



REPUBLIC OF MALAWI

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

CLEVERSON BANDA & KENNETH M. NYIRENDA.....COMPLAINANTS

AND

MINISTRY OF EDUCATIONRESPONDENT

INQUIRY NO.: 81/2019

FILE NUMBER - MZ/OMB/C/2016/08

CORAM:

- MARTHA CHIZUMA - OMBUDSMAN
- Cleverson Banda & Kenneth Maganga - Complainant
- Mr. Dzongololo and Happy Mwale - Representing Respondent

DETERMINATION

1. We received a complaint from two Complainants, Mr. Kenneth M. Nyirenda and Mr. Cleverson Banda claiming that the Respondents had unfairly treated them by not promoting them upon attaining a higher qualification.
2. We sought comments from the Respondent through investigations but it came out that the matter was far from being resolved. Thus the matter was set down for inquiry which took place on 11th December, 2017.
3. In the inquiry the Complainants testified separately. Mr Kenneth Nyirenda stated that he was employed as a Primary School Teacher in or around 2000. He obtained a study leave to pursue his bachelor's degree at Mzuzu University which he eventually obtained in 2014.
4. He was then posted to Bolero Secondary School and according to him the Head Teacher of his school, reported to the DEM in Rumphi that he had reported for work, He was informed to wait for change of salary to that of Secondary School Teacher.
5. Later he received a letter from Headquarters that he should go to South Western Division. He inquired from the EDM on the same who told him that the posting letter from Headquarters was confusing as it meant that he had to fill a new form GP1. He then advised the Complainant to continue teaching at Bolero whilst this was being sorted out.
6. He never received new salary and in meantime was told that he could not be directly promoted and that he had to attend interviews. He attended interviews in 2016 which he failed.
7. In response the Respondents state that at first promotion for teachers like the Complainant was automatic. Actually what used to happen was that once they had obtained their degree they would usually request for a posting to a Secondary school whilst waiting to be deployed by the Headquarters. Therefore, in this case the Mr Nyirenda was posted to Bolero on Grade L, Primary school although he was teaching at a secondary school,
8. He was later posted to South Western Education Division in Blantyre but he never reported. If he had reported, he would have been given an offer but because he did not he could not be assisted. Whilst this was happening that is when a circular was released prohibiting direct promotion.

9. In as far as Cleverson Banda is concerned the evidence shows that he was initially employed as a primary school teacher. In 2008 he went to upgrade his qualifications and he consequently obtained a bachelor's degree in 2014.
10. The Complainant was deployed to Tukombo Community Day Secondary School of which he went and reported for duties. However he noted that he was still getting salary for a primary school teacher. He wrote the Ministry on the matter but did not get any response. But all his friends with whom he was deployed together started receiving reviewed salary.
11. The Respondents' representative testified that indeed the Complainant visited her office with this complaint. Though he was given an offer letter dated 15th July, 2014, he was not yet promoted.
12. She stated that what was supposed to have happened was that he was supposed to report for duties, then accept the offer and a letter from head teacher that the Complainant reported for duties. This is what should have been sent to Teaching Service Commission to effect the promotion. However, when she went to the Ministry headquarters she found that none of the above mentioned documents were there.
13. The Complainant was contacted to submit all the necessary documents of which he did and the same was forwarded to the Ministry.
14. The Respondent went on to state that still there were some hiccups on the matter since before this was sorted there was now a circular that prohibited direct promotions and that all those that had qualified needed to attend interviews.
15. The Complainant attended interviews for promotion which he failed. The Respondent knows that there are some teachers who reported on time and accepted the offer on time before the prohibition of direct promotion that are getting secondary school teacher salary and accordingly there was no way that they could have helped him .
16. After hearing all parties at the inquiry I directed that I would make a determination after the results of the interviews were released. The results are now out and it has come to my attention that the Complainant was unsuccessful, therefore I will proceed with my determination.

17. For maladministration to be proved against Government according to section 123 of the Constitution and section 5 of the Ombudsman Act the complaint against the public authority has to allege either or several of the following instances; injustice; abuse of power; unfair treatment; manifest injustice or conduct qualifying as oppressive or unfair in an open and democratic society; the exercise or performance of powers, duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) this further includes decision or recommendation made by or under the authority of any organ of Government or any act or omission of such organ that is unreasonable, unjust or unfair or based on any practice deemed as such and also that the powers, duties and functions which vest in any organ of Government are exercised in a manner which is unreasonable, unjust or unfair.
18. The question that has to be determined is whether the Respondents conducted themselves in a manner that fits into any of the instances mentioned above.
19. It is not in dispute that both Complainants upgraded and obtained their Bachelor's Degrees in 2014. It is also not in dispute that as at the time that Cleverson Banda was deployed to Tukombo Secondary School and Mr Nyirongo to Bolero Secondary School they had not been officially promoted to the higher position of a Secondary School Teacher. Mr Cleverson Banda had to officially send the acceptance letter together with a letter from the Headmaster notifying the Teaching Service Commission that he had actually accepted the offer and had started work. Mr Nyirongo was supposed to have reported at South Western Education Division where the Headquarters had deployed him.
20. Both of the Complainants did not fulfill these conditions on time such that by the time the Respondent's Northern Region Office started helping them to get their paper work in order they were caught by the Respondent's circular which prohibited direct promotion. They both attended interviews twice and both times they have failed.
21. In the meantime, the Complainants' colleagues with whom they had graduated at the same time were recognized as Secondary School teachers and were getting appropriate salaries through the same direct promotion. The question

to ask is if in the circumstances of this case the Complainants herein were discriminated against or unfairly treated.

22. **The Public Service Act, Section 4 cap. 1 of the Laws of Malawi** states: *'entry and advancement within the public service shall be determined solely on the basis of merit, namely relative ability, knowledge, skill and aptitude after fair and open competition which assures that all citizens receive equal opportunity'*. This clearly shows that for promotion in the Civil Service, one is subjected to fair and open competition and decisions to promote are based on merit, knowledge and skill and these are decided by the Civil Service Commission after interviews.
23. However the Government Teaching Service Regulations Division 3 section 15 provides that upgrading of the post shall amongst other things be ;
'Upon attainment of a higher educational qualification that would warrant placement into a grade higher than that substantively held before the attainment of the higher education'.
24. I have also read through the circulars mentioned by the Respondent dated 17th July, 2013 (Ref No. Edu/HRD/37) and another circular dated 8th September, 2006 (Ref.No.HRM/ADM/04/5/) prohibiting direct promotion
25. It is clear that since 1994 only way that promotions should be made in public service is through competitive process of interviews and no other way. The circulars mentioned in the above paragraphs simply buttress that position. The 2001 Regulations mentioned above which seem to depart from this position cannot hold to the extent of their inconsistency to the Public Service Act because being regulations they are inferior to the Act in terms of compellability.
26. That said I am aware that the Respondents in total contravention of the law have been effecting direct promotions throughout the existence of this Act. The promotions that are subject of this matter are case on point in this regard. As an Ombudsman am supposed to uphold the law. However, in so doing I would be discriminating against the Complainants whose colleagues has benefited from the same illegality perpetrated by the Respondents.
27. To deal with such injustice the option is to direct that all those teachers that have been directly promoted since 1994 should have their promotions

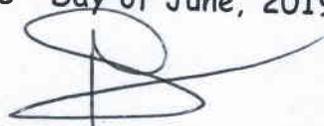
rescinded. However just the idea of that route is an administrative nightmare which could simply collapse the Teaching services and therefore impracticable.

28. My other undesirable option is to simply allow the Complainants herein to enjoy the illegality and for me to direct the Respondents to affect their promotions. However I also note that the reason why the Complainants found themselves in the position that they are today is because of their own lack of diligence. Unlike their colleagues Mr Cleverson Banda did not submit his paper work on time and Mr Kenneth Nyirongo did not report at the station he was deployed to. In the circumstances and also in view of the law it would be irresponsible for me to affirm their claim.
29. That said my plea is that the Respondents should with immediate effect stop making all these illegal promotions which do nothing but throw the Ministry into incredible chaos and suffering for its teachers. As per the law no promotion should be effected without a competitive interview. We cannot as a nation continue to politicize these promotions. The effects of such actions are quite devastating to the teaching services and standards and therefore general development of the whole country.
30. Nevertheless, I dismiss the claims in their entirety.

RIGHT OF REVIEW

31. Any Party dissatisfied by this determination and with sufficient interest in the matter has a right to apply for review to the High Court in accordance with section 123 (2) of the Constitution within 90 days from the date of this determination.

Dated this 18th Day of June, 2019



Martha Chizuma

OMBUDSMAN