



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/GVA/2010/111

Judgment No.: UNDT/2011/172

Date: 6 October 2011

English

Original: French

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**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

GORDON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Marcus Joyce, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant contests the decision dated 25 June 2010 not to select him for the P-5 post of Chief of the Documents Control Unit, in the Department of General Assembly and Conference Management (“DGACM”).
2. He claims compensation for the harm resulting from the unlawfulness of that decision.

## **Facts**

3. The Applicant joined the United Nations on 10 January 1986. At the time of the events concerned, he encumbered the P-4 post of Chief of the Printing Section, in the Publishing Service, at the United Nations Office in Geneva.
4. On 30 March 2010, the vacancy announcement for the P-5 post of Chief of the Documents Control Unit, DGACM, was issued on Galaxy, the former online United Nations jobsite, with a deadline of 29 May 2010 for the submission of applications.
5. After submitting an application for this post, the Applicant took a written test on 12 May 2010 and had a telephone interview on 21 May 2010 with a five-member selection and interview panel.
6. In a memorandum of 24 May 2010, which was not sent to the Applicant, the Chief of the Documents Management Section, DGACM, in his capacity as programme manager (in other words, the hiring manager) recommended to the Under-Secretary-General, DGACM, that a candidate other than the Applicant be selected for the post of Chief of the Documents Control Unit.
7. On 15 July 2010, the Applicant learned from consulting Galaxy that the post had been filled.
8. On 21 July 2010, he asked the programme manager on what date the selection decision had been taken and when he would receive the notification regarding his non-selection and his possible placement on the roster of candidates

not selected for the post in question but pre-approved to perform similar functions.

9. On the same day, the Applicant received an email informing him that the post of Chief of the Documents Control Unit had been filled by decision of 25 June 2010 and that he was not among the candidates recommended.

10. On 29 July 2010, the Applicant requested a management evaluation, contesting the regularity of the selection process, and complained that he had not been notified of the outcome of that process.

11. By a letter dated 8 September 2010, he was notified of the Secretary-General's decision to uphold the decision not to select him for the litigious post. In a subsequent letter of 26 October 2010, the Applicant was informed of the Secretary-General's decision to pay him compensation of USD 500 for the violation of the right to be notified in a timely manner of the outcome of the selection, provided that he agreed not to pursue any further action in respect of the notification of the non-selection decision or the amount of the compensation.

12. The Applicant filed his application with the Tribunal on 3 December 2010. On 7 January 2011, the Respondent submitted his reply as well as documents concerning the selection process and, by order dated 31 January 2011, the judge in the case instructed the Applicant to submit further observations, which he did on 7 February 2011.

13. By order dated 9 August 2011, the new judge in the case instructed the Respondent to submit his comments on the Applicant's observations. The Respondent submitted his comments on 18 August 2011.

#### **Parties' submissions**

14. The Applicant's contentions are:

- a. The vacancy announcement for the post of Chief of the Documents Control Unit specified that eligible candidates had to fulfil the lateral move requirements. It was the responsibility of the human resources unit

to verify that the candidates selected to be interviewed did indeed meet the requirement of two lateral moves in order to be eligible for promotion to P-5. However, the selected candidate did not meet that requirement. Despite the request made by the Applicant in his request for a management evaluation, the Administration has not confirmed that the selected candidate had made two lateral moves and has not, as it should have done, transmitted to him the supporting documents, on the grounds that they were confidential. With regard to the Respondent's claim that the selected candidate had made a lateral move when he had served on mission between 1989 and 1993, it should be noted that at the time he was in the General Service and not the Professional category;

b. The fact that, during the preliminary evaluation of eligible candidates ("Galaxy evaluation") made by the programme manager, an overall score was awarded rather than a score for each competency demonstrates a lack of transparency;

c. The marking of the written test was arbitrary. No passing mark was pre-determined. In addition, contrary to what the Respondent claims, the invitation to the telephone interview was not sent after the written test had been marked. In fact, the Applicant's interview took place before he took the written test;

d. One of the five panel members did not participate in the selection of candidates, which is in breach of the instructions issued by the Under-Secretary-General, DGACM, on 6 February 2008;

e. The programme manager had taken the selection decision even before the process had been approved by the central review body, and that violated section 8 of administrative instruction ST/AI/2006/3/Rev.1 (Staff selection system). In addition, he did not prepare a table showing the marks given for each competency, as he was required to do in accordance with the instructions of the Under-Secretary-General, DGACM;

f. The programme manager conducted a subjective evaluation. Instead of evaluating the competencies required, he assessed the experience, expertise and “political savviness” of the Applicant, although he had not done so for the two other candidates invited for the written test and the interview, who were both stationed in New York.

15. The Respondent’s contentions are:

a. In accordance with the Tribunals case law, the Applicant carries the burden of proving that he was denied a fair chance of promotion, which he failed to discharge;

b. The selected candidate had indeed made two lateral moves within the meaning of ST/AI/2006/3/Rev.1. He was in the Field Service category in 1989 and served on mission until 1993. In addition, his functions changed significantly in the periods 2004-2005 and 2006-2007. In any event, whether the selected candidate had the requisite number of lateral moves is not determinative of whether the Applicant’s right to fair and full consideration was respected;

c. Of the eight candidates who applied for the litigious post, five were eliminated because they did not have sufficient experience. The Applicant and two other candidates met the requirements and, although he ranked lowest in the written test, he had an interview and again received the lowest ranking;

d. The marks awarded by the programme manager in the Galaxy evaluation did not determine the outcome of the selection process. In addition, he did not reach a decision before the process had been approved by the central review body. The interviews were held on 21 May 2010 and the evaluation report was transmitted on 24 May to the Under-Secretary-General, DGACM, who decided on 25 June 2010 to appoint the candidate selected, after the central review body had approved the process;

- e. No passing mark was set in order to retain as many candidates as possible. The written tests were marked anonymously and each question received a separate mark;
- f. It appears from the documents produced that the allegation that the interviews did not deal with the candidates' competencies is unfounded;
- g. The *ex officio* panel member participated fully in the panel's deliberations;
- h. The programme manager did prepare, in a memorandum dated 24 May 2010, a table showing the marks received by the different candidates and the format in which the marks are presented is not relevant;
- i. The Applicant received timely notification of the selection decision. Section 10 of ST/AI/2006/3/Rev.1 provides that candidates other than those selected and those eligible to be selected for similar posts are advised of the outcome of the selection process through posting of the results on an electronic bulletin board. In this case, the results were posted on Galaxy. Moreover, the Applicant was notified of the results five weeks after the selection decision was taken, which is not an unreasonable delay;
- j. The Tribunal is requested to preserve the confidentiality of the data concerning the selected candidate.

### **Consideration**

16. ST/AI/2006/3/Rev.1, which came into force on 11 January 2010, established a staff selection system applicable from the beginning to the end of the selection process (see section 2.5 of the instruction).

17. Although ST/AI/2010/3, which abolishes and replaces ST/AI/2006/3/Rev.1, entered into force on 22 April 2010 with immediate effect, it specifies:

12.1 The provisions of ST/AI/2006/3/Rev.1 shall continue to govern recruitment, placement and promotion in respect of

applications for job openings advertised before 22 April 2010 through the “Galaxy” system.

18. In this case, the post of Chief of the Documents Control Unit was advertised on 30 March 2010 on Galaxy; ST/AI/2006/3/Rev.1 is therefore applicable to this selection process.

19. In contesting the regularity of the selection process, the Applicant first maintains that, as part of the Galaxy evaluation, the programme manager should have given the three eligible candidates marks for each competency rather than one overall mark.

20. However, ST/AI/2006/3/Rev.1 does not prescribe any particular format for this evaluation and the programme manager was therefore at liberty to give an overall mark to each of the candidates. Moreover, the Applicant cannot claim that this method of marking was harmful to him, since he was invited for a written test and an interview despite the mark that he received.

21. The Applicant claims that the marking of the written test was arbitrary because this test was marked after the telephone interview and no passing mark had been predetermined. However, no provision in ST/AI/2006/3/Rev.1 required the Administration to determine a passing mark or to convene candidates for a telephone interview only after their written tests had been marked.

22. The Applicant also claims that the selection process is irregular because one of the five panel members did not participate in the selection of candidates.

23. ST/AI/2006/3/Rev.1 does not specify or define a selection and interview panel. It simply states, referring to arrangements for evaluating candidates:

7.5 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. Competency-based interviews must be conducted in all cases of recruitment or promotion.

24. However, once the Administration chooses to follow a procedure, it is bound to comply with it (see *Mandol* UNDT/2011/013).

25. Contrary to what the Respondent maintains, it is clear from the record that only four of the five members of the panel actually participated in the marking of candidates. While the documents on the selection process indicate that the *ex officio* panel member “administered” the written test, in his submissions the Respondent simply stated that “[t]he *ex-officio* member ... participated fully in panel deliberations” but did not explain in what capacity or how. Even if ST/AI/2006/3/Rev.1 did not provide for a selection and interview panel, the five panel members should have actually participated in the marking of candidates since the Administration had chosen to set up such a jury by appointing five members. The failure to follow the procedure decided by the Administration had the effect of vitiating the entire selection process and making the decision not to select the Applicant unlawful.

26. The Applicant’s allegation that the programme manager had taken the selection decision even before the process had been approved by the central review body is disproved by the documents placed on record, which clearly indicate that, on 24 May 2010, the manager formulated and transmitted to the Under-Secretary-General, DGACM, a recommendation in favour of the candidate finally selected and that the Under-Secretary-General took the decision to select the recommended candidate on 25 June 2010, after the process had been approved by the central review body. The Administration thus followed the provisions of ST/AI/2006/3/Rev.1, which state:

7.6 For each vacancy, the programme manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and/or decision by the head of the department/office.

7.7 For posts up to and including at the D-1 level, programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, unranked candidates to the appropriate central review body through the head of department/office after the 15-, 30- or 60-day mark. The head of department/office shall ensure that, in making the proposal, he or she has taken into account the Organization’s human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body ...



**Central review bodies**

The central review bodies shall review the proposal for filling a vacancy made by the department/office concerned to ensure that candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed ...

**Decision**

9.1 The selection decision for posts up to and including at the D-1 level shall be made by the head of department/office when the central review body finds that the evaluation criteria have been properly applied and/or that the applicable procedures have been followed. ..

27. While the Applicant alleges that the evaluation conducted by the programme manager was subjective, he provides no justification for this allegation and it appears from the documents on record that the written test was blind marked, as indicated in the memorandum dated 24 May 2010 from the programme manager addressed to the Under-Secretary-General, DGACM.

28. It thus follows from the foregoing that the selection process is unlawful for the sole reason that one of the members of the selection and interview panel did not mark the candidates. Since the Applicant has not requested rescission of the decision to appoint the selected candidate but has simply requested compensation for harm caused, the Tribunal must decide on the link of causality between the irregularity committed and the alleged harm—in other words, on whether the irregularity committed deprived him of a chance to be selected for the post of Chief of the Documents Control Unit, DGACM.

29. Out of all the applicants for the post, three eligible candidates, including the Applicant, were selected for a written test and an interview. Following their evaluation, the programme manager recommended the appointment of the candidate finally selected and placement of the other candidate on the roster of candidates not selected but pre-approved for similar functions. However, that candidate was finally not rostered because he did not meet the eligibility conditions relating to work experience.

30. If the *ex officio* member of the selection and interview panel had participated fully in the marking of the candidates, and even if she had given the

highest mark (15 for the written test and 30 for the interview) to the Applicant and the middle mark (7.5 for the written test and 15 for the interview) to the other two candidates, the Applicant's overall mark would still have been far below that of the two other candidates.

31. Thus, without it being necessary to decide whether the selected candidate had the requisite number of lateral moves to be eligible for promotion to P-5, the Tribunal can only find that the irregular composition of the selection and interview panel had no effect on the decision not to select the Applicant for the litigious post.

32. Since there is no link between the unlawfulness and the alleged harm, the Applicant's claim for compensation can only be rejected.

### **Conclusion**

33. For these reasons, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Jean-François Cousin

Dated this 6<sup>th</sup> day of October 2011

Entered in the Register on this 6<sup>th</sup> day of October 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry