
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/020
&
UNDT/NBI/2011/057
Judgment No.: UNDT/2013/035
Date: 28 February 2013
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar:

Introduction

1. The Applicant is a Senior Security Officer at the rank of a Sergeant, GS-5, with the United Nations Office at Nairobi's Department of Safety and Security ("UNON/DSS").

2. In case No. UNDT/NBI/2011/020, the Applicant contested the administrative decisions not to select him for the following posts: Security Lieutenant under Vacancy Announcement Number 10-SEC-UNON-424103-R-NAIROBI dated 23 March 2010 and Security Lieutenant under Vacancy Announcement Number 10-SEC-UNON- 424422-R-NAIROBI dated 19 April 2010.

3. In case No. UNDT/NBI/2011/057, he challenged a decision by UNON's Chief, Safety and Security Section to suspend his use of the Organization's Lotus Notes e-mail account.

4. The matter was heard on 10 October 2011 and from 12-13 March 2012. On 12 March 2012, the Tribunal ordered that the two cases be consolidated.

Facts

5. The Applicant's official fire arm was revoked by the Chief, UNON/DSS in October 2006 on grounds of his performance. Since the revocation of his official firearm the Applicant had been attending weapons qualification training without a firearm.

6. On 23 March 2010, a vacancy announcement ("VA 1") was advertised for six G-6 posts for Security Lieutenant within UNON/DSS. On 19 April 2010, two vacant posts were advertised for the same post for Security Lieutenant G-6 UNON/DSS ("VA 2")

7. The Applicant applied for the posts in both VA 1 and VA 2. UNON/DSS decided that, given the identical requirements for the two vacancy announcements and in the interest of saving time and resources, the recruitment process of the two posts should be merged.

8. A total of 11 candidates including the Applicant were shortlisted, all the shortlisted candidates were internal applicants at the G-5 level serving as Security Sergeants within UNON/DSS and seeking promotion to the G-6 level.

9. The 11 shortlisted candidates were interviewed on 27 May 2010. The interview panel comprised of the Deputy Chief of UNON/DSS, Mr. Roger Lewis, Mr. Donald Zimmer, Safety and Security Officer at the United Nations Human Settlement Programme and Mr. Elsaid Karara, Security Coordinator UNON/DSS.

10. Following the interview, the panel recommended all the 11 shortlisted candidates including the Applicant as demonstrating the requisite qualifications, experience, and competencies for the G-6 Security Lieutenant posts. The interview panel considered the ability to carry a fire arm as a desirable skill for the post of Security Lieutenant.

11. On 25 June 2010, the Programme Case Officer (“PCO”) submitted the list of the 11 candidates to the Secretary of the Central Review Panel (“CRP”), Mr. Sousa Jossai for endorsement.

12. By a memorandum dated 13 September 2010 the CRP endorsed the list of recommended candidates and indicated that it was satisfied that UNON/DSS had properly applied the relevant evaluation criteria and the prescribed procedures under Administrative Instruction ST/AI/2002/6. The names of eight candidate selected from the list of 11 endorsed by the CRB was sent to UNON’s Director, Division of Administrative Services.

13. On 16 September 2010, the eight candidates selected to fill in the eight vacant posts were notified of their selection. The Applicant was not one of the eight selected candidates.

14. The Applicant sought management evaluation of the decision 4170(o)-20(f)3Tm [(On)19(-)-74ifOn

report on a 7.2 mm bullet allegedly found in the office of Mr. Jorum Mkunde and; an investigation report on matters addressed by Mr. Jones Atogo in a 26 May 2006 memorandum to Mr. David Venness relating to certain concerns within the ranks of the Security and Safety Services of UNON.

26. On 10 October 2011 the Tribunal issued a ruling on the motion for production of documents. The Tribunal ordered the Respondent to produce all the documents prayed for by the Applicant

27. The Respondent made an ex-parte production of documents and an application to maintain confidentiality of the same on 18 October 2011. The Applicant asked the Tribunal to make the said documents available to him in the interest of justice. The Tribunal allowed the production of documents to be done in an ex-parte basis as per the Respondent's request.

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needs to show mental stability and an understanding of the UN policy on the use of force.

- e. He was not involved in the recruitment process of the G6 Security posts advertised on 23 March 2010. He appointed the Deputy Chief of UNON/DSS as the Case Officer for the said recruitment process. He did not select the members of the interview panel neither was he involved in the deliberation process.
- f. The Applicant was on the list of recommended candidates. He could not recall if he made the selection of the candidates but the ultimate decision maker was the Director-General of UNON. He did not in any way influence the selection of the candidates.
- g. The considerations in the final selection included, *inter alia*, past performance, attitude and leadership skills. Most of the candidates were qualified. The Applicant was the weakest candidate when considering these competencies.
- h. He does not have personal animus towards the Applicant. The Applicant had not demonstrated any qualities to merit his promotion. Promotion is not based on seniority or length of service. He can only recommend the Applicant if he shows improvement in his performance and that he can do the right thing and gain respect from his subordinates.
- i. The Applicant's performance has always been problematic. He is never at the right place at the right time, he is sometimes absent from his duty post, he is involved in various acts of misconduct, his productivity is low and he is inefficient in most of his duties.

evidence to submit in support of his claims on non-

Officers and was offered professional psychiatric counselling to resolve certain aspects of his behaviour that led the Human Resources and Mr. Marshall to believe that the Applicant was unstable and therefore not fit to carry a fire arm.

54. The Applicant's contention on the suspension of his Lotus Notes privileges pending investigation is without merit. The decision to suspend the Applicant's access to Lotus Notes was a proper, non-arbitrary exercise of the Respondent's discretion pursuant to staff rule 10.1.

55. The use of organizational resources including the right to use Lotus Notes and other ICTS services is a privilege conferred on staff for the benefit of the organization rather than a right devolving to a staff member for his or her own benefit.

56. The facts and the legal principles demonstrate that the decision to suspend Applicant's Lotus Notes privileges was predicated upon credible information received from the ICTS that the Applicant used his Lotus Notes and the disk on his UN- assigned computer to receive and thereafter store pornographic materials.

57. The Applicant's non-selection for the subject post was not based on lack of fire arms qualification. The Applicant had a record of dereliction of duty, dishonesty and a poor work attitude which also informed the final selection decision. The Applicant had poor records when compared with other candidates which made him a less attractive candidate.

58. In view of the above, the Respondent prays that the Applications be dismissed in their entirety.

Issues

59. Having reviewed the entire case records, the Tribunal finds that the following are the legal and other issues that arise for consideration.

- a. Whether the Applicant's claims are receivable.

- b. Whether the non-selection of the Applicant for the post of Security Lieutenant was unfair and motivated by discrimination.
- c. Whether the continued withdrawal of the Applicant's access to Lotus Notes was a proper exercise of authority?
- d. Whether the Chief, DSS/UNON abused his authority with regard to the revocation of the Applicant's licence to bear a firearm. Did the said revocation affect the Applicant's chances of promotion?
- e. Whether the Applicant was a victim of harassment in the work place?
- f.

of his official firearm is interlinked with his non-selection case and is not an independent claim thereof.

63. The Applicant also submitted that all his claims were sent for management evaluation within the 60-day time limit contrary to the Respondent's assertions.

64.

68. The Respondent submitted that the Applications were not receivable *ratione temporis*. Pursuant to staff rule 11.2(c), a request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

69. On the matter of receivability due to the exhaustion of time, the Tribunal observes that it was never raised before the MEU whether the Applicant's requests were receivable, but rather the MEU had proceeded to review the Applicant's requests on the basis of the facts before it resulting in the contested decisions being upheld.

70. Just as the Tribunal has no power to extend time limits for management evaluation under art 8.3 of the Tribunal's Statute, it has no business examining, in a case like this, whether a management evaluation request was entertained out of time. It is up to the MEU to decide whether to deal with requests brought to it outside its own time limits. The MEU having affirmed the impugned administrative decisions, it is indeed strange that the same Respondent should seek at this stage to attack the process simply in order to convince this Tribunal to reject the Application.

71. The Tribunal adopts a presumption of regularity in respect of the MEU proceedings. The Respondent fully cooperated with the MEU and at no point during the proceedings did he challenge the receivability of the Applicant's requests.

72. The Tribunal finds on this score that the applications were filed within the applicable time limit and that all the Applicant's claims were properly submitted for management evaluation and are therefore receivable.

Was the non-selection of the Applicant for the posts of Security Lieutenant unfair and motivated by discrimination?

73. The Applicant submitted that the failure to select him for the post of Security Lieutenant was due to the fact that he had previously challenged irregular vacancy announcements. He testified that no explanation was given as to his unsuitability for the posts and that the candidates selected were either recently recruited, junior in rank and/or had been recently promoted/selected during the irregular selection process. He also argued that UNON/DSS had failed to disclose any superior qualifications possessed by the selected candidates in comparison to his.

74. The Applicant contended that the interview panel did not consider that despite the fact that his licence to bear a firearm had been revoked, he was capable of handling a firearm as he had once been a firearms instructor.

75. The Respondent submitted that he meticulously followed the requirements of the staff selection process and accorded the Applicant a full measure of his right to receive full and fair consideration for the posts and that the Applicant's seniority did not in any way entitle him to preferential treatment in the selection process. The Respondent submitted that the Applicant did not adduce any evidence to prove that there was a conspiracy to prevent his promotion.

76. The Respondent also submitted that the Applicant was assessed and found to possess the required qualifications and competencies for the posts. On the basis of that assessment, the interview panel placed the Applicant on the list of recommended candidates. The CRP subsequently endorsed him as one of the candidates possessing the competencies and other requirements for the posts and he was rostered for similar posts accordingly.

77. The Chief/DSS testified that the Applicant had not demonstrated any qualities to merit a promotion and that he could only select the Applicant if he showed improvement in his performance. The Tribunal is curious as to why the Applicant

would be placed on the roster in the first place if his promotion is entirely dependent on the whims of the Chief/DSS.

78. The Respondent submitted that the reason for the Applicant's non selection was that he was the weakest candidate and not because of his lack of firearms qualification as this was a desirable but not a required skill.

79. The MEU took into cognizance the fact that the Applicant had not completed the UN firearms qualification training while the other candidates had completed the said training as a justification for the Applicant's non-selection for the Security Lieutenant posts.

80.

Applicant as technically capable of handling a firearm, the Respondent has not produced any documentary evidence to support the same. On the contrary all evidence points to the fact that the Applicant was not selected because he was considered as lacking firearms qualification.

84. Mr. Marshall's testimony conflicts with both what he himself wrote to the MEU and the testimony given by his deputy, Mr. Lewis. Mr. Marshall had told the Tribunal that the Applicant was not selected for the Security Lieutenant posts because he was the weakest candidate and not because of his firearm qualifications, while he had earlier written to the MEU clearly stating that the Applicant's non selection was due to his non completion of the UN firearms course. Mr. Marshall had also told the Tribunal that the interview panel considered the Applicant capable of handling a fire arm.

85. This unfortunate resort to blowing hot and cold over the issue on the part of the Respondent's agents raises serious doubts as to the integrity of the entire promotion exercise. Mr Marshall's memorandum to the MEU clearly shows that the MEU's decision was based on the misleading statements of the Chief of UNON/DSS.

86. The Dispute and Appeals Tribunals in their jurisprudence have consistently held that the Administration bears the burden of proving that a candidate was given full and fair consideration for appointment/promotion. Where an applicant alleges discrimination or unfairness in the appointment/promotion process, he/she bears the evidentiary burden.¹ In *Majbri* 2012-UNAT-200, the Appeals Tribunal stated that,

All the candidates that appear before an interview panel have the right to full and fair consideration. A candidate challenging the denial of a promotion must prove through a preponderance of the evidence any of these grounds: that the interview and selection procedures were violated; that the members of the panel were biased; that the panel discriminated against an interviewee; that relevant material was

¹ See for example in *Andrysek*

ignored or that irrelevant material was considered; and potentially other grounds depending on the facts of each case.

87. Due to the lack of access to an official firearm as a result of the revocation of his licence since October 2006 by Mr. Marshall, the Applicant was not able to complete the UN firearms qualification course. The Applicant had successfully completed the “firearms instructor course” and the “Glock armourer’s course” in April 2005. He had also been a firearms instructor before the revocation. The Applicant no doubt had certified knowledge and sound experience in handling of firearms.

88. Having analysed the evidence before it, the Tribunal finds and holds that the interview panel, in spite of Mr. Lewis’ claims, failed to fairly consider the material issues on the Applicant’s firearm qualification and that this failure impacted unfavourably on the selection of the Applicant for the Security Lieutenant posts. It is also the Tribunal’s findings that because of the inclinations of the Chief, UNON/DSS who was hell-

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only for such time as is reasonably necessary to ascertain whether the suspected misconduct had occurred.

98. In the investigation report from the SIU/UNICTR, dated 12 August 2011 it was stated that: “following consultation between the OIC, ICTS and the Chief, UNON/DSS it was decided to deny the officers access to their accounts while an investigation was conducted.” This shows that Mr. Marshall was in fact involved in suspending the Applicant’s access to Lotus Notes and that the suspension of the Applicant’s access to Lotus Notes was intended only for the purposes of ensuring the integrity of the investigation.

99. In the present case, the investigation on the Applicant’s alleged misuse of ICTS resources was concluded on 12 August 2011. Para 3 of ST/AI/371 (Revised Disciplinary measures and procedures) directs that where the investigation report indicates that the allegation of misconduct is well founded, the head of the office or the responsible officer should immediately report the matter to the ASG/OHRM.

100. The investigation report was never sent to the ASG/OHRM for appropriate action. The Respondent has not shown that any measures were taken as a result of the investigations.

101. The Tribunal is of the view that if the withdrawal of the Applicant’s access to Lotus Notes was imposed only to secure the integrity of the investigation, the proper procedure would have been to restore access upon the completion of the investigation. Surprisingly, this is not the case and so from August 2011 when the investigations were concluded to date the Applicant’s access to Lotus Notes has not been restored while no disciplinary action was commenced against him.

102. The Tribunal finds that Mr. Marshall abused his position and authority by not restoring Applicant’s access to Lotus Notes even after the completion of the investigation.

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by the United Nations Security Officers (hereinafter referred to as “UN firearms policy”) paras. D (7) and (8). Paragraphs D (7) and (8) state as follows:

(7) An officer shall not carry a firearm unless the officer has received training for that firearm in accordance with the applicable policies of the United Nations, and the Officer is authorized to carry the firearm ...by the Chief, United Nations Security and Safety Service.

(8) An officer shall only carry a firearm as and where authorized by the Chief of the Security and Safety Service.

108. It not in contention that the Applicant had successfully completed his “firearms instructor course” and the “Glock armourer’s course” in 2005 which explains why the Applicant was given a firearm. Paragraph D (7) poses a restriction to persons who have not received firearm training. The Applicant having completed firearm training and being authorised to carry a firearm, the question arises as to whether there were other reasons for revoking the Applicant’s official firearm licence.

109. While giving oral evidence before the Tribunal Mr. Marshall stated that:

- a. The withdrawal of the Applicant’s fire arm was due to performance issues. He could not recall the specific details of what led to his withdrawal of the Applicant’s firearm as this happened six years ago. There were many happenings at the time including, his performance, poor judgment attitudes and the safety of staff members. He decided to withdraw the Applicant’s fire arm to reduce the chances of an accident within the UNON complex.
- b. The Applicant was sent to counselling before the withdrawal of his firearm. The efforts at counselling were not successful and he was informed by the Human Resources Officer, Ms. Jamie

Kearney-Sassi and the Assistant Chief of Security UNON that the Applicant demonstrated instability. The Applicant may regain his weapon but he needs to show mental stability and an understanding of the UN policy on the use of force.

110. This testimony raises two major issues, first, the credibility of his testimony and second, the role of the Assistant Chief of Security UNON and the Human Resources Officer in counselling in this regard.

Mr. Marshall's testimony

111. Whereas Mr. Marsha

Applicant's licence to bear firearms has indeed impacted on his career advancement in the United Nations as the said revocation has been used to deny him promotion.

115. Mr. Marshall is a senior official within the UN/DSS, and was responsible for revoking the Applicant's licence to bear firearms. His contradictory and unreliable testimony attests to an unfortunate lack of credibility on his part.

Is there any role for the Chief, UNON/DSS, Assistant Chief of Security UNON and a Human Resources Officer in medical evaluation of staff members?

116. It was submitted for the Respondent that the Applicant had obtained counseling from a Human Resources Officer and the Assistant Chief of Security, UNON. Further, Mr. Marshall testified that his decision to revoke the Applicant's licence to bear firearms was reached after the Human Resources Officer and the Assistant Chief of Security UNON informed him that the applicant demonstrated mental instability.

117. In a note to file signed by one Mr. Alphonso Jasper and tendered as part of the Respondent's case, Mr. Marshall was said to have requested the Assistant Chief, Mr. Jasper, to counsel the Applicant and that on 15 September 2005 he scheduled a meeting with the Applicant and Ms. Kearney-Sassi, a HR officer at UNON. The Applicant was informed that the purpose of the meeting was to counsel him on his performance.

118. Another note to file also tendered by the Respondent and signed by the then Acting Deputy Chief of UNON/DSS stated that the Applicant was invited by telephone on another occasion to meet with one Ms. Ba, a stress counselor from New York. The Applicant refused and asked that the request to see a stress counselor be made to him in writing.

119. Three questions arise from this account of events; the first is whether a manager can unilaterally refer a staff member to counseling; the second is whether the Assistant Chief and the Human resources officer have any authority to provide

unsolicited counselling to a staff member while the third question is whether Mr. Marshall and the Human resources officer can declare a staff member mentally unstable. To the first two questions, the answers are no.

120. The provisions of the applicable ST/AI/2005/12 (Medical clearances) are clear that only the UN Medical Director or a medical officer duly authorized by him can, under permitted circumstances, make determinations as to a staff member's medical or mental state with a view to providing medical clearance where necessary. Certainly, it is not within the competence of the Chief, UNON/DSS, his deputy or a Human Resources Officer to usurp the powers of the Medical Director in this regard.

121. It is curious that these two senior officials who are not medical professionals and have no authority in medical matters came to a conclusion that the Applicant was mentally unstable following one meeting and one phone conversation with him.

122. Mr. Marshall had testified that he would not restore the Applicant's licence to bear firearms until he showed mental stability. The fact that Mr. Marshall has not even tried to make a case for a proper psychiatric evaluation of the Applicant more than six years after revoking his licence to bear firearms simply means that he is determined to continue to abuse his authority with regards to the Applicant and to frustrate the said Applicant's career prospects.

123. In *Kasmani* UNDT/2009/017, the Tribunal held that:

When an applicant seeks to impugn a decision of an administrative authority by challenging the legality or rationality of the decision, a failure by that authority to offer an answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully.

124. The Tribunal finds and holds that by deciding through his own personal methods, and employing the assistance of an overreaching Human Resources Officer, to conclude that the Applicant is mentally unstable; Mr. Marshall's abuse of authority and position on this score is manifestly egregious.

Was the Applicant a victim of harassment in the work place?

125.

Matters of concern for DSS/Headquarters

129. The Applicant has filed a total of five applications with the Tribunal. All of the Applicant's claims are based on the actions of the Chief, UNON/DSS against him.

130. This Tribunal is of the view that the situation of the Applicant in the UNON/DSS workplace does not bear out the noble intentions of the Secretary-General who has promulgated a special bulletin for the protection and respect of every staff member. The reaffirmation of faith in the dignity and worth of the human person boldly made in the preamble of the Charter of the United Nations must constantly remain a beacon for managers in this organization.

131. During the course of the proceedings in this case, this Tribunal had the opportunity to observe the demeanour of the witnesses and to fully study their pleadings and submissions. The unnecessary hostility and lack of respect between the Applicant and the Chief, UNON/DSS which have been on-going for several years were writ large throughout.

132. It is tragic that the Chief, UNON/DSS has felt free for so long to mistreat an officer working under him and has never been called to account. It is equally unfortunate that its It

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134. The Tribunal recommends that DSS/HQ should take more concrete actions in resolving this situation.

Findings

135. The following are the Tribunal's findings:

- a. The Applications were filed within the applicable time limit, all the Applicant's claims were properly submitted for management evaluation and are therefore receivable.
- b. The Applicant was not given full and fair consideration in the selection process. The Chief, UNON/DSS, has consistently employed personal methods to frustrate the Applicant's career prospects.
- c. The Applicant was a victim of harassment in the workplace. The Chief, UNON/DSS' actions cons ierg 0.9981 0 0 1 167.52 (a)-16(3fT(63()-270)3(s)8(s)-1-130(w)-(e)-1

Judgment/Remedies

136. In the light of its findings the Tribunal:

- a. Orders the Respondent to reinstate the Applicant's licence to bear a firearm;
- b. Orders the Respondent to restore the Applicant's access to Lotus Notes; and
- c. In view of the fact that the Applicant was not given a full and fair consideration in the selection process and that he was a victim of harassment and abuse of authority, the Tribunal awards compensation in the amount of six months' net base salary.

137. The Applicant is entitled to the payment of interest on the awards from the date this Judgment is executable at the US Prime Rate until payment is made. If payment is not made within 60 days of the date that this Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of February 2013

Entered in the Register on this 28th day of February 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi