

The Tribunal cannot deal with issues on Schemes of service.

For upper grades there is no need to have a technical person as advisor on the interview panel as long as the member chosen know the policies involved

The Appellant, a PMB of the a specialised bureau of the Ministry of (the Ministry) has lodged an appeal to this Tribunal contesting the decision of the Respondent to appoint the Co-Respondent to the post of DDB.

Appellant's Case

The Appellant solemnly affirmed as to the correctness of his Grounds of Appeal (GOA) and his Statement of Case (SOC).

Appellant's GOA as further expatiated in his SOC were as follows:

Ground (1): Procedural flaw. The Appellant contested the suitability of Public Service Commission (PSC) Circular Note No ... of ...which related to the invitation to apply for the post of DDB. He considered the circular as flawed as it drew from an objectionable Scheme of Service, specifically with regards to part (i)(a) and (i)(b) of the qualifications" requirements. The circular stated that the post was filled by selection from among officers of the bureau who

"(i) reckon

(a) at least two years' service in a substantive capacity in the grade of LPMB for an aggregate of at least six years' service in a substantive capacity in the grades of LPMB and PMB

(b) at least six years' service in a substantive capacity in the grade of PMB;

(ii) possess excellent organizing skills and have the ability to meet tight deadlines;

(iii) have good initiatives and possess sound judgment; and

(iv) have strong interpersonal and problem-solving skills".

The Appellant stated that it was not clear whether candidates to the post should have both qualifications or not. This was not clear. In case both (i)(a) and (i)(b) were required then both the Appellant and the Co-Respondent would not qualify for the post. The Appellant had complained to the Ministry on several occasions about the ambiguity of this part of the Scheme of Service but he was not given an answer.

The Appellant averred that the Scheme of Service had been changed without his knowledge. He further averred that the president of his Union had told him that he was not given a copy of the proposed amendments to the Scheme of Service and he was not consulted.

Appellant averred that the post had been filled on the basis of a Scheme of Service where there could be different and contradictory interpretation of the qualifications requirements and the appointment exercise was procedurally flawed.

Ground (2) Undue advantage: The Co-Respondent was given an undue advantage. He averred that both he and the Co-Respondent were appointed as PMB (now restyled) on the same date in the year.... The Co-Respondent had been ADDB from... and ADB from... upto his appointment as DDB. Prior to these years, from..., the Co-Respondent had also been assigned duties on several occasions. The assignment of duties had been on a continuous and recurring basis for periods of more than five years, approved by the Commission at intervals of every six months despite several verbal representations made to the Ministry for equitable opportunity to be given to deserving PMB. This was not in line with natural justice as the recurrent and continuous appointments of the Co-Respondent in assignment of duties' positions of DDB and DB had given the Co-Respondent an undue advantage over the Appellant throughout the recruitment exercise. He referred to the PRB Report 2016 where it was said at paragraph 18.10.13 that "*opportunities for acting assignments should be provided and same be managed in such a manner that would not result in an unfair advantage to anyone except in other circumstances when other administrative arrangements have been made for continuous workflow*".

In his SOC the Appellant explained that, prior to the appointment of the Co-Respondent, the latter ranked 5th in the hierarchy at the Department and he ranked in the 8th position. The POs who ranked 6th and 7th were appointed POs on the same date in the year ... but assumed duty at different dates, thus their ranking. He averred that the other POs were not interested to be assigned higher duties. The Co-Respondent and the Appellant were the only ones to be interested in assignment of duties.

He stated that the posts of DB and DD were vacant since ...and only the post of DD was filled in.... Since then the Co-Respondent had been assigned the duties of DB and another PMB had been assigned the duties of DD. He harped on the fact that the two top posts at the Department had not been filled for more than 10 years.

He also drew attention to the fact that seniority wise there were only a few months difference between him and the Co-Respondent.

Ground (3): Interview panel not properly set up. A DPS who was transferred to the Ministry a few months prior to the interview session formed part of the interview panel as technical advisor. The position of DDB was technical and required formal qualifications and experience in the field and the DPS did not have the wide knowledge, technical expertise and adequate experience at the Ministry in the specific area. He was not qualified to assess his competence in such a specialised and technical area and as such, could not have properly advised the interview panel during the interview exercise. The DPS held a different qualification and was not familiar with the duties of DDB.

Ground (4) Perception of bias.The Appellant averred that he was acquainted with the Chairman of the interview panel. They were previously colleagues at an institution. The Appellant was also previously interviewed in ... by the same Chairman who was chairing an interview panel and the Appellant was not successful. The Appellant felt that the person should not have been part of the interview panel as these previous situations had given rise to a genuine and legitimate perception of bias.

Ground (5) Procedural flaw: The Appellant was deprived of a fair interview as the interview procedure was disrupted by phone calls received from a panel member while the Appellant was answering a question put by that same panel member. Furthermore, being given that there was communication with external parties during the interview session, this situation had also created a negative perception as regards the good conduct of the interview exercise.

The Appellant felt that prejudice had be caused to him as the appointment was perceivably biased, unreasonable, unfair, procedurally flawed and not in line with the principles of natural justice.

The Appellant, therefore, asked the Tribunal to quash the decision of the Respondent to appoint the Co-Respondent to the post of DDB or for such other order that the Tribunal may deem appropriate.

Respondent's Case

The Representative of the Respondent solemnly affirmed as to the correctness of Respondent's Statement of Defence (SOD).

The Respondent averred that the post was filled by selection as per the Scheme of Service. There was one vacancy and it was advertised on ... by way of PSC Circular Note No ... of There were 17 candidates and five of them, including the Appellant were found eligible and were called for interview on.... The Co-Respondent was selected and he assumed duty on....

The Respondent rebutted the grounds of appeal as follows:

Ground 1: The Respondent stated that the Tribunal was not the relevant forum for contesting the suitability of the circular or making any findings as regards the suitability of the Scheme of Service.

The Respondent had been informed that the Ministry had received the representations of the Appellant but such representations by emails had been received after the Scheme of Service had been prescribed. The Ministry had informed the Appellant that his representations would be taken up in the context of the merger exercise and that no action was being taken at that stage to make any amendments to the Scheme of Service. All procedures were followed and consultations were made with the respective unions. The vacancies in the grades of DDB and DB could not be filled earlier as the permanent vacancies occurred only in ... and.... Action could not be taken as the Schemes of Service had to be amended as they dated several years earlier;

Ground 2: The Respondent confirmed that the Appellant was ranked 7th in the grade of PMR while the Co-Respondent was ranked 4th in the grade. The Appellant was also assigned higher duties while the Co-Respondent was assigned the duties of DDB on the ground of administrative convenience.

The Respondent had drawn the attention of the Responsible Officer that acting appointments/assignment of duties on grounds of administrative convenience should not be of a long duration and that the merger exercise should be expedited.

In its SOD the Respondent explained the delay in the filling of the post and the need to amend the Scheme of Service for the post which was only prescribed in The revised Scheme of Service was discussed with the unions and not individually.

The Respondent averred that assignment of duties was done on the basis of seniority and among those willing to be assigned higher duties.

The Respondent stated that any reference to the filling of the post of DB had no relevance to the present appeal. The Appellant was drawing an allowance while he was monitoring the different important projects and with a view that the projects were implemented in a timely manner. Further, the Appellant was assigned the duties of DD once for the period ...to.... The Appellant was transferred to another Ministry for one year with effect from....

The selection exercise was carried out in compliance with the Scheme of Service for the post, the selection criteria and the provisions of PSC Regulations 14 and 19 (6).

Ground 3: The selection panel was adequately constituted and there was no representation by the Appellant regarding the composition of the panel at the time of the interview and even after the interview nor did he make any representation regarding the conduct of the interview. It was only through the present appeal that he was making such averments.

Ground 4: The Respondent took note that the Appellant was acquainted with the Chairman of the selection panel but that such averment was irrelevant to the appeal.

Ground 5: The Respondent averred that the Appellant did not make any representation regarding the conduct of the interview at the time nor after the interview. It was only in the present appeal that he was making such averments.

The Respondent moved that the appeal had no merits and that it be set aside.

Co-Respondent's Case

The Co-Respondent solemnly affirmed as to the correctness of his Statement of Defence (SOD).

He averred that, in rebuttal to the points raised by the Appellant:

- (i) The appointment was made by selection and all procedures were followed
- (ii) The Scheme of Service had been prescribed after consultation with the unions
- (iii) The issue relating to the eventual filling of the post of DB was not related to the present appointment of DDB.
- (iv) He had also been assigned the duties of DDB for which he was given an allowance.
- (v) On grounds (3) (4) and (5) of the GOA, the Co-Respondent did not have any comments

Determination

The Tribunal will address the grounds of appeal seriatim:

Ground 1: This ground is outside the jurisdiction of the Tribunal. The Tribunal is concerned with appointments and in doing so it has to adhere strictly to the prescribed Scheme of Service in force at the time candidates apply for the post. The Tribunal cannot delve on issues relating to anomalies in the content of the Scheme of Service or flaws that may have occurred in its prescription. In the present case, it has been pointed out that there had been consultation with the Unions prior to the prescription of the Scheme of Service and that the representations which Appellant made to the Ministry came by way of emails after the Scheme of Service had been prescribed. The Appellant had been explained the situation. Given that there was a prescribed Scheme of Service and both the Appellant and the Co-Respondent were found eligible and called for interview the Tribunal has no more to say on the issue. Ground 1 fails.

Ground 2: The Appellant has contested the fact that the Co-Respondent had been given long periods of assignments of duties at both the level of DDB and DB. This had given him an unfair advantage as he gained experience. However, there is not much that can be done on this as assignment of duties is given on the basis of seniority and the Co-Respondent being senior-most was assigned such duties. The Appellant made reference to the PRB Report where it is said that opportunities should be given to officers such that no officer is given an advantage. There is no indication as to how this could be done and how officers have to be chosen for assignments of duties and by-passing the senior-most officer. This is a hypothetical desideratum which does not find its way in practice. The problem in this case was that the Scheme of Service was outdated and had to be amended. The problem was further compounded by the fact that the vacancies took time to occur as the incumbents were on leave and had not retired.

The Appellant conceded himself that this gave the Co-Respondent experience. It is apposite to note that such long assignments of duties to the Co-Respondent was against PSC Circular No... of... The circumstances were such that the Co-Respondent had to stay on assignments of duties.

The Tribunal does not find any flaw in the assignments of duties given to the Co-Respondent.

Ground 2 does not hold.

Ground 3: The Tribunal holds the view that the advisor on a selection panel must be someone knowledgeable on the scope and duties of the post for which candidates are assessed. However, one has to make the difference between the purely technical requirements of the post and the policy aspects of the position. For post lower down the cadre the technical aspects take prominence and candidates have to know the nitty gritty of the job in which case the advisor must be a more technical person. However, at higher echelons, the management and policy skills are given priority. In the present case, this relates to the post of DDB and one would expect that the technical aspects must give way to the more policy orientation of the job. The presence of a DPS on the selection panel as contested by the Appellant may not be justified as the Secretary is supposed to advise his supervisors or Minister on policies related to the field. He is expected to be conversant on relevant policies and strategies well enough to be on the selection panel the more so that the posts of DBB and DD were vacant. The Tribunal sets aside this ground.

Ground 4: The Appellant has put in question the presence of the Chairman on the selection panel. However, the mere fact that the Appellant and the Chairperson were acquainted and worked together at ... is not enough to presume any possibility of bias. The fact that the Appellant before a previous interview panel where the same Chairman was present and his application was not successful cannot be a sufficient ground for perception of bias.

The Respondent stated that the Appellant never protested against the presence of the Chairman on the panel. This is a moot point as there is no mechanism set up for such protests. The Tribunal has always queried the Respondent as to how this could be done but never obtained any satisfactory reply. It is quite proper for such protests to be brought before the Tribunal since its setting up in 2008. The onus before this Tribunal to bring proof of any averment rests with the Appellant. There has been none.

Ground 4 is set aside

Ground 5: The Appellant averred that one member of the panel was on the phone while he was answering a question that was put by that same member. This is an irresponsible and discourteous act by any member of the panel which the Tribunal finds unfair to a candidate. It has not been shown, that this actually took place and that this has affected the outcome of the exercise in any manner whatsoever.

The Tribunal, therefore, finds that the appeal has no merits.

The appeal is set aside.