



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUHSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Jan Schrankel, UNHCR
Elizabeth Brown, UNHCR

Introduction and procedural history

1. The Applicant is a staff member of the United Nations High Commissioner for Refugees (UNHCR; the High Commissioner).
2. On 30 March 2016, he filed an application with the United Nations Dispute Tribunal (UNDT) contesting the “decision [] about my recourse following the 2013 promotions session”.
3. The application was served on the Respondent on 31 March 2016 with a deadline to file a reply by 29 April 2016.
4. On 8 April 2016, the Respondent filed a motion for leave to submit a reply on the sole issue of the receivability of the application.
5. On 26 April 2016, the Tribunal issued Order No. 201 (NBI/2016) granting the Respondent’s motion and setting a deadline for filing the reply on 9 May 2016. The Applicant was also ordered to file his observations/response on the issue of receivability by 23 May 2016.
6. The Respondent filed the said reply on 9 May 2016.
7. On 5 December 2016, the Tribunal issued Order No. 499 (NBI/2016) in which the Respondent was ordered to file, by 4 January 2017, a reply on the merits and to indicate the legal authority determining the body to which a request for management evaluation in UNHCR should be directed where a decision has been taken by the High Commissioner himself.
8. The Respondent filed the said reply on 4 January 2017.
9. For reasons specified below the Tribunal found that the application was irreceivable.

Facts

10. The facts summarized below are undisputed and/or result unambiguously from the submitted documents.

11. The High Commissioner has authority delegated by the Secretary-General to decide on promotion of his staff (Annex 3 to the Respondent's reply). The High Commissioner has authority delegated by the Secretary-General to carry out management evaluation as part of the formal justice system. The High Commissioner has further delegated the management evaluation functions to the Deputy High Commissioner (Annex 1 to the Respondent's reply).

12. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2; "Promotion Policy", reply on receivability, Annex 1). The Promotion Policy provided that recommendations for promotion to the P-4 level would be considered by a Promotions Panel in accordance with the criteria and processes set out therein. It informed about availability of recourse in an internal procedure notwithstanding access to the formal justice system through management evaluation (Promotion Policy, para. 49, 52).

13. On 20 October 2014, the decisions of the High Commissioner concerning promotions to the P-4, P-5 and D-1 level were announced to all staff via an email memorandum dated 17 October 2014. The Applicant was not among the successful candidates. Staff were advised that, in the event where information that may have had an impact on the final recommendation was not available at the time of the review, they could seek "recourse" in an internal procedure. (reply on receivability, Annex 2). On 25 November 2014, the Applicant submitted a recourse application (reply on receivability, Annex 4).

14. The Promotions Panel met from 19 to 23 January 2015 to consider recourse applications submitted by staff members. On 3 March 2015, the High Commissioner's decisions on promotions following the recourse sessions were announced to all staff. The Applicant was not among the successful candidates.

15. On 2 May 2015, in accordance with the UNHCR circular on the implementation of the Internal Justice System and the Promotion Policy, the Applicant submitted a request for management evaluation to the Office of the Deputy High Commissioner (application, unnumbered Annex).

16. On 17 June 2015, the Office of the Deputy High Commissioner informed the Applicant by email that his request for management evaluation was still under consideration. The Applicant was also informed that he had the right to file an appeal with the UNDT and his attention was drawn to the time limit for such filing in accordance with art. 8 of the UNDT Statute (reply on receivability, Annex 6).

17. By memorandum dated 4 September 2015, the Deputy High Commissioner responded to the Applicant's management evaluation request. In her memorandum, the Deputy High Commissioner stated that the recourse minutes did not provide sufficient evidence that the recourse panel had fully considered the circumstances of the Applicant's case with regard to the unavailability of his performance appraisals covering the period from June 2013 to April 2014 and thus he may not have received full and fair consideration during the recourse session. Therefore, the Deputy High Commissioner rescinded the decision not to promote the Applicant and informed him that his candidacy for promotion to the P-4 level would be reviewed anew (reply on receivability, Annex 7).

18. The Applicant was also informed that for reasons of efficiency the review would be conducted after the finalization of all management evaluations of non-promotion decisions taken as a result of the 2013 promotions and recourse sessions and that he would be contacted regarding the outcome of the reassessment of his candidacy for promotion.

19. By email dated 27 November 2015, the Applicant was informed that the Office of the Deputy High Commissioner had completed the management evaluations relating to the 2013 promotions session and that his candidacy for promotion as well as that of other staff members in a similar situation would be reassessed by an independent body specifically established for that purpose (reply on receivability, Annex 8).

20. Following the finalization of the management evaluation process, the High Commissioner constituted an Ad-Hoc Promotions Review Board to advise him on the reassessment of the candidacies for promotion in relation to those staff

members whose management evaluations resulted in rescission of the 2013 non-promotion decisions.

21. The Board met on 14 and 16 December 2015 to reassess the candidacies of the staff members concerned. With regard to the Applicant's candidacy, the Board concluded that there was no reasonable likelihood that the Applicant would have been recommended for promotion had he received full and fair consideration during the 2013 promotions session (reply on receivability, Annex 12).

22. The High Commissioner accepted the Board's recommendations on 28 December 2015 (reply on receivability, Annex 13).

23. On 5 January 2016, the Director, Division of Human Resources Management (DHRM) informed the Applicant of the High Commissioner's decision to confirm his non-promotion based on the Board's recommendation (reply on receivability, Annex 14).

The Applicant's case

24. The Applicant submits the following as his grounds for contesting the administrative decision.

- a. The impugned administrative decision did not accurately and fairly reflect the quality and significance of his performance and contribution contained in his performance appraisal document for the period June 2013 to April 2014.
- b. The impugned decision was based on an unknown and unfavorable comparison with the group of candidates recommended for promotion.
- c. The Board did not specify the basis for his second low round score.
- d. The information he included in his management evaluation request was not taken into account.

e. He has more than 15 years of a proven track record with tangible accomplishments and value added service. Recognition for this is long overdue and well deserved.

The Respondent's case

25. The Respondent's objections on the grounds of receivability are hereunder summarized.

a. Any appeal against the High Commissioner's initial non-promotion decision following the 2013 Promotions and Recourse Sessions, as announced on 3 March 2015 is moot in light of the rescission of that decision by the Deputy High Commissioner on management evaluation. As of that moment this decision no longer produced any consequences to the legal order and cannot be legally challenged

b. The Applicant has not explained how his rights remain affected by a decision that has been rescinded nor has he shown that he is still suffering any injury because of the rescinded decision for which the Tribunal can award relief. Even if he has made such a showing, the application would be time-barred.

c. Should the Tribunal consider that the application should be read as challenging the High Commissioner's new decision not to promote the Applicant to the P-4 level following the reassessment by the Board, the application would nevertheless not be receivable.

d. The High Commissioner's new decision on the Applicant's non-promotion following the reassessment by the Board required another management evaluation request which the Applicant failed to make contrary to art. 8.1(c) of the UNDT Statute and staff rule 11.2(a).

Considerations

26. Pursuant to UNDT Statute art. 8.1(c), management evaluation is an obligatory step to take prior to requesting judicial review of an administrative

decision alleged to be in non-compliance with a staff member's contract of employment or terms of appointment. Similarly, staff rule 11.2(a) provides that a staff member wishing to formally contest such an administrative decision shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. Decisions concerning promotion do not fall under the statutory exemption from this requirement.

27. In accordance with staff rule 11.2(c), a request for management evaluation shall not be receivable unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

28. The Applicant complied with these requirements following the first negative decision on the merits of 3 March 2015, subsequently, however, this decision was not submitted for judicial review within the deadlines from UNDT Statute art. 8.1(d). Moreover, following its rescission that decision stopped producing any consequences for the Applicant's terms of appointment. Therefore, for reasons noted by the Respondent, the decision of 3 March 2015 cannot be reviewed by the Tribunal. Given, however, that the Applicant, who is self-represented, apparently does not distinguish that decision from the following ones, the Tribunal considered it appropriate to make a distinction as each decision falls under a different rubric for review.

29. With this in view, the Tribunal has also considered the second negative decision on the merits communicated to the Applicant on 5 January 2016 by the Director of the Division of Human Resources Management. That decision was taken in consequence of the rescission of the decision of 3 March 2015, purportedly upon a fresh consideration of the matter and was dispositive of the question of promotion. As such, in order for the application to be receivable before the UNDT, this new decision should have been first submitted for management evaluation, failing which it must be dismissed.

30. Whereas the Tribunal is bound to take a legalistic approach in respect of the requirement of the management evaluation, it notes nevertheless that the process applied in the Applicant's case was convoluted and confusing. The chain

of control in which the Deputy High Commissioner rescinds decisions of the High Commissioner subverts the hierarchy and represents, in the legal sense, reconsideration by the same organ rather than hierarchical administrative control. In the case at hand, it obscured, especially from the point of view of a staff member, the moment when the management evaluation ended and the new decision-making took place.

31. Moreover, whereas the communications coming out of the Deputy High Commissioner's Executive Office were informative and precise, including instruction on the available remedy, the communication sent by the Director of the Division of Human Resources Management may have been confusing in that, despite the previous decision having been rescinded, it informed of "confirmation" of the non-promotion decision. Furthermore, instead of a review of the case *de novo*, as announced by the Deputy High Commissioner, an advisory board which had been convened as a result of the rescission of the previous decision embarked on a limited review only, whereupon it concluded "that there was no reasonable likelihood that the Applicant would have been recommended for promotion had he received full and fair consideration", again implying that the review was a continuation of the previous process, and that the first decision, albeit taken in an unfair manner, stands. No information of a further recourse was provided. All in all, although the Administration had put the matter through four rounds of consideration (1st review, recourse review, management evaluation, 2nd review), all within the *sensu largo* High Commissioner's office, the Applicant was still required to file for a 5th consideration and by the same office, which is not a conclusion readily prompted by common sense. Whereas it is for the Respondent to decide whether the arrangements described above best serve the principle of efficiency and impartiality declared by the circular on the implementation of the Internal Justice System, at a minimum, informing the Applicant of the applicable remedies would have been appropriate.

32. The Tribunal is mindful of the fact that its authority to suspend or waive the time limits set forth in art. 8.3 of the UNDT Statute does not extend to deadlines for management evaluation. These deadlines cannot be waived notwithstanding whether the failing of the deadline would have been occasioned

by confusing information received from the Administration. As provided in staff rule 11.2(c), the deadline for requesting management evaluation may only be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General, which is not the case here.

Judgment

33. In view of its considerations above, the Tribunal finds that the application is not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 8th day of March 2017

Entered in the Register on this 8th day of March 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi