



Administrative Tribunal

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LIMITED

AT/DEC/870
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 870

Cases No. 964: CHOUDHURY
No. 965: RAMCHANDANI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Deborah Taylor Ashford, Vice-President, presiding;

Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas, on 8 March 1996, Pradeep Kumar Choudhury and K.H. Ramchandani, staff members of the United Nations Military Observer Group in India and Pakistan (hereinafter referred to as UNMOGIP), filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicants, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May and 31 August 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 24 May 1996, the Applicants again filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicants, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1996 and 31 March 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1997, the Applicants again filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 April 1997, the Applicants, after making the necessary corrections, filed applications containing pleas which, inter alia, requested the Tribunal:

“[i] ... to rescind the Respondent’s decision of February 1996 regarding the non-inclusion of the Applicant[s] in the 1992 promotion list;

...

[ii] ... to find:

(d) that the decision to exclude the Applicant[s] from the 1992 promotion list was a consequence of discrimination within the UNMOGIP promotion panel against staff members of Indian nationality in New Delhi and thus contravened the principle of equality as established in Article 8 of the Charter;

... [and]

[iii] ... to order:

(a) that the Applicant[s] ... be fairly considered by the relevant promotion bodies on an equal footing and on the basis of merit with other candidates and not be penalized for being ... New Delhi staff member[s] of Indian nationality;

...

(c) the award of two years net base salary as compensation for salary lost due to the non-progression of the Applicant[s]’ career[s] caused by the biased decisions of the Appointment and Promotion Panel;

...”

Whereas the Respondent filed his answer in case No. 964 on 17 July 1997;

Whereas the Respondent filed his answer in case No. 965 on 16 October 1997;

Whereas the Applicants filed written observations on 30 June 1998;

Whereas, on 1 July 1998, the Tribunal put questions to the Respondent to which he provided answers on 9 July 1998;

Whereas, on 13 July 1998, the Tribunal put additional questions to the Respondent to which he provided answers on 16 July 1998;

Whereas, on 27 July 1998, the Applicants submitted comments on the Respondent's reply;

Whereas, on 5 August 1998, the Respondent submitted a response to the Applicants' comments of 27 July 1998;

Whereas the facts in the case are as follows:

The Applicant Choudhury entered the service of the United Nations on 1 January 1975, on a one-year fixed-term appointment as an Office Boy at the G-1 level, with UNMOGIP. His appointment was extended for a further fixed-term of one year. On 1 January 1977, it was converted to an indefinite appointment and his functional title was changed to Office Boy/Mimeograph Operator at the G-2 level. On 1 April 1980, he was promoted to Senior Mimeograph Operator at the GS-2A level, and on 1 April 1982, to Typist Clerk at the GS-3 level. On 1 October 1984, his grade was changed to ND-4 (GS-4), to coincide with revised levels of the New Delhi General Service Salary Scale. On 1 April 1985, he was promoted to Senior Typist/Clerk at the GS-5 level. The overall rating on all his performance evaluation reports (PERs) since 1977 has been "A very good performance".

The Applicant Ramchandani entered the service of the United Nations on 16 August 1984, on a three-month fixed-term appointment as an Office Management Assistant at the ND-5 level with UNMOGIP. On 1 October 1984, his grade was changed to ND-6 to coincide with revised levels of the New Delhi General Service Salary Scale. His fixed-term appointment was successively extended until 16 September 1985, when he was granted an indefinite appointment. His grade level was changed to ND-5 on 1 July 1994, when the salary scale was converted to a seven-level structure. The overall rating on his PER for the period 12 July 1988 through 28 February 1993, was "an excellent performance".

By memoranda dated 21 September, 30 October and 23 November 1992, the Chief, Field Personnel Section, Field Operations Division (FOD), transmitted to the Office of Human Resources Management (OHRM), FOD's recommendations for promotion, based on the review and recommendation of the 1992 UNMOGIP Subsidiary Promotion Review Panel (SPRP) for locally-recruited General Service staff. The Panel had recommended eight staff members for promotion. The Applicants were not among them. On 23 November 1992, the Staff Administration and Training Division, OHRM, recommended to the Director of Personnel, the promotion of three of the eight staff members.

On 10 January 1993, the Officer-in-Charge, UNMOGIP, informed all UNMOGIP locally-recruited General Service staff of the names of the three staff members whose promotions had been approved, and advised them of their right to submit a recourse letter to Working Group I of the Appointment and Promotion Panel (APP) at Headquarters.

On 22 January 1993, the Applicant Choudhury instituted a recourse before the APP requesting that his name be included in the 1992 Promotion Register. He attached a "job description" prepared by him, requesting comparison between his job description and other jobs at the same level in other UN agencies. The letter was forwarded to the 1992 SPRP for its comments.

Also on 22 January 1993, the Applicant Ramchandani instituted a recourse before the APP seeking the inclusion of his name in the 1992 Promotion Register, claiming that, when he was first appointed, he was assured that he would be promoted within a year, and that, furthermore, the duties he performed were at least at the ND-8 level, when compared with similar posts at other UN agencies in New Delhi. His letter was forwarded to the 1992 SPRP for its comments.

The 1992 UNMOGIP SPRP did not recommend that the Applicants' names be included in the 1992 Promotion Register.

By a cable dated 28 October 1993, UNMOGIP was informed that the promotion of another staff member, one of the eight originally recommended, had been approved.

In a cable dated 31 December 1993, the Applicants were informed that the Acting Director of Personnel did not approve the addition of their names to the 1992 Promotion Register.

On 4 January 1994, the Applicants and four other locally-recruited General Service UNMOGIP staff in New Delhi cabled the Director, FOD, alleging that "Delhi Office local staff members have been completely deprived of promotions for the last ten to seventeen years when all the required qualifications for promotion are being fulfilled."

On 22 February 1994, the Applicants wrote to the Secretary-General requesting administrative review of the decision not to promote them. Having received no response to their request for review, on 3 June 1994, the Applicants lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 23 January 1996. Its considerations and recommendations read as follows:

"Considerations

41. The Panel reviewed the issues raised by this appeal in light of the contentions of the parties. It considered the Appellants' contention that they were denied a justified promotion, based on discriminatory reasons. The basis of this discrimination was delineated in their appeal dated 3 June 1994 and in their observations dated 24 February 1995, in which they asserted that preferential treatment was afforded to those local staff members who serve at the Rawalpindi location (where the Promotion Review Panel (PRP) always sits).

42. The Panel agreed that the Appellants have a right to be fully and fairly considered for promotion. However, the Appellants do not have the 'right' or legal expectancy to be promoted. The Administrative Tribunal has consistently held that staff members have no legally enforceable 'right' to be promoted. In Judgement No. 134, Fürst III (1969), the Tribunal stated that 'promotions are within the discretion of

the Secretary-General ...'

43. The Tribunal has recognized, however, that staff members have a right to be considered for promotion on the basis of objective considerations free from bias and discrimination. However, the burden of proof of the existence of these facts is on the Appellant. The Panel did not think that it had been discharged in this case.

44. The Panel further considered the issue of New Delhi staff representation on the Subsidiary Promotion Review Panel. It found that the lack of adequate staff representation on any recommendation bodies, especially dealing with promotions, is undesirable.

45. With respect to the Appellants' contentions that based on comparable positions at other UN agencies, Mr. Ramchandani should be a GS-8 and Mr. Choudhury, a GS-6, the Panel stated that this contention should be referred to the Administration in accordance with staff regulation 2.1, which states that '... the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.'

46. With respect to the Appellants' contention concerning official holidays (as set forth [above]), the Panel observed that UNMOGIP UN holidays should take into account the need of staff members to attend to their religious obligations.

Recommendations

47. On the basis of the aforesaid considerations, the Panel concluded that the Appellants failed to show convincingly that the decision not to include them in the 1992 promotion list violated their rights.

48. The Panel, however, recommends that the persistent absence of New Delhi staff from the Subsidiary Promotion Review Panel be looked into, with a view to remedying it.

49. The Panel further recommends that UNMOGIP UN holidays should take into account the need of staff members to attend to their religious obligations.

50. The Panel makes no further recommendation in support of the appeal."

On 2 February 1996, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicants and informed each of them as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that you failed to show convincingly that the decision not to include you in the 1992 promotion list violated your rights having not discharged the burden of proof on the existence of bias and discrimination. Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on your case.

As regards the Board's recommendations in paragraphs 48 and 49, the Secretary-General will examine the implications to determine whether a change in the existing procedures is warranted."

On 11 April 1997, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants were not given proper consideration for promotion because of the "discriminatory practices of the Appointment and Promotion Panel".
2. The promotion process was flawed by improper procedures because the present structure of the SPRP in UNMOGIP lacks effective representation of New Delhi staff, resulting in a "pattern of discrimination" against Indian staff members in favour of Pakistani staff members.
3. The Applicant Ramchandani argues that posts comparable to his post, in other UN agencies, are classified at the GS-8 level, that his predecessor was at that level, and that his supervisor's assurances "created a legitimate expectancy of proper consideration and subsequent promotion" to that level.

Whereas the Respondent's principal contentions are:

1. Promotion is within the discretion of the Secretary-General. No staff member has either a legally enforceable expectancy or a right to promotion.
2. The decision not to promote the Applicants was not vitiated by prejudice or extraneous factors, nor was the promotion process procedurally flawed.

The Tribunal, having deliberated from 1 to 31 July 1998, now pronounces the following judgement:

- I. The Tribunal finds that the Applicants Ramchandani and Choudhury raise the same legal issues and present comparable factual circumstances. The Tribunal therefore orders the joinder of the cases.
- II. The Applicants claim that the decision not to include them in the 1992 Promotion Register was tainted with discrimination and unfairness. The Applicants appealed that decision to the Joint Appeals Board (JAB), which concluded "that the Appellants failed to show convincingly that the decision not to include them in the 1992 promotion list violated their rights."
- III. The principal issues in these cases are:
 - (i) Whether the Applicants were discriminated against by the Respondent when he took the contested decision, and
 - (ii) Whether the decision was fairly taken, considering the composition of the Subsidiary Promotion Review Panel (SPRP) which did not recommend that the Applicants' names be included in the 1992 Promotion Register.

IV. The Tribunal has clearly stated in earlier cases that a staff member generally has no right to promotion. (Cf. Judgement No. 411, Al-Ali (1988), paragraph III). However, there may be circumstances such as occurred in Al-Ali, which give the staff members a right to promotion. Thus, there may be an agreement or promise, which can be proved, that gives a staff member a right to promotion. (Cf. Judgements No. 134, Fürst (1969) and No. 308, Karlik (1983)). On the other hand, a mere expectancy, however strong, does not give the staff member a right to promotion. (Cf. Judgements No. 312, Roberts (1983) and No. 375, Elle (1986)). While a decision not to promote is discretionary (Judgement No. 275, Vassiliou (1981)) it may be reviewed by the Tribunal in order to ascertain whether there has been an abuse of discretion because the discretion to promote is not absolute or unfettered. The Tribunal will not substitute its own judgement for that of the Administration (Vassiliou) but it will ascertain whether there has been an abuse of discretion.

V. In the present case, discrimination has been alleged as a ground for questioning the validity of the decisions taken by the Administration. It is the duty of the parties to provide the Tribunal with all the available evidence in order to enable it to pass judgement on whether the allegation made has been proven.

The Applicants allege that their rights to "a fair and unbiased consideration" were "violated by discriminatory practices of the Appointment and Promotion Panel". The Applicants adduce the following facts as evidence of discrimination: (i) the SPRP sat in Rawalpindi, Pakistan, (ii) the SPRP had representation only from the Rawalpindi office, and (iii) the number of staff promoted at the New Delhi office was low in comparison with the number of staff promoted from the Rawalpindi office. The Respondent explains the low rate of promotion for local staff in the New Delhi office by reference to the fact that most of the local staff in New Delhi were manual workers, a fact which the Applicants dispute. The Tribunal is of the view that none of the facts adduced by the Applicants, assuming them to be correct, support by themselves the conclusion that there was bias or discrimination against the

Applicants in the decision not to promote them. Among other things, in response to questions put by the Tribunal, the Respondent provided information which showed that in the period between 1987 and 1992, from the Rawalpindi office 42 per cent of those recommended and 23 per cent of those eligible for promotion were promoted, while from the Srinagar and New Delhi offices combined, 44 per cent of those recommended and 18 per cent of those eligible for promotion were promoted. On the basis of the record, the Tribunal finds that it cannot determine conclusively that there was bias or discrimination against the staff of the Srinagar and New Delhi offices.

VI. With regard to the second issue, the Tribunal notes that according to the Respondent's admission in proceedings before the JAB:

“Participation of local staff members in the Subsidiary Promotion Review Panel in UNMOGIP is through nomination by the Local Staff Association in Rawalpindi which has a membership of 30. A Local Staff Association (LSA) in Srinagar, with membership of 7, although not normally consulted, has never objected to the nominations of the Rawalpindi LSA. The 6 staff members of the New Delhi Office are neither members of the Srinagar LSA (which is supposed to represent all staff on the Indian side of the Mission) nor do they have a separate union in New Delhi. As will be noted, the majority of staff are in Rawalpindi.”

In reply to questions put by the Tribunal during these proceedings, the Respondent submitted a document containing a similar admission.

VII. It is a general principle of international administrative law that a committee involved in the taking of administrative decisions should be properly constituted. (Cf. Judgement No. 28, Wallach (1953)). The principle requires that, in the constitution of a committee, in keeping with the maxim that justice must not only be done but must be seen to be done, if there is representation, there must be properly distributed representation. The constitution of the SPRP was defective in this regard, and in fact, improper, as there was no representation,

direct or indirect, of the LSA in Srinagar or of the staff in New Delhi. As a result, there was disproportionate representation of the LSA in Rawalpindi. The Respondent's explanation for this lack of representation was that travel restrictions between Pakistan and India prevented representation from staff in the Srinagar and New Delhi offices. The Tribunal finds this explanation to be inadequate. Following the recommendations of the JAB, the Respondent indicated that "he will examine the implications [of, inter alia, the persistent absence of New Delhi staff from the SPRP] to determine whether a change in the existing procedures is warranted." The record indicates that no change has been made.

The disproportionate representation is a procedural irregularity which violated the rights of the Applicants. It is not necessary for the Applicants to show that, had there been proper representation, they would have been promoted. What is relevant is that there was improper constitution of the SPRP which could have affected the chances of the Applicants' being promoted. Furthermore, the fact that the SPRP was an advisory body and not the authority taking the final decision on promotions is also immaterial. Insofar as it gave advice, its advice was tainted by the procedural irregularity. This is sufficient injury to the Applicants, for which compensation is due.

VIII. The Applicants also make a subsidiary claim that they had an expectancy of being promoted. The Applicant Ramchandani relies on the conduct of his supervisor in virtually assuring him that he would be promoted. This conduct did not amount to a giving of a promise that the Applicant would be promoted nor is there evidence of an agreement to promote the Applicant. A mere expectancy of promotion does not create a right to promotion. This claim, therefore, fails.

IX. From the evidence provided by the Respondent in reply to questions put by the Tribunal, it would appear that the grade levels of those promoted in the years 1987 through 1992 were generally lower in the Indian (New Delhi and Srinagar) offices than in the

Rawalpindi office. This may reflect anomalies in the classification of posts or may be the result of irregularities in the promotion procedures as described in paragraphs V, VI and VII above. The Tribunal strongly recommends that the Respondent conduct a proper review of the classification of General Service posts at the Srinagar and New Delhi offices.

X. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to each of the Applicants three months of the Applicants' respective net base salary at the rate in effect on the date of this judgement;
2. Orders the Respondent to undertake a meaningful review of the constitution of the UNMOGIP appointment and promotion bodies with a view to securing fair representation of all staff in the India and Pakistan offices.
3. Rejects all other pleas.

(Signatures)

Deborah Taylor ASHFORD
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary