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Case

- d. Whether the Respondent properly observed the Applicant's procedural rights when he performed the 2006 desk audit and made the determination not to reclassify the SCU Post on the basis of the out-dated job description; and
- e. Whether compensation is warranted, in the event that a breach of the Applicant's procedural rights occurred.

Procedural background

5. On 12 February 2007, the Applicant filed his Statement of Appeal with the Joint Appeals Board ("JAB").
6. On 27 June 2008, the JAB issued its Report No. 1997.
7. On 26 January 2009, the Applicant filed his appeal with the former United Nations Administrative Tribunal. The Respondent's Reply was filed in due course.
8. On 1 January 2010, the case was transferred to the United Nations Dispute Tribunal, New York Registry.
9. On 1 June 2010, in response to Order No. 103 (NY/2011), the parties filed a joint statement ("the Joint Statement").
10. On 29 March 2011, both parties participated in a directions hearing. The Respondent offered to call an expert witness who could explain the rules and procedures relating to classification matters. During the directions hearing, the Applicant informed the Tribunal that he believed the matter could be decided on the papers, that there was no need for a further hearing, that he did not wish to call any witnesses and that he waived his right to submit a closing submission. In light of the Applicant's comments, Counsel for the Respondent also agreed that all issues were sufficiently covered in the papers already before the Tribunal.
11. On 29 March 2011, by Order No. 10 (NY/2011), the Tribunal determined that "a further hearing would not be in the interests of the just and expeditious

18. On 19 May 2000, at the request of Mr. Brooks, a desk audit of the SCU Post was performed under ST/AI/1998/9, sec. 1.1(d), by Mr. Bruce Shearhouse, Classification Officer, CCPU, in order to clarify whether the tasks which the incumbent performed were fairly reflected in the SCU Post's job description or whether they needed to be updated. On 25 May 2000, Ms. Brzak-Metzler reported the results of the desk audit to the Executive Office of the Department of Management.

19. On 26 May 2000, Mr. Brooks sent a modified request for the reclassification of the SCU Post to be reconsidered "in light of additional information that has been provided" (which comprised a modified request form, a sample user guide, a statement that funding was available for the SCU Post and the new post number for the SCU Post).

20. On 19 June 2000, Ms. Brzak-Metzler responded that, after review of the functions of the SCU Post further to the submitted material, "the [SCU Post] remain[ed] classifiable at P-3 level".

21. In January 2006 (no date specified), the Applicant requested Ms. Sharon Van Buerle, Director, PPBD/OPPBA, to review the Applicant's job description.

22. By memorandum dated 30 January 2006, Applicant's supervisor at the time, Ms. Thuy Basch, Chief of the SCSE, sent a memorandum entitled "Revision of Job Description" to Ms. Van Buerle. This memorandum included a recommendation that the SCU Post remain at the P-3 level and that the job description be only updated

these comments, the Applicant noted that current job description was drafted over ten years previously, and that the scope of his responsibilities had changed significantly; the Applicant again requested that job description be re-evaluated.

24. On 7 August 2006, Ms. Van Buerle wrote a memorandum to Ms. Brzak-Metzler (now Chief of the Conditions of Service Section (“CSS”), Human Resources Policy Service (“HRPS”), Division for Organizational Development (“DOD”), OHRM), attaching both the memorandum from the Applicant’s supervisor of 30 January 2006 and the memorandum from Applicant of 24 July 2006, asking for advice as to whether a desk audit was required.

25. From August to September 2006, a desk audit of the SCU Post was undertaken pursuant to ST/AI/1998/9, sec. 1.1(d).

26. On 27 October 2006, Ms. Brzak-Metzler sent a memorandum to Ms. Van Buerle, where she stated that “[b]ased on our review, we have determined that the [SCU Post] remains classifiable at the P-3 level”.

27. On 15 November 2006, the Applicant sent email to Ms. Brzak-Metzler, in which he expressed his concern regarding the actions discussed in the 27 October 2006 memorandum and asked for clarification as to whether the desk audit was performed under ST/AI/1998/9, sec. 1.1(a) and classification advice was given under ST/AI/1998/9, sec. 1.2, given, or whether the classification decision and analysis had been taken under ST/AI/1998/9, secs. 2.3 and 2.4. In the Applicant’s view, for either action, the Administration had taken either action improperly in the absence of documents specifically required by ST/AI/1998/9, particularly a complete and up-to-date job description). The Applicant also noted that the point rating worksheet and the notes of the interviews had not been sent to the incumbent of the SCU Post, as required by ST/AI/1998/9, sec 2.4 (emphasis in original):

a) I am not sure about the status of your memorandum [of 27 October 2006]. As outlined in ST/AI/1998/9 section 1.2, the Office of Human Resources Management should provide classification advice for the reclassification of existing posts. I understand that such an

advice should be provided in the form P.148/B, which was not made available to me with your letter.

b) On the other hand in your memorandum you informed [the Director, PPBA, OPPBA] that you had actually determined the level of the post in question. I am surprised to learn this because as per provisions of the ST/IA/1998/9 section 2.2 a request for reclassification shall include, among other things, *complete and up-to-date* job description for the post in question. I am not aware that such a document (P.148) has been prepared and signed by me the incumbent of the post and/or that it has been provided to OHRM.

c) ST/AI/1998/9 section 2.4 outlines that the notice of the classification results including the final rating and/or comments on the basis of which the decision was taken (the Point Ratings Worksheet) shall be sent to the request office and to the incumbent of the post. Again, that was not what I received with your document.

d) I would like to request that these ratings and the notes of the interviews taken during the desk audit be provided to all involved. It came to my attention that not all interviewees have been given a chance to examine and approve their respective notes before they are made official.

In view of the above, could you please clarify whether your memorandum of 27 October 2006 to [the Director, PPBD/OPPBA] was a response on the appropriate action under section 1.1(d) of ST/AI/1998/9 or it was OHRM formal classification decision on the subject post under section 2.4 of ST/AI/1998/9?

28. On 15 November 2006, a Compensation Officer from CSS/OHRM confirmed by email that the notes of the desk audit interviews had not been provided to the staff member interviewed during the desk audit.

29. On 21 December 2006, having received response from the Respondent, the Applicant filed a request for administrative review of the classification decision to the Secretary-General.

30. On 4 January 2007, the Administrative Law Unit ("ALU"), OHRM, acknowledged receipt of the request for review.

31. On 9 January 2007, Ms. Brzak-Metzler sent a memorandum to Ms. Adèle Grant, Chief of the Administrative Law Unit ("ALU"), OHRM, referring to the

Applicant's case. In that memorandum, stated that a specific procedure for desk audits is not elaborated upon under ST/AI/1998/9 and that appropriate process had been followed:

4. In light of the facts as presented and taking into consideration the difference of opinion between [the Applicant] and management concerning the classification level of the functions of the [SCU Post] he is encumbering, it was decided that it would be appropriate to conduct an audit.

5. As regards the auditing of jobs, we would recall that Administrative Instruction, ST/AI/1998/9, on the system for the classification of posts refers to audits in paragraph 1.1(d), but does not elaborate on the procedure for their conduct. Audits are technical in nature and are intended to give an opportunity to collect facts and obtain additional information to ensure a better understanding of the functions of a post as well as the parameters under which the functions of the post are being carried out.

6. In line with established practice, two Classification Officers from the Conditions of Service Section (CSS) scheduled an audit interview with the incumbent of the [SCU Post]. A second interview was conducted with the Chief of the Systems Control Unit (SCU), a third interview with the Database Administrator, and finally, interviews were also conducted with officers outside the SCU, (one in PPBD and the other in ITSD) who interact with SCU in the course of their work. In the case at hand, there were a total of five separate interviews conducted for the purpose of collecting information.

7. As indicated in my memorandum dated 27 October 2006 to [the Director, PPBD/OPPBA], we deemed that the [SCU Post] (number OKA-41-832-T-P-3001) remains classifiable at the P-3 level.

32. On 10 January 2007, ALU/OHRM sent interview of the administrative decision to the Applicant, noting that the comments provided by the Chief, CSS/OHRM, attached to the letter, "have addressed appropriately the issues you have raised in [the Applicant's] letter".

33. On 12 February 2007, the Applicant filed his application with the Joint Appeals Board ("JAB").

34. On 5 April 2007, the Respondent filed his Reply which, for the first time, contained a point rating worksheet for the earlier reclassification of the post in 2000.

CaseNo. UNDT/NY/2010/031/UNAT/1669

JudgmenNo. UNDT/2011/102

38. The relevant provisions of ST/AI/1998/9 (System for the classification of

ratings and comments on the basis of ~~while~~ the decision was taken), that were to be sent both to the requesting ~~offi~~(sec. 2.4) and ~~pro~~vided to the staff member (sec. 2.4);

b. On the issue of the classification ~~re~~views sought in 2000, in all three instances of the review of the SCU Post in 2000, the requesting department and the Applicant were not ~~pro~~vided with the required supporting documentation (i.e., point rating worksheets) to explain and justify the decisions made by CSS/OHRM. ~~By~~ not providing this supporting documentation, CSS/OHRM effectively ~~pr~~ived the Applicant and/or his supervisors at that time from the possi

e. In 2006, a classification notice was prepared and a point rating work sheet was not provided, to explain and support the classification decision;

f. The 7 August 2006 request from the Director, PPBD/OPPBA, to CSS/OHRM only asked for advice as to whether a desk audit was required under ST/AI/1998/9, sec. 1.1, and merely constituted a request for general advice on how to proceed; the CSS/OHRM 27 October 2007 reply was “illegitimate and unwarranted”, since CSS/OHRM did not request OPPBA to prepare and submit a duly-completed request for reclassification of the SCU Post (including the revised job description of the SCU Post (signed by the incumbent, the supervisor, and the head of the office, accompanied by the organizational chart of the unit (ST/AI/1998/9, sec. 2.2)); the interviews carried out by CSS/OHRM were not sufficient, were inadequate and could not provide CSS/OHRM with all the necessary data about the SCU Post;

g. “The issue at hand is not the merits of the classification decision per se or the correct application of the existi

It cannot be so for a simple reason that [CSS/OHRM] did not have in its possession a revised job description in the established format and therefore did not and could not have ALL the necessary information about the post. Knowledge required to perform the functions was but just one parameter to be considered. Applicant also does not agree with Respondent's assertion that a noted change in the knowledge base did not necessarily affect the complexity of the duties and functions leading to the reclassification of a post... A job description is always the minimum required basis and the foundation for a review. Accordingly, Respondent's claim that somehow without a duly completed job description [CSS/OHRM] was able to give due consideration to all aspects of the revised functions is without merit;

- i. The Applicant requests an award of compensation in the amount of the difference in pay actually received by him and the salary and allowances he would have received had he been reclassified as requested, retroactive from 1 March 2000, and compensation for the financial and moral damages suffered by the Applicant for the harm to his career and for the loss in income through the whole career and retirement and specifying that the amount should be not less than one year's net base salary.

Respondent's case

40. The Respondent, in his Reply to the former Administrative Tribunal, advances the following principal contentions:

- a. Regarding the classification decision taken in 2000, the Applicant's appeal is not receivable, as it is time-barred; reference to the 2000 decision was not contained in the original request for review, as required, and nothing prevented the Applicant from appealing the classification decision in accordance with sections 6.1(a) and 6.2 of ST/AI/1998/9;
- b. "Exceptional circumstances", as defined by the jurisprudence of the former Administrative Tribunal do not exist to justify the Applicant's failure to meet the deadlines for appeal; the Applicant's claim of "discovery of a new

- c. Regarding the 2006 decision not to seek reclassification of the SCU Post, the Applicant's appeal is not receivable; the JAB found that it lacked competence *ratione materiae* over the 2006 decision, as it concerned the classification of a post and ST/AI/1998/9, secs. 5, 6 and 7, provides for a special appeals procedure for classification;
- d. Should the Tribunal decide to review the merits of the Applicant's appeal related to the 2006 decision, Applicant's rights were not violated by the Administration's decision not to submit the post for reclassification; a "full-fledged" classification review is only required where a request for classification or reclassification of a post has been made pursuant to the provisions of section 2 of ST/AI/1998/9, which was not done in this case; CSS/OHRM only provided "classification advice" pursuant to section 1.2 of ST/AI/1998/9; ST/AI/1998/9 does not have a provision for a "full-fledged classification review" where OHRM is not requested to provide advice on, or an audit of, the classification level of a post;
- e. The Tribunal should not substitute its judgment for that of the Secretary-General in classification matters; the decision not to seek reclassification of the SCU Post, taken on the basis of the desk audit, was a reasonable exercise of the Respondent's discretionary authority and no justification exists for the Tribunal to substitute its judgment for that of the Respondent;
- f. On the issue of compensation, Applicant's rights have not been violated and, accordingly, he is not entitled to any compensation;

g. Even if the SCU Post had been reclassified to the P-4 level, this does not mean that the Applicant automatically would have been promoted to that level, since the Applicant would have been required to compete for this position, together with other qualified candidates.

Consideration

Is the Applicant's appeal with respect to the 2000 decision receivable?

41. Under former staff rule 111.2(a), the statutory framework for appeals which was in place at the time, a staff member needed request review of an administrative decision within two months of the date that s/he received notification of the decision in writing.

42. The Tribunal has reviewed the Applicant's request for administrative review of 21 December 2006, and notes that the Applicant does not make reference to the 2000 decision but specifically refers to the 2006 decision. The Applicant only raises the 2000 decision in the context of his 2006 appeal. Thus, the matter of the 2000 decision was never properly put before the Secretary-General for administrative review.

43. For the foregoing reasons, the Tribunal finds that the Applicant's appeal with respect to the 2000 decision is not receivable.

Did the discovery of new evidence in 2007 during the review of the 2006 decision, including the point rating worksheet for the 2000 decision, render the 2000 classification decision receivable as constituting exceptional circumstances?

44.

45. The Applicant contends that the failure to provide him with these documents deprived him of being able to make a “meaningful appeal” and that the time limits should be waived due to exceptional circumstances under former staff rule 111.2(f).

46. While the mentioned documents may have added weight to the Applicant’s argument to reclassify, the Tribunal does not accept that the Applicant was prevented from filing an appeal of the 2000 decision simply because the documents had not been provided to the Applicant or because the Applicant was unaware that these documents were in existence. Had the documents been provided and an appeal sought, the Applicant’s appeal may have had a greater chance of success, but the crucial fact remains that the Applicant failed to exercise his right to file an appeal, within the time limits imposed, of the classification decision, of which reclassify,

62. The Tribunal finds that the Respondent breached the Applicant's procedural rights when he performed the 2006 desk audit and made the classification determination not to reclassify the SCU Post.

Is compensation warranted, since the Tribunal has found that a breach of the Applicant's procedural rights occurred?

63. In light of the Respondent's failure to observe the Applicant's procedural rights when the Respondent performed 2006 desk audit and gave classification advice not to reclassify the SCU Post, the Tribunal must consider the issue of compensation. The question is whether the breach of the Applicant's procedural rights has caused any harm to the Applicant.

64. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059, *Iannell* 2010-UNAT-093).

65. The Applicant simply states, without more, that he has suffered harm following the classification advice not to reclassify the SCU Post. The Applicant has not provided any concrete evidence of harm with regard to his career (i.e., that he was not promoted or that he was overlooked for other positions within the Organization) or to his morale, except to state that harm occurred. No evidence exists that, if the breach had not occurred, a reclassification to the P-4 level would have resulted or, if the reclassification had taken place that the Applicant would have been promoted to the P-4 level.

66. The rationale and holding of *Sina* 2010-UNAT-094 apply to the Applicant's case. In *Sina*, while the staff member had the right to be informed of administrative decisions affecting him, the few-day lapse in such notification was deemed by the Appeals Tribunal to be "inconsequential" and with "no consequences whatsoever". The Appeals Tribunal further ruled that it "will not approve the award of compensation when absolutely no harm has been suffered".

67.

to-date job description and, if necessary, the Applicant appealing any decision to the appropriate classification review body as provided for in ST/AI/1998/9.

(Signed)

Judge Marilyn J. Kaman

Dated this 17th day of June 2011

Entered in the Register on this 17th day of June 2011

(Signed)