

**107th Session**

**Judgment No. 2852**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. M. S. against the Food and Agriculture Organization of the United Nations (FAO) on 7 December 2007 and corrected on 20 March 2008, the Organization's reply dated 16 July, the complainant's rejoinder of 23 October 2008 and the FAO's surrejoinder of 12 February 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The FAO has a Professional Staff Selection Committee (hereinafter "the PSSC") which is mandated to make recommendations regarding, inter alia, the appointment and promotion of staff. The PSSC's terms of reference and procedures are contained in Appendix A to Section 305 of the FAO Manual, which deals with recruitment and appointment. Appendix A relevantly provides:

"10. The recruiting division, in collaboration with the Personnel Officer concerned, reviews the applications of qualified candidates [...] and prepares an evaluation for the consideration of the division director, who

makes a submission to the Committee through the Assistant Director-General of the department concerned proposing a short-list of [...] candidates qualified for selection.

[...]

13. A representative of the division may be called by the Committee to supply further information and clarification, and must be called before the Committee makes a recommendation which is at variance with the division's recommendation. [...]

14. The recommendations of the Committee are forwarded to the Deputy Director-General for decision except when the Committee's recommendation is at variance with the recommendation of the division. In such a case, the Secretary of the Committee notifies the director of the recruiting division of the recommendations of the Committee. If no representations are received by the Secretary within five working days of receipt of notification [...], the recommendations of the Committee are forwarded to the Deputy Director-General for decision.

15. If the director of the recruiting division does not agree with the Committee's recommendation, he may make representations within the above period to the Chairman of the Committee, through the Secretary, in writing. The Chairman presents these views to the Committee for comments and then transmits them together with the final recommendation of the Committee to the Deputy Director-General for a decision. The decision is communicated to the Committee at a subsequent meeting."

The complainant, a United States national born in 1955, joined the FAO in 1986 as a Records Officer at grade P-2. She currently works in the Conference, Council and Government Relations Branch. Her initial fixed-term appointment was extended on a regular basis until it was converted to continuing status in April 1992. She currently holds the position of Reports/Records and Documentation Officer at grade P-4.

On 17 June 2005 a vacancy announcement was issued for the P-5 post of Chief of the Conference, Council and Government Relations Branch. The complainant applied and was one of four shortlisted candidates whose names were submitted to the PSSC by the recruiting division, the Conference, Council and Protocol Affairs Division, which ranked her in third place and designated Mr D. as the preferred candidate.

The PSSC met on 11 May 2006 to review the recruiting division's submission. It asked a representative of the division to explain the rationale for the ranking of the shortlisted candidates and subsequently

recommended that the complainant and Mr D. be both placed in first position. Considering that its recommendation was not technically “at variance” with that of the recruiting division, on 23 May 2006 the PSSC forwarded it for approval to the Deputy Director-General, Mr H., who was also Officer-in-Charge of the department to which the division belongs, namely the General Affairs and Information Department (hereinafter “the GI”).

On 13 June 2006 the Deputy Director-General wrote to the Chairman of the PSSC and asked whether, pursuant to its terms of reference and procedures, the PSSC had notified the division director of its decision. He indicated that a final recommendation should be submitted to him only when the division director’s comments, if any, had been discussed.

The PSSC reviewed the case at an extraordinary meeting on 20 June 2006 and revised its original recommendation by ranking the complainant first and Mr D. second. It withdrew its first report, issued a new report that reflected the revised rankings, and sent that report to the recruiting division on 22 June in order for the director of that division to provide his comments. That same day it sent a copy of its new report to the Deputy Director-General for information.

In a memorandum dated 29 June 2006 to the Secretary of the PSSC, the division director provided a detailed assessment of the respective qualifications, work experience and interpersonal skills of Mr D. and the complainant, and reaffirmed the selection panel’s conclusion that Mr D. was the best candidate for the position. This assessment was sent to the PSSC through Mr H., in his capacity as Officer-in-Charge of the GI, who added a handwritten comment on the first page endorsing the choice of Mr D. as the “superior candidate” for the post.

The PSSC reconvened on 2 August 2006. After reviewing the assessment provided by the recruiting division it again revised its recommendation and placed Mr D. in first position and the complainant in second position. Its report was forwarded to the Deputy Director-General on 16 August and on 7 September 2006 the Director-General selected Mr D. for the vacant post.

On 21 September 2006 the complainant lodged an appeal against the Director-General's decision. By a letter dated 6 November 2006 the ad interim Assistant Director-General of the Administration and Finance Department, writing on behalf of the Director-General, informed her that her appeal had been dismissed as unfounded. She submitted an appeal of that decision to the Appeals Committee on 29 November. In the course of the proceedings before the Committee, she submitted an affidavit from Mr I., a member of the PSSC at the material time. In its report of 25 May 2007 the Committee recommended that the complainant's appeal be rejected. By a letter dated 17 September 2007 the Director-General informed the complainant that he had decided to accept the Committee's recommendation. That is the impugned decision.

B. As a preliminary matter, the complainant points out that she has not had access to a number of documents concerning the selection procedure for the disputed post and that, consequently, she is not on an equal footing with the defendant, contrary to the principle of due process. She asks the Tribunal to consider ordering disclosure of those documents.

The complainant acknowledges that, according to Staff Regulation 301.4.1 and the case law, the Director-General has the discretion to appoint staff members. However, discretionary authority must not be confused with arbitrary power. She submits that the impugned decision is illegal because it is vitiated by procedural flaws, the omission to take into account an essential fact and abuse of authority.

Firstly, she alleges that the procedure concerning appointments contained in Manual Section 305 was not followed correctly. The PSSC mistakenly concluded that its first recommendation was not at variance with that of the recruiting division and sent it to the Deputy Director-General instead of submitting it to the division director so that he could provide his comments. Moreover, the Deputy Director-General intervened in the appointment procedure: by endorsing the choice of Mr D. on the division director's memorandum of 29 June 2006 in his capacity as Officer-in-Charge of the GI, he exerted

pressure on the PSSC and, as a consequence, the complainant was denied the benefit of due process.

Secondly, the complainant argues that an essential fact was not taken into consideration. She contends that Mr I.'s affidavit provides evidence of the Deputy Director-General's influence over the PSSC with respect to its final recommendation. However, it is not mentioned in the list of submissions contained in the "Notice of Hearing" of 17 April 2007 provided to the parties by the Appeals Committee. Furthermore, the Committee made three references to the affidavit in its report but did not comment on its content and the Director-General made no specific mention of the affidavit in his final decision.

Thirdly, referring to the Tribunal's case law, the complainant contends that there is misuse of authority when an administration takes a biased decision for reasons not in the best interests of the Organization. In her view, the Deputy Director-General has displayed a long-standing prejudice against her. This is illustrated by the fact that before she was awarded her P-4 post, he decided to re-advertise the vacancy for that post, thereby extending the selection process. Also, in 2005 she requested a salary advance in order to provide assistance to her family but he denied that request. She further alleges that he showed "undue favouritism" to Mr D. during the selection process and that, as the actual decision-maker, he exerted a considerable influence on the PSSC's final recommendation. She submits that his influence and the fact that he misused his authority are confirmed by Mr I.'s affidavit. She therefore considers that she is justified in questioning whether the Organization has dealt with her in good faith.

Lastly, the complainant submits that since she filed her appeal, she has been placed under considerable pressure and her division has attempted to isolate her by, inter alia, preventing her from participating in major meetings. In her view, she is being punished for pursuing her appeal and this warrants an award of moral damages.

The complainant asks the Tribunal to set aside the Director-General's decision of 17 September 2007 and to refer the case back to the Organization so that the proper procedure can be followed with a view to awarding her the disputed post and paying her the resulting

difference in the emoluments due to her since 7 September 2006. She also claims moral damages and costs.

C. In its reply the FAO points out that the complainant has not attempted to demonstrate that her qualifications and experience are better than those of Mr D. and submits that in the absence of any argument to that effect her complaint is moot.

It asserts that it acted in full compliance with the applicable rules and procedures related to the recruitment and selection of staff and that the selection process was carried out in a transparent manner. The Deputy Director-General ensured that the selection procedure was correctly followed. The PSSC's failure to recognise that the change in the candidates' rankings resulted in a recommendation that was at variance with the assessment of the division was not a procedural irregularity. In addition, the Deputy Director-General was required, in his capacity as Officer-in-Charge of the GI, to countersign the division director's submission to the PSSC, and his handwritten endorsement of the recommendation in favour of Mr D. was not evidence of "undue pressure", nor was it irregular. It did not compromise the independence of the PSSC or the selection procedure.

The Organization argues that the affidavit from Mr I. should be dismissed as thoroughly unreliable and gratuitous. It submits that his testimony is completely contradicted by the documented record of the selection process. Furthermore, the Appeals Committee reviewed the affidavit and made its findings based on all the evidence. Neither the Committee nor the Director-General overlooked an essential fact.

The FAO states that the PSSC operates independently in making its recommendation and no official of the Organization has the authority to give it instructions. Its members are protected from undue influence by safeguards which include full confidentiality of its deliberations.

It also argues that the fact that the Deputy Director-General was also Officer-in-Charge of the GI is not problematic *per se*. This situation occurs regularly within the FAO and other organisations and

the complainant cannot conclude that the selection procedure was tainted because an official has a dual role.

Lastly, the Organization contends that the complainant has not discharged her duty to provide proof of her allegations. It denies that there has been an abuse of authority or that the Deputy Director-General displayed prejudice towards her.

D. In her rejoinder the complainant elaborates on her pleas and states that the issue at stake in this case does not relate to a comparison between her merits and those of Mr D. but rather to whether she was given the benefit of due process during the selection process. She produces a number of documents relating to that process which, she contends, were recently and anonymously left on her desk.

In addition, she argues that Mr H. acted *ultra vires* by intervening in the selection process in his capacity as Deputy Director-General when he should only have been acting as Officer-in-Charge of the GI.

E. In its surrejoinder the Organization maintains its position in full. It deplores the complainant's possession of confidential documents concerning the selection process and submits that there is evidence that she had knowledge of those documents as early as August 2006, contrary to her claim that she "recently" received them. It submits that the documents in question demonstrate that the selection procedure was carried out correctly and illustrate the level of the complainant's interference with that procedure and her attempts to control the process and manipulate its outcome. It produces a document showing, in its view, the complainant's failure to act in conformity with the Standards of Conduct for the International Civil Service.

## CONSIDERATIONS

1. The complainant was selected by a selection panel composed primarily of staff members of the recruiting division as one of four shortlisted candidates for a P-5 advertised post. In its first submission

to the PSSC, the recruiting division ranked the complainant third and placed Mr D. in first position.

2. The PSSC ranked both the complainant and Mr D. in first place. Considering that “technically” its recommendation was not “at variance” with that of the recruiting division, the Committee forwarded it to the Deputy Director-General pursuant to paragraph 14 of Appendix A to Section 305 of the FAO Manual, outlined under A, above. The Deputy Director-General wrote to the Chairman of the PSSC on 13 June 2006 asking him whether, as required by its terms of reference, the PSSC had notified the division director of its decision. In consequence, the PSSC met again and subsequently recommended that the complainant be placed first and Mr D. second.

3. The Director of the recruiting division, upon notification by the PSSC of its new recommendation, reiterated in a detailed memorandum the division’s position in favour of Mr D. whom it had shortlisted in first place. This memorandum was sent to the PSSC through the Officer-in-Charge of GI, Mr H., who was also the Deputy Director-General; in a handwritten note he expressed the view that Mr D. was the “superior” candidate. In other words, the recruiting division formally and strongly maintained its initial submission, to which Mr H.’s annotation added limited endorsement. Such a course of action was not undue in any way, for the relevant rules of the Organization required the Deputy Director-General, as Officer-in-Charge of the GI, to countersign divisional submissions to the PSSC.

4. Having reviewed the assessment provided by the recruiting division, the PSSC recommended that Mr D. be placed in first position. On 7 September 2006 the Director-General decided to appoint Mr D. to the vacant post.

5. The complainant lodged an appeal against the Director-General’s decision. The Appeals Committee, in a well-reasoned report, recommended that it be rejected and the Director-General endorsed that recommendation.

6. As a preliminary matter, the complainant claims in her submissions that she has not had access to a number of documents and has applied for their production. It now appears that she herself has obtained some documents. Accordingly, her application is refused.

7. While acknowledging that the Tribunal has always considered that the appointment of staff members is a matter of discretion, the complainant points to cases which deal with the limits of such discretion (see Judgment 191 and Judgment 1077, under 4). She contends that the decision is vitiated on several grounds.

8. She alleges first that there were procedural flaws. In particular, she submits that when Mr H. endorsed on the memorandum of 29 June 2006 the submission to appoint Mr D., he did so in his capacity as Deputy Director-General and not in his capacity as Officer-in-Charge of the GI, which constitutes, in her view, a form of pressure exerted on the PSSC.

However, there was no inconsistency or impropriety in his acting in either capacity as the handwritten annotation merely supported the submission of the recruiting division.

9. Further, she submits that there was an omission to take into account an essential fact, an affidavit by Mr I., a former member of the PSSC, in which he alleged that the PSSC preferred the complainant but changed her ranking at the insistence of the recruiting division and also in view of the handwritten annotation of Mr H. acting in his capacity as Deputy Director-General.

Various matters should be noted with respect to the affidavit. Firstly, it contains a number of factual errors, including a claim that the second meeting of the PSSC was convened “at the request of the [Deputy Director-General] to re-consider” its earlier recommendation. Secondly, Mr I. cannot attest to matters on behalf of other members of the PSSC; he is certainly in no position to say that “[t]he PSSC also felt that the selection for the post in question was most irregular”. Thirdly, his assertion that the Deputy Director-General was “insistent” on the selection of Mr D. is his own personal conclusion which is not

borne out by the objective facts. The Deputy Director-General was right to point out that the correct procedures had to be observed in relation to the first PSSC recommendation. His subsequent limited endorsement of the recommendation was not inconsistent with his dual roles of Deputy Director-General and Officer-in-Charge of GI. His note on the memorandum of 29 June 2006 could not possibly have compromised the independence of the PSSC or the selection process.

In its report, the Appeals Committee noted that the complainant had produced the affidavit but it made no reference to its content. As already noted, the affidavit had little, if any, probative value and, in these circumstances, it cannot be concluded that the Committee failed to have regard to material facts.

10. Lastly, the complainant alleges abuse of authority insofar as a biased decision was taken which was not in the interests of the Organization. The complainant's assertion is not borne out by the evidence. As already indicated, the selection procedures were correctly followed after the Deputy Director-General intervened to ensure that they were properly observed. His subsequent endorsement of the submission of the recruiting division was not in conflict with his dual role and could not compromise the selection process which was completed by the Director-General's decision of 7 September 2006; the latter took no part in the initial selection process.

11. The fact that another vacancy was once re-advertised, before the complainant was appointed to the post, cannot in and of itself prove any bias against her; nor can her assertion that she was once denied a salary advance, something which in any event the Organization is under no obligation to grant.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron  
Agustín Gordillo  
Giuseppe Barbagallo  
Catherine Comtet