

**IN THE POLICE BOARD**

**NUKU'ALOFA**

**NO: 3-8 of 2012**

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Judgment - "Police Board"*  
  
09/04/13

**POLICE BOARD APPLICATIONS FOR REVIEW**

**BETWEEN**

**ASP Tulu Kalaniuvalu**

(Applicant - No 3 / 2012)

**Sgt Saimone Tano'a**

**IP Siosifa Latu**

**Sgt Tu'ineau 'Oneone**

(Applicants no 4 / 2012)

**Sgt Fielea Faeamani**

**IP Veimau Leone**

**IP Tupou'Otutaha**

(Applicants - No 5 / 2012)

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**IP Siosifa Latu**

**IP Veimau Leone**

**IP Tupou'Otutaha**

(Applicants No 6 / 2012)

**Sgt Fielea Faeamani**

**IP Siosifa Latu**

**IP Veimau Leone**

(Applicants No 7 / 2012)

**IP Siosifa Latu**

(Applicant – No 8 / 2012)

**Sgt Fielea Faeamani**

**Sgt Tu'ineau 'One'One**

**IP Veimau Leone**

**IP Tupou'Otutaha**

(Applicants No 9 / 2012)

(Respondent)

Coram

The Board

Chairman

Justice Cato

Members

Lord Tupou

Mr. Laki Niu

The Applicants in person

Mr. Kefu for the Respondent

**RULINGS OF THE BOARD ON APPLICATIONS for REVIEW  
OF THE POLICE EMPLOYMENT COMMITTEE MADE ON THE  
4<sup>TH</sup> DECEMBER 2012 TO PROMOTE;**

- 1. INSPECTOR LOLESIO HAUSIA to the rank of  
Superintendent, Response manager  
(Application 3 of 2012)**

~~2. CORPORAL HAISIKULU FAKATELI to the rank~~

of Chief Inspector of Police, Tactical Response  
Group manager

**(Application 4 of 2012)**

3. SGT SAIMONE FIFITA to the rank of Chief  
Inspector of Police, Intelligence manager

**(Application 5 of 2012)**

4. IP MELEANE TAUELI to the rank of Chief  
Inspector of police, Professional Standards  
manager

**(Application 6 of 2012)**

5. IP 'OKUSITINO PELEKI to the rank of Chief  
Inspector of Police District Commander PD 4

**(Application 7 of 2012)**

6. ACIP 'AKILEO M LATU to the rank of Chief  
Inspector, Prosecutions manager

**(Application 8 of 2012)**

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**7. SGT SIOSIUA 'ATEVALU** to the rank of Chief  
Inspector of Police, Serious crimes manager  
**(Application 9 of 2012)**

[1] The Tribunal on the 1<sup>st</sup> March, 2013 sat to consider these applications which involved a review of appointments made by the Police Employment Committee, chaired by Commissioner O' Fee and two other senior Police officers. The appointments were made under the provisions of the Tongan police Act, 2010. Foremost amongst the principles of appointment is section 31 which provides that appointments for promotion in the Tongan police is merit based. This may we suspect, have caused concern amongst certain amongst certain members of the Tongan police who had been used to promotion being associated with seniority. Whilst merit is the legislative criterion, we can well understand that amongst senior and long serving Tongan police who have been rejected in favour of younger applicants, there may well be disappointment and even perhaps a feeling of rejection. That is a matter which we are sure the Committee has not overlooked.

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[2] For the most part, the applications before us were similarly crafted. One applicant admitted to having some legal advice and we suspect that at the same or similar precedent was used because the wording of the applications and grounds for review for the most part are similar. None of the applicants were represented by a lawyer, but the grounds advanced were clear. For reasons, which we advance below we do not consider that any of the applications had merit. We emphasize we are not an appeal body. Our role as the Board is simply to ensure that in accordance with principles of review there is no procedural injustice (breach of natural justice), and that decisions have not been made which could be described as arbitrary, or as lacking in principle as to be unreasonable or capricious. We repeat it is not our function in law to substitute our view for the view of the Committee. We are not a Tribunal of appeal in that sense. We have a limited curial role to play. It would be wrong of us to exceed our jurisdiction by meddling or trifling with the decisions made by the statutory authority, the Employment Committee, which is far better placed and experienced in such matters than we are to make decisions on a merit based approach to appointment or promotion of members of the Tongan police.

[3] We emphasize the latter because in every case, grounds of application repeated a common theme amounting to arguments that the appointment was not made on merit, and

~~the decision had resulted in an applicant being promoted over~~  
others more senior and has caused disharmony amongst the Tongan police force. It is not our responsibility as we have said to act as an appeal court. The Employment Committee is the body charged to consider these matters on a merit basis and that does not necessarily involve seniority although in some case seniority and merit may be coincident. Weighing up the merits of individual applications is a delicate matter. There is nothing that we can detect; nor has any evidence been put before us, by affidavit to suggest that each case was not given proper consideration. We have said during argument and indeed emphasize that if evidence is to be given before the Board we would expect this to be on affidavit so that appropriate response and consideration can be given to allegations in a timely way. No evidence was placed before us to suggest that the Committee had acted capriciously or unreasonably, and other than on merit aside from certain allegations raised by IP Leone which we consider below. Further we quote from a passage from the recent judgment given by Chief Justice Scott in Fifita v The Police Board AM 16 of 2012, 8<sup>th</sup> February 2013 involving an appeal from a Police Board review;

“The fact that the Appellant is of the view that his application was more meritorious than that of the Lance

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Corporal does not of itself indicate that the Employment Committee erred."

We dismiss any arguments raised by applicants of this kind.

[4] In any event, the members have all reviewed the individual files and examined each application to ensure that applications were given adequate consideration before individuals were shortlisted or declined and we have examined also the bases upon which decisions to promote were made. We have considered the various recommendations and eventual appointments. We have not detected anything which would suggest to us that decisions made were arbitrary, capricious, or unreasonable and that there exist grounds for intervention.

[5] A number of the applicants complained that they had not been given reasons or had been denied reasons when request had been made for not being shortlisted. We do not consider there is any requirement in law for reasons to be given to candidates who have not been shortlisted. Nor are we prepared to say that reasons should be given, even where requested. Employment matters and decisions such as have to be made in relation to appointments and promotion are often delicate and involve balancing of the merits of other

~~individual applications (and some measure of confidentiality)~~

which would impose an unusually high and onerous task on the Committee should chapter and verse have to be cited and reasons given for the failure of a candidate to make a short list. That is not to say in an appropriate case, reasons could not be given, but we do not think that there is any legal reason to give a decision in such cases. Nor is there any reason to do so in relation to a candidate who having been shortlisted fails to secure the appointment or promotion. However again, it may be considered appropriate in some cases that the Committee provide reasons. We would be reluctant to impose this as a matter of legal obligation. Although in some cases the Committee may chose to give reasons.

[6] There was one issue which concerned the Board in regard to short listing and that was the suggestion that decisions that were made not by the Committee but by the interview panel which in every case made recommendations to the Employment Committee who had the duty of accepting or rejecting the recommendation. In every case, information was provided to the Committee concerning the applicants and where shortlisted and those who had not been shortlisted. Mr. Kefu who was tasked with reviewing the various applications at our request and making submissions, which we found of considerable assistance, argued that because this information

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had been included in the recommendation to the Committee, the Committee could have countermanded the decision not to shortlist up until the time the recommendation was accepted. We accept that is so. Consistently with the opinion of the Chief Justice in Efifa, supra we accept that the Committee may delegate the role of interviewing, short listing, and conducting final interviews and make recommendation. The decision to accept a recommendation must however be a real determination of the Committee, and should not be regarded as a rubberstamp process because that would be an improper delegation. We do not detect that was the case here.

- [7] That disposes of most of the applications. One candidate ASP Tulu Kalaniuvalu objected to the appointment of IP Hausia to the rank of Superintendent of Police, response manager. The applicant chose not to attend the hearing of this application. He also chose not to attend a serious disciplinary review of his employment in the Tongan Police Force. We have considered this application independently, prior to considering the disciplinary charge and recommendation that his employment be terminated.

The grounds of this application was that it was unlawful for the selection panel to conduct the interview in place of the Committee, no promotions standards have been published,

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the appointment was not made on merit, and the decision involved promotion over others more senior and caused disharmony amongst the officers. We do not consider any of these grounds have merit for reasons which we have considered. Also the issue of publication of standards or lack of publication as Fifita also states is not a ground for invalidity of these decisions.

[8] We also mention briefly the complaint of one applicant IP Leone that he was the victim of bias in that he had made a complaint against a member of the interviewing committee on a previous occasion and he contended that the member should not have sat to determine his application or applications. He later had made complaint concerning this. However, we do not think this application has any merit. If the point was to be taken, IP Leone who should have made his objection clear before consideration was given to his application. In another instance, he declined to attend the final interview where he had been shortlisted. That was his choice. We do not think claims of bias can be substantiated where an applicant does not take timely steps to raise his concern. In any event, we would expect such an application to be based on rather more than an allegation set out in an application, but in form of affidavit evidence so that a timely response could be made to it. The applicant also contended that he had heard from a reliable source that in one case that

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of IP Peleki to the rank of Chief Inspector of Police District Commander PD 4 that was a pre-determined decision. Again, we consider that applications of this kind should be properly evidenced by affidavit, and substantiated. Hearsay allegations of the kind suggested here are insufficient to found a basis for review.

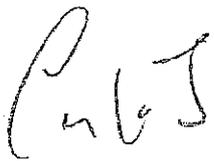
[9] We add that it can be difficult to arrange a suitable time for the Chairman and members of the board who are busy practitioners to sit and determine matters in the time frame provided in the legislation. These matters further require members to read detailed files. One applicant raised with us the review had not taken place within 28 days after receiving the request contrary to s 84 (3) of the Police Act. Whilst this may be so, we view this as a procedural provision and not one that invalidates either our review or indeed the appointments made.

[10] One applicant IP Siosifa Latu sought an adjournment to have legal representation. For the reasons given in 9, namely the difficulty in securing time for hearing we declined this. The issues were presented in the various applications and

we do not consider any applicant to be prejudiced by not having a lawyer present. As we outlined in a minute provided to the Secretariat we do not expect to have applications adjourned for legal representation. On the filing of an application we would expect any applicant to indicate whether he or she will be represented. As we have said also if evidence is to be adduced it should be provided in affidavit form and copies filed with the Secretariat, so that proper and timely response can be made, and application made for the deponent to be cross-examined before us if that is required.

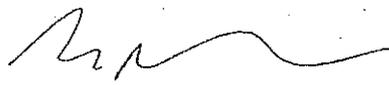
[11] We confirm that Sgt Tu'ineau 'Oneone advised us at the hearing that he was withdrawing his applications.

[12] It is our decision that in every case the application is dismissed.



**Justice Cato**

(Chairman)



**Lord Tupou**

(Member)



**Mr. Laki Niu**

(Member)

**DATED: 11<sup>th</sup> MARCH 2013**