



## UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/SFO/2009/14

Judgment No.: UNRWA/DT/2011/016

Date: 25 November 2011

Original: English

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**Before:** Judge Bana Barazi

**Registry:** Amman

**Registrar:** Laurie McNabb

DIAB

v.

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

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
W. Thomas Markushewski

## **Introduction**

1. This is an application by Abdullah Diab (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 Senior Medical Officer.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board 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 Joint Appeals Board (JAB) has been submitted to the Commissioner-General.

## **Facts**

4. Effective 6 April 1986, the Applicant was employed by the Agency as Medical Officer “A” in Damascus, Syria. Upon completion of his probationary period, his appointment was confirmed on 6 April 1987.

5. On 20 January 2008, the Agency advertised a vacancy notice for the post of Senior Medical Officer (“SMO”) at the Huseiniyeh Health Centre, in the Damascus area. The Applicant applied for the post and was short-listed for a written technical test.

6. The test was administered on 2 November 2008 to a total of 11 candidates. Six candidates (including the Applicant) passed the test and were invited to interview. On 17 December 2008, the Applicant interviewed for the SMO post.

7. After concluding interviews with all six short-listed candidates, the Panel unanimously recommended that another candidate be appointed for the post of SMO.

8. On 13 January 2009, the Human Resources Committee (“HRC”) recommended that the Panel’s selected candidate be appointed to the post. On 8 February 2009, the Commissioner-General approved the HRC recommendation.

9. On 26 February 2009, the Applicant requested the Director of UNRWA Affairs, Syria, to review the decision not to select him for the SMO post. On 20 April 2009, he submitted his Appeal to the JAB. On 11 May 2009, the JAB Secretariat requested the Applicant to submit the Appeal form in English with all the required documentation.

10. On 24 May 2009, the Applicant submitted an application which was received on 18 June 2009.

### **Applicant’s contentions**

11. The Applicant contends that the selection process was improper for the following reasons:

- i. the period of advertisement of the post was extended to include the candidate who was ultimately selected;
- ii. the administration requested staff to apply within the extended period of advertisement;
- iii. the administration gave a second chance to the selected candidate and two others, who had failed the exam the first time, to repeat the test;
- iv. the selected candidate was not required by the administration to be interviewed in order to be appointed;
- v. he was discriminated against by the administration due to his prosthetic left arm.

The Applicant requests that the Tribunal rescind the contested decision and order the Respondent to appoint him to the post of SMO at the Huseiniyeh Health Centre or provide compensation.

### **Respondent's contentions**

12. The Respondent essentially contends that the selection process for the post of SMO was properly made, and that the remedies sought by the Applicant have no legal basis. The Respondent requests that the Tribunal dismiss the application.

### **Applicant's rejoinder**

13. On 24 August 2011, the Applicant submitted a rejoinder of one page (without requesting leave) following the Respondent's Reply of 12 July 2011. In the interest of fairness and comprehensibility, the Tribunal will briefly address it, however, noting that it will not as a general rule review rejoinders which bring nothing new to the case at bar.

14. On 6 September 2011, the Registrar of the Tribunal transmitted a copy of the Applicant's rejoinder to the Respondent providing, "[t]he Judge will make a determination as to whether or not Dr. Diab's submission will be considered in the case, and if so, whether a response is required from the Respondent." After reviewing the Applicant's rejoinder, the Tribunal finds that the Respondent's 12 July 2011 Reply adequately addresses all of the Applicant's allegations and therefore, there is no need for any further submissions.

### **Considerations**

#### *Main issue*

*Was the selection process tainted with improprieties?*

15. In order to address this issue, which is at the crux of the matter, it is important to look at the legal and administrative framework, in effect at the material time governing the selection process.

16. Area Staff Regulation 4.3 provides that:

Due regard shall be paid in the appointment, transfer and promotion of staff to the necessity for securing the highest standards of efficiency, competence and integrity.

17. Former Area Staff Personnel Directive A/4/Part II Rev.6/Amend.2 provides that:

### 7.3 **Recruitment Strategy**

The recruitment of Area staff is based on the Agency's strategy to obtain the best-qualified and suitable employees through a competitive recruitment process.

Therefore, having analyzed the job and determined the job specifications through the post descriptions, consideration should be given as to how suitable applicants (internal and external) will best be obtained. As long as they are qualified, the internal candidate will be given preference, without prejudice to the Agency's right and discretion in the recruitment and assessment of its staff.

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### 7.4 **Advertising**

All Staffing table post vacancies shall be advertised simultaneously internally and externally.

\* \* \*

- (i) UNRWA is an equal opportunity employer and welcomes applications equally from male and female candidates.

- (ii) It is the Agency's policy to give full consideration to disabled candidates whose disablement does not mitigate against the effective performance of the duties of a post.

18. It is important to recall that although the United Nations Appeals Tribunal (the "UNAT") accords the Agency broad discretionary authority in the application of its Staff Regulations, Rules and other relevant issuances, it provides that this authority will not be disturbed unless the decision was arbitrary or capricious, was motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law. In *Asaad* 2010-UNAT-021 paragraph 11, it stated that:

Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration (see, for example, Judgment No. 952, *Hamad* (2000)). We would add that its decisions must not be based on erroneous, fallacious, or improper motivation.

19. In *Abbasi* 2011-UNAT-112, paragraph 26, the UNAT also held that:

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.

20. The Applicant is reminded that when he alleges that the Respondent's exercise of his discretionary authority was tainted with "discrimination" and motivated by "revenge", the jurisprudence of the UNAT and the former UN Administrative Tribunal is clear that the burden of proof rests on the Applicant, and that he must adduce convincing evidence in support of his allegations.

21. The evidence in the file indicates that the Respondent complied with all aspects of former Personnel Directive A/4/Part II, regarding the recruitment strategy, the advertisement for the post, the short-listing of candidates and their assessment. Out of 26

applications, 11 candidates were short-listed; a written technical test was administered on 2 November 2008 for all of the 11 candidates; 6 candidates, including the Applicant, passed the test and were interviewed on 17 December 2008 by a properly constituted Interview Panel. The Panel produced a report containing all the required elements, i.e. an assessment of each candidate interviewed, the results of his or her written test, the results of the interview, a summary of his or her strengths and shortcomings, and its recommendation. The Tribunal finds nothing in the evidence which would point to any impropriety or bias on the part of the Respondent.

22. In response to the Applicant's claim that the period of advertisement of the post of SMO was extended to include the candidate who was ultimately selected, the Respondent submits that the period of advertisement of the post is normally extended by the administration when the pool of applicants is low or when the administration is not satisfied with the qualifications and/or experience of the existing applicant pool. To be clear, the Tribunal is unaware of the customary practice of extending vacancies announcements (unlike re-advertisement, which is a common strategy employed by the Human Resources Department when an applicant pool is less than fruitful) however, in the case at bar, the Applicant alleges that the recruitment process was extended for an additional five days, yet fails to provide any proof. Regardless, it is in the Tribunal's view that such an action- to extend recruitment- is well within the Agency's discretion. While the Applicant claims that this was a violation of the Agency's Regulations, Rules and other relevant issuances or that the recruitment process was flawed by procedural irregularity, he has nevertheless, failed to produce any evidence supporting his allegations. Additionally, the Applicant has failed to submit any evidence - convincing or otherwise - that the candidate selected had two opportunities to pass the written test, and that he was not interviewed prior to his appointment, or that the Agency had pre-determined the candidate selected and the whole selection process was a sham.

23. With respect to the Applicant's allegation that he was discriminated against, the Tribunal has given it the utmost consideration. The Tribunal notes that the selection criteria for the SMO post were clearly specified in the vacancy notice; they were reflected

in the job analysis, the post description and the interview protocol of the Interview Panel's "Job Profile". The job analysis, post description and interview protocol, as set out in the Interview Panel's "Job Profile", provided a description, among other things, of the responsibilities of the SMO in order to guide the Interview Panel's assessment of the candidates, more specifically:

This level of seniority attached to the post makes it essential and imperative for the incumbent of the post, to be able to carry out the duties effectively and efficiently, to demonstrate the possession of the following key competencies and skills at good level.

24. In accordance with former Personnel Directive A/4 Part II, paragraph 7.6.3, the job analysis, post description and interview protocol set out in the Interview Panel's "Job Profile" provided a guide to help the panel in assessing each candidate which included 11 key competencies, as well as the requirements associated with each.

25. The record in the file indicates that the Interview Panel came to the conclusion that the Applicant did "not sufficiently meet the required profile for the post..." with each of his shortcomings related directly to the key competencies:

- ii. limited comprehension and ability to express himself in English;
- iii. lack of the required level of supervisory and managerial skills necessary for the post;
- iv. demonstrated inability to make substantial contributions and make decisions independently;
- v. out of context self-confidence reflecting on maturity and interpersonal skills;
- vi. lack of knowledge about gender issues;
- vii. lack of teamwork skills.

26. The former United Nations Administrative Tribunal in its Judgement No. 1252, (2005) in cases involving the review of decisions relating to appointment or promotion provided that:

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 consideration and free from bias or prejudice.

27. The Tribunal notes that none of the shortcomings identified by the Interview Panel bears any relation to the Applicant's prosthetic device. The comments attributed by the Applicant to a member of the Interview Panel (a representative of the General Authority for Palestine Arab Refugees) reflect an individual opinion relating to Personnel Directive A/4/Part II, paragraph 7.4.2 (ii) with respect to the application of "the Agency's policy to give full consideration to disabled candidates whose disablement does not mitigate against the effective performance of the duties of the post." The record in the file shows that the panel member was concerned that the Applicant's prosthetic device would prevent the Applicant from discharging his duties as a medical officer in emergency situations. While the Tribunal sympathizes with any discomfort that such an opinion may have caused to the Applicant, if there is a question that an Applicant's disablement may adversely affect the performance of the duties of a post, such a line of questioning would not be prohibited. The Tribunal does not see any evidence of discrimination against the Applicant in regard to his disability in the recruitment process.

28. The Applicant has failed to discharge the onus of proof resting on him that the Respondent's decision not to select him was exercised arbitrarily, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or error of law.

*Other issues*

29. As the Tribunal found that the Respondent's decision not to select the Applicant was based on the conclusion, properly formed, that he did not meet the required profile for the post; as the Respondent complied with the selection procedure and gave full and fair consideration to the Applicant's candidature; and as the Applicant failed to submit evidence of any prejudice or improper motivation on the part of the Respondent for not selecting him to the post of SMO; consequently, the Tribunal finds that the Applicant has no legal basis for the consideration or award of the remedies he seeks.

30. The Tribunal refers to the UN Appeals Tribunal in *Sina* 2010-UNAT-094 paragraph 25, and *Antaki* 2010-UNAT-095, in which it held that compensation will not be awarded "when absolutely no harm has been suffered".

### **Conclusion**

31. Given all the above, the application is dismissed in its entirety.

(Signed)

Judge Bana Barazi

Dated this 25<sup>th</sup> day of November 2011

Entered in the Register on this 25<sup>th</sup> day of November 2011

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman