



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Pallavi Sekhri, Officer-in-Charge

KENNEDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 28 May 2018, the Applicant, a Senior Security Officer at the S-3 step 11 level with a permanent appointment serving in the United Nations Department of Safety and Security (“UNDSS”) in New York, submitted an application requesting suspension pending management evaluation of the decision to select a candidate other than him for a position at the S-4 level as Security Sergeant.

2. On the same day, the case was assigned to the undersigned Judge.

3. By notification dated 28 May 2018, the New York Registry acknowledged receipt of the application and, upon the instruction of the Judge, the Tribunal instructed the Respondent to file a reply by 5:00 p.m. on 30 May 2018.

4. In his duly filed reply, the Respondent claims that the Application should be rejected as not receivable because the contested decision has been implemented on 8 May 2018. The Respondent also argues that should the Dispute Tribunal find that the Application is receivable, it should be dismissed because the Applicant has failed to satisfy the conditions for granting an order for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute. First, the decision was lawful. The Organization lawfully selected roster candidates for the position. The Applicant’s candidacy was fully considered in the selection exercise. Second, any urgency is self-created. Third, the Applicant has not demonstrated irreparable harm.

Factual and procedural background

5. In his application, the Applicant sets out the following chronology of facts (emphasis omitted):

... Petitioners belong to a group of candidates on a permanent roster established in 2008 for the position of S-4 (Security Sergeant).

... In 2012 a promotion exercise was carried out for nine vacant S-4 posts. At the end of the exercise only six posts were filled. At that time the administration indicated that there were not enough suitable applications found—disregarding the list of roster candidates at the time.

... In November of 2014 another promotion exercise was carried out for five S-4 posts at the end of the exercise five posts were filled and a list of eight candidates were placed on a roster. The list for the newly promoted S-4's and the roster list were published in the Daily Orders by the Office of the Chief on 5, November 2014. None of the petitioners were mentioned on that list or promoted.

... On 3, March 2016, the following Vacancy announcement was published in the Daily Orders “Please be informed that Job Opening #55220 for two (2) Security Sergeant Posts (S-4) has been published in Inspira with expiry date 19 March 2016. All eligible (including rostered) candidates are encouraged to apply if interested in the posts. You are also encouraged to take any relevant OHRM courses such as PHP preparation, mock-interview, and others that may be available”.

... Petitioners applied for the position but none were considered since the names were taken again from the roster established on November 2014 as indicated above.

... On 22 February 2017 an announcement was made in the Admin Bulletin as follows “7. JOB OPENING: Security Sergeant, S4, Department of Safety and Security, NEW YORK (Job Opening 71692) Please be informed that Job Opening #71692 for S4 Security Sergeant will be published by 1 February 2017, with expiry date of 1 March 2017. All eligible (including rostered) candidates are encouraged to apply if interested in the posts. You are also encouraged to take any OHRM courses such as PHP preparation, mock-interview, and others that may be available”. All petitioners again applied, however the only candidates selected were again from the roster established in November, 2014.

... On 24 February 2018 I filed an application for Job Opening 86971 S4 Security Sergeant for which there were two (2) vacancies.

... On 08 May 2018 I received an email stating that a candidate was selected for the position of Security Sergeant from a roster of pre-approved candidates, and as a result this Job Opening has been closed. There is no mention of which roster has been utilised as there are now several rosters in existence.

... On 10 May 2018 an announcement was made in the Daily Orders announcing that two (2) Security Personnel have been

congratulated for their selection to the rank of Security Sergeant (S-4) effective 1 June 2018 through JO#86971. This contradicts the information received via email indicated in #8 above.

... The initial JO#86971 has a capital letter R. This indicates that the post is for a “Standard Requisition Job Opening”. This is another inconsistency in the process.

... The above information shows that there is a pattern of abuse of authority carried out by the administration, which categorically targeted the petitioners and denied them their right of being fairly considered for the vacancies—contrary to Article 101, paragraph 3 of the Charter of the United Nations and contrary to prior practice and precedence to use the 2008 roster for promotion to S3 in 2016. In this promotion most or all of 23 Security Officers got promoted from the roster which was also established in 2008.

... Attached is a formal request for Special Post Allowance for performance at the higher [l]level of S-4 Security Sergeant. This request went unanswered. These duties went on for a period of nine (9) years. EPAS documentation also proves that these duties were performed by this Senior Security Officer. Other subsequent EPAS’s have statements from the FRO and SRO recommending me for promotion to Sergeant and fully endorsing my ability to perform at the higher rank of Sergeant. This latest EPAS (2017-2018) has a statement by the FRO highly recommending this Officer for promotion to Sergeant along with concurring statement by the SRO. EPAS documentation is also attached.

6. On 28 May 2018, prior to filing his application for suspension of action, the Applicant submitted a request for management evaluation.

Considerations

The mandatory and cumulative conditions for suspending an administrative decision

7. Article 2.2 of the Dispute Tribunal’s Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where

the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

8. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

9. Article 13.1 of the Tribunal's Rules of Procedure states:

The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

10. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The contested decision has not yet been implemented;
- c. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

11. It follows from art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Dispute Tribunal's Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256).

12. As results from the case record, the Applicant submitted his request for management evaluation on 28 May 2018, prior to filing the application for suspension of action, and the Tribunal has not been informed that management evaluation has been finalized. As follows from the Applicant's submissions, the contested decision is to be implemented on 1 June 2018. The Tribunal therefore considers that the first two cumulative and mandatory conditions for a suspension of action have been fulfilled.

Whether the application concerns an administrative decision that may be properly suspended by the Tribunal

13. The Tribunal notes that the contested decision is a promotion decision to a S-4 level post (Security Sergeant) in UNDSS, New York, and concludes that the application for suspension of action concerns an administrative decision that may be properly suspended by the Tribunal, thus the third condition is also fulfilled.

Implementation of the contested decision

14. Following an application for suspension of action pursuant to art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may "suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision". This means that if the contested administrative decision has already been "implemented" there no longer is a decision that the Tribunal can suspend.

15. The present case concerns a selection decision and the question to be determined here is therefore when such a decision is implemented.

16. In the online Oxford dictionary (english.oxforddictionaries.com) the word “implementation” is defined as “the process of putting a decision or plan into effect; execution”.

17. On 8 May 2018, UNDSS provided the selected candidates with an offer of employment for the positions of S-4 (Security Sergeant) which they accepted on the same day.

18. An employment contract is an agreement, which is established by an offer and a subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 determined that “a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate” (see also *Iskandar* 2012-UNAT-248 and *Cranfield* 2013-UNAT-367).

19. In accordance with *Tiwathia* UNDT/2012/109, upheld by the Appeals Tribunal on appeal in *Tiwathia* 2013-UNAT-327, the Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Dispute Tribunal’s Statute refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member’s unconditional acceptance of the offer.

20. When formed, the employment contract is a legally binding bilateral act that is agreed upon by the consensual will of the contracting parties and it is not required to be in a written form for it to be valid. It is a contract in which the successful candidate cannot be replaced as this person has been selected after a competitive selection process based on her/his personal skills and competencies (*intuitu personae*) and works under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contract period by each of the parties when they satisfy their successive and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labor.

21. The date on which a selected candidate is to assume her/his functions is therefore not a matter of implementing the selection decision but one of executing the resultant employment contract. Consequently, in the present case, the Tribunal finds that the selection decision was implemented on the date when UNDSS presented its offers regarding the positions of S-4 (Security Sergeant) to the selected candidates on 8 May 2018, and that, on 8 May 2018, it was followed by the formation of the selected candidates' employment contracts upon their unconditional acceptance of these.

22. The Tribunal further finds that, since the contested decision has already been implemented, one of the cumulative conditions for it to render a suspension of a contested decision is not fulfilled. It is therefore not necessary for the Tribunal to further examine if the remaining statutory requirements specified in art. 2.2 of its Statute, namely, *prima facie* unlawfulness, particular urgency and irreparable damage have been met in the case at hand.

Conclusion

23. In light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is denied.

(Signed)

Judge Alessandra Greceanu

Dated this 31st day of May 2018