departed from the material and procedural conditions laid down in sec. 2.5 of ST/AI/2010/3 for lateral moves.

32. Firstly, the post was advertised, despite the stipulation that lateral transfers within the same department be effected “without advertisement of the job opening”. According to the Applicant, the advertisement of the post, all the more since it was disseminated beyond DGACM, triggered the application of the staff selection system general regime.

33. The Tribunal emphasises that the vacancy was advertised through an IVA. It is obvious that this cannot be considered as a proper publication in the compendium of vacant posts pursuant to sec. 4.1 of ST/AI/2010/3. The IVA was never posted on the careers portal of Inspira; it was disseminated by email to the head of different offices, mainly within DGACM, albeit also outside it—like ESCAP. Both the IVA and the accompanying email specified that the advertising was strictly internal and for lateral move only; hence, no one could have been misled by the reach and conditions of the vacancy. Although sec. 2.5 of ST/AI/2010/3 expressly sets aside the duty of advertisement, it does not prohibit some kind of publication. Considering that advertisement of the post, even limited, tends—if anything—to render the process more transparent, the course of action consisting of circulating an IVA could hardly be deemed to harm potential

position with its own post description in a different duty station and under different supervisors; as such the posts are clearly distinct. At any rate, the above-quoted definition specifies that a change in functions will “normally” be involved, indicating by the use of this adverb that it is not even a mandatory requirement.

Improper motivation

36. Lateral reassignments, like any discretionary decision, must not be arbitrary or capricious, tainted by improper motives, based on erroneous or irrelevant considerations, procedurally flawed or resulting in a manifestly unreasonable outcome (see generally, *Assad* 2010-UNAT-021, *Sanwidi* 2010-UNAT-084, *Abbassi* 2011-UNAT-110).

37. The Applicant suggests that the decision was unduly influenced by personal retribution from the Chief, RTS, UNOG, further to a disagreement in a past selection exercise and, at the same time, because he had promised the post to the eventually reassigned candidate.

38. It is well-established that the burden of proving any allegations of ill-motivation or extraneous factors rests with the applicant (*Jennings* 2011-UNAT-184, *Obdeijn* 2012-UNAT-201, *Beqai* 2014-UNAT-434). In this case, the Applicant has not provided any evidence backing either of these claims. His history of unsuccessful applications for Geneva-based posts falls short to demonstrate personal prejudice. Likewise, no evidence shows that the incumbent of the post at issue had been pre-determined or enjoyed some sort of favouritism.

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