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 interview him for the post of Deputy Director of UNRWA Operations, Jordan. 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 1988, the Applicant was employed by the Agency as Assistant Protective Services and Communications Officer, in Beirut, Lebanon, at the P-2, step 1, level. 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 P-4, step 10, level.

5. On 11 December 2003, the Agency circulated internally a vacancy notice for the post of Deputy Director of UNRWA Operations, Jordan (“D/DUO/J”), at the P-5 level, which included a description of the essential qualifications and experience required for the post. On 13 December 2003, it was advertised externally.
6. The Agency received 130 applications for the post, nine 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 29 February 2004. Two internal candidates were also invited for in-person interviews. The Applicant was not one of them.

7. By letter dated 2 March 2004, the Head, Recruitment and Staff Development Section, informed the Applicant that:

    All candidate details have now been reviewed, and I regret to inform you that we will not be progressing any further with your application.

8. The interviews were conducted on 17 March 2004, following which the Interview Panel recommended, and the Human Resource Committee endorsed, the appointment of another candidate to the post of D/DUO/J.

9. By letter dated 26 April 2004, the Applicant requested the Commissioner-General to review the decision not to interview him for the post of D/DUO/J and requested documentation, as set out in paragraph 13.

10. By letter dated 30 July 2004, the Applicant filed an appeal with the Secretary of the International JAB against the decision not to interview him for the post of D/DUO/J.

11. By memorandum dated 4 October 2004, the United Nations Department of Peacekeeping Operations requested UNRWA to release the Applicant on a reimbursable loan for one year to serve as Chief Procurement Officer with the United Nations Advance Mission in Sudan (UNAMIS). The Agency acceded to the request and released the Applicant effective 31 December 2004.

12. Since then, the Applicant has not returned to the Agency. 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

13. The Applicant contends that:

(i) “...the [Agency’s] decision was arbitrary and violated [his] right to reasonable consideration for appointment in light of the fact that [he] had already been interviewed and found suitable for two other Deputy Director posts, namely, Deputy Director of UNRWA Affairs, Lebanon and Deputy Director UNRWA Operations, West Bank”;

(ii) “the decision clearly constituted a lack of due process and furthermore, in the light of the DAHR’s pronouncement that he did not shortlist me because I was “not qualified”, the decision was motivated by error and lack of knowledge on the part of DAHR of UNRWA rules, policy and practice with respect to the concept of ‘equivalency’.”

The Applicant further requests the production of the following documents:

(i) Any and all correspondence including E-mails, Memos, Notes for the Record or Notes for the File (handwritten or otherwise) and faxes pertaining to the selection of candidates for interview for the post of D/DUO/J.

(ii) Copy of résumé and P11 of all candidates interviewed.

(iii) Copy of all Notes, handwritten and typed, of Secretary Human Resources Committee (HRC) to HRC meeting of 5 April 2004.

(iv) Copy of all Notes, handwritten and/or typed of the ISA Representative who was present at the HRC meeting on 5 April 2004.

(v) Copy of qualifications, with previous work experience, of all Directors and Deputy Directors in the Agency.

(vi) Copy of résumé and P11 of successful candidates for the post of D/DUO/J.

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

Respondent’s contentions

14. The Respondent contends that:

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1 Director of Administration and Human Resources
(i) the short-listing for the post of D/DUO/J was properly made;

(ii) the decision not to short-list 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;

(iii) there is no basis for granting the Applicant’s request for the production of documents.

Considerations

Main Issues

Was the short-listing for the post of D/DUO/J properly made?

15. 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 securing 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.

16. 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.

17. 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.

18. In the implementation of Chapter IV 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, processing of applications, short-listing of eligible candidates, 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.

19. The Tribunal would like to point out that the Commissioner-General has broad discretion with regard to personnel matters. It is not the role of the Tribunal to assess the merits of the candidates for the post under consideration. However, the discretionary power 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 full and fair consideration. As held by the former United Nations Administrative Tribunal (“UN Administrative Tribunal”) in Judgment No.1252, Campos (2005):

The views of the members of the JAB panel and also the views of the Tribunal panel as to who was the most suitable or the best candidate are irrelevant. All that can be required of those bodies is to review the process and to determine if the procedures do appear to have been complied with and that there was evidence that the Applicant’s candidacy was given due consideration and that the result appears to have been based on reason and that it was free from extraneous considerations and free from bias or prejudice.

20. Looking at the evidence in the file, the Tribunal notes that the Agency has complied with International Staff Regulations, Chapter IV, on Appointment and Promotion, and with PD No. I/104.2. Indeed, 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 geo-political 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).
21. 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”. By not short-listing the Applicant for the post of D/DUO/J, the Agency showed consistency with the former UN Administrative Tribunal Judgment No. 1122, *Lopes Braga* (2003), paragraph V, highlighting the importance of adhering to the requirements in a vacancy notice:

By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of a degree was but one factor in its determination.

22. If the Agency had short-listed the Applicant when he did not meet the essential requirements in the vacancy notice, it would not have acted in conformity with the principle of securing “the highest standards of efficiency, competency and integrity” required in appointment of staff under International Staff Regulation 4.3, quoted above in paragraph 15. The Tribunal finds that the Applicant’s candidacy was given full and fair consideration.

*Was the Respondent’s decision not to short-list the Applicant arbitrary and in violation of the Applicant’s right to consideration for appointment?*

23. The Applicant contends that the decision not to short-list him was arbitrary and violated his right to reasonable consideration for appointment. He bases his contention on the fact that he had already been interviewed and found suitable for two posts, i.e. Deputy Director of UNRWA Affairs, Lebanon (“D/DUA/L”) and Deputy Director of UNRWA Operations, West Bank (“D/DUO/WB”). By “suitable”, the Tribunal understands this to mean that he was short-listed, as he was not selected to either post. The Tribunal has already rendered a Judgment in the Applicant’s appeal against his non-selection to the post of D/DUO/WB, *Purcell* UNRWA/DT/2012/015. Furthermore, the fact that the Applicant had been interviewed for the two posts does not necessarily mean that he should have been short-listed for the D/DUO/J post, since the candidate pool for each post would have been reasonably different.
24. The Tribunal fails to see on what basis the Applicant claims arbitrariness on the part of the Respondent. As held by the United Nations Appeal 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. However, the Applicant has failed to submit any evidence to support his claim that the Respondent’s decision not to short-list him for the post of D/DUO/J was tainted by prejudice or procedural irregularity.

25. The Applicant also contends that the Agency lacked knowledge of or erred in the application of its rules, policy and practice with respect to “equivalency”. The Tribunal would like to point out that neither the vacancy notice, as evidenced in the file, nor the Agency’s Regulations, Rules, Personnel Directives and other relevant issuances provide for consideration of equivalency in the short-listing of candidates. True, it is possible for the Director of Human Resources, in consultation with the Field Office Directors or Programme Directors, to allow exceptionally a substitution on the basis of equivalency where a vacancy notice specifically provides for the same. In the case at bar, the vacancy notice for the post of D/DUO/J did not include such a provision. The Tribunal finds that there is no basis for the Applicant’s claim that his relevant experience should be a substitute to the requirement of an advanced university degree, noting that the Applicant did not even possess the requisite years of managerial experience.

26. The Applicant claims that the Respondent’s decision constituted what he described in vague and general terms as “lack of due process”. Having determined that the short-listing process for the post of D/DUO/J was properly made, and in the absence of evidence - convincing or otherwise - from the Applicant of arbitrariness, procedural irregularity or error of law on the part of the Respondent in not short-listing him for the post in question, the Tribunal finds that it has no reason to interfere with the discretionary decision of the Respondent. 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.

Is there any basis for the Applicant’s request for production of documents?

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

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

28. Article 13 of the Rules of Procedure of the Tribunal provides:

1. The Tribunal shall determine the admissibility of any evidence.

2. The Tribunal may order production of evidence from either party at any time and may require any person to disclose any document or provide information that appears to the Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

29. In assessing the Applicant’s request for the production of documents, the Tribunal is guided by the United Nations Appeals Tribunal 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.

30. 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, Stepeczynski (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.

31. 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 and whether the Respondent has followed the relevant recruitment procedures and policy. Furthermore, the Tribunal finds that the documents requested, such as the résumés and P11s of all candidates interviewed, are irrelevant because they do not relate to the consideration of the Applicant for the post.

32. The Applicant is reminded that the role of the Tribunal is not to compare him to the other candidates, but its role, as held by the UN Administrative Tribunal in Judgment No. 1252, *Campos* (2005):

   …is to review the process and to determine if the procedures do appear to have been complied with and that there was evidence that the Applicant’s candidacy was given due consideration and that the result appears to have been based on reason and that it was free from extraneous considerations and free from bias or prejudice.

33. Moreover, the Tribunal finds the production of qualifications and previous work experience of all Directors and Deputy Directors in the Agency, as requested by the Applicant, to be vindictive and frivolous because these documents are irrelevant to the issue of the decision not to short-list him to the post of D/DUO/J, since the appointment of these managers is not the object of this application.

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 short-list him to the post of D/DUO/J 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.

(Signed)
Judge Bana Barazi
Dated this 1\textsuperscript{st} day of March 2012

Entered in the Register on this 1\textsuperscript{st} day of March 2012

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