

The Administrative Tribunal,

Considering the complaint filed by Mr R.S. I. against the Food and Agriculture Organization of the United Nations (FAO) on 6 November 2003 and corrected on 5 February 2004, the FAO's reply of 24 May accompanied by comments provided by Mr N. at the Tribunal's request, the complainant's rejoinder of 9 July and the Organization's surrejoinder of 14 October 2004;

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

Having examined the written submissions;

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

A. The complainant, a British national born in 1955, was recruited in November 1983 as Internal Auditor at grade P-3. At the material time, he was Chief of the Central Accounting Service in the Finance Division, at grade D-1 under a continuing appointment.

In June 2001 he applied for the post of Director of that division at grade D-2. His name was on a list of 13 candidates who were to be interviewed, but he was not retained on the further shortlist of five, from which the selected candidate was appointed.

In an e-mail sent to the Consultant/Interim Director of the Finance Division on 13 March 2002, the complainant enquired about the outcome of the selection process and later on about the reason why he was not on the shortlist. He was informed on 19 March by that Director that the consensus of the interview panel was that the five shortlisted applicants were stronger in management skills and had broader experience than him.

On 4 June 2002 the complainant appealed to the Director-General against the decision to appoint a candidate other than himself to the post. By a letter of 19 July the Assistant Director-General in charge of Administration and Finance rejected his appeal on the Director-General's behalf.

On 5 August 2002 the complainant lodged an appeal with the Appeals Committee. In its report dated 20 June 2003, the Committee recommended rejecting the appeal as unfounded. By a letter of 25 August 2003 the Director-General dismissed the appeal. That is the impugned decision.

B. The complainant challenges the validity of the decision to appoint another staff member to the D-2 post, on several grounds. Firstly, the statutory provisions, such as those requiring that the selection be made with a view to ensuring the highest standards of efficiency and technical competence, were not applied. He contends that there were flaws in the selection process. He was excluded from the shortlist on the grounds that he lacked management skills and experience, but in his opinion the panel that interviewed him did not assess and compare the management skills and experience of candidates in an objective way. For instance, during his interview, he was asked 15 questions, which he was told were put to all candidates. By comparing notes with other candidates, it became clear to him that the other candidates were asked fewer questions, and that the relative experience of each candidate was not objectively assessed. He contends that his experience and management skills are broader than those of the selected candidate.

Secondly, he alleges that the FAO misrepresented his qualifications and experience, which in turn misled the Appeals Committee. Quoting a performance appraisal record as evidence of his management skills, the complainant claims there was no objective reason for his not being placed on the shortlist apart from this misrepresentation as, in his view, his relevant experience far exceeds that of the selected candidate.

Thirdly, the Appeals Committee did not give due regard to significant and essential evidence. He had asked to be present at the Committee's hearings and had asked it to examine a letter he had written on 11 April 2003 which contained essential elements to his case; but the Committee denied both requests.

The complainant seeks the quashing of the decision appointing the selected candidate and wants to be appointed to the D-2 post. Alternatively, he requests an award of compensation representing the difference between his current salary – including benefits such as pension entitlements – and that which he would have received had he been selected for that post. He also seeks moral damages.

C. In its reply the Organization points out firstly that the Director-General has discretionary authority in appointing staff, particularly at senior level. The exclusion of D-level appointments from Professional appointment procedures does not mean that there is no procedure to follow: discretionary authority does not mean arbitrary power. The FAO states that it acted in conformity with the legal requirements. The interview panel had a list of questions which was established in an objective manner and the questions were put to all candidates. In addition, it had knowledge of the internal candidates' qualifications and past performance. In interviewing candidates for a senior managerial post, the panel could not, in the view of the Organization, follow a uniform and pre-determined scheme. There was a need for a real dialogue which would vary from case to case; were that not so the whole process could have been done in writing. In fact, as the complainant was not suitable for the post, he need not have been interviewed at all. Furthermore, it would have been unwise to disregard already-acquired information on a candidate's managerial skills and only take into account what he or she said during the interview. Citing the Tribunal's case law, the Organization adds that the interview panel could and should rely on any useful information.

Secondly, the FAO submits that the complainant is asking for his opinion of his experience and management skills to be substituted for that of the interview panel; however, it is the panel which is entrusted with the responsibility of assessing the respective merits of the candidates. The Organization claims that there is no legal justification for this substitution and that the panel acted in a legally correct manner.

While acknowledging the complainant's technical skills, the FAO asserts that he lacked the required experience and management skills for the post. Contrary to his contention, in appointing a candidate other than him, the Organization acted in a legally correct manner. The complainant attempted to belittle the selected candidate's experience and skills.

Thirdly, the Organization submits that the Appeals Committee did not disregard any significant or essential evidence. The performance appraisal record to which the complainant refers was established when he was at grade P-5; but when he obtained D-1, his duties and responsibilities were different. In a series of memoranda, in particular in a memorandum dated 30 May 2000 from the Consultant/Interim Director of the Finance Division to the Assistant Director-General in charge of Administration and Finance, various shortcomings were mentioned and his managerial skills were not considered to be up to the required level. Hence, in the view of the Organization, no misrepresentation took place.

The Appeals Committee did not allow hearings because it considered, in accordance with the Tribunal's case law, that the facts set out in the case records were sufficient for it to draw its conclusions. Manual paragraph 331.3.6 entitled "Presence at Hearings" confirms that it is up to the Committee to decide whether or not to hold oral proceedings. The appeals process was thus carried out in strict accordance with the statutory provisions as well as the Tribunal's case law.

In his comments the appointed candidate states that he has no additional observations to make but wishes to see the complainant's rejoinder.

D. In his rejoinder the complainant claims that the assessment of his management skills was not based on the official records of his performance but on the memorandum of 30 May 2000 appended to the Organization's reply. He considers that this memorandum constitutes new evidence and that he was deprived of any right to reply to it. In his view the memorandum constitutes a breach of the Organization's duty to bring his alleged shortcomings to his attention in order to resolve the issues; instead, they were reported clandestinely which caused irreparable damage to his career prospects. In addition, the comments made therein did not refer to any event, nor were they supported by any evidence. The complainant concludes that the Organization has placed more importance on this "secret" document than on his official performance appraisals.

E. In its surrejoinder the FAO reiterates its arguments on the selection procedure, the assessment of the complainant's qualifications and the procedure followed by the Appeals Committee. The same questions were put to all interviewed candidates but the ensuing dialogue necessarily varied depending on the responses given by them.

A division director is inherently required to possess management skills, and all known information about the candidates' skills had to be taken into account.

On the assessment of the complainant's qualifications, the Organization says that the memorandum of 30 May 2000 was not "secret" but confidential. It concerned matters relating to the operation of the whole of the Finance Division and certain parts of it were deleted because they were not relevant to the complainant's case.

CONSIDERATIONS

1. The complainant has been employed by the FAO since November 1983. He progressed from Internal Auditor, at grade P-3, to Chief of Receipts, Payments and Treasury Service in the Finance Division, at grade D-1, in 1998. At the material time, he occupied the post of Chief of the Central Accounting Service in the Finance Division, at grade D-1.
2. On 5 June 2001 applications were called for the position of Director of the Finance Division, at grade D-2. The complainant was one of 230 applicants. He was one of 13 interviewed for the position, but was not included in the shortlist of five. One of the shortlisted candidates was subsequently appointed to the position.
3. The complainant appealed in a timely manner to the Director-General against the decision to appoint the successful candidate. He claimed that, had the selection process been properly conducted, he would have been the successful candidate. He asked that the decision be reversed and that he be appointed to the post in question. Alternatively, he claimed compensation and moral damages. He was informed, on 19 July 2002, that the Director-General had decided to dismiss his appeal.
4. On 5 August 2002 the complainant filed an appeal with the Appeals Committee. The Committee reported to the Director-General on 20 June 2003, recommending that the appeal be dismissed as unfounded. The Director-General informed the complainant on 25 August 2003 that he had decided to accept that recommendation. That decision is the subject of the complaint. It is accepted by the FAO that the complaint is receivable.
5. Before the Tribunal the complainant contends that the selection procedure was flawed in that different candidates were asked different questions in the pre-shortlist interviews. He asserts that he had greater and more relevant experience than the selected candidate and that his non-inclusion in the shortlist was because there was not "an objective and fair or equal assessment" of experience and management skills by the interview panel.
6. The complainant also contends that the proceedings before the Appeals Committee were flawed because he was denied an oral hearing. He claims that, had there been an oral hearing, he would have called evidence to establish that different applicants were asked different questions and would have been able to refute claims made by the FAO in the internal appeal that he lacked relevant management skills.
7. By way of relief, the complainant seeks to have the decision to appoint the successful candidate reversed and to be appointed in his place. Alternatively, he claims compensation and moral damages. Additionally, he seeks permission to call evidence as to the process followed by the interview panel.
8. Rule XXXIX, paragraph 4, of the General Rules of the Organization relevantly allows the Director-General to "act in his unfettered judgement in appointing, assigning and promoting staff personnel". Staff Regulation 301.4.2 provides:

"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. [...]"
9. The procedure for selection to posts graded D-1 and D-2 was set out in a memorandum of 21 December 2001 signed by the Directeur de Cabinet. Briefly, that procedure requires a vacancy notice to be issued as soon as possible; any qualified internal candidates should be identified by Heads of Departments and their names and curricula vitae submitted to the Director-General. A shortlist of candidates is then presented to the Director-General who selects the candidates to be interviewed. Interviews are conducted by a panel consisting of the Deputy Director-General, the Directeur de Cabinet and the appropriate Assistant Director-General. Thereafter, the Director-General decides on the appointment on the basis of the evaluations received from the interview panel.

10. The only variation in the set procedure in the present case was that an internal screening process resulted in the elimination of more than two hundred applicants before a decision was made as to who was to be interviewed. As the complainant was one of the persons selected for the pre-shortlisting interview, that is not a matter about which he can complain.

11. The general principles applicable to a decision to appoint one person rather than another to a senior post are well established. Being a discretionary decision, it may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (Judgment 2163, under 1; see also Judgments 1077, 1497, 1549 and 1564).

12. The general principles allow that a discretionary decision with respect to an appointment may be set aside if applicants have not received equal treatment. It is this consideration that is invoked by the complainant's claim that different candidates were asked different questions by the interview panel.

13. The general principles also allow that a mistake as to a candidate's qualifications or experience may constitute a mistake of fact or result in some material fact being overlooked. It is this consideration that is invoked by the complainant's contentions that he had greater experience and skills than the successful candidate, and that the interview panel and the FAO were mistaken as to his management skills. However, and as held in Judgment 1827, the selection of candidates necessarily "requires a high degree of judgment" with which the Tribunal will interfere only if a serious defect is demonstrated. And as was also held in that judgment, a defect of that kind is not established merely by asserting that one is better qualified than the selected candidate.

14. The FAO contests the complainant's claim that different candidates were asked different questions by the interview panel. The complainant's claim may be accepted for present purposes. It is to be expected that questions asked of candidates will differ according to the interviewer's knowledge of the candidate and his or her background, skills and experience. It is also to be expected that they will vary according to the answers given by the interviewee. Moreover, an interview is not simply an interrogation. An interviewee may volunteer information, whether in answer to questions or otherwise, that renders questions asked of other candidates unnecessary or prompts additional enquiry. Given these considerations, it is unreasonable to expect that interviews will conform to some set pattern, much less that all candidates will be asked the same questions. Accordingly, the fact, if it be the fact, that not all candidates were asked the same questions does not, of itself, demonstrate unequal treatment or any other defect in the interview process.

15. Different considerations would apply if, for example, the interview was conducted in such a way as to prevent a candidate giving relevant information as to his qualifications, skills or experience. The only matter to which the complainant points in this regard relates to "change management" which, he claims, was neither included in the requirements of the vacancy announcement nor in the questions put to some interviewees. It is significant that the complainant does not contend that he was not questioned on this topic. Of greater significance, however, is the consideration that "change management" is simply one aspect of general managerial skills and, inevitably, the interview panel would have been aware of the general management experience and skills of internal applicants. In this context, it is not surprising that some candidates were not asked specific questions about "change management". Again, that does not indicate unequal treatment or any other defect in the interview process.

16. Given the nature and role of interviews in the selection process and given, also, the nature of the arguments advanced, the Appeals Committee had no need to hear the evidence which the complainant wished to call to establish that different candidates were asked different questions by the interview panel. Similarly, there is no need for this Tribunal to hear that evidence.

17. The complainant has consistently maintained that he was "more suitably qualified and experienced than the selected candidate" and that he was not selected because there was no "objective and fair or equal assessment" of his experience and management skills. In this regard, he complains of the "weighting" given to these matters by the interview panel.

18. The first matter that should be noted is that management is far from an exact science. Different people may well have different views as to what constitutes "management skills" and, accordingly, may differ in their views as to whether one person is superior in that regard to another. There is no objective basis on which management skills can be measured: all that can be expected is that the persons called upon to assess and compare the relative skills of

one candidate over another will bring to bear their experience and knowledge in forming a value judgement. Similarly, it is a matter of value judgement as to what weight should be given to any particular aspect of a person's management skills and experience.

19. Because the selection of a person for a senior management position is dependent on matters of judgement, it is irrelevant that the complainant believes that he had more suitable qualifications and experience than the selected candidate. The interview panel was entitled to come to a different conclusion.

20. One other matter should be mentioned. The complainant's consistent assertion that he was better qualified and more experienced than the successful candidate has, unfortunately, led to the situation in which the FAO has, unnecessarily, set about proving to the contrary. To this end, it appended to its reply part of a memorandum from the Consultant/Interim Director of Finance which was critical of the complainant's management skills. The complainant claims that, had the Appeals Committee had regard to a letter which he submitted in support of his application to call evidence, the Organization's criticism would have been found to be false and unwarranted.

21. Although one member of the Appeals Committee thought it necessary to have regard to confidential material that was before the interview panel to determine if the selection process was fair, the majority rested their recommendation on the opinion that "the judgement [...] of the interview panel should not be questioned, given their professional experience and actual position". It appears, therefore, that the memorandum played no part in the Committee's recommendation and, in the circumstances of the case, it matters not that the complainant's letter was not taken into account.

22. The complainant has failed to establish that there was any defect in the interview process. As his contentions are entirely concerned with that process, he has also failed to demonstrate reviewable error in the decision of the Director-General as to the appointment in question.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet