



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

FINNISS

v.

SECRETARY-GENERAL

OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Katya Melliush, OSLA

Counsel for Respondent:
Stephen Margetts, ALU/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the Office of Internal Oversight Services (“OIOS”), filed three claims with the former Joint Appeals Board (JAB) contesting decisions of non-selection for two P-5 positions in New York and Vienna and a decision not to pursue his complaint against another staff member as a disciplinary matter under ST/AI/371 (Revised Disciplinary Measures and Procedures).

UNDT Proceedings

2. In accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice), the JAB transferred its pending cases to the United Nations Dispute Tribunal (“the Tribunal”) in New York on 1 July 2009. The Applicant’s cases were subsequently transferred to the Tribunal in Nairobi and were assigned case numbers UNDT/NBI/2009/19, UNDT/NBI/2009/37 and UNDT/NBI/2009/38 respectively.

3. By a letter dated 15 October 2009, the parties were informed by the Registry that the Tribunal had decided to consolidate the three cases under case number UNDT/NBI/2009/019 as they raised similar issues and relied on similar facts.

4. On 21 and 22 September 2010, the Tribunal held oral hearings. At the commencement of the hearing on 21 September 2010, the Applicant withdrew his case relating to the decision not to pursue his complaint against another staff member as a disciplinary matter under ST/AI/371. Consequently, the current case is limited solely to the decisions not to select the Applicant for the P-5 positions in New York and Vienna.

Background facts

5. The Applicant entered into service with the Organization in November 2004 as Chief Resident Investigator of the Investigations Division, Office of Internal Oversight Services (“ID/OIOS”) in the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUC”) on an appointment of limited duration (“ALD”). In September 2005, he was assigned to the ID/OIOS Regional Office at the United Nations Office at Nairobi (“UNON”) as the Regional Coordinator. In February 2006, he was appointed as acting Operations Manager of Unit 2 of ID/OIOS with management responsibility for the day-to-day operations of ID/OIOS in Africa¹ and Haiti². On 1 May 2006, he was granted a fixed-term appointment at the P-4 level.

6. On 25 January 2008, a vacancy announcement was posted on the United Nations Galaxy website (“Galaxy”) for the post of Senior Investigator at the P-5 level with the New York office of ID/OIOS (“the New York post”). The Applicant applied and was interviewed for this post on 9 April 2008. Following the interview, four candidates, including the Applicant, were in the list of recommended candidates transmitted to the OIOS Review Board, which subsequently recommended that the Head of Office, the then Under-Secretary-General for OIOS (“USG/OIOS”), Ms. Inga-Britt Ahlenius, proceed with the final selection.

7. While the Applicant was deemed fully qualified for the post, Ms. Ahlenius decided to select another candidate from the list of recommended candidates. Consequently, on 21 October 2008, the Applicant was placed on the roster of candidates pre-approved for similar functions in accordance with Section 9.3 of ST/AI/2006/3 (Staff selection system) and was informed accordingly on 23 October 2008 by the OIOS Executive Office.

¹ The Applicant’s area of responsibility did not include the United Nations Mission for the Referendum in Western Sahara (“MINURSO”) and the International Criminal Tribunal for Rwanda (“ICTR”).

² In March 2007 management responsibility for Haiti was transferred to ID/OIOS headquarters in New York.

8. On 24 October 2008, the Applicant submitted a request for administrative review on the decision not to select him to the New York post. He received a negative response to his request for review on 16 December 2008 and submitted his Statement of Appeal to the JAB on 11 January 2009.

9. Meanwhile, on 22 October 2008, a vacancy announcement was posted on Galaxy for the post of Senior Investigator at the P-5 level with ID/OIOS at the Vienna duty station (“the Vienna post”). The Applicant applied for this post on 4 November 2008, took a written test on 23 January 2009 and was interviewed on 26 January 2009. The Interview Panel submitted a list of three candidates, the Applicant being one of them, to the OIOS Review Board, which subsequently recommended to the then USG/OIOS to proceed with the final selection.

10. Once again, the Applicant was found to be fully qualified for the post but the then USG/OIOS decided to select another candidate from the recommended list. Consequently, the Applicant was informed on 7 April 2009 by the OIOS Executive Office that he had been placed on a roster of recommended candidates as of 6 April 2009.

11. On 12 April 2009, the Applicant submitted a request for administrative review of the decision of the then USG/OIOS not to select him for the Vienna post. He received an unfavourable response to his request for review and subsequently submitted his Statement of Appeal to the JAB.

12. On 30 October 2009, a Senior Investigator post at the P-5 level was advertised in Galaxy for the Nairobi duty station. The Applicant was selected for this post from the roster of candidates.

Preliminary issue

13. On 13 May 2010, the Respondent filed a motion for summary judgment on the basis that the Applicant’s submissions were “dense, unwieldy and in large part

irrelevant”. The Respondent further argued that by failing to submit his factual and legal contentions as directed, the Applicant failed to clarify his case in a manner required by the Tribunal. In this respect, the Respondent submitted that “the Applicant should not profit from his disobedience and, instead, the Respondent’s factual and legal contentions should provide the basis for the Tribunal’s determination of this application for summary judgment. The Applicant has been given a full and fair opportunity to make his case and he has forfeited this right”.

14. The relevant part of article 9 of the Rules of Procedure of the Tribunal provides that:

“A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law [...]”

15. The Respondent’s motion for summary judgment was not given any consideration by the Tribunal in light of the fact that the Respondent failed to establish clearly that there were no material facts remaining to be tried. The Applicant’s failure to submit a statement of facts and legal contentions is a matter that the Tribunal frowns upon and considers as a serious affront to its authority. However, failure to submit a statement of facts in this case will not be the grounds upon which an application for summary judgment is granted. The statement of facts was meant to be a tool to assist the Tribunal in its review of the matter; it was not meant to take the place of the pleadings, which the Tribunal notes, generally consists of the application and reply. Based on its review of the pleadings and additional evidence adduced by the parties, the Tribunal considered that there was a genuine issue of material fact that required a hearing for a proper resolution to be reached. The Tribunal will not use summary judgment in an irrational, injudicious or random manner as seemingly requested by the Respondent.

Issues

16. Based on the parties' written and oral submissions, the Tribunal deems the following to be the legal issues that need to be determined in respect of the decisions not to select the Applicant for the New York and Vienna posts:

- a. Whether the Applicant was subjected to bias, prejudice or discrimination during the selection processes;
- b. Whether the recruitment exercise for the contested posts was conducted in accordance with the provisions of ST/AI/2006/3³ (Staff selection system).

The New York post - Issue 1

17. Was the Applicant subjected to prejudicial and/or discriminatory conduct during the selection process?

Applicant's submissions

18. The Applicant submits that he was denied full and fair consideration for promotion and that the selection process for the New York post lacked transparency and consistency. He had been subjected to prejudicial and/or discriminatory conduct for nearly two years and his non-selection for the post was merely a continuation of this treatment. The Applicant alleges that there was animosity between the Programme Case Officer ("PCO") for the New York post, and Mr. Mark Gough, the then Deputy Director, ID/OIOS and that he, the Applicant, subsequently became a collateral victim of this animosity due to several factors. He was therefore discriminated against by the PCO as a retaliatory measure.

19. Additionally, he submits that the PCO enjoyed a very close working relationship with Ms. Ahlenius, and that Mr. Vladislav Guerassev, the then Acting

³ Has now been replaced by ST/AI/2010/3.

Director of ID/OIOS, had told him that the PCO “enjoyed the USG’s favor”. He also testified that the PCO may even have been an adviser to the then USG/OIOS.

20. Further, while the Applicant and Mr. Guerassev had initially enjoyed a good working relationship, starting from September 2006, Mr. Guerassev also commenced to treat him in an unfair, inequitable and harassing manner and he eventually reported the mistreatment to the USG/OIOS, who ignored his concerns. As a last resort, he also reported the matter to the Secretary-General.

21. The Applicant submits that Ms. Ahlenius, the then USG/OIOS, demonstrated her prejudice towards him by deliberately not assigning an Operations Manager post at the P-5 level to ID/OIOS Nairobi so as to prevent his promotion to the P-5 level. Additionally, her acceptance of the Interview Panel’s overall evaluation of him despite her own knowledge of his skills, qualifications and experience is evidence of her bias against him.

22. Lastly, the Applicant submits that the failure of OIOS management to address the disparity in grades between ID/OIOS Operations Managers in the different duty stations i.e. New York, Vienna and Nairobi, so as to avoid the upgrade of this post and deny him promotion opportunities is also evidence of bias, prejudice and discrimination.

Respondent’s submissions

23. The Respondent submits that the Applicant’s candidacy received the full and fair consideration to which it was entitled and that the selection process was conducted in accordance with applicable regulations, rules and procedures and was not tainted by prejudice, bias or other extraneous factors. In this respect, the Respondent submits that pursuant to the jurisprudence of the former United Nations Administrative Tribunal (“the former UN Administrative Tribunal”), the burden of proving prejudice or improper motives lies with the Applicant, who, in this case, failed to discharge his burden. Specifically, the Applicant produced evidence of

personal and professional disagreement between himself and certain colleagues within OIOS but did not demonstrate any causal link between the incidents cited and the contested decision.

24. There was no evidence of bias, prejudice or discrimination on the part of the Interview Panel as the Applicant was recommended for the post, rostered and subsequently selected for another P-5 level post in Nairobi by Mr. X⁴, who was one of the members of the Interview Panel.

25. Lastly, the decision of Ms. Ahlenius to appoint another candidate to the post constituted a valid exercise of discretion and disputed the Applicant's claim that the structure of ID/OIOS was maintained in a particular manner due to the desire of management to deprive him of promotion opportunities.

Considerations

26. It is well established in law that in civil litigation the burden of proving an assertion to the required degree of certainty (i.e. the standard of proof) normally lies on the party bringing the matter or making the allegation. In civil cases, the standard of proof is on a "preponderance of the evidence" or on a "balance of probabilities". In the celebrated case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J, as he then was, had this to say regarding standard of proof in civil case:

"That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not."

27. It is also recognised that in the majority of discrimination cases, it is difficult to obtain clear cut evidence that the alleged discrimination took place. Instead, there will most probably be contradictory evidence that is evincive of the very different perceptions of the parties. In order to address this evidentiary difficulty, a two-stage

⁴ Mr. X is currently the Deputy Director of the Investigations Division of OIOS (ID/OIOS).

test for proving discrimination was developed in the case of *Igen Ltd & Others v Kay Wong*.⁵

28. First, the party bringing the claim (“the applicant”) must establish a *prima facie* case or a case that, on its face, amounts to discrimination. Since it is difficult to find confirmatory evidence of discrimination, the Tribunal is allowed to and should make reasonable inferences from the totality of the evidence presented. If the applicant is able to establish a *prima facie* case, then the burden of proof shifts to the respondent, who will then have to show, on the balance of probabilities, that its actions were not discriminatory.

29. In the present case, the Applicant is alleging prejudicial and/or discriminatory conduct on the part of certain individuals within OIOS management, including the two persons who had key roles in the recruitment process for the New York post i.e. the PCO who was responsible for the preparation and conduct of the recruitment exercise, and Ms. Ahlenius, who as Head of Department was responsible for the final selection decision. Thus, the initial burden lies on him to prove by a preponderance of the evidence that there was discriminatory conduct on the part of the PCO and Ms. Ahlenius and that this subsequently affected the selection process to his detriment.

Bias on the part of the Programme Case Officer (“PCO”)

30. In furtherance of his case, the Applicant submits that there were serious professional differences between Mr. Guerassev and Mr. Gough and that the PCO sided with Mr. Guerassev and thereby created animosity between himself and Mr. Gough. The Applicant testified that he became a collateral victim of the animosity between Mr. Gough and the PCO because he was seen to be part of Mr. Gough’s clique as both he and Mr. Gough are Australian and he was recruited by Mr. Gough.

⁵ [2005] 3 All ER 812 or [2005] EWCA Civ 142.

31. Additionally, the Applicant contends that as a result of the hostilities between the senior managers, the teams he was supervising were not receiving proper support and that as their manager, he deemed it appropriate to speak out about the lack of support, which in turn made the PCO publicly hostile towards him. The Applicant submits that the PCO's prejudices against him were imported into the recruitment exercise for the New York post and this fact was one of the determinant factors in the recruitment process.

32. In support of his allegation of discriminatory behaviour, the Applicant called Mr. Y, the candidate who had initially been selected for the New York post but was subsequently rejected by the Office of Human Resources Management ("OHRM"), to testify on his behalf. Mr. Y testified that it was common knowledge that there was "bad blood" between the Applicant and various senior managers i.e. the PCO, Mr. Guerassev and Ms. Ahlenius. The witness stated that he had also been subjected to this "bad blood" and explained that those who spoke up against or questioned the professional standards or ethics of the people in positions of power in OIOS were subjected to "suitable retribution". He expanded on this by stating that there had been a number of professional disagreements regarding the way the Applicant worked and when the Applicant took up the matter with the persons concerned, emails would be circulated widely and the issue would be taken to a personal level.

33. Mr. Y further testified that it was quite well known within OIOS that the Applicant would not obtain a position of the caliber of the New York post. When asked to expound, he explained that at the time there was a lot of turmoil within OIOS senior management and that a lot of this had been clearly broadcasted to a number of staff by email "barrages" and at a retreat in Senegal.

34. Additionally, Mr. X, who was called as a witness by the Respondent, testified that subsequent to the selection process, he heard rumours and statements that the relationship between the PCO and the Applicant was bad and that the PCO may not

have had professional respect for the Applicant. He stated that he was aware of friction within the division. In relation to communications between the PCO and the Applicant, both clearly had room to improve.

35. The Applicant also submitted a chain of emails between OIOS staff, including himself, the PCO, Mr. Gough and Mr. Guerassev as part of his evidence. While the Tribunal was unable to find any evidence that directly corroborated Mr. Y's claim that it was quite well known within OIOS that the Applicant would not be given the New York post, it did find some rather revealing emails, which corroborated his testimony that professional disagreements within OIOS were taken to personal levels. For example, in an email to Mr. Gough dated 5 April 2007 and copied to the PCO and other OIOS personnel, the Applicant wrote, *inter alia*, that:

“I am extremely disappointed by the tone, tenor and insulting nature of the below email.⁶ As you are aware for the past eight months or so, [the PCO] has embarked on a path of attacking various ID/OIOS colleagues (particularly those involved in peacekeeping) on all manner of issues. I have previously liaised with [the PCO] about his manner and sought to elicit a more collegiate and collaborative attitude from him [...]”

36. In an email dated 14 April 2007, the PCO responded to the Applicant's 5 April 2007 email with the following introductory paragraph:

“I will not respond to the personal attacks contained in the malicious piece of fiction below. I know why you are doing this – and more importantly – why you are doing it now. I trust, however, that the attached document will provide those colleagues who do not know me with sufficient documentary information to show that one of us (and probably others) may need an urgent reality check.”

37. Another example of professional disagreements involving the PCO that apparently disintegrated into a personal vendetta was found in an email dated 23 May

⁶ This was in reference to an email from the PCO dated 5 April 2007.

2008 from a then OIOS Investigator based in Nairobi, one MO, to the PCO and copied to numerous OIOS staff members. MO stated the following:

“I was actually in the process of writing a farewell email to ID-ALL just prior to me leaving this office for the last time when I received your last vitriolic email. A form of communication that you seem to have mastered, and for reasons that completely escape me a destructive habit, which your supervisors seem unwilling or unable to curtail [...]. Your comments [FP] are neither helpful or insightful. It is a good example of why there is such a disconnect between OIOS staff based in NY and those based in every other location. It simply perpetuates the feeling of us versus them [...]. Nevertheless, I do thank you for the timing of your email. It reinforced in my own mind that I am doing the right thing by leaving this office [...]. As long as you are in a defacto position of power within the New York office there really is little hope of this division moving forward.”

38. In response, the PCO wrote, *inter alia*, that:

“First, after reading your mail, I am more than pleased that you too are leaving ID. I do not wish to have a colleague who challenges my integrity – especially with no evidence whatsoever. But see, this once again shows that not all of us have the same understanding of the true meaning of the word “evidence”. I trust that in your new employment, you will learn more about that. So, good luck!”

39. Taking into account the hostility, both subtle and overt, that has been compressed into the emails submitted by the Applicant and the oral evidence provided by Mr. Y, Mr. X and the Applicant, a reasonable conclusion can be drawn that there was animus between the PCO and the Applicant, and that this animus had gone far beyond mere professional disagreements, as asserted by the Respondent. In actuality, it had become distastefully personalized and highly unprofessional. Based on the negative state of the relationship, a further inference can be made that the PCO harboured prejudice against the Applicant.

40. The question now is whether the PCO’s prejudice against the Applicant was transferred into the selection process to the Applicant’s detriment. Mr. X told the

Tribunal that during the interview, there was nothing remarkable that suggested favouritism, aggression or belligerence towards the Applicant by the PCO. The Tribunal does not doubt that the PCO did not show his hostility toward the Applicant openly during the interview but it does not follow from this that the hostility was not there. As noted earlier, in cases such as these, there will be no clear cut evidence that the alleged conduct has taken or is taking place. Hence, this is an added reason for the Tribunal to carefully examine the circumstances surrounding the case.

41. In recruitment exercises, a staff member's confidence in the integrity of the process is just as important as the process itself and is vitally crucial for the interest of the Organization. In cases, such as this one, where animus exists between a PCO and a candidate, a fair-minded person can reasonably deduce that a certain amount of bias or prejudice will be carried into the selection process to the detriment of the candidate because the PCO is ultimately responsible for preparing the record of the evaluation of the proposed candidates and for transmitting a proposal of candidates to the appropriate central review body.

42. Additionally, while the interview panel was comprised of two other members, Mr. X and Mr. Pillay, who clearly enjoyed a good working relationship with the Applicant, they apparently did not play as integral a part in the evaluation process as they should or could have. When asked what his role was in the assessment of the candidates for the New York post, Mr. X told the Tribunal that:

“For this particular vacancy, I think it was fairly early on in my assignment with OIOS. I was rather limited in my role. Essentially, I was asked to serve on the interview panel for the position. I was neither PCO nor was I involved with the development of the evaluation criteria, which is used to cultivate the vacancy announcement.”

43. The Tribunal is of the considered view that Mr. X and Mr. Pillay allowed the, PCO, someone whom they knew as having worked with the Applicant longer and more closely than they had, to drive the process to the detriment of the Applicant.

This is very obvious in the very low scores that the Applicant, whom the Respondent unreservedly acknowledges was a very well-qualified candidate that the Organization holds in high regard, was awarded at the end of the interview process.

Bias on the part of the then USG/OIOS as Head of Department

44. The Applicant also alleges that the then USG/OIOS, Ms. Ahlenius, was also prejudiced against him and that this clearly came into play when she had to make the final selection decision as Head of Department. He asserts that her prejudice was demonstrated by her deliberately not assigning an Operations Manager post at the P-5 level to ID/OIOS Nairobi so as to prevent his promotion to the P-5 level and by her acceptance of the Interview Panel's overall evaluation of him despite her own knowledge of his skills, qualifications and experience.

45. In February 2006, the Applicant, the PCO and one AM, were appointed as acting Operations Managers at the P-4 level in Nairobi, New York and Vienna, respectively. On 14 July 2006, a temporary vacancy for a P-5 in ID/OIOS New York was advertised. In response to a query from the Applicant regarding the 14 July 2006 vacancy announcement, the then Director of ID/OIOS informed him that "...we had requested a P-5 for Nairobi in the regular budget and I am sure that at some point in the near future such a post will be established". The P-4 Operations Manager in New York, the PCO, was the successful candidate for the temporary vacancy and was promoted to Operations Manager at the P-5 level. The P-4 Operations Manager in Vienna was subsequently promoted to P-5 Operations Manager on the basis of a temporary vacancy announcement as a result of a previously encumbered P-5 post becoming vacant in the ID/OIOS Vienna office.

46. On 31 October 2006, a Senior Investigator at the P-5 level with ID/OIOS New York separated from service and at this point, the expectation of the Applicant and Mr. Gough was that this vacancy would be used to create a P-5 Operations Manager post in Nairobi so as to equalize the levels of the Operations Managers at the three duty stations. Unfortunately, this did not happen as the vacant post was maintained in

New York and another staff member was selected to fill it in November 2007. Meanwhile, in July 2007, another P-5 level post was established in ID/OIOS Vienna and in November 2007, this post was transferred to ID/OIOS New York and was subsequently advertised on 25 January 2008. This post is the subject of the current application.

47. While it would have been fair for one of the P-5 posts that became available in the New York and Vienna offices to have been re-assigned to ID/OIOS Nairobi, the Applicant did not offer any evidence that would lead the Tribunal to conclude that the failure to assign an Operations Manager post at the P-5 level to Nairobi was a deliberate omission on the part of the then USG/OIOS so as to discriminate against him. The Tribunal finds feasible the Respondent's explanation that the redeployment of the P-5 posts was part of a general restructuring within OIOS and that the timing of the deployment of resources was determined by operational needs and resource availability.

48. Further, the Applicant submits that Ms. Ahlenius' acceptance of the Interview Panel's overall evaluation of him despite her own knowledge of his skills, qualifications and experience demonstrated her prejudice. The Tribunal cannot make any inferences in this respect as the Applicant did not provide any evidence on this allegation. It is acknowledged, however, that the low scores the Applicant was awarded on the overall evaluation as a result of the PCO's prejudice would have played a great part in Ms. Ahlenius not selecting him for the post.

The New York post – Issue 2

49. Was the recruitment exercise for the New York post conducted in accordance with the provisions of ST/AI/2006/3? In this respect, the Tribunal considers that the following are the related issues for determination:

- a. Whether the questions asked during the interview were in conformity with ST/AI/2006/3;

- b. Whether the decision to select Mr. Y for the post was in conformity with ST/AI/2006/3; and
- c. Whether the overall evaluation was fair.

Were the questions asked during the interview in conformity with ST/AI/2006/3?

50. Section 1 of ST/AI/2006/3 defines evaluation criteria as follows:

“[C]riteria used for the evaluation of candidates for a particular position after approval by a central review body. Evaluation criteria must be objective and related to the functions of the post and must reflect the relevant competencies”.

51. The relevant part of section 4.4 of ST/AI/2006/3 provides that:

“The evaluation criteria must be objective and related to the functions of the post and must reflect the relevant competencies”.

Applicant’s submissions

52. The Applicant submits that he was not accorded full and fair consideration for the New York post because the evaluation criteria for the post that was communicated to OIOS staff by Ms. Ahlenius was “specifically drafted to ensure the recruitment of skilled and experienced investigators in white-collar offenses”. However, the Interview Panel did not ask any questions with a view to identifying such “skilled and experienced investigators in white-collar offenses”. He submits that on the contrary, the questions asked were of the most basic investigative procedure, which would only have identified, at best, competent investigators and not the skilled and experienced investigators in white-collar offenses that were required.

Respondent’s submissions

53. The Respondent submits that the Applicant was invited to participate in a competency-based interview, during which he had the opportunity to demonstrate his

competencies, skills and suitability for the post. The Respondent asserts that the selection record established by reasonable and measurable means that the Applicant was fully and fairly considered against the applicable evaluation criteria in accordance with section 7 of ST/AI/2006/3. With regard to the Applicant's claim concerning the questions posed during the interview, the Respondent submits that:

“The generic competency questions are not targeted to the particular strength of any candidate so as to ensure a fair process, which includes the assessment of each candidate's Personal History Profile and e-PAS. The assessment is, therefore, full in terms of each candidate's qualifications, and since each candidate was subject to the exact same assessment, it is objective and non-discriminatory.”

Considerations

54. The responsibilities for this post, as listed specifically in the vacancy announcement, indicated, *inter alia*, that the incumbent “...plans, organizes, conducts and/or supervises investigations of serious and complex cases in the field of corruption, fraud and financial crime”. The competencies for this post included, in relevant part, the following:

- a. Professionalism: Expert knowledge, understanding and experience in the field of corruption, fraud and financial crime investigations; proven ability to supervise complex serious financial investigations, produce reports and review and edit the work of others; ability to interview witnesses in complex white collar cases; and
- b. Leadership: Proven ability to provide strategic direction, to plan and establish priorities for fraud and corruption investigations and analysis; proven track record of excellent management and technical leadership skills in fraud and corruption investigations.

55. With respect to work experience, the following was required, “[a] minimum of ten years of progressively responsible experience in professional investigatory

work in law enforcement, government, national or international investigation agency, including criminal and/or administrative investigations, or equivalent experience in the private sector or equivalent specializing in internal white collar fraud and/or corruption investigations.”

56. In the 2007 “OIOS report on actions to strengthen its investigations function”⁷, OIOS observed that the then organizational structure of ID/OIOS was one of the contributing factors to the problems of the Division. Significantly, the report noted that OIOS investigations related to cases involving “financial, economic misconduct by staff members or contracted third parties and administrative misconduct by staff members” and cases involving “sexual exploitation and abuse by UN staff members”. In this respect, the report stated:

“43. The skills and experience required for the two types of investigations undertaken by ID/OIOS vary significantly and OIOS’ experience over the years combined with the experts report are a compelling argument for staffing investigators in specialized teams/units...Similarly, it is unlikely that a SEA investigator would have the same level of expertise as a specialist “white collar crime” investigator namely knowledge of business procedures as well as informal ways of concealing corruption, fraud, and embezzlement. OIOS has decided therefore that the teams should be staffed with investigators who have a requisite amount of skill and expertise in each particular area.

44. Specialization would also produce greater focus and development of expertise in the particular type of investigations, as well as development of appropriate tools and techniques, all of which would improve the quality and speed of investigations conducted.”

57. Additionally, in an email dated 15 December 2007, Ms. Ahlenius informed OIOS staff members that she had decided to restructure ID/OIOS to reflect a specialization of investigation capacity in relation to Sexual Exploitation and Abuse (“SEA”) and Fiscal, Economic and Administrative (“FEA”) cases. She further stated that “this implies a respect for the specific knowledge that is required for carrying out investigations in these different areas.”

⁷ Annex 1 of A/62/528 (Strengthening Investigations).

58. The Respondent was instructed to provide the Tribunal with the list of interview questions used by the Interview Panel during the recruitment exercise for the New York post. The Respondent subsequently informed the Tribunal that despite diligent searches and enquiries, the interview questions had not been located and therefore could not be produced for the Tribunal's examination. Mr. X, who was a member of the Interview Panel, stated during the hearing that he had checked all his files (electronic and paper) but was unable to locate the questions. The Tribunal finds this to be very disturbing. The Tribunal is at a loss to understand how such a professional body like OIOS would be unable to retrieve such an important document as the list of questions used during the interview of candidates for a senior management post especially since the questions are supposed to form part of the report that the PCO submits to the relevant review board.

59. In light of the Respondent's failure to produce the interview questions for examination, the Tribunal's consideration of this issue is based solely on the oral evidence presented at the hearing. The Applicant's evidence was that the questions asked during the interview were not relevant to the competencies advertised in the vacancy announcement. In his view, they were the sort of questions one would ask of a P-2 or P-3 level investigator. Further, he was of the view that none of the questions could have assisted anyone to gain insight into the candidates' experience as FEA investigators as the vacancy announcement required.

60. Mr. X's testimony corroborated the Applicant's evidence. Mr. X gave evidence that the questions, which had been authored solely by the PCO, were "rather generic competency-based questions" and that they were rather basic for a P-5 level candidacy. He also testified that the Interview Panel did not ask any specific questions relating to the experience of the candidates in FEA investigations.

61. Based on the vacancy announcement and other documents referred to earlier, the New York post evidently required a certain degree of expertise or special skills in FEA. Reading the provisions of sections 1 and 4.4 of ST/AI/2006/3 in conjunction

with the vacancy announcement, the OIOS report and the email of the then USG/OIOS, the only logical conclusion that can be drawn is that the questions asked during the interview should have related very specifically to the functions of the post as detailed in the vacancy announcement, i.e. investigations into FEA cases, and should have reflected the relevant competencies.

62. In light of the specificity contained in the vacancy announcement, one would have expected that the questions asked would have been geared towards eliciting the candidates' experience in the field of financial, economic and administrative investigations. The Tribunal finds that this was not the case. The Respondent would have the Tribunal believe that even though the candidates were asked basic questions that did not reflect the P-5 level vacancy and did not reflect on the relevant attributes of FEA investigations, they were evaluated against the competencies in the vacancy announcement. Unfortunately, the Tribunal was not enlightened on how such incongruities can co-exist.

63. While the answers candidates give in competency-based interviews generally reflect the breadth of their experience, the questions must be tailored to fit the responsibilities and competencies of the advertised post otherwise the whole interview process is an exercise in futility. The Tribunal considers that the goal of OIOS, in crafting the vacancy announcement for the New York post specifically to meet the demands of FEA, were not achieved by the Interview Panel asking general and simplistic questions during the interview. Under these circumstances, the inference the Tribunal gathers is that the questions may have been tailored to fit a particular candidate.

64. Where a vacancy announcement is not generic and set outs very specific and/or unique responsibilities and competencies, such as in the present case, an Interview Panel cannot ask general questions and expect the candidates to shoot darts blindly in the dark and hope that by sheer luck, their answers hit the bull's-eye. The Tribunal finds therefore that the questions asked by the Interview Panel for the New

York post were not in conformity with the relevant provisions ST/AI/2006/3 in that they were not objective and did not relate to the functions or the competencies of the post. This was to the detriment of the Applicant because the generic and basic questions that were asked did not allow him to showcase the specialized experience he possessed in the area of FEA investigations during this rather crucial interview.

Was the decision to select Mr. Y for the New York post in conformity with ST/AI/2006/3?

65. Section 4.3 of ST/AI/2006/3 provides in relevant part that:

“The vacancy announcement shall include the qualifications, skills and competencies required [...]”

Applicant’s submissions

66. The Applicant submits that he was not given full and fair consideration for the post in light of the fact that the successful candidate did not possess the minimum education requirement for the post and he did not also meet the competencies in the vacancy announcement.

Respondent’s submissions

67. The Respondent acknowledges in his reply that the candidate initially chosen from the recommended list could not be granted an offer of appointment for the post because he did not fulfill the criteria set out in the vacancy announcement with regard to educational qualifications. However, this matter was not ascertained until after the selection process had been completed and pre-recruitment formalities had been conducted by the Office of Human Resources Management (“OHRM”). As such, the Respondent submits that the selection exercise was not tainted by this turn of events and that the matter had no impact on the consideration of the Applicant’s candidacy.

Considerations

68. In *Lopes Braga*⁸, the former UN Administrative Tribunal highlighted the importance of strict adherence to the requirements included in a vacancy announcement. Notably, the former UN Administrative Tribunal held, in relevant part, that:

“By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.”

69. The Tribunal endorses the above legal principle. The vacancy announcement for the New York post required an advanced university degree (Master’s degree or equivalent) preferably in law, or related areas of investigation. In the alternative, a first level university degree in combination with qualifying experience could be accepted in lieu of the advanced university degree.

70. Mr. Y was initially chosen from the recommended list but was not granted an offer of appointment for the post because OHRM considered that he did not fulfill the education qualifications set out in the vacancy announcement. Mr. Y’s evidence at the hearing was that he did not have an advanced university degree when he applied for the New York post. The Respondent also acknowledged that Mr. Y did not meet the education criteria set out in the vacancy announcement. In light of the foregoing, the Tribunal will not engage in a lengthy discourse as to whether or not Mr. Y was eligible for appointment to the New York post because he obviously was not.

71. It is, however, crucial for the Tribunal to examine closely the Respondent’s assertion that Mr. Y’s ineligibility was not ascertained until after the selection process had been completed and pre-recruitment formalities had been conducted by OHRM. The Respondent further submits that the selection exercise was not tainted by this

⁸ Judgment No. 1122 (2003).

turn of events and that the matter had no impact on the consideration of the Applicant's candidacy.

72. Mr. Y's evidence at the hearing was that at the time he applied for the post, there had been some contention over whether or not his qualifications were equivalent to the requirements of the vacancy announcement. He explained that he did not have a bachelor's degree but based on his experience and an advanced diploma in investigation, he was allowed to enter into a Masters program in the Australian education system. Even though he had not completed his Masters program, he applied for the job anyway and left it to the "powers that be" to determine whether or not he met the requirements of the post. Mr. X's evidence did not do much to buttress the Respondent's assertion that Mr. Y's ineligibility was not ascertained until after the selection process had been completed. When asked whether Mr. Y was engaged in post graduate studies at the time of the interview, Mr. X responded that, "I feel that that is my recollection but I don't know if I learned that later or at the time of the selection process."

73. Based on Mr. Y's evidence, which was not challenged by the Respondent, it is apparent that his lack of the requisite academic qualifications was clearly denoted in his application for the post, which obviously preceded the interview and selection process. Additionally, the Tribunal takes special note of a comment in the Interview Panel's overall evaluation, which states that "Mr. Y holds a First University degree and will obtain a Masters Degree in Management and Leadership [...]". The obvious inference is that the Interview Panel, including Mr. X, was very much aware, prior to the completion of the selection exercise, that Mr. Y was ineligible for the post. However, since neither the PCO nor the other members of the Interview Panel were keen on performing their duties with the requisite diligence, Mr. Y, a noticeably ineligible candidate, was not only interviewed but recommended and selected for the post. The Tribunal therefore does not accept the Respondent's assertion that Mr. Y's ineligibility was not ascertained until after the selection process had been completed and pre-recruitment formalities were being conducted by OHRM. Not only was this

fact highly misleading but it also goes a long way to show how those involved in the recruitment process were so oblivious either by design or by their avowed aim to ensure that the Applicant should at all cost not to be shown to be a serious candidate for the position. As such, the Tribunal rejects as totally unsound the Respondent's further assertion that the selection exercise was not tainted by this turn of events and that the matter had no impact on the consideration of the Applicant's candidacy. The question remains however as to why and in what circumstances Mr. Y was short-listed and recommended for the post.

74. In light of the foregoing, the Tribunal concludes that the selection of Mr. Y, who did not possess the requisite academic qualifications, was not in conformity with section 4.3 of ST/AI/2006/3 and thereby caused harm to the Applicant.

Was the Overall Evaluation fair?

75. The relevant part of section 5.1 of ST/AI/2006/3 provides that:

“However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.”

76. Sections 7.5 and 7.6 of ST/AI/2006/3 mandate the PCO to prepare a reasoned and documented record of the evaluation of the candidates against the requirements and competencies set out in the vacancy announcement.

Applicant's submissions

77. The Applicant submits that he was deliberately downgraded in the overall evaluation to enable inclusion of his name on the recommended list of candidates but at the same time ensuring that his evaluation would be inferior to those of other candidates on the recommended list, thus justifying the selection of another candidate.

Respondent's submissions

78. The Respondent submits that the Applicant's credentials were deemed to meet the requirements for the post, and he was included in the list of recommended candidates. However, pursuant to the authority conferred by section 9.2 of ST/AI/2006/3, the then USG/OIOS decided to appoint another candidate to the post from the list approved by the Central Review Committee. This constituted a valid exercise of discretion and did not in and of itself mean that the Applicant had not received full and fair consideration.

79. The Respondent submits that the Secretary-General enjoys wide discretion to appoint and promote staff members and as such, decisions on promotions cannot be challenged on the grounds of inadequate consideration of performance, or length of service, or on any similar ground, but can be reviewed on the grounds of abuse of authority, lack of due process, procedural or substantive errors or other extraneous factors.

Considerations

80. Out of a total score of 100, the maximum points a candidate could receive for experience was 50, education and languages was 20 and other skills was 10. Of the four recommended candidates, the Applicant received the lowest score of 57 points. Mr. Y received 68 points, the candidate who was eventually appointed to the post received 79 points and the third candidate received 62 points.

81. With respect to experience, candidates for the New York post were required to have "a minimum of ten years of progressively responsible experience in professional investigatory work in law enforcement, government, national or international investigation agency, including criminal and/or administrative investigations, or equivalent experience in the private sector or equivalent specializing in internal white collar fraud and/or corruption investigations with at least 5 years of experience at the managerial level, three years experience in international investigations, and at least 3 years of experience as a government, national or international prosecutor strongly preferred."

82. Despite the fact that the Interview Panel noted that the Applicant had “**over 20 years of relevant** investigatory experience in a variety of organizational investigative settings at national and international levels” (*emphasis added*) and that “his international experience includes his tenure with the Investigations Division of the Office of Internal Oversight Services of the United Nations – first as an Investigator and then as Operations Manager, **which provided him with investigative skills commensurate with the requirements of this post**” (*emphasis added*), he was awarded only 27 out of 50 points for his experience.

83. A look at the comparative analysis that was prepared in conjunction with the overall evaluation shows that the Applicant served for about 21 years with the Victoria Police and the Australian Bureau of Criminal Intelligence. For approximately 16 out of the 21 years, he was an investigator and/or supervisory investigator tasked with investigating complex crimes, which included, *inter alia*, organized crime, money laundering, fraud, theft and serious offences against the person. Additionally, the comparative analysis shows that by the time of his interview, he had nearly 4 years of international investigation experience as he was working with OIOS as an investigator. Mr. X’s evidence at the hearing was that even though the vacancy announcement required a minimum of 10 years of experience, it was fair and appropriate for the Applicant to be awarded only 27 points with all of his experience. This kind of warped reasoning should have no place in a selection process in this esteemed Organization. Top managers should not be allowed to run the Organization as their personal chattel and in defiance of the rules and rights of staff members.

84. Strangely enough, the Interview Panel did not bother to provide the number of years of experience for the successful candidate or the third candidate. Mr. Y was awarded a higher score even though he had 14 years as an investigator with the Australian Police and his experience was described in basically the same manner by the Interview Panel as the Applicant’s. Mr. Y was awarded 35 points due to his “relevant investigatory experience at both national and international levels” and for

his many years of experience in the Australian Police coupled with his experience as an OIOS investigator. The successful candidate was awarded 40 points because she had “extensive experience in a variety of organizational investigative settings at the national and international levels” and because of her prior assignments with ICTR and UNMIK. Perplexingly, the Interview Panel was of the view that her tenure as an Assistant District Attorney provided her with more “solid investigative skills commensurate with the requirements of [the] post” than the Applicant who is a qualified investigator! It would have been more expedient for the Interview Panel to consider the type of experience, actual performance and achievements in determining the ability and potential of the candidates to perform successfully.

85. With respect to languages, the vacancy announcement called for fluency in oral and written English with a working knowledge of other official United Nations languages being an advantage. Mr. Y was awarded 10 points for his proficiency in English. The successful candidate, who is proficient in English and has some knowledge of Spanish, French and Italian was awarded 10 points. The third candidate, who is proficient in English and has some knowledge of French, was awarded 15 points while the Applicant was awarded 12 points for his proficiency in English and his knowledge of French. Here, the arbitrariness in the awarding of points defies logic. Mr. X tried, unsuccessfully, to convince the Tribunal that the Applicant’s score here was also fair because he did not have United Nations proficiency in French. Based on the available evidence, neither did the third candidate but somehow she was awarded 3 points more than the Applicant for her knowledge of French. The Tribunal is simply baffled by Mr. X’s logic.

86. With respect to education, the vacancy announcement required an advanced university degree (Master’s degree or equivalent) preferably in law, or related areas of investigation or a first level degree in combination with qualifying experience. The Applicant was awarded 12 points with the following conflicting comment, “[The Applicant] holds a Master of Business Administration Degree which is suited for the requirements of this position”. Since he had the requisite degree and the qualifying

experience, there was no tangible reason for him not to have been awarded higher points. The Tribunal notes that Mr. Y, who had neither an advanced university degree nor a first level degree, was awarded 15 points. The Interview Panel was of the view, however, that this was “consistent with the requirements of [the] position”. Further, the Respondent asserts that it was appropriate for the Interview Panel to look beyond the mere title of “Masters” and determine where the Applicant’s degree was awarded, how it was awarded and what the subject of the study was. It is noteworthy however, that the Interview Panel did not identify or discuss any of these supposed shortcomings in the Applicant’s educational qualifications in their comparative analysis.

87. With respect to other skills, the vacancy announcement called for a comprehensive knowledge of United Nations policies, staff regulations and rules, procedures and operations, in particular those undertaken by the United Nations in the areas of procurement and financial management being desirable. The Applicant was awarded a score of 6 in this area, which was the lowest. He was deemed to be a knowledgeable professional with “adequate experience and managerial skills”. The third candidate was awarded a higher score even though she did not answer all practical questions posed by the Interview Panel and admitted that she had never interviewed a subject of investigation in any of her Procurement Task Force cases. Mr. Y, who overall provided “reasonable answers to most practical questions posed by the interviewing panel”, was awarded 8 points.

88. It is noteworthy that on one hand, the Respondent effusively acknowledges and proclaims the excellent qualifications and experience of the Applicant and yet on the other hand, the same Respondent vociferously defends a selection process that denigrates and sullies those same qualifications. It is quite apparent that the Applicant’s assertion that he was deliberately downgraded in the overall evaluation to enable inclusion of his name on the recommended list of candidates for mischievous reasons is accurate.

89. The Tribunal is horrified at the unabashed act of malevolence and the blatant disregard of the Organization's rules and regulations governing the selection process that has been laid bare in the preceding paragraphs. Regrettably, the only reason that the Tribunal can point to in explaining these shocking acts of obstruction is malice.

90. The appalling conduct of the PCO and the lackadaisical attitudes of Messrs. X and Pillay during this selection process can only be characterized as reckless or grossly negligent. Noting that it is for the Secretary-General to decide what action to take to enforce accountability against these persons in the light of the findings in this judgment be they *obiter dicta* or amounting to *ratio decidendi*, the Tribunal wishes to underscore, however, that it would be a matter of regret if the Secretary-General remains passive in the face of such conduct. This prevailing culture of impunity should be addressed in the sternest manner possible and senior managers should be reminded that “[b]e you never so high, the law is above you.”⁹

91. In light of the foregoing, the Tribunal concludes that the Applicant's overall evaluation was not fair due to the fact that he was not evaluated against the requirements and competencies set out in the vacancy announcement as his experience, knowledge and skills were completely disregarded. The overall impression is that what mattered to the Interview Panel was not so much an exercise in identifying the best candidate but an exercise in jettisoning the Applicant overboard. The Tribunal must emphasise that it is very patent how those who were tasked with evaluating the candidates showed a most shameless bias towards the Applicant.

Conclusion on the New York post - Issue 2

92. The Tribunal finds that the recruitment exercise for the New York post was not conducted in accordance with the relevant provisions of ST/AI/2006/3 and as such, the Applicant was not fully and fairly considered for the post.

⁹ Dr. Thomas Fuller (1733).

The Vienna post – Issue 1

93. Was the Applicant subjected to prejudicial and/or discriminatory conduct during the selection process?

Applicant’s submissions

94. The Applicant submits that his non-selection for this post, despite his superior performance, was influenced by prejudice and discrimination. In this respect, he asserts that he has been subjected to a “more-than-two-year history of prejudice and discrimination, which has, inter alia, influenced the structure of ID/OIOS at the Nairobi duty station so as to deny [him] an opportunity for advancement” and that this prejudicial treatment was imported into this selection process. In particular, the Applicant asserts that he has been subjected to prejudice and discrimination by certain members of OIOS senior management and, in particular by Ms. Ahlenius, and that her actions and decision in the selection process adversely impacted him by denying him full and fair consideration for the post.

Respondent’s submissions

95. In order to challenge a decision on appointment or promotion, it must be established that the Secretary-General’s discretionary decision was motivated by extraneous factors such as prejudice or discrimination. In the current case, the Applicant failed to establish that the decision of the USG/OIOS to appoint another candidate was affected by bias or other extraneous considerations. Further, the members of the Interview Panel for the Vienna post were not associated in any way with the allegations made by the Applicant against OIOS senior management in the recruitment exercise for the New York post. Thus, the allegations of bias have no relevance to the assessments made by the Interview Panel for the Vienna post.

Considerations

Bias on the part of the Interview Panel

96. The Tribunal notes that the Applicant did not allege in any of his submissions that the Interview Panel for the Vienna post was biased or prejudiced against him. Neither did he lead any evidence on this issue at the hearing. Thus, this is not an issue that needs to be canvassed by the Tribunal.

Bias on the part of the then USG/OIOS as Head of Department

97. The Tribunal wishes to recall its consideration of this same issue at paragraphs 44 to 46 above and its conclusion at paragraph 47 that the Applicant did not lead any evidence that would lead the Tribunal to conclude that the failure to assign an Operations Manager post at the P-5 level to Nairobi was a deliberate omission on the part of the then USG/OIOS so as to discriminate against him.

Conclusion on the Vienna post – Issue 1

98. Based on the foregoing, the Applicant's non-selection for the Vienna post was not influenced by prejudice and discrimination.

The Vienna post – Issue 2

99. Was the recruitment exercise for the Vienna post conducted in accordance with the provisions of ST/AI/2006/3? In this respect, the Tribunal considers that the related issues for determination are:

- a. Whether the rules governing roster candidates were complied with by the Respondent; and
- b. Whether the evaluation of the Applicant was fair.

Were the provisions governing roster candidates in ST/AI/2006/3 complied with by the Respondent?

100. Pursuant to section 9.3 of ST/AI/2006/3, candidates endorsed by a central review body but not selected for the specific position shall be placed on a roster of

candidates pre-approved for similar functions. Section 7.8 of ST/AI/2006/3 provides that a manager may recommend the immediate selection of a suitable roster candidate to the head of department/office without reference to the central review body.

Applicant's submissions

101. The Applicant submits that as a candidate who had been placed on the roster for a similar position (i.e. the New York post), he should simply have been selected for the Vienna post and that his non-selection is indicative of his being deliberately side-lined.

Considerations

102. The Tribunal called on the Chief of the Recruitment and Planning Section, Human Resources Management Service, United Nations Office at Nairobi ("Chief/RPS"), to give expert evidence on the issue of roster management. He gave evidence that when a PCO is faced with a roster candidate, s/he may choose to either recommend the immediate selection of the suitable roster candidate to the head of department/office without reference to the central review body or s/he may exercise his/her discretion and interview the roster candidate during the new selection exercise. He explained that a PCO can decide to interview a roster candidate because the position against which the individual was rostered may not be an exact match for the position that the PCO is recruiting for.

103. The Applicant was placed on the roster subsequent to his non-selection for the New York post. While the New York and Vienna posts were both advertised as Senior Investigator positions at the P-5 level, an examination of the vacancy announcements revealed that there were significant differences in the responsibilities, competencies and qualifications for the two positions. Whereas the responsibilities and competencies for the New York post focused solely on FEA investigations, the Vienna post was divided between FEA and SEA investigations and also focused on administrative/operational tasks relating to the management of the Investigations

Division in Vienna. Further, the competencies required for the New York post were: professionalism, communication, technological awareness, teamwork and accountability. The competencies required for the Vienna post were professionalism, planning and organizing, client orientation, communication, accountability, judgement/decision-making and leadership.

104. In accordance with section 7.8 of ST/AI/2006/3, the PCO for the Vienna post, Mr. X, could have recommended the immediate selection of the Applicant to Ms. Ahlenius without reference to the central review body but he apparently chose not to do so. In view of the dissimilarities in the responsibilities, competencies and qualifications, the Tribunal considers that Mr. X's decision to have all the candidates, including the Applicant, take a written test and participate in an interview for the Vienna post was a judicious managerial choice. While the goal of the roster is to expedite the selection process, this goal should not eclipse the goal of the Charter of the United Nations to secure the highest standards of efficiency, competence and integrity in the employment of staff.

105. In light of the foregoing, the Tribunal finds that while the Applicant had been placed on the roster as a result of the selection process for the New York post, the functions of the Vienna post were significantly different enough as to justify his being tested and interviewed again. The Tribunal concludes therefore that the Respondent complied with the provisions governing roster candidates in ST/AI/2006/3 and that on this basis, the Applicant's non-selection was not indicative of his being deliberately side-lined.

Was the Applicant fully and fairly considered in accordance with ST/AI/2006/3?

106. As noted in paragraphs 75 and 76 above, sections 5.1, 7.5 and 7.6 of ST/AI/2006/3 are the relevant provisions for consideration of this issue.

Applicant's submissions

107. The Applicant submits that he was denied full and fair consideration for promotion because despite the fact that he had a proven and demonstrable history of excellent performance in the role of Operations Manager, which is the same role and functions of the Vienna post, the position was offered to another candidate who did not possess his superior experience and skills. In this respect, his excellent performance had been recognized and acknowledged by his various supervisors, including the PCO for the Vienna post, Mr. X, in his e-PAS. The Interview Panel failed to properly consider his “experience, knowledge and institutional memory relevant to the functions” even though this was required by section 5.1 of ST/AI/2006/3.

108. The Applicant argues that the Respondent’s failure to provide his “overall evaluation” for this recruitment process leads to a natural inference that the Applicant was marked down even more in this recruitment exercise than he was in the recruitment exercise for the New York post.

Respondent’s submissions

109. As long as staff members are given full and fair consideration for selection, the Secretary-General has considerable latitude of discretion in appointing and promoting staff. The selection process for this post was carried out in accordance with the rules of the Organization in that the Applicant was invited to participate in a competency-based interview and written examination, during which he had the opportunity to demonstrate his suitability for the post. Based on the selection record, the Applicant was fully and fairly considered against the applicable evaluation criteria.

110. With respect to the Applicant’s performance appraisal, the reason that he may have been more favourably rated in the e-PAS and less favourably rated in his candidate evaluation is that the two assessments are compiled by different people performing different roles. Further, they are based on different standards, for different activities and serve different purposes. Additionally, the e-PAS assessment prepared

by Mr. X rated the Applicant for his performance at the P-4 level, whereas the assessments made of his candidacy addressed his suitability for promotion to P-5.

Considerations

111. The Respondent was instructed to provide the Tribunal with all the documents from the selection process relating to the assessment/evaluation of the candidates for the Vienna post. The Respondent subsequently submitted the overall comparative analysis, which included the numeric scores for the other candidates, DW and DS, but not for the Applicant. The only evaluation submitted by the Respondent of the Applicant's candidacy for this post is the evaluation set out in the memorandum from the PCO to the Head of Department.

112. The Respondent informed the Tribunal that all relevant documentation had been produced and that no further documentation existed. The Respondent explained further that no evaluation of the Applicant's candidacy was submitted to the OIOS Review Body following the Vienna selection exercise for the reason that the Applicant had already been approved by the review body and rostered at the P-5 level following the New York selection process.

113. The Roster Management Guidelines ("the Guidelines"), dated 16 September 2005, sets out the steps a PCO is to follow when s/he is recommending only roster candidates for a position. In such a case, the recommendation is sent directly to the head of department for selection without referral to a review body. If the roster candidate is interviewed, the interview results should be entered in the Galaxy comments text box. The PCO cannot, however, enter new evaluations in the five evaluation text boxes as this will trigger the system to send the roster candidates to the central review bodies for review. Pursuant to the Guidelines, in a case where a mixture of roster and new applicants ("mixed cases") are recommended by the PCO, the case goes to the central review body for endorsement before being submitted to the head of department for selection. The Guidelines however do not provide guidance as to what evaluations can or cannot be done for these mixed cases. In this

regard, the Tribunal notes the Applicant's evidence that, in his capacity as a PCO, when he has had to score a roster candidate after testing and interviewing, he has included an addendum as the evaluation fields are inaccessible.

114. In light of the lack of clarity in ST/AI/2006/3 and the Guidelines in respect of the evaluations that are required for roster candidates in mixed cases, the Tribunal declines to infer, as requested by the Applicant, that the Respondent has willfully abused the proceedings by failing to produce all the Galaxy evaluation documents as directed. The Tribunal is of the view however that the absence of the Galaxy overall comparative analysis for the Applicant is a handicap that makes it very difficult for it to carry out a comprehensive assessment as to whether or not the Applicant was given full and fair consideration for this post. The Respondent provided only a woefully brief (less than one page) evaluation of the Applicant that was contained in the memorandum from the PCO to the Head of Department. It is noteworthy that in addition to the brief evaluations contained in the PCO's memorandum, the other candidates were provided with extensive comparative analysis and scores that measured their skills and experiences against the specific requirements and competencies of the Vienna post.

115. It is evident that when a PCO exercises his discretion and decides to interview a roster candidate in the context of a new recruitment exercise, the whole purpose of rostering candidates, i.e. to expedite the selection process, is soundly defeated. Once a PCO decides that a new post/vacancy is different enough in responsibilities and competencies so as to require testing and interviews for both roster and new candidates, the slate is obviously wiped clean and all candidates must be treated the same. Thus, in the Tribunal's considered view, there is no logical reason for the PCO to short-circuit the new selection process by depriving the so-called roster candidate of the well-reasoned and properly documented evaluation required by sections 7.5 and 7.6 of ST/AI/2006/3 when this must be done for the new candidates anyway. Under these circumstances, depriving the Applicant, who was a roster candidate, of a meaningful and properly documented evaluation of his skills against the additional

and/or new responsibilities and competencies contained in the subsequent vacancy announcement is in and of itself inherently unfair.

116. The lacuna in ST/AI/2006/3 and the Guidelines seems to have created a situation whereby roster candidates are in actuality marginalized when competing against non-roster candidates as PCOs are not required to provide a documented record of the evaluation of the roster candidates against the requirements and competencies set out in the vacancy announcement. The Tribunal finds that this lacuna is not in the interests of prudent management as the Respondent is then not in a position, as in the present case, to provide convincing documentary evidence that a roster candidate was indeed given the full and fair consideration, which is his/her unequivocal right.

117. Additionally, the Tribunal finds that the brief evaluation of the Applicant submitted by the Respondent apparently disregarded the provisions of section 5.1 of ST/AI/2006/3 in that his experience and institutional knowledge were not taken into consideration. The evidence adduced at the hearing made it abundantly clear that the Applicant, who at the time of the interview for the Vienna post in January 2009 was serving as the Nairobi Operations Manager at the P-4 level, was in essence performing, in a very competent manner, the same duties as required for the Vienna post even though he was carrying the heaviest workload of all the operations managers. Further, he had been working for OIOS since November 2004, which was just over 4 years of service. The PCO's evaluation memorandum stated that the Applicant had "less than 4 years of international experience" with OIOS and that:

“[The Applicant] had limited knowledge of UN practice, which would affect his ability to perform at the P5 level as the sole manager of an office. It was noted, however, that [the Applicant] had the basic skills and knowledge that would allow him to develop as a manager given more experience.”

118. The evaluation memorandum states that the Applicant's performance on the test was merely "acceptable". However, the PCO notes that: (i) he identified all and responded to the problems with sound judgment; (ii) his answer was well prepared

and thoughtful including both procedural and technical insight; and (iii) the drafting of his response showed that he possesses excellent written communication skills.

119. The Tribunal finds that the language used to describe the Applicant in parts of the evaluation memorandum were inconsistent with the skills, experience and knowledge contained in his personal history profile (“PHP”) and his e-PASes, which were reviewed by the Interview Panel during their assessment of the candidates. The Tribunal agrees with the Applicant that the language used to describe him in this evaluation is hurtful and disturbing and not of much value to a subsequent decision-maker, such as the head of department.

120. Based on the foregoing, the Tribunal concludes that the Respondent failed to show that the Applicant had been fully and fairly considered in accordance with ST/AI/2006/3 for the Vienna post due to: (i) the absence of an overall comparative analysis for him; and (ii) inconsistent comments made in the brief evaluation contained in the PCO’s memorandum to the head of department. The Tribunal further concludes that under the circumstances of this case, the absence of a reasoned and documented record of evaluation for the Applicant violated his rights as a staff member.

Conclusion on the Vienna post – Issue 2

121. The Tribunal concludes that while the decision to test and interview the Applicant, a roster candidate, for the Vienna post was proper, his evaluation was not properly reasoned and documented, thereby depriving him of his right to full and fair consideration.

Remedies

122. The Applicant submits that in both cases, the Respondent failed to respect his right to full and fair consideration and that as a result he lost two promotion opportunities. Consequently, with respect to the New York post, the Applicant

requested that he be appointed to the subject post and that he be awarded damages and compensation equivalent to lost net earnings at the P-5 level. With respect to the Vienna post, the Applicant requests that he be awarded financial compensation for lost earnings at the P-5 level and damages.

Decision

123. The decision not to select the Applicant for the New York post was unlawful as the selection process was tainted by prejudice, which resulted in his candidacy not being given full and fair consideration. Further, the decision not to select the Applicant for the Vienna post was unlawful in that the Respondent was unable to prove that the Applicant's candidacy had been fully and fairly considered. While promotion was not a right that the Applicant enjoyed, he did enjoy the right to have his candidacy for promotion to be fully and fairly considered. Unfortunately, there was a failure of procedure and a violation of his rights during both selection exercises. Had Ms. Ahlenius been more prudent and more in control of the Office she was managing, she would have been bound to detect the flaws that this judgment has pointed out.

124. Pursuant to Article 10 of its Statute the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10(5) (b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years' net base salary.

125. With respect to the New York post, the remedy of rescission is not appropriate as the selected candidate was successfully appointed and has been functioning in the post since 2008. However, the Applicant is entitled to compensation under Article 10(5) (b) for the illegal action of the PCO which resulted in his candidacy not being given the full and fair consideration it deserved. As a consequence of the egregious and discriminatory actions that the Applicant was subjected to during this selection

exercise, the Tribunal orders the Respondent to pay to the Applicant compensation in the amount of eighteen (18) months of his current net base salary.

126. With respect to the Vienna post, the Applicant is entitled to compensation as his candidacy was not fully and fairly considered. Consequently, the Tribunal orders the Respondent to pay to the Applicant compensation in the amount of six (6) months of his current net base salary for the negative effect of the violation of his rights.

127. The Applicant will be entitled to the payment of interest, at the US Prime Rate applicable at the date of this judgment, on these awards of compensation from the date this judgment is executable, namely 45 days after the date of the judgment, until payment is made. If the judgment is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

(Signed)

Judge Vinod Boolell

Dated this 31st day of March 2011

Entered in the Register on this 31st day of March 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi