

UNDT/2021/024, Ponce-Gonzalez

UNAT Held or UNDT Pronouncements

Since there was no formal notification of the results of the selection process to the Applicant, the internal circular suffices as the notice for purposes of lodging the challenge against the process. Time started running on the date that the Applicant read the internal circular that the position had been filled, conversely that he had not been successful. The Applicant complied with staff rule 11.2(c) by timely requesting management evaluation of his case. The Applicant's refusal to participate in the interview was not voluntary. The Applicant's grievances about the selection process were not resolved to his satisfaction. He is entitled to access justice which is a fundamental human right that this Tribunal is competent to grant within its statutory framework. The Respondent has satisfied the minimum burden of proof that he acted regularly. The burden now shifts to the Applicant to rebut this presumption through clear and convincing evidence that his candidacy was not given full and fair consideration. The Applicant was not entitled to and has not shown any legal basis either by citing a rule or regulation or policy or jurisprudence that exempted him from participating fully and completely in the selection process. His argument fails to take into consideration the one underlying principle of the Respondent's discretion in staff selection, which is that even in TJOs, the Secretary-General shall not compromise on the United Nations core values and competences. The Applicant has not shown which particular applicable rule states that the assessment of candidates must strictly adhere to criteria established in the published job opening. The correction of an error appearing in the advertisement exempting rostered staff members from participating in the interview was not prejudicial to the Applicant's right to fair and full consideration for the position. This is because it had no effect on the outcome of the selection process as the Applicant and all candidates were expressly on notice that despite the exemption, they were required to sit for a CBI. The Applicant has not adduced any evidence to show that the decision was improperly motivated. The argument that the Applicant's chances of being afforded full and fair consideration would have been achieved only if the CBI was conducted by "an impartial and independent panel outside UNISFA" is without any factual or legal basis. It is an assumption not supported by evidence or law. The Applicant has not adduced any evidence to establish that the selection exercise was corrupted or manipulated or that there was conflict of interest, animus and bias on the part of the Hiring Manager. It is not enough to just allege without backing the allegation with clear and convincing evidence. The Applicant has not disputed the fact that he was not recommended for selection because he did not take the CBI.

Decision Contested or Judgment/Order Appealed

The Applicant is contesting the failure by the UNISFA Administration to afford him full and fair consideration for the temporary position of Chief, Operations and Resource Management Section under the Temporary Job Opening ("TJO") No. 109862.

Legal Principle(s)

The Applicant is not appealing against a step in the selection process, that is: 'a decision to conduct a test' but rather a final decision not to select him for the position. It would not be in the interests of justice to deprive a staff member access to the internal justice system on the basis that he refused to participate in an interview not voluntarily but out of protest. In a selection exercise to fill temporary job openings, the Administration is still required to adhere to the principle of fairness, reasonableness, legality, rationality, procedural regularity and proportionality. In reviewing the impugned decision, it is the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration. Promotions and selections are presumed to be regular. However, the presumption is rebuttable. If management is

able to show that an applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the evidentiary burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of promotion. A candidate challenging the denial of promotion therefore must prove that proper grounds of review exist to rebut the presumption of regularity and set aside the decision. Assessment for a TJO may include a competency-based interview and/or other appropriate evaluation mechanisms, such as written tests, work sample tests and assessment centres. The Administration's discretion on staff selection may extend to introducing a criteria in the interests of operational requirements or efficiency as long as such introduction is lawful, reasonable and fair. An editorial error in a job opening does not invalidate a selection process and the Administration took steps to correct it. A Hiring Manager cannot be compelled to recommend a rostered candidate where the exigencies of the exercise require other qualities, such as a test on technical competence. In relation to improper motives, it is the duty of the Applicant to provide clear evidence of improper motive. It is not enough to just allege without substance.

Outcome

Dismissed on merits

Outcome Extra Text

The application is receivable but is dismissed on the merits.

Full judgment

[Full judgment](#)

Applicants/Appellants

Ponce-Gonzalez

Entity

UNISFA

Case Number(s)

UNDT/NBI/2020/017

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

19 Mar 2021

Duty Judge

Judge Sikwese

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Jurisdiction / receivability (UNDT or first instance)

Staff selection (non-selection/non-promotion)

Applicable Law

Administrative Instructions

- ST/AI/2010/4/Rev.1

Staff Rules

- Rule 1

UNDT Statute

UNAT Statute

- Article 2.1(a)