

Case No.: UNDT/GVA/2016/092
Judgment No.: UNDT/2018/029
Date: 27 February 2018



Introduction

1. By application filed on 12 October 2016, the Applicant, contests his non-selection to the position 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).

2. The application was served on the Respondent, who filed his reply on 16 November 2016.

7. After the assessment of the seven candidates, the Under-Secretary-General, OIOS (“USG/OIOS”), in an interoffice memorandum dated 27 April 2016, submitted her recommendation for filling the post of Director, ID/OIOS, to the Chairperson, Senior Review Group (“SRG”). Her recommendation contained three candidates, namely, the Applicant, the then Deputy Director, ID/OIOS, Nairobi, and an external candidate.

8. In an interoffice memorandum dated 24 May 2016, the Chairperson, SRG, informed the Secretary-General that the SRG had endorsed the recommendation of the USG/OIOS and that the three candidates’ names were submitted for his consideration.

9. On 2 June 2016, the Executive Office of the Secretary-General (“EOSG”) informed the Chairperson, SRG, that the Secretary-General had approved the appointment of the then Deputy Director, ID/OIOS, Nairobi, as the new Director, ID/OIOS. On the same date, the then Secretary, SRG, informed the USG/OIOS of the appointment.

10. The Applicant was informed of his non-selection on 2 June 2016 and he filed an application for suspension of action on 3 June 2016, seeking suspension of the decision not to select him. The Tribunal, on 8 June 2016 through Order No. 116 (GVA/2016), found the contested decision to appear to be *prima facie* illegal and suspended the implementation of the selection decision pending the outcome of management evaluation.

11. On 14 July 2016, the Management Evaluation Unit informed the Applicant that the contested decision was upheld and on 12 October 2016, the Applicant filed the application subject of this Judgment.

Parties’ Submissions

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

- a. The Secretary-General acted *ultra vires* when he made the decision regarding the selection exercise of the Director, ID/OIOS;

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- b. General Assembly Resolution 54/244 emphasised the operational

- a. The scope of judicial review in non-selection cases;
- b. Legal nature and scope of delegated authority; and
- c. Functional independence of OIOS *vis-à-vis* the authority of the Secretary-General.

Consideration

The judicial review by the Tribunal in non-selection cases

15. It is well-established case law that in cases of staff selection, the Tribunal cannot substitute its assessment to that of the Administration and, as a consequence, its role is to evaluate the procedure and verify whether the Applicant was given full and fair consideration.

16. The United Nations Appeals Tribunal in *Ljungdell* 2012-UNAT-265 held that:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the

The lawfulness of the decision not to select the Applicant

Legal nature and scope of delegated authority

19. When evaluating the lawfulness of the decision not to select the Applicant to the position of Director, ID/OIOS, the Tribunal first has to assess who, according

25. Para. 35 of ST/SGB/273, *inter alia*, provides that:

With respect to the staff of the Office, the Under-Secretary-General for Internal Oversight Services shall have 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.

26. The OIOS was established to assist the Secretary-General in fulfilling internal oversight responsibilities in respect of resources and staff of the Organization. However, the original source of authority to perform such oversight lays with the Secretary-General. Pursuant to sec. 3.1 of ST/SGB/2002/7 on Organization of the OIOS, the USG/OIOS is (emphasis added):

[A]ccountable to the Secretary-General, but exercises operational independence as provided for in section A of General Assembly resolution 48/218 B of 29 July 1994 and General Assembly resolution 54/244 of 23 December 1999.

27. From the above provisions, it is clear that OIOS has an operational independence that allows it to function without interference from the Secretary-General.

28. The Applicant avers that the Secretary-General had delegated the appointment of staff members at the D-2 level within OIOS to the USG/OIOS, by virtue of ST/SGB/273 and that, therefore, he could not make the selection decision in the p8p.453(wi)1(t)a813(l)1(a)0.9cnt (t)a8.1(a)0.9c p8/T1()1(y)bu98535(l)1()JT99(5943.90628(v

USG/OIOS could or should have “surrendered” her delegation back to the Secretary-General are flawed. Rather, the Secretary-General may simply revoke a prior delegation of authority at any time.

30. The delegation of powers to hierarchically subordinated organs (as in the present case) presents several defining juridical features:

Section 3

Reserved and delegated authority in the administration of the Staff Regulations and Staff Rules

3.1 The matters reserved exclusively for the Secretary-General's decision are set out in the annex to the present bulletin. ...

3.2 With the exception of the matters reserved exclusively for the Secretary-General or as otherwise indicated in the annex, ...

...

Section 4

Existing delegations of authority

...

4.2 Notwithstanding section 3.2, the delegations of authority which currently exist through administrative issuances, memorandums or other written communications shall continue to be

34. Thus, the Tribunal cannot but conclude that the Secretary-General's authority to select staff members to positions at the D-2 level applies across the board to any appointment to positions at that level, without any exception. It follows that by virtue of the above extract of the annex to ST/SGB/2015/1, any prior delegation of appointments to the D-2 level within OIOS to the USG/OIOS was revoked by the "retention", as per the above-referenced sec. 4.2(a) and annex 1 of ST/SGB/2015/1.

35. Furthermore, according to the principle of hierarchy of norms, ST/SGB/2015/1, which is also a specialized norm, prevails over Administrative Instructions ST/AI/40I amended by ST/AI/2003/4 (see *Villamorán* 2011-UNAT-160).

Functional independence of OIOS vis-à-vis the authority of the Secretary-General

36. The Applicant contends that the selection procedure was unlawful, because the recommendation for the post in question was done by the USG/OIOS, and reviewed by the SRG instead of the OIOS Review Body.

37. The scope of responsibilities of the Secretary-General and the USG/OIOS, in personnel matters, is defined in ST/AI/401 on personnel arrangements for OIOS as amended by ST/AI/2003/4.

38. Pursuant to para. 6 of ST/AI/401 as amended by ST/AI/2003/4, the Secretary-General, in consultation with the USG/OIOS, shall establish an OIOS Review Body to advise the USG/OIOS on the appointment, promotion and termination of all staff members up to and including at the D-2 level. Also, paragraph 6 sets forth that the functions and procedures of the OIOS Review Body shall be comparable to those of the other United Nations central review bodies. Nonetheless, this framework is only to be applicable when it is the USG/OIOS who makes the appointment, since the OIOS Review Body was specifically established to advise the USG/OIOS.

39. Since the USG/OIOS was not the one making the appointment decision, and did not have the authority to do so, the present selection exercise ought not to be submitted to the OIOS Review Body.

40. Rather, according to ST/AI/2010/3 on Staff Selection System, the review had to be done by the Senior Review Group. Indeed, secs. 2.1, 2.4 and 3 of ST/AI/2010/3 relevantly provide that:

2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

...

2.4 Selection decisions for the positions at the D-2 level are made by the Secretary-General when the Senior Review Group is satisfied that the applicable procedures were followed.

3. ... The process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present instruction. For positions at the D-2 level, the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

41. The recruitment process in the case at hand was conducted in accordance with ST/AI/2010/3 and, since the post in question was at the D-2 level, the USG/OIOS correctly referred the matter of selection and appointment to the SRG for further action, before the selection decision being made by the Secretary-General.

42. As examined in detail above, after the coming into force of ST/SGB/2015/1, the Secretary-General retained the authority for all selections of staff members at the D-2 level, after review by the SRG, if required. This is what happened in the case at hand.

43. Therefore, since the decision-maker in this instance was the Secretary-General, the OIOS Review Body had no role to play in this selection exercise.

44. In light of all of the above, the Tribunal reaches the conclusion that the Secretary-General had the authority to make the selection decision for the post of Director, ID/OIOS.

45. Finally, the Tribunal finds that the Applicant's reliance on the Judgment in *Appleton* is not relevant in the current case for two main reasons. Firstly, the set of factual circumstances in both cases are completely different and, secondly, the legal framework has changed with the coming into force of ST/SGB/2015/1.

46. In *Appleton*, the original decision-maker was the USG/OIOS and the applicable legal framework was ST/AI/40I as amended by ST/AI/2003/4, whereas, in the present case, it was the Secretary-General who made the decision to select a candidate at the D-2 level, under a new legal framework—ST/ SGB/2015/1.

47. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(Signed)

Judge Teresa Bravo

Dated this 27th day of February 2018

Entered in the Register on this 27th day of February 2018

(Signed)

René M. Vargas M., Registrar, Geneva