Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

PURCELL

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant: Self-represented

Counsel for Respondent: W. Thomas Markushewski
Introduction

1. This is an application by Sean Purcell (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), not to select him for the post of Deputy Director of UNRWA Operations, West Bank. As a part of his application, the Applicant requested the production of certain documents relating to the recruitment process for the above post.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board ("JAB") was abolished as of 1 July 2009. Effective 1 June 2010, as set out in International Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB has been submitted to the Commissioner-General.

Facts

4. Effective 1 February 1998, the Applicant was employed by the Agency as Assistant Protective Services and Communications Officer, in Beirut, Lebanon, at the level of P-2, step 1. Following several promotions and transfers, the Applicant occupied at the time of the events, the post of Field Procurement and Logistics Officer, West Bank, at the level P-4, step 10.

5. On 17 January 2003, the Agency circulated internally a vacancy notice for the post of Deputy Director of UNRWA Operations, West Bank (“D/DUO/WB”), at P-5 level, which included a description of the essential qualifications and experience required for the post.
6. On 14 October 2003 the vacancy notice for the post of D/DUO/WB was advertised externally.

7. The Agency received 81 applications for the post, 10 of which were from internal candidates, including the Applicant. Five external candidates, who satisfied the post requirements, were short-listed and telephone interviews were conducted on 30 November 2003. In-person interviews were scheduled for 8 January 2004 with two external candidates and six internal candidates, including the Applicant.

8. In its report, the Interview Panel found that the Applicant did not have the academic background required, and had less exposure to the more strategic and managerial aspects of a senior role or to humanitarian development projects. Three panel members recommended the Applicant as a suitable second candidate for the post and one panel member considered him a suitable third candidate. The Interview Panel unanimously recommended one of the external candidates as suitable for the post.

9. The recommendation of the Interview Panel was approved by the Commissioner-General.

10. By letter dated 19 February 2004, the Applicant was advised that his application for the post of D/DUO/WB was not successful.

11. By letter dated 18 April 2004, the Applicant requested the Commissioner-General to review the selection decision for the post concerned, to reverse the decision and to appoint him to the post.

12. By letter dated 20 May 2004, the Commissioner-General while explaining to the Applicant the reasons for the decision not to select him advised him that:

   It is true that you have extensive experience with the Agency. However, another candidate also had extensive experience, as well as strong qualifications. As that other candidate was an external candidate and there were internal candidates, the decision on whom to appoint necessarily took cognizance of the relevant regulations and policies, in particular, International Staff Regulation 4.3 and 4.5 and the International Staff Personnel
Directive No. I/104.2 at paragraphs 1.4 and 3.5. These documents refer to a preference being given to internal candidates, the preference being that “all things being equal, internal candidates are given preference…” See, International Staff Personnel Directive No. I/104.2.

In the case of the candidates for the post of Deputy Director UNRWA Operations, West Bank, it was decided that all things were not equal and that the external candidate was better qualified. Because all things were not equal, the external candidate, who was the better candidate, was appointed. This is in line with International Staff Regulation 4.3, which establishes “securing the highest standards of efficiency, competence and integrity” as “the paramount consideration in the appointment…of staff.” Accordingly, at this time I am unable to justify either reversing the decision taken in this matter or appointing you to the post of Deputy Director UNRWA Operations, West Bank.

13. By letter dated 30 July 2004, the Applicant indicated to the Secretary of the International JAB his intention to file an appeal regarding the appointment of the D/DUO/WB and requested documentation, as set out in paragraph 16.


15. Since then, the Applicant has not returned to the Agency, and as indicated in an e-mail he sent to the Registrar on 24 February 2011, he is now serving as Chief, Peace-keeping Procurement Section, Procurement Operations Service, UN Secretariat – Procurement Division, in New York, USA.

Applicant’s contentions

16. The Applicant contends that the Agency failed to follow its Recruitment Policy as outlined in International Staff Regulation 4.5 and its Recruitment Policy
The Applicant further requests the production of the following documents:

1. Any and all correspondence including E-mails, Memos, Notes for the Record or Notes for the File (handwritten or otherwise) and faxes:
   
   a. pertaining to the selection of candidates for interview for the post of D/DUO/WB.
   
   b. pertaining to the timing of the personal interview of candidates for the post of D/DUO/WB.

2. Any and all correspondence including E-Mails, faxes, Notes for the Record, or Notes for the File including personal handwritten notes of the Recording Secretary for the Interview Board, draft of Interview Assessment Forms and Rating Criteria and Recruitment Report initially circulated and any amended Interview Assessment Forms and Rating Criteria and Recruitment Report which were re circulated for signature as well as the discussion, minutes, both handwritten and final, and decision of Human Resource Committee (HRC) meeting for the post of Deputy Director of UNRWA Operations West Bank.

3. Copy of notes of ISA Representative who was present at the HRC meeting.


The Applicant requested that this information be provided as soon as possible.

**Respondent’s contentions**

17. The Respondent contends that:

   (i) the selection process for the post of D/DUO/WB was properly made;

   (ii) the decision not to select the Applicant for the post was not arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law;

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1. The referenced International Staff Personnel Directive No. I/104.2 was promulgated pursuant to Letter of Transmittal No. 295 rather than LOT No. 245, as indicated by the Applicant.

2. International Staff Association
(iii) there is no basis for granting the Applicant’s request for the production of the documents requested.

Considerations

Main Issues

Was the selection process for the post of D/DUO/WB properly conducted?

18. It is important to look at the legal and administrative framework applicable in the case at bar. International Staff Regulation 4.3, provides that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for security the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible.

19. International Staff Regulation 4.4 provides that:

In accordance with the principles of the Charter of the United Nations, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

20. International Staff Regulation 4.5 provides that:

With due regard to the recruitment of fresh talent, and on as wide a geographical basis as possible, preference shall be given to persons already in the service of the Agency who have the requisite qualifications and experience.

21. In the implementation of the International Staff Regulations, International Staff Personnel Directive No. I/104.2 (“PD No. I/104.2”) provides for UNRWA’s recruitment policy, including vacancy advertisement methods, personal interviews, composition and size of the Interview Panel, consideration and recommendations by the Human Resources Committee, and appointment approval, along with the required time frame for each of these steps.

22. The Tribunal would like to point out that the Commissioner-General has broad discretion in making decisions regarding appointments. In reviewing such
decisions, it is not the role of the Tribunal to substitute its own decision for that of the Respondent regarding the outcome of the selection process. However, the discretion of the Respondent is not absolute and the Tribunal will examine whether the procedures as set out in the Staff Regulations and Rules and other relevant issuances were followed, and whether the staff member was given fair and adequate consideration. As held by the United Nations Appeals Tribunal in *Abbasi* 2011-UNAT-112, paragraph 26:

The UNDT has jurisdiction to rescind administrative decisions concerning the selection of staff on certain grounds. A decision not to select a staff member may be rescinded in circumstances where he or she did not receive fair and adequate consideration, there has been any kind of discrimination or bias against the staff member, or the proper staff selection procedures were not followed.

23. When the Applicant alleges that the exercise of the Respondent’s discretionary authority was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law, he bears the burden of proving prejudice and must provide convincing evidence that the Respondent’s decision was tainted. As held by the United Nations Appeals Tribunal in *Rolland* 2011-UNAT-122, paragraphs 21 and 26:

A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored.

* * *

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

24. Looking at the evidence in the file, the Tribunal notes that the Agency has complied with International Staff Regulations, Chapter IV, and with PD No. I/104.2 regarding recruitment policy and procedures, appointment and promotion. The Tribunal would like to recall, among other things, that the Agency advertised
the post internally and externally, with the essential qualifications and experience required for the post including, namely:

(i) advanced university degree in public or business administration, or social science or political science, supplemented by in-depth knowledge of Middle Eastern geopolitical realities and its socio-cultural implications …

(ii) at least 12 years’ practical experience in application of the principles of the theoretical knowledge, including at least six years at supervisory and management level in a large governmental or international commercial organization. The extreme diversity of problems relating to political social, economic and administrative matters gives considerable extra importance to the requirement for senior management experience, with a high level of skill in negotiation and problem-solving (emphasis added).

25. The Tribunal notes that the vacancy announcement, quoted above, clearly states that the Agency “gives considerable extra importance to the requirement for senior management experience”. Moreover, in the case of the candidates for the post of D/DUO/WB, it was determined that the internal candidate (the Applicant) and the external candidate were indeed not equal, and that in fact, the external candidate was better qualified. Therefore, because all things were not equal, the external candidate, who was the better candidate, was appointed. In reaching this decision, the Agency proceeded in line with International Staff Regulation 4.3, which requires “securing the highest standards of efficiency, competence and integrity” as being “the paramount consideration in the appointment … of the staff.”

26. The Tribunal finds, as evidenced in the file, that the Agency complied with all aspects of its recruitment policy, namely:

(i) the vacancy announcement was circulated internally and externally;

(ii) a short list of internal and external candidates was prepared;

(iii) the Applicant and other short-listed candidates were interviewed by a properly constituted Interview Panel, comprised of the Director of UNRWA Operations, Gaza, and Director of Operations, the Director of UNRWA Operations,
West Bank, the then Deputy Director of UNRWA Operations, West Bank, the Chief, Human Resources Division, and the Head, Recruitment and Staff Development Section;

(iv) the Interview Panel produced a report assessing the Applicant’s strengths and weaknesses in light of the vacancy announcement and requirements of the post;

(v) the Interview Panel unanimously agreed that another candidate was the most suitable candidate for the post, while some members of the Panel considered the Applicant to be a suitable second candidate in the event that the unanimously agreed upon candidate declined the offer;

(vi) the conclusions and recommendations of the Interview Panel were presented to the Human Resources Committee, which recommended the appointment of the candidate whom the Interview Committee found to be the most suitable candidate;

(vii) the Commissioner-General approved the recommendation of the Human Resources Committee.

27. With regard to the Applicant’s claim that the Agency’s recruitment policy gives preference to internal candidates, International Staff Regulation 4.5, “preference shall be given to persons already in the service of the Agency who have the requisite qualifications and experience” the Applicant is reminded that preference is given to internal candidates only when all things are equal between an internal and an external candidate (emphasis added). In the case at bar, all things were not equal between the Applicant and the external candidate who ended up being offered the post. Indeed, the report of the Interview Panel and the Applicant’s own curriculum vitae are clear that the Applicant failed to meet the essential academic qualifications of the post, i.e. holding “an advanced university degree in public or business administration, or social science or political science” because he held a Diploma in Electronics and Telecommunications. Furthermore, the Applicant failed to meet the essential experience required for the post because, as found by the Interview Panel, the Applicant had “less exposure so far to the more strategic and managerial aspects of a senior role or to humanitarian development projects.” In fact, the Tribunal fails to understand why the Applicant was even short-listed at all, when it is clear that he did not possess the proper
educational background or the requisite years of managerial experience. Accordingly, the Tribunal is of the belief that the Applicant’s statement, in his letter to the Secretary of the International JAB dated 19 April 2004, that he had been found suitable for the post, has no basis.

28. The Tribunal thus fails to see on what grounds the Applicant bases his allegation that the Agency failed in following its recruitment policy in line with International Staff Regulation 4.5 and PD No. I/104.2. Rather, the Tribunal finds that the Agency complied with the relevant Staff Regulations, Rules and relevant Directives by securing the highest standards of efficiency, competence and integrity in the appointment and promotion of its staff.

Was the Respondent’s decision exercised arbitrarily, motivated by prejudice or flawed by procedural irregularity or error of law?

29. As held by the United Nations Appeals Tribunal in Hepworth 2011-UNAT-178, paragraph 28, the evidence to be submitted by an applicant must be convincing, when it comes to proving allegations of extraneous motivation. In the case at bar, the Applicant has not alleged that the Agency’s decision not to appoint him to the post of D/DUO/WB was arbitrary or capricious, influenced by prejudice or improper motive or flawed by procedural irregularity or error of law. No evidence has been submitted by the Applicant to establish that the Respondent’s decision was flawed or arbitrary. The Tribunal would like to refer the Applicant to the United Nations Appeals Tribunal, which held in Rolland 2011-UNAT-122, at paragraph 4:

Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

The Tribunal finds that the Respondent’s decision not to select the Applicant to the post of D/DUO/WB was not tainted by prejudice or procedural irregularity or by error of law.
Is there any basis for the Applicant’s request for production of documents?

30. Article 9(1) of the Statute of the Tribunal provides that:

The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.

31. In assessing an applicant’s request for the production of documents, the United Nations Appeals Tribunal when considering similar requests, has noted in a leading case, Bertucci 2011-UNAT-121:

This power is conferred on the Tribunal so that there may be a fair and expeditious disposal of the case. The Tribunal is entitled to order the production of any document relevant to that end.

In determining whether the production of documents is required for the fair and expeditious disposal of the case, the measure consistently adopted, as in Bertucci, originated in the former United Nations Administrative Tribunal (“UN Administrative Tribunal”) in Judgment No. 774, Stepczynski (1996) which held:

With regard to the request for the production of extracts from the minutes of the Appointment and Promotion Board, the Tribunal considers that the documents at its disposal are sufficient to enable it to render a decision. This being the case, the request shall be rejected.

32. Similarly, when applicants have requested an order for the production of documents, this Tribunal has denied such requests on the basis, among other things, that “The rule does not grant a license to a party to request the Tribunal’s intervention in order to engage in a fishing expedition.” Al Khatib Order No. 001 (UNRWA/DT/2012), Wishah Order No. 007 (UNRWA/DT/2011). In the case at bar, the Applicant’s request is overly broad and the documents requested are not necessary for the fair and expeditious disposal of the proceedings. Indeed, the documents at the Tribunal’s disposal are sufficient to enable it to render a decision as to whether the Applicant was given full and fair consideration in his candidacy for the post of D/DUO/WB, and whether the Respondent has followed the relevant recruitment procedures and policy.

33. The Applicant is reminded that the role of the Tribunal is not to substitute itself for the Interview Panel or for the Human Resources Committee, or compare
the Applicant to the successful candidate to the post of D/DUO/WB. It is not for the Tribunal to assess the merits of the candidates for the position in question. Instead, the role of the Tribunal, as held by the UN Administrative Tribunal in Judgment No. 834, *Kumar* (1997):

The Tribunal’s task is to determine whether the Respondent’s decision not to appoint the Applicant to the above-referenced post was a proper exercise of his discretion or whether this decision was vitiated by prejudice or other extraneous factors. The Tribunal notes that the burden of proof in matters where prejudice or discrimination is alleged rests upon the Applicant.

The Tribunal is guided by the UN Administrative Tribunal, again in *Kumar*, cited above, where it held:

The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post ... Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motive or extraneous factors, which the Tribunal has not found in this case.

34. Given the above, the Tribunal finds that the Applicant has failed to establish the relevance of the documents requested or the need for their production. The Applicant has also failed to discharge his onus of proof that the Respondent’s decision not to select him to the post of D/DUO/WB was not properly made or was flawed by procedural irregularity, arbitrariness or error of law.

**Conclusion**

35. The Tribunal finds no merit to this application. The application is dismissed in its entirety.

(Signed)  
Judge Bana Barazi  
Dated this 29th day of February 2012

Entered in the Register on this 29th day of February 2012

(Signed)  
Laurie McNabb, Registrar, UNRWA DT, Amman