



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/027/
JAB/2008/060
Judgment No.: UNDT/2010/059
Date: 7 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ANTAKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
H. Esther Shamash, OSLA

Counsel for respondent:
Steven Dietrich, ALS

Introduction

1. The applicant applied for three P-5 translator positions in the Arabic Interpreters Section in New York (AIS) in the Department of General Assembly and Conference Management (DGACM). She was not recommended as a qualified candidate for two of these positions as it was found that she had not demonstrated the required competencies during a competency-based interview, particularly regarding teamwork. The applicant appeals this decision, which she also claims resulted in her being excluded from the third and similar P-5 position. The applicant now works for the UN in Vienna.

Facts

2. On 19 October 1982 the applicant started at the UN as an Arabic interpreter at the P-1 level. After successive promotions, she became a P-4 translator in 1989, where she has served at step-15 for the past four years. Since 2000, the applicant has submitted several applications for the P-5 positions in question in AIS.

3. The filling of P-5 vacancies and the e-PAS evaluations in the Arabic Interpreter Section (AIS) have been mired in controversy for years. It appears the issues in relation to the applicant initially started in 2000 and 2003 when the applicant appealed decisions concerning two different promotion processes to the UN Administrative Tribunal. In 2007 the Administrative Tribunal held that the applicant had not been given fair consideration concerning two of the positions, referring, *inter alia*, to violations of her due process rights. However, this judgment deals with different questions to those relevant here.

4. While the applicant's case was pending before the Administrative Tribunal, other promotion exercises began in April and May 2004 for two P-5 positions in AIS. This was the commencement (called the first round) of the selection process out of which the present case arises. The applicant applied for both positions and was interviewed in early November 2004. At this time, she had sought rebuttal of earlier

e-PAS evaluation reports and was concerned that she would be assessed on the basis of those evaluations, which she did not accept as valid. According to the applicant, her first reporting officer had explained to her that he had recommended her and another candidate for the positions and that she should not be concerned with rebutting her e-PAS appraisals because they were of minimal importance. However, before the recommendations were considered two other staff members had complained about the process, and it appears, claimed that their better e-PAS appraisals should have led to them being recommended. Enquiries by the then Assistant-Secretary-General for DGACM elicited the information that, indeed, the e-PAS evaluations had been ignored and the recommendation was based on age, seniority and language combinations. It was accepted that these criteria did not comply with the relevant Administrative Instruction or the criteria specified in the vacancy announcements. It seems that the recommendation of the applicant was then replaced by a recommendation of another candidate, whose e-PAS appraisal was superior to hers.

5. Examination by management of the e-PAS system in the AIS revealed what is said to be fundamental shortcomings that reflected significantly on the reliability of the appraisals. Thus it was seen as impossible to correct what had been recommended by bringing these impugned appraisals into account and, accordingly, it was decided to cancel the 2004 vacancy announcements and recommence the selection process. A new vacancy announcement was made on 12 April 2005.

6. In the meantime, on 21 March 2005 the applicant sought a suspension of the continuation of the first round from the Joint Appeals Board (JAB) and for an investigation concerning the way it was conducted. On 21 April 2005 the Administrative Law Unit (ALU) of the Office of Human Resources Management (OHRM) informed her that the vacancy announcements had been withdrawn and the posts were now re-advertised. This was the beginning of the second round. The Chief, Interpretation Service requested the new promotion criteria which had been prepared by the AIS to be posted online and hard-copies were claimed to have been delivered to all the candidates. However, the applicant alleges that she and some

other candidates were unaware of these notifications. On 12 October 2005 the applicant filed a further request for suspension of action regarding this process. Her request was granted and the promotion process was suspended again.

7. In December 2005, upon the recommendation of the Staff Council, OHRM decided to establish a working group to review the promotion process. This group, however, was criticized by the applicant and other Arabic interpreters for only representing management despite the proposals of the Staff Council and the Staff Union. The applicant and others therefore refused to be interviewed by the working group. In May 2006 the group, nevertheless released a report, the details of which are not presently relevant.

8. In early November 2006 the second round was cancelled. On 8 November 2006 the new Assistant Secretary-General (ASG) of DGACM presented the candidates with a list of "Performance/Promotion Criteria for P-5 Interpreters" (called "list 12" because it had been already revised 12 times in consultation with the candidates). In a note to the candidates of 5 December 2006, to which list 12 was attached, the ASG outlined the following criteria for the handling of the third round of the promotion process (which were largely based on the recommendations of the working group) –

- The two vacancy announcements will be re-advertised with a 30-day deadline.
- Candidates will be evaluated solely on the basis of the final promotion criteria used for all DGACM Interpreters, which is available to all and which was given to each of you at the 8 November meeting.
- The evaluation criteria will be consistent with ST/AI/2002/4, the Staff Selections System, including paragraphs 4.3, 4.4 and 5.3.
- The interview panel would not include persons who participated in the first or second rounds of interviews.

9. List 12 set out five categories of competency to be individually scored out of a total of 180, namely "education" (15), "work experience" (50), "languages" (20),

“other desirable skills” (20) and “competencies” (80). The last category was divided into the following sub-categories: “professionalism” (45), “teamwork” (5), “leadership” (5), “commitment to continuous learning (5) and “interview” (20). Of these, teamwork was to be rated according to whether the candidate “helps colleagues and ... helps organize work in booth, ie documents, statements, etc”, while the score for the interview was to be based on whether the candidate “communicates well ... is alert focused”.

10. Also attached to the note was an explanation of the performance/promotion criteria, which read as follows –

According to OHRM and CR bodies:

1. The promotion criteria comprise of two parts:

a) Qualification:

- Made up of Education, Languages, and Other desirable skills, and must add up to 100 points. It focuses on WHAT the applicant has done;
- For Education, X-years at the UN level under Work experience and Languages: in theory, as long as an applicant fulfills the minimum requirements, s/he gets FULL score. All qualifications over and above the minimum requirement should be reflected in better performance, and evaluated through Competencies;
- Other desirable skills have lower scores, as it covers skills that are just “desirable” (e.g. additional UN passive language means a fourth language for some booths).

b) Differentiation of performance:

- Covered under Competencies.
- Focuses on HOW the applicant has done the job, and accords flexibility to managers to differentiate the PERFORMANCE of the applicants.

Please note that CR bodies do not see scores. They are just for use within the Department.

2. The promotion criteria are to correspond to and be consistent with the vacancy announcement. All elements in the VA should be evaluated by the promotion criteria: the promotion criteria should not evaluate elements not included in the VA.
11. The two P-5 vacancies were issued in Galaxy on 12 July 2007. The vacancy announcement included the following –

RESPONSIBILITIES

Under the broad supervision of the Chief of the Arabic Interpretation Section [AIS] ... S/he is routinely assigned to sensitive meetings; routinely functions as team leader of all Interpreters assigned to the same meeting. The Incumbent may be called upon to serve as weekend duty officer for the Interpretation Service and as Chief Interpreter on missions. S/he may be assigned as Officer-in-Charge of the Section or the Service.

COMPETENCIES

Professionalism: Punctuality, accuracy, delivery, and preparation for meetings. Ability to perform under stress, willingness to travel and keep flexible working hours. Ability to function as Programming Officer and as weekend duty officer, as required. Teamwork: Demonstrated ability to establish and maintain effective working relations as a team member and team leader in a multi-cultural, multi-ethnic environment with respect for diversity. Ability to organize the work in the booth. Communications: Good interpersonal; and communications skills ... Commitment to Continuous Learning: ...

Leadership: Provide leadership and guidance to more junior interpreters. Ability to instruct and advise trainee interpreters, as required. Ability to function as Team Leader of all interpreters assigned to the same meeting and as Chief of Mission, as required. Demonstrated ability to provide leadership and take responsibility for incorporating gender perspectives into substantive work; commitment to the goal of achieving gender balance in staffing.

12. On 24 October 2007 the applicant was interviewed. The panel of five included the Programme Case Officer (the PCO), who was Chief of the AIS. It might seem to some as surprising that the interviews, said to be conducted as “competency-

based”, involved no testing of any translation skills of the candidates either in writing or orally. Instead, the candidates were asked a range of similar pre-prepared questions concerning the competencies mentioned in the vacancy announcement. The PCO also prepared the evaluation criteria (approved by OHRM) and, based on these, interview questions were drafted jointly by the panel members. During the interviews, each panel member took handwritten notes and placed grades in tables prepared by the PCO. This material has not been produced.

13. The PCO testified that, following the interviews, she prepared a narrative in respect of each candidate reflecting the handwritten notes and tables of scores of the panel members, convening a meeting to ascertain that the narrative fairly reflected what the members had written, having first provided them with the notes to enable the comparison to be made. The panel members confirmed the accuracy of these narratives. That concerning the applicant (the narrative) was as follows –

[The applicant] has not demonstrated the competencies required for this post and is therefore not recommended.

Professionalism:

When asked about the benchmarks for measuring performance as a senior interpreter, [the applicant] referred only to “best performance” and did not go beyond that failing to answer questions meaningfully. [The applicant]’s answer were incomplete and vague. She provided an example of the need to be politically aware during sensitive and demanding high profile meetings. She failed though to demonstrate awareness of additional supervisory functions of the post of senior interpreter, including deputizing for the Chief of section, and punctuality.

Teamwork:

[The applicant] provided examples about teamwork. She explained how she helped free lance interpreters assigned to politically sensitive meeting by staying after her assignment was over in order to brief them about the situation. She also demonstrated how she at one point had helped with solving a technical problem when assigned as a team leader. But [the applicant]’s responses on questions related to her interaction with Secretariat staff revealed tension in her relationships with colleagues. She fell “entitlement” to services, and “impatience”

when such services are not forthcoming, an attitude that could strain relations and adversely affect the whole team. She also referred to “specific arrangements” made with regard to punctuality which run counter to being available without conditions all the time to undertake assignments. [The applicant] twice referred to “territorial issues” and specific working habits in responding to questions on how she rises above differences, which points towards another possible source of tension in relation with team members.

COMMUNICATION:

During the interview, [the applicant] came across as a good communicator. However, she was unable to demonstrate that she uses her good communication skills as part of a competency needed for the discharge of her duties with the members of her team in the booth or with the Secretariat staff at large. References to strained relations with Conference and Document officers during the interview were a case at point.

Commitment to continuous learning:

[The applicant] demonstrated that she had adequate IT skills although she mentioned that she uses DT search to download terminology, which shows that she is not exactly aware of how or for what purpose the data base is used.

Leadership:

[The applicant] did not provide convincing arguments about her leadership skills. She was short in specific examples that could have demonstrated those skills. She supervised junior colleagues and shared handwritten glossaries with them but could not elaborate on how or why her team members would trust her to be their leader. While her examples sought to express tact “if colleagues ask for help I will provide it”, she did not demonstrate any proactive skills that are necessary for good leadership functions. EDUCATION: Candidate meets the requirements.

14. The Under-Secretary-General for DGACM (the USG) had instructed the PCO also to obtain the views of her two senior colleagues. In an email of 29 November 2007 the PCO informed the USG that her colleagues, who had not been involved in the interview process or knew of the scores of the candidates both concurred with the panel’s conclusions. In a note to the USG of the same day (29 November 2007) jointly signed by the ASG, the PCO and the Director of the Meeting and Publishing

Division, DGACM, all of the seven candidates' scores were listed, ranging between 129.5 and 154, placing the applicant in an overall fifth place with a total of 147.56, comprising 135 points for the "overall evaluation" and 12.56 points for the interview.

15. Also submitted to the USG for his consideration regarding the final selection of the two candidates were documents described as "interview matrix", "promotion criteria matrix", "overall matrix (with interview and promotion criteria)", list 12, the vacancy announcement, the P-5 generic job profile, the interview questions, the candidates' evaluations, the agreed interview evaluations and the individual interview evaluation forms. It appears as neither the panel members' own notes nor their scoring matrixes were not provided to the USG.

16. In what appears to be the "interview matrix", a rating for each candidate is noted on a 5 point scale for "professionalism", "teamwork", "leadership", "commitment to learning/IT" and "communication" competencies. The final total score out of 25 was then adjusted to a 20 point scale to comply with list 12. The applicant achieved either 2.5 or more out of 5 points for each competency, an adjusted total of 12.56. In her oral testimony, the PCO explained that a score of less than 2.5 points signified that the panel member did not believe that the candidate possessed the skill at the necessary level. Looking at these scores alone, therefore, it appeared that the applicant was rated as possessing the necessary competencies, perhaps slightly above the minimum necessary. As will have been seen from the narrative, however, distinct shortcomings were identified by the panel in respect of each competency. The PCO identified, in particular, the applicant's difficulties in respect of teamwork and said that this failure was the most significant and rendered her unsuitable for appointment. The PCO testified that, despite the scoring, the narrative prevailed. The purpose of the scores was simply to reflect comparative rather than definitive evaluations.

17. In what seems to be described as "promotion criteria matrix" each candidate was evaluated in the following "core competencies" (in parenthesis is noted the applicant's score): "accuracy, completeness, ability to render feelings faithfully"

(14/20); “delivery” (3/5), “endurance” (3/5), “preparation studies docs.& glossaries” (3/5), “ability to cope with fast delivery” (3/5), “punctuality, presence” (3/5), “teamwork, helps colleagues, organizes docs” (3/5), “lead/guidance” (2/5), “ct. to learning, contributions to the profession” (3/5). The applicant’s total score noted on this table was 50.56, which included her interview score of 12.56.

18. Finally, in the “overall matrix (with interview and promotion criteria)” was noted each candidates’ total score out of 180 (the applicant receiving the abovementioned total score of 147.56) which was accumulated upon the basis of the candidate’s scores in the following categories (in parenthesis is noted the applicant’s score): “Work Experience ... X yrs @ UN Capacity in Range of UN Meetings, including SC, GA” (50/50); “Language ... (VA)” (15/15); “Education ...” (15/15 points); “Other Skills ... ‘C’ languages 10 Consecutive 5 IT Skills 5” (17/20); “Professionalism ... Quality of target and source language, accuracy, delivery” (30/45); “Team Work” (3/5); “Leadership” (2/5); “Commitment to learning” (3/5), and “Interview” (12.56/20). The last five scores were imported from the promotion criteria matrix, although categories were named slightly differently and “Professionalism” was the accumulated figure for all the first four categories listed in the promotion criteria matrix.

19. The PCO disclosed in her evidence that she had adjusted several of the scores to reflect, as I understand her evidence, the comparative ratings given by the panel members but her explanation was somewhat confused. Thus, although she said that the panel concluded that the applicant had not demonstrated sufficient competence for the teamwork requirement of the posts, the PCO said she noted her score in the overall matrix under this head as 3 (where two members of the panel had given the applicant 2.5 and three had given her 3, thus upgrading slightly). I am somewhat skeptical about the reliability of the PCO’s recollection in this particular respect, having regard to the complexity of the process and the lapse of time. I think it fair to state, however, that I thought she was telling the truth as best she could. The fundamental problem was the unnecessary complication introduced by the use of the matrices without consistent terminology and clearly articulated objectives.

20. In another note of 29 November 2007 the PCO and the ASG recommended two candidates: a woman and a man, but not the applicant. On 26 December 2007 the Central Review Board (CRB) stated that it endorsed the recommendation of the USG for filling the posts and they were then selected.

21. In January 2008 the applicant learned that the two selected candidates were those that had initially replaced her on the roster during the first round of the process. Later in January, a third P-5 post in AIS (which had become available because of an internal promotion in the Section) was advertised, but on 28 January 2008 the applicant was notified that she had not been selected for this post either.

22. To return to the applicant's e-PAS, she had successfully rebutted her evaluations for 2002-2003 and 2003-2004, with two different rebuttal panels recommending that some of the evaluations of core values and competencies be upgraded to "outstanding". Her overall ratings for both periods of "frequently exceeds performance", which was also given to all the other interpreters in AIS at her level, was not changed. As it happened, in both of these e-PAS evaluations, as well as in her e-PAS evaluation for 2006-2007, her teamwork skills were rated as "outstanding".

Applicant's submissions

23. The first reporting officer's recommendation of the applicant during the first round of the promotion exercise should be upheld, since the cancellation of the exercise was in violation of sec 1.6 of ST/AI/1999/9 (Special measures for gender equality) which required her superior experience to be taken into account.

24. Neither the interview questions nor the promotion criteria matrix developed by the PCO for the third round of the promotion exercise were consistent with the ASG's performance/promotion criteria of 5 December 2006 (as set out above). Using them in the selection process was therefore *ultra vires* and unlawful. Moreover, the matrix was not necessary as the handwritten data from the interview panelists were available.

25. The PCO made subtle, arbitrary changes in the interview matrix concerning both the criteria and their relative weight. The weighting of the criteria in the promotion criteria matrix and the interview matrix was substantially different to the weighting accorded by the performance/promotion criteria of the ASG. This was therefore also *ultra vires* and unlawful. For instance, “professionalism” was weighted twenty-five percent in list 12, twenty percent in the interview matrix and seventy-five percent in the promotion criteria matrix. According to list 12, the interview was to account for 20 out of a possible total of 180 for each candidate, but ultimately the entire selection process was predicated on this interview. Furthermore, the results of the interview were double-counted as they formed part of both the interview rating itself (20/180) and the basis for extrapolating the core competency rating (60/180). The interview scores were manipulated and inconsistent since not all of these scores were double-counted: the scores for the promotion criteria matrix were extrapolated from all of the interview scores except for the score on “communication”, which was the category in which the applicant received her highest score. The promotion criteria matrix was, in addition, prepared subsequent to the interviews, ie, when the scores were already known to the PCO and therefore susceptible to manipulation. At trial, the PCO admitted that the ASG’s weighting was not reflected in either the promotion criteria matrix or the interview matrix. None of the candidates were informed about the change of the weighting. Finally, the creation of the promotion criteria matrix and the interview matrix represented a significant and unjustified departure from the ASG’s instructions.

26. The scores given on the overall matrix were arbitrary. The PCO vitiated the scoring process by ignoring the scores given by the panel members and inserting arbitrary scores for the candidates instead based on her reading of the narrative, which was written by the PCO herself and belied the independent scores of the other panel members given to the applicant (see more below). For one of the successful candidates, the score was raised by 0.8 in one category, while the applicant’s score were lowered by 0.7. The PCO made these changes without consulting anyone, she

did not create any record to explain her choices, and she left no evidence that the scores had in fact been manipulated.

27. Ultimately the selection of candidates was predicated on a single interview which the PCO assessed subjectively. The PCO did not have authority to do so, cf, sec 6.6 of ST/AI/2006/3, which states that candidates are to be deemed to have fully met their performance expectations in the absence of their e-PAS.

28. It is not plausible that the PCO relied on the narrative rather than the scores given by the panel members. Based on the interview scores (even as adjusted by the PCO) the applicant fully demonstrated the required competencies. Only in her oral testimony did the PCO claim that the scores in the promotion criteria matrix and the interview matrix were irrelevant as she explained that merely the narrative of the interview mattered. The PCO's statement that the applicant did not demonstrate the required competencies in the interview was disingenuous, since the PCO's testimony was self-contradictory.

29. The PCO's reliance on the narrative rather than the scores given by the panel was in itself unlawful. The narrative was little more than the PCO's subjective impression of the interview and contradicted the interview scores given by the other panel members. Nowhere in the ASG's instructions was it implied that the PCO possessed such authority. The narrative did not specify which competencies the applicant demonstrated. The PCO only stated that the applicant failed one competency, namely teamwork, but the narrative was formulated in such a vague manner that it could also be read as the applicant's possessed all of the required competencies since nothing in it was formulated in an express manner. This violated sec 7.6 of ST/AI/2006/3.

30. Even though the PCO was not to take her previous knowledge into account at the interview, it is unclear how the applicant who received the highest evaluation, "outstanding", in the category of teamwork in her e-PAS 2006-2007 (accorded by the PCO) could be deemed unsuitable for the P-5 position for the same reason.

31. The applicant demonstrated the required competencies for the position as shown by the records of the case. Even if the Tribunal finds that the applicant did not comply with the “teamwork” requirement, she was still suitable, since ST/AI/2006/3 states that a candidate will be deemed as having been a successful candidate if he/she demonstrates at the competency-based interview *most or all* of the competencies required for the post. (It is unclear on which section in the Instruction the applicant bases this submission, but it is assumed that she refers to sec 7.5 which states that: “For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required.)

32. In determining whether the applicant possessed the required competencies, the independent scores given by the panel should be decisive rather than the PCO’s subjective opinion as reflected in her narrative. The respondent bears the burden of proving that the applicant failed to demonstrate the required competencies, since the respondent had the access to the evidence (*Sefraoui* (UNDT/2009/95)). In this regard, the respondent only relied on the PCO’s witness statement regarding her narrative which did not necessarily reflect the other panel members’ opinions. It is unproved that the applicant did not demonstrate the required competencies, for which the Tribunal should rely on the available evidence, namely the matrices. If these had not been manipulated by the respondent, the applicant would have shown the required competencies.

33. The respondent violated sec 1.8 of ST/AI/1999/9 (Special measures for the achievement of gender equality) since the applicant demonstrated that she possessed the required competencies. Based on the overall matrix the applicant was substantially equal to a successful male candidate for which reason the applicant should have been chosen. By giving all candidates the maximum rating in terms of years of experience, the respondent effectively ignored sec 1.6 of the Instruction since this deprived the applicant of the advantage of having her years of experience calculated cumulatively as stipulated in the mentioned Section.

34. The violations of the applicant's rights have caused her career to plateau and will also have implication for her pension rights and entitlements.

Respondent's submissions

35. The initial recommendation in the first round should not be upheld. The cancellation of the first round was correct, since the process violated the staff selection policy as the evaluation criteria were inconsistent with ST/AI/2002/4 (Staff selection system). The applicant also accepted the procedure outlined by the ASG in connection with the withdrawal of the second round promotion exercise by not objecting to it at a subsequent meeting (assumedly the 8 November meeting) with the ASG, despite the fact that she had refused to cooperate with the working group established to solve the problems.

36. The third round selection process was in full accordance with par 7.5 and Annex II of ST/AI/2006/3, and the PCO did not act outside the scope of her authority during any part of the selection process. The matrices were tools used to present the evaluation of each candidate to the Head of Department in a clear manner, and they were produced to demonstrate that the complete process was fair, transparent and without procedural irregularities. The PCO explained at trial the matrices allowed the Head of Department to directly compare the candidates as opposed to receiving a booklet with the raw handwritten notes of each panel member.

37. The PCO's authority to evaluate the candidates after the interview stemmed directly from the accompanying explanations to list 12 which stated in par 1(b): "Differentiation of performance ... Focuses on HOW the applicant has done the job, and accords flexibility to managers to differentiate PERFORMANCE of the applicants". The Chief of the AIS (ie, the PCO) was therefore the appropriate official to score the candidates on past performance and provide a record of the evaluation of the candidates, not the panel members.

38. A close review of the tables of the PCO shows that the scores were properly tabulated and recorded, and it is not proved that the PCO double-counted and

manipulated the interview scores or that the entire selection process was predicated solely on the interview. Even though the matrices show that the interview was accorded only 20 out of 180, the applicant did not demonstrate during the competency-based interview that she possessed the required competencies. The PCO's weighting of the criteria was proper and accurate, as demonstrated by the evaluation of the applicant's professionalism in the promotion criteria matrix and the overall matrix. Some recommended candidates scored less than the applicant in some skills but demonstrated all competencies, which is consistent with par 10 of the Guidelines to ST/AI/2006/3 for the promotion evaluation, which states that the documented record should compare the candidates against the evaluation criteria and not against each other.

39. The applicant's single score for communication skills was not reflected in the promotion criteria matrix since these were tested during the interview. This matrix instead included the combined scores given to the candidates for sub-elements for each competency, such as professionalism, teamwork, leadership and commitment to continuous learning. No extraneous factors therefore existed to explain the absence of communication from the core competency matrix.

40. The PCO did not admit that the relative weights of the criteria in the ASG's promotion criteria were not reflected in either the promotion criteria matrix or the interview matrix. In addition, the PCO did not change the relative weighting of the scores. Under ST/AI/2006/3 the PCO was mandated to ensure that: (1) the terms of the criteria of the ASG were implemented, and (2) the documented record accurately reflected the scores given to each candidate by the panel members.

41. It is patently false that the PCO changed the final scores attained by the candidates after the interview. It is factually incorrect that the candidates were not informed of the relative importance of the interview, which remained 20 out of a total of 180. Irrespective of these scores, the candidates had to demonstrate that they possessed the required competencies during the competency-based interview. Under ST/AI/2006/3 the PCO may consider other factors to determine the best suited

candidates, and the PCO did not add any more factors than those predetermined by the management.

42. As to reliance on the narrative and not the scores, the PCO acted in full compliance with sec 7.6 of ST/AI/2006/3, which requires the submission of a written record of evaluations. Similarly, par 10 of the Guidelines to ST/AI/2006/3 state that “the written record should ... be included in GALAXY under the applicable heading or headings of competencies, education, experience, languages and skills”.

43. The third round of the promotion exercise was in full accordance with art 101.3 of the UN Charter and staff regulations 4.2 and 4.3. The applicant participated in a highly competitive selection process where she was required to demonstrate all competencies, which only four out of seven candidates managed to do and who then were then recommended for the posts. This is demonstrated by the views of the panel members, the CRB’s endorsement and the USG’s approval.

44. The respondent fully complied with sec 1.8 of ST/AI/1999/9. The relevant documentation indicates that the applicant’s qualifications were not deemed equal to or superior to her male counterparts. Another female candidate was selected during the process and the issue of gender equality was duly considered.

Discussion

45. I should state at the outset that I am satisfied that the decision of the management to set aside both the first and second rounds of the exercise was reasonable, although this was most regrettable: the reasons for doing so should never have arisen and betray a worrying level of incompetence. I am also satisfied that, despite the applicant’s criticisms of the terms of the criteria, there was substantial compliance with the stipulations of list 12.

46. As I have already mentioned, the number of matrices and the terms used in them introduced unnecessary complexity into the exercise. The relationship between the scores and the narrative is, in principle, relatively obvious. Since the narrative

uses descriptive language comparing the particular attributes of a candidate to the competencies necessary to satisfy the requirements of the position, it will not always make it clear whether the candidate possessing the particular attribute to some degree or other, is sufficiently qualified in that respect for appointment. Merely to describe the candidate's attributes will not in this event indicate whether he or she has – to use simpler language – passed or failed. This evaluation follows from or is explained by the descriptive narrative. In this case, the panel agreed that the applicant “has not demonstrated the competencies required for [the] post” and the description of her attributes made it clear that the shortcomings which were identified were the reason for this overall evaluation. These were clearly significant and adversely affected each competency and fully justified the overall evaluation.

47. It is, of course, inherent in such an evaluation that no numerical score can ever be more than indicative. Part of the problem is that the use of numbers gives what is, and inevitably must be, an essentially misleading impression of precision. To take but one example, one merely has to ask, what is the actual difference in leadership skills that distinguishes a score of, say, 3 from a score of 3.5. It is for this reason that it is imperative that the panel state whether a candidate did or did not demonstrate possession of the requisite attributes for appointment. If shortcomings in any particular respect were sufficient to put the candidate out of contention, then it would be desirable – from the point of view of transparency – to indicate the particular quality that was found to be lacking. This is sometimes difficult to do since many of the required attributes overlap to a greater or lesser extent and it might well be that it is the overall accumulation of shortcomings which will render the candidate unsuitable. In this case, the narrative did not identify, as it happened, any particular lack as placing the applicant out of contention: a number of matters were identified as unsatisfactory for a variety of specified reasons. It seems to me that, providing the narrative was a fair reflection of the true consensus of the panel, then it was both clear enough and sufficient to satisfy the requirements of transparency and good faith or, in the argot of administrative law, due process. The evidence of the PCO, therefore, that the narrative trumped the scores makes good sense.

48. It follows that little, if anything, useful was added by the matrices, so far as the applicant in particular was concerned. But their potential advantage was that they enabled an indication (and no more, for the reasons explained above) of the extent to which a candidate satisfied or fell short of the requirements and permitted some comparison of relative suitability. In that sense, they gave some further information to the decision-maker of the panel's opinions about the candidates, but, as is obvious, they are significantly less informative than the narrative.

49. It is problematical, however, if there is an inconsistency between the scores and the narrative, even if the latter is regarded as definitive, since it suggests that perhaps the narrative is mistaken. The PCO's evidence was that it was principally in respect of teamwork that the applicant failed to be assessed as suitable for appointment. The narrative gives some support for this evidence, since it is distinctly critical of this attribute. However, on the face of it, a score of 2.5 indicates acceptable, though I assume minimal, fulfillment of the requirement and a score of 3 more than minimal fulfillment; thus, it seems that – if the scores are definitive – that the criticisms were not so significant, despite the severity of the language used, to justify a conclusion of failure. Though simplified, this is the essential point made by the applicant who, not surprisingly, prefers to rely on the scores rather than the narrative. However, as I indicated above, I doubt the reliability of the PCO's recollection of the *details* of the process, and her inability to explain this apparent contradiction is the prime example of the problem, but I am satisfied that, overall, her evidence was both truthful and accurate. Nor did I discern any personal animus towards the applicant or any attempt to manipulate the process to favour or harm the prospects of any candidate.

50. The scores may be explicable as recording comparative assessments between the candidates, but this explanation does not account for all the anomalies. I am persuaded that the PCO did in fact use the materials provided by the panel members to create a single narrative expressing what she understood to be their consensus and that which she ultimately produced was approved by the panel members as fairly reflecting their evaluations and recommendations. Moreover, this was not only

proper, but necessary, providing, of course, that there was indeed a consensus. Of course, if there had been a dissent, transparency required that dissent to be fairly stated. I also accept that, although her recollection as to the scoring was confused and unreliable, whatever she thought she was doing was done honestly and with good intentions. However, the lack of competence displayed cannot be ignored and was especially unfortunate given the necessity for a fair and transparent process. In the end, there is no adequate explanation for the apparent contradiction between the scores and the consensus decision expressed in the narrative. But this problem does not, in the result, affect the propriety of the evaluation of the applicant as unsuitable, which was justified for the reasons stated by the panel.

51. I do not propose to undertake a detailed analysis of the matrices although, of course, I have carefully examined them in light of the criticisms made by the applicant, some of which are quite reasonable. In light of the evidence of the PCO about the changes, extensive discussion is of little value. I have already referred to problems caused by the use of inconsistent language to describe the same or similar qualities or requirements and the lack of precise articulation of their function. When the PCO's variations of the original scores of the panel members for reasons that she could not satisfactorily explain are added to this mess, further close examination is useless, although it must be conceded, in fairness, that the general thrust of the scores is clear enough. In this respect, the applicant is entitled, I think, to be disturbed and upset over this lack of transparency. After all, this was the third attempt to structure a fair and reasonable selection exercise which was not inherently difficult or complicated and should have been easily achieved if the PCO had remained focused on the overall objective.

52. As already suggested, despite her evidence, the purpose of the changes made by the PCO and the source used for them remains somewhat obscure. The need for such an explanation itself demonstrates that the matrices were faulty and, as well, the need for adequate record keeping. If the matrices cannot be accepted at face value, what can they really be worth? What, for example, would the decision-maker have made of them?

53. At its simplest, the scores suggest that the applicant in fact qualified for consideration (though, on this basis, she certainly would not have been the preferred candidate) whilst the actual assessment of the panel was that she was not. This contradiction demonstrates that the matrices did not comply with the accuracy required to satisfy the requirements of ST/AI/2006/3, particularly sec 7.5 and 7.6 which specify that “a reasoned and documented record of the evaluation” is necessary. If one cannot interpret a matrix such as those used here with precision, by definition, it must be inadequate. Here, the failing was more significant than mere imprecision. On the other hand, I am satisfied that the variations introduced by the PCO were, albeit inexcusably confused, made with the intention of attempting to reflect the views of the panel as to the extent to which the candidates matched the criteria.

54. So far as the applicant’s complaint goes about there being only one interview to determine the recommendation, it seems to me that this was reasonable and certainly not a breach of any contractual right. Nor, as I have explained, is it true that the outcome of the interviews represented the subjective views of the PCO. Rather, the narrative accounts fairly expressed the views of the panel. Sec 6.6 of ST/AI/2006/3 is irrelevant.

55. As to gender equality, a woman was appointed to one of the posts and, at all events, the question only becomes relevant in the event that a female candidate qualifies for the post and the applicant did not.

56. There is no substance in the contention of the applicant about what she called double-counting. This did not have a significant ultimate adverse affect on her scores, let alone the outcome of the process. Nor was it unfair that all candidates were given the same score out of 50/50 under the head of work experience since this did not take into account the differences in length of service. This category, at all events, is not confined purely to the years of employment with the UN but includes the additional element of “capacity to work in a range of UN meetings, including the Security Council and the General Assembly”. The applicant’s submission as to the

significance of the score for the “interviews” misconceives the elements of this item. It does not refer to the overall function of the interview of assessing the candidates’ competencies.

57. It remains necessary to deal with the e-PAS issue but this can be briefly done. First, there is a live question about the reliability generally of the e-PAS evaluations in the AIS over the relevant period. Secondly, accepting the applicant’s e-PAS evaluations, as amended on rebuttal, to be appropriate – as must be done in all fairness to her – they related to her position as a P-4. It is reasonable to infer that the requirements of a P-5 post required not only a higher degree of competence where the functions were more or less identical to those of a P-4 post, but that some functions were significantly different: for example the nature of working with a team and the requirement of leadership. These different attributes, it is fair to infer, were clearly in the minds of the panel and provided the context for the evaluations expressed in the narrative. Accordingly, the decision at the outset to exclude reference to e-PAS evaluations was not unreasonable and I am not persuaded that consideration of the applicant’s claims was unfairly handicapped by this exclusion.

58. It follows from this that it was not only proper but essential for the PCO to put forward the recommendations of the panel as expressly approved by them to the USG.

Conclusion

59. The decision not to appoint the applicant is valid and lawful. However, the frustration and distress caused to the applicant, still evident at the hearing of the case, and to which the inappropriate imprecision and confusion of the matrices were, I am satisfied, a significant contributing factor, justifies an award of compensation. The applicant failed to achieve a promotion to which she legitimately aspired and a fundamental requirement of good faith obliged the administration – here embodied by the PCO – to ensure that the outcome demonstrably complied with all the instrumental requirements, especially in light of the unfortunate mismanagement of

prior attempts which had directly involved the applicant. To do otherwise is to compound the inevitable disappointment, which is a natural consequence of failure, with entirely unnecessary distress that, in part, the rules are designed to avoid. In short, it is one thing to accept the decision of the umpire following a fair contest and another to feel (not entirely unreasonably) that one has been cheated of what one feels is deserved. The transparency and logic of the process should have prevented this from occurring.

60. Since the shortcomings in the process have not affected the propriety of the outcome, compensation should be nominal but sufficient to reflect the real, and not trivial, interest of the applicant in compliance with her contractual rights. Accordingly, I award the applicant the sum of USD1,000. The application is otherwise dismissed.

(Signed)

Judge Michael Adams

Dated this 7th day of April 2010

Entered in the Register on this 7th day of April 2010

(Signed)

Hafida Lahiouel, Registrar, New York