



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel, Registrar

DIATTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 16 November 2012, the Applicant, a retired staff member since 30 April 2014, filed an application contesting the decision not to select him for the position of Director, Documentation Division, Department of General Assembly and Conference Management (“Director, DD/DGACM”) at the D-2 level (“the Post”). Three separate job openings were issued for the Post between December 2010 and November 2011. The third job opening, which resulted in the contested selection decision, notified to the Applicant in June 2012, was advertised under job opening number 11-ADM-DGACM-21524-D-NEW YORK (“JO 21524”).

2. The Applicant requests that the Tribunal: (a) find that the Respondent completely disregarded the rules governing the staff selection system; (b) find that the Respondent’s decision to not include the Applicant on the list of recommended candidates was tainted by improper and illegitimate motives; (c) find that the Applicant was plainly and egregiously denied his right to a full and fair consideration of his meritorious case for selection; and (d) set aside the contested decision, if feasible, and order “appropriate compensation” or, alternatively, compensation equivalent to the salary at the D-2 level from 1 August 2012 until his date of mandatory retirement on 30 April 2014.

Facts

3. The first job opening regarding the Post (number 11-ADM-DGACM-17359-D-NEW YORK (“JO 17359”)) was advertised with a posting period of 31 December 2010 to 1 March 2011. The Applicant indicated that he received confirmation of his application for the Post on 10 February 2011.

4. The second job opening regarding the Post (number 11-ADM-DEPT FOR GA & CONFERENCE MGMT-19376-R-NEW YORK (“JO 19376”)) was advertised with a deadline of 14 May 2011. The Applicant and seven other candidates, including

two female candidates, were short-listed and participated in a competency-based interview. The Applicant was assessed as only partially meeting the requirements and was not among the four candidates who were recommended for the post.

5. A comparative analysis of the candidates included the following comments in the “Interview Assessment” column in respect of the Applicant:

While the candidate has direct conference management experience, all examples were tied to his work at the ICTR dating back to 1998-2001. Though verbose, the candidate’s responses were vague and not on point. Candidate’s presentation during interview was neither focused nor well articulated. Partially meets the requirement.

6. By memorandum dated 30 June 2011, the Chairman of the Senior Review Group submitted the names of the four recommended candidates to the Secretary-General for consideration.

7. In a note dated 13 October 2011, the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) was advised that “the recommendation was not accepted by the Secretary-General” and asked to advise DGACM to re-advertise the position.

8. The Post was then re-advertised. JO 21524 was posted between 27 October and 26 November 2011. The job opening including the following information:

Assessment Method

Eligible applicants will be assessed via an essay, which may be followed by a competency-based interview depending on the result of the essay.

Special Notice

SPECIAL NOTE: This is a reissuance of Job Opening 19376. This job opening has been posted for an additional 30 days to attract a larger pool of candidates. Qualified female candidates are encouraged to apply. ...

...

9. Eight candidates, including the Applicant, were short-listed for the position. Six of the short-listed candidates were internal and two were external. Three of the short-listed candidates were female.

10. The short-listed candidates took part in a competency-based interview. The five-member interview panel consisted of the Under-Secretary-General, DGACM (“USG/DGACM”), two directors from DGACM, a director from the Office of Human Resources Management (“OHRM”), and a director from the Department of Public Information.

11. By memorandum dated 28 December 2011 to the Chair of the Senior Review Group, the USG/DGACM submitted the recommendations of the interview panel. Attached to the memorandum was a comparative analysis of all of the interviewed candidates. The following comments were provided in the “Interview Assessment” column in respect of the Applicant (emphasis in original):

While the candidate has direct conference management experience, and acts as OIC of the Documentation Division from time to time, all examples relates to his work at the ICTR dating back to the period from 1998-2001. Though verbose, his responses were vague and not on point. Partially meets the requirement.

12. By email from the ASG/OHRM dated 16 April 2012, the USG/DGACM was advised that the Secretary-General had selected a candidate for the Post. However, this candidate declined the Post. The Secretary-General selected one of the other recommended candidates and, by email dated 6 June 2012, the ASG/OHRM advised the USG/DGACM of the Secretary-General’s decision to appoint the selected candidate.

13. By email dated 11 June 2012, the USG/DGACM advised a number of colleagues, including the Applicant, of the decision to appoint the selected candidate, stating:

Please note that the contents of my 17 April 2012 email notification have been overtaken by events. Following [Ms. V’s] decline of the

offer, the ASG/OHRM informed me on 6 June that the Secretary-General had decided to appoint [Ms. L] to the position. ...

14. By email dated 13 June 2012, the Deputy Executive Officer, DGACM, personally advised the Applicant that a candidate other than him had been selected for the Post.

15. On 5 July 2012, the Applicant submitted a request for management evaluation of the selection decision.

16. By memorandum dated 24 July 2012, addressed to the Chief of the Management Evaluation Unit, the USG/DGACM attached documentation regarding the selection exercise for job openings 21524 and 19376, and provided the following explanation for the decision not to select the Applicant (emphasis in original):

For JO 21524, for which I was the Chair, I wish to state that the majority of the panel members found [the Applicant] as *'requiring development'* in one or more of the following competencies: accountability, technological awareness, leadership and managing performance. The only competency that he was deemed unanimously fully competent was professionalism.

Mr. Diatta's candidature was fully and fairly considered. It was his performance at the competency-based interview, on both occasions, which was below par. Each time, he failed to convince the five-member panel of his proven ability in four out of five requisite competencies, which resulted in his exclusion from the recommended list.

17. By letter dated 1 August 2012, the Under-Secretary-General for Management advised the Applicant that based on a review by the Management Evaluation Unit, the Secretary-General had decided to uphold the decision not to select the Applicant for the Post.

Procedural history

18. On 15 November 2012, the Applicant filed the present application after his motion for extension of time was granted by Order No. 218 (NY/2012).

19. On 21 December 2012 the Respondent filed his reply.

20. The case was assigned to the undersigned judge on 2 July 2014.

21. By Order No. 250 (NY/2014), dated 28 August 2014, the parties were instructed to attend a case management discussion (“CMD”) on 11 September 2014 to: (a) clarify the claims and the legal and factual issues in the case; (b) consider whether any further information or particulars were required from either party; (c) decide whether a hearing should be held, and, if so, to identify the witnesses to be called, or if the case was to be determined on the basis of the documents; (d) to consider any other matter relevant to a just and expeditious disposal of the case, including, if applicable, alternative resolution to the dispute.

22. A case management discussion (“CMD”) was held on 11 September 2014 at which the Applicant expressed a desire for a hearing on the merits to be held in this case.

23. By Order No. 263 (NY/2014), dated 15 September 2014, the Tribunal ordered the Respondent to file and serve all relevant documentation relevant to the selection processes for JO 19376 and JO 21524. The Tribunal also ordered the parties to inform the Tribunal, by 24 October 2014, whether any further evidence was necessary, including witnesses, and, if not, whether the case could be determined on the papers. If no further evidence was necessary, the parties were ordered to submit their closing submissions on 7 November 2014.

24. The parties filed initial closing submissions on 7 November 2014. The Applicant recalled that, at the CMD on 11 September 2014, he had expressed a desire for a hearing on the merits to be held in this case. He stated that he had “only now

been able to secure commitments from his two prospective witnesses ... they are prepared to provide testimony ...”.

25. In light of the Applicant’s response, the Tribunal convened a second CMD on 20 November 2014. The parties agreed that, taking into account that the Applicant’s proposed witnesses were only going to provide evidence regarding the Applicant’s character and professionalism, and not the contested post selection process, they could present submissions in the form of written statements.

26. On 5 December 2014, the Applicant filed witness statements and the Respondent filed further documentation as ordered by Tribunal.

27. By Order No. 341 (NY/2014) dated 16 December 2014, the Tribunal ordered the parties to appear at a hearing on the merits on 14 January 2015. The Applicant gave evidence at the hearing.

28. On 5 March 2015, the parties filed the final closing submissions.

Applicant’s submissions

29. The Applicant’s principal contentions may be summarized as follows:

- a. The selection decision violated the Staff Regulations, specifically staff regulations 4.2, 4.3 and 4.4;
- b. The selection decision was tainted by improper motives and bias;
- c. The selection decision was not in compliance with the requirements of the job offering;
- d. The Respondent failed to fully and fairly consider his candidacy;
- e. The successful candidate was not suitably qualified.

Respondent's submissions

30. The Respondent's principal contentions may be summarized as follows:
- a. The Applicant was fully and fairly considered for the Post;
 - b. He participated in a competency-based interview during which he did not demonstrate the required competencies;
 - c. The Applicant did not have a right to selection;
 - d. The Applicant has not identified any provision of ST/AI/2010/3 (Staff selection system) that has been violated;
 - e. The selection process was not tainted by extraneous considerations;
 - f. There is no basis to compensate the Applicant.

Applicable law

31. Article 8 of the United Nations Charter provides:

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in the principal and subsidiary organs.

32. ST/SGB/2011/1 (Staff Rules and Staff Regulations), in effect at the relevant time, provided in relevant part:

Regulation 4.2

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.

Regulation 4.3

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Regulation 4.4

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

Rule 11.2

Management evaluation

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

33. ST/AI/2010/3 (Staff selection system) provides in relevant part (emphasis added):

Section 2

General provisions

2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

2.4 Selection decisions for positions at the D-2 level are made by the Secretary-General when the Senior Review Group is satisfied that the applicable procedures were followed.

2.6 This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail

Section 3

Scope

3.1 The process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present instruction. For positions at the D-2 level, the functions normally discharged by a central review body [footnote omitted] shall be discharged by the Senior Review Group [footnote reads: “ST/SGB/2009/2, as may be amended or replaced by a new bulletin on the same subject”] prior to selection by the Secretary-General.

Section 4

Job openings

4.8 The deadline for applying for job openings *shall* normally be:

- (a) 60 calendar days after posting for position-specific job openings in the Professional and above categories, unless in cases of unanticipated job openings OHRM or the local human resources office exceptionally approves a 30-day deadline;

4.9 Generic job openings *will* be posted for the period of time that is deemed sufficient to attract the number of qualified candidates sufficient to satisfy the vacancies projected through workforce planning.

Section 7

Pre-screening and assessment

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

7.6 For each job opening, the hiring manager or occupational group manager, as appropriate, shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of the department/office.

7.9 For positions at the D-2 level, heads of department/office/mission shall submit to the Senior Review Group a shortlist normally containing three names of qualified and suitable candidates, including at least one female candidate. The shortlist will be prepared following interviews by an interdepartmental assessment panel. In making such submission, due regard shall be given to candidates with diverse experience, including career mobility. The

submission to the Senior Review Group from the head of department/office shall be transmitted to the Chairperson of the Senior Review Group through the Secretary of that body and shall include a comprehensive evaluation of the shortlisted candidates justifying their qualifications and suitability for the position. The submission shall also include the personal history profile of the shortlisted candidates and statistics on staff at the D-1 and D-2 levels in the department/office/mission, including information on nationality and gender.

Section 9

Selection decision

9.2 ... For positions at the D-2 level, the Senior Review Group shall provide its recommendation to the Secretary-General, who will make the selection decision.

34. Article 8.1(c) of the Dispute Tribunal's Statute provides:

An application shall be receivable if:

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;
...

35. The Dispute Tribunal's Rules of Procedure provide:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

36. The relevant provisions from the Hiring Manager's Manual – Manual for the Hiring Manager on the Staff Selection System (March 2011) (“the Hiring Manager's Manual”) the Recruiter's Manual – Manual for the Recruiter on the Staff Selection System (March 2011) (“the Recruiter's Manual”), adopted in March 2011, applicable to the selection process for JO 19376 and to JO 21524 are incorporated in the considerations where relevant. It is noted that these manuals have since been updated and reissued.

Consideration

Receivability

37. On 11 June 2012, the contested selection decision was notified to a number of staff members, including the Applicant, by email from the Under-Secretary-General, DGACM (“USG/DGACM”). The email noted that the candidate who was originally selected for the Post (Ms. V) had declined to accept the offer and that the Secretary-General had decided to appoint another candidate (Ms. L). The Applicant was further notified of the decision on 13 June 2012 when the Deputy Executive Officer, DGACM, informed him that his application for the Post had been unsuccessful. The Applicants submit that he received notification of the contested decision by email dated 13 June 2012.

38. On 5 July 2012, within 60 days of receiving notification of the contested decision, the Applicant filed a request for management evaluation. Therefore the Applicant complied with the requirement, set out in staff rule 11.2(c) from ST/SGB/2011/1, that a request for management evaluation must be filed within 60 calendar days from the date on which the staff member received notification of the contested administrative decision. By letter dated 1 August 2012, the Applicant was informed by the Under-Secretary-General for Management that the Secretary-General had decided to uphold the decision not to select him for the Post.

39. On 2 November 2012, the Applicant filed a motion for extension of time to file an application before the Tribunal. He stated that “the catastrophic weather conditions experienced by New York City [as a result of Hurricane Sandy] that eventuated in the closure of the UN Secretariat for three consecutive days”, prevented him from filing his application before the Tribunal by the deadline of 30 October 2012. By Order No. 218 (NY/2012), the Tribunal granted the requested extension of time until 16 November 2012. The application was filed on 15 November 2012, within the deadline established by the Tribunal, and the application is therefore

receivable in accordance with art. 8.1(c) of the Dispute Tribunal's Statute and art. 7.1(a) of the Dispute Tribunal's Rules of Procedure.

The staff selection system and the manuals on the staff selection system

40. In *Korotina* UNDT/2012/178 (not appealed), the Tribunal stated as follows:

As the Tribunal stated in *Villamoran* UNDT/2011/126, at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).

Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the International Labour Organization, Judgment No. 486, *In re Léger* (486)). It is also important to highlight that a distinction must be made between matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that must be introduced by properly promulgated administrative issuances (*Villamoran, Valimaki-Erk* UNDT/2012/004).

41. Section 2.1 of ST/AI/2010/3 (Staff selection system) states:

The present instruction establishes the staff selection system (the "system") which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

42. Section 2.6 of ST/AI/2010/3 states:

This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that

provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

43. ST/AI/2010/3 (Staff selection system) establishes the procedures applicable to the staff selection process (sec. 2.6). The staff selection system manuals for “the Applicant”, “the Hiring Manager”, “the Recruiter”, “the Department Head” and “the Central Review Bodies”, were first issued in March 2011 in accordance with sec. 2.6 of ST/AI/2010/3. The Tribunal appreciates that the issuance of these manuals was mandatory under sec. 2.6 of ST/AI/2010/3, which states that “[m]anuals *will* be issued that provide guidance” (emphasis added), and that the steps set out in these manuals are therefore mandatory and form part of the procedures applicable from “the beginning to the end” of the staff selection process. The Tribunal considers that these guidelines must be respected during the entire staff selection process, except where there is an inconsistency between the text of the manuals and the text of ST/AI/2010/3. In these circumstances, the text of ST/AI/2010/3 will prevail.

44. Section 1.1 of the Recruiter’s Manual issued in March 2011 states that the manual serve as “a comprehensive step-by-step guide on the staff selection process”. A similar provision is included in the manuals for the Department Head and the Central Review Bodies.

45. The Tribunal appreciates that, in accordance with the above-mentioned provisions, the manuals for the Hiring Manager, Recruiter, Department Head and Central Review Body are all comprehensive step-by-step guides on the staff selection process, which means (in accordance with the definition of the word “comprehensive” in the *Oxford English Minidictionary* (Oxford University Press, 1995) and the *Webster’s New World College Dictionary* (Wiley Publishing, Inc., 2010)) that they are including/dealing with all or many of the relevant details of the

staff selection process. Further, the Tribunal appreciates that, once adopted and published on Inspira, these manuals, which establish in detail the steps to be followed in the selection process, must be respected by the Administration.

46. In *Gordon* UNDT/2011/172, para. 24 (not appealed), the Tribunal reiterated that, when the Administration chooses to use a procedure, it is bound to fully comply with it (see also *Mandol* UNDT/2011/013, para. 39 (not appealed); *Applicant* UNDT/2010/211 (not appealed); *Eldam* UNDT/2010/133 (not appealed)).

47. The Tribunal will first analyze the ground of appeal consisting of the Applicant's contention that the "staff regulations and rules and statutory instruments were violated".

Procedural irregularities in job openings

48. Three separate job openings were issued for the Post between December 2010 and November 2011. No information was provided by the parties about the procedural steps followed in JO 17359 for which the Applicant applied. The Applicant was assessed as part of the selection exercises carried out in relation to the second and third job openings: JO 19376 and JO 21524.

49. The Tribunal appreciates that procedural irregularities related to the issuance of the second and third job openings contributed to the violation of the Applicant's rights, and an analysis of all three job openings is therefore relevant. After setting out the applicable law and procedures regarding job openings, the Tribunal will analyze the procedural steps taken in relation to each of the three job openings issued in the stated period in the light of the mandatory legal provisions for the staff selection process.

50. Section 4 of ST/AI/2010/3 (Staff selection system) provides (emphasis added):

Section 4
Job openings

...

4.8 The deadline for applying for job openings *shall* normally be:

(a) 60 calendar days after posting for position-specific job openings in the Professional and above categories, unless in cases of unanticipated job openings OHRM or the local human resources office exceptionally approves a 30-day deadline;

...

4.9 Generic job openings *will* be posted for the period of time that is deemed sufficient to attract the number of qualified candidates sufficient to satisfy the vacancies projected through workforce planning.

51. Section 5.4 (“Understanding Rules on Cancelling and Re-advertising Job Openings”) and sec. 6.5 (“Modifying or Cancelling a Published Job Opening”) of the Hiring Manager’s Manual and sec. 5.7.2 (“Modifying published Job Openings”) and sec. 5.8.3 (“Cancelling and Re-advertising Job Openings”) of the Recruiter’s Manual stated (emphasis in original):

Changes to a published job opening are not allowed [footnote omitted]. However, should changes be requested to a published job opening, the Hiring Manager must provide a detailed written justification explaining the reasons for changes to the Senior Recruiter. The Senior Recruiter will cancel the job posting and if applicable, the Hiring Manager will create a new job opening with the necessary changes. The Recruiter will inform all applicants who have applied of the cancellation of the posting and, if applicable, re-advertisement.

Job opening 17359

52. The first job opening issued for the Post—JO 17359—was posted for 60 days, from 31 December 2010 until 1 March 2011.

53. The competencies listed in the job opening included, *inter alia*: “Professionalism: Expert knowledge of conference management; in-depth understanding of the strategic direction of documentation processing ...”

54. The work experience requirement was:

Over 15 years of progressively responsible experience in activities related to conference servicing and programme management or related area ... of which ten years should be at the international level. Experience in managing diverse teams of people in the United Nations or other inter-governmental organizations is required. Experience in leading projects, including planning and analysis, is required.

55. Under the heading “Assessment Method” the job opening stated: “Eligible applicants will be assessed via an essay, which may be followed by a competency-based interview depending on the result of the essay”.

56. The posting period for JO 17359 complied with sec. 4.8 of ST/AI/2010/3 in that the deadline, 1 March 2011, was 60 calendar days after the job opening was posted on 31 December 2010. The Applicant indicated that he received confirmation of his application for this job opening on 10 February 2011.

57. There is no evidence on the record to indicate what procedural steps were taken after the posting period for JO 17359 expired. It appears that due to the absence, or insufficient number, of female applicants, the recruiter (OHRM) decided to re-issue JO 17359 and to extend its posting period for an additional 30 days. A second job opening—JO 19376—was created and issued for the Post. There is no evidence on the record to prove that JO 17359 was formally cancelled or that those who applied to JO 17359 were notified of its cancellation prior to the issuance of JO 19376.

Job opening 19376

58. JO 19376 was posted for the period 14 April 2011 to 14 May 2011. A special notice was included at the beginning and the end of the job opening, which stated:

This is a reissuance of Job Opening 17359. This job opening has been posted for an additional 30 days to attract a larger pool of candidates. Qualified female candidates are encouraged to apply. Candidates who have applied to job opening (10-ADM-DEPT FOR GA &

CONFERENCE MGMT-17359-R-NEW YORK) are being considered and need not apply.

59. The work experience requirements for JO 19376 were amended as follows (emphasis added):

At least 15 years of progressively responsible experience in programme management required, of which ten years should be at the international level. Knowledge of and experience in conference management is a decided advantage. ...

60. The assessment method and all other requirements set out in the first job opening were maintained in JO 19376.

61. The Tribunal appreciates that the selection process for a post starts with the creation of a job opening (sec. 3.1 of the Hiring Manager's Manual) and ends when the Head of the Office/Department makes the selection decision (sec. 14.3.7 of the Hiring Manager's Manual). A new job opening represents the beginning of a new selection process and cannot be created and or viewed as a continuation of a previous selection process that has been initiated by the publication of the first job opening for the same post.

62. In the present case, the Tribunal finds that there is no evidence to indicate that JO 17359 was cancelled before a new job opening, JO 19376, was published for the same post. There is also no evidence to indicate that the staff members who applied for JO 17359, including the Applicant were informed of the reason for the reissuance of the job opening before the publication of JO 19376.

63. The Tribunal appreciates that in the present case, the publication of JO 19376 for the Post represented, at the same time, a reissuance of JO 17359 and a continuation of JO 17359, which was not cancelled since its posting date was extended for 30 days.

64. The Tribunal notes that JO 19376 modified not only the posting period for JO 17359, but also introduced an important additional working experience requirement for the post: knowledge of and experience in conference management issues, which was to be considered an important advantage.

65. The Tribunal identifies the following procedural irregularities in the selection process initiated by the publication of JO 19376:

a. JO 19736, which was issued as a new job opening, and included new requirements, was not advertised for the required posting period of 60 days (sec. 5.5.1 of the Recruiter's Manual). The job opening indicated that it was to be seen as an extension for 30 days of the posting period for JO 17359;

b. The applicants for JO 17359 were automatically considered applicants for JO 19376, instead of being informed of the cancellation of the job opening. No clear reason for the reissuance of JO 17359 was provided to them. A new job opening must have a new recruitment process and this requirement was not respected;

c. The new job opening was created in order to make changes to JO 17359, specifically to extend the posting period by 30 days and to modify the work experience requirements. There is no evidence that, prior to the publication of JO 19376, a change to the work experience requirement was considered necessary by the Hiring Manager and that he provided the Recruiter with a detailed written justification explaining the reasons for such a change. The Tribunal is of the view that, since no changes are allowed to extend the posting period of a published job opening, which is an essential element of the job opening, the necessary changes to elements of the published job opening can only be made for exceptional reasons during the posting period and not after the expiration of the deadline established for applications;

d. As results from the content of JO 19376, the Recruiter used the new job opening to extend the posting period for a published job opening (JO 17359) after 43 days from the expiration date of the deadline for applications, ignoring the express interdiction from the manuals (cited above)

66. In accordance with the provisions cited above, changes to a job opening are not allowed after the publication of the job opening in Inspira. If changes are to be requested to a published job opening, the hiring manager must (“will”) provide a detailed written justification explaining the reasons for changes to the senior Recruiter. The senior Recruiter must (“will”) cancel the job opening and the Hiring manger must (“will”) create a new job opening with the necessary changes. The Recruiter must (“will”) inform all applicants who have applied of the cancellation of the job opening and, if applicable, re-advertisement. The Tribunal underlines that the posting period is an essential element of the job opening and any change to it represents a change to the JO which is expressly prohibited and these mandatory provisions were not respected when JO 19376 was issued.

67. The Tribunal notes that as results from the evidence on the record the Applicant and seven other candidates, including two women, were short-listed for JO 19376. The written assessment of the short-listed candidates was conducted in June 2011. The candidates’ answers were evaluated anonymously and the candidates’ names were not disclosed to the assessors, who were also the members of the first panel.

68. Following the written assessment, eight candidates, including the Applicant were invited to the competency-based interview. The assessment panel interviewed the candidates and recommended four candidates, who were endorsed by the Senior Review Group on 30 June 2011. The Secretary-General did not select any of the recommended candidates and JO 19376 was reissued under JO 21524.

Job opening 21524

69. The third job opening for the Post—JO 21524—was posted for the period 27 October 2011 to 26 November 2011. A special notice was included in the JO, which stated:

This is a reissuance of Job Opening 19376. This job opening has been posted for an additional 30 days to attract a larger pool of candidates. Qualified female candidates are encouraged to apply. Candidates who have already applied to job opening (10-ADM-DEPT FOR GA & CONFERENCE MGMT-19376-R-NEW YORK) are being considered and need not apply.

70. The content of this job opening was otherwise identical to JO 19376. As indicated in the special notice included in its content, JO 21524 represented a reissuance of JO 19376, which was an extension of JO 19376 and JO 19376 was an extension of JO 17359.

71. The Tribunal identifies the following procedural irregularities in relation to the selection process initiated by the publication of JO 21524, which was in fact the second extension of the posting period for JO 17359:

- a. There is no evidence on the record that JO 19376 was cancelled by the Recruiter prior to the publication of JO 21524;
- b. The required posting period (60 days) for JO 21524, which was also a specific job opening, was not included in the announcement; the new JO did not have an independent posting period of 60 days and the only posting period indicated was an extension for 30 days of the posting period for post 19376;
- c. The new JO was created in order to make changes to JO 19376, specifically to extend the posting period by 30 days;
- d. As stated in the “Special Notice”, the Recruiter used JO 21524 to extend the posting period for a published job opening—JO 19376—ignoring the express interdiction from the manuals (sec. 6.5 of the Hiring Manager’s

Manual and sec. 5.8.3 of the Recruiter's Manual from March 2011 indicated above);

e. JO 21524 was posted after 148 days from the expiration of the posting period for JO 19376 (14 May 2011) and included a special notice indicating that it was a reissuance of JO 19376.

72. The Tribunal notes that as results from the evidence on the record for JO 19376, eleven candidates were short-listed for interview, including the Applicant. Two of those short-listed were women. The written assessment of the previously short-listed candidates for JO 19376 was conducted in June 2011 and for two new candidates short-listed for JO 21524 candidates in December 2011.

73. In the letter from 28 December 2011 sent to the Senior Review Group by the USG/DGACM it was mentioned that JO 19376 was reissued on 27 October and circulated with a deadline of 26 November with "a view to eliciting applications from women, as well as from nationals of un- and under-represented Member States ... All female applicants, internal applicants and those from unrepresented, as well as under-represented countries were given particular attention". The Tribunal notes that for JO 19376 internal and external candidates applied from different Member States, including female applicants, two of them being short-listed. It appears that these aspects were covered by JO 19376.

74. According to the special notice included in JO 21524, the posting period for JO 19376 was extended for another 30 days. The short-listed candidates who applied before for JO 19376, including automatically the ones who applied for JO 17359, were not informed about the results of the selection process for JO 19376 and they continued to be considered candidates for JO 21524.

75. The Tribunal notes that, as stated by the Respondent, female candidates applied for JO 19376 and two of them were shortlisted for the interview. The assessment panel, which included the USG/DGACM and the Director of DGACM,

continued the procedure and finalized it. The Senior Review Group endorsed the recommended candidates, but none of them were selected by the Secretary-General.

76. The Tribunal considers that the situation when no recommended candidates are considered suitable for a post by the Secretary-General is similar to the situation in which the members of the assessment panel consider that none of the candidates are suitable for the post.

77. Section 11.1.1 of the Hiring Manager's Manual and sec 10.3 of the Recruiter's Manual stated:

In the event the assessment panel concludes that none of the recommended candidates are suitable for the position, the Hiring Manager will record the assessment panel's findings in the system. The Hiring Manager will submit to the Senior Recruiter a request to cancel the job opening, along with a detailed written justification explaining the reason why none of the recommended candidates were found suitable.

78. In the present case, no request for cancellation of JO 19376 was made prior to the publication of JO 21524. JO 21524 was a reissuance of JO 19376 through which the posting period for JO 19376 was extended for 30 days.

79. At the hearing, the Applicant testified that he was not informed about his results from the selection process for JO 19376, specifically, his scores from the written assessment and the interview, and that he was not informed that JO 19376 was cancelled. He considered JO 21524 as a continuation of the selection process for JO 19376, which was not cancelled officially since the advertisement for JO 21542 stated that candidates who had already applied to JO 19376 "are being considered and need not apply". The Tribunal finds that there is no evidence on the record to indicate that JO 19376 was cancelled prior to the publication of JO 21524 or that any of the candidates for JO 19376 were officially informed if this did occur.

The composition of the assessment panel for JO 21524

80. The Tribunal notes that the assessment panel for JO 21524 interviewed all of the candidates.

81. Section 9.2 of the Hiring Manager’s Manual and 9.3 of the Recruiter’s Manual stated:

2. The same assessors that arrange for the assessment exercises also conduct the competency-based interviews. All applicants for one job opening are to be assessed and interviewed by the same assessors.

3. ... In identifying and assigning the panel of assessors, by nomination, the **Hiring Manager** must ensure that the individuals selected fulfil the appropriate requirements as follows:

...

d. Freedom from outside pressure – There are no conflict of interest situations ...

...

82. In *Finniss* 2014-UNAT-397, the Appeals Tribunal stated that:

The guidelines in paragraph 9 of ST/AI/2006/3 provide that candidates need to be evaluated against pre-approved evaluation criteria. It is reasonable to expect that the selection process is not only fair but also seen to be fair. Thus, as a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination.

83. The Tribunal refers to the persuasive holding by the Administrative Tribunal of the International Labour Organization (“ILOAT”), Judgment No. 179, *In re Varnet* (1971), where the ILOAT stressed that:

It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice.

Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.

84. The Tribunal is of the view that the members of the assessment panel, even if they do not themselves make the selection decision, have a crucial role in conducting an independent and impartial process, assessing and evaluating the candidates, and submitting a list of recommended candidates to the Department Head, based on which he or she makes the selection decision. Further, the Tribunal considers that all member(s) of an assessment panel have a legal obligation and the correlative right to withdraw, on their own initiative, from an assessment panel if they made a prior assessment regarding one or more candidates and/or if the panel member's impartiality could be open to question on reasonable grounds.

85. In the present case, as indicated in the Respondent's submissions, the assessment panel for JO 19376 included the following staff members: Mr. F.B., Assistant Secretary-General, DGACM; Mr. W.S., Assistant Secretary-General, Department of Management; Ms. J.D., Director, Ethics Office, Executive Office of the Secretary General; Ms. N.T., Director, Office of the Under-Secretary-General, Department of Management; and Mr. M.O., Director, DGACM. This panel evaluated the assessment exercise (written test) and conducted the competency-based interview of the candidates, including the Applicant. They decided not to recommend the Applicant for the Post.

86. For JO 21524, a new assessment panel was established. The members of the panel were: Mr. S.S., USG/DGACM; Mr. I.B., Director, DGACM; Mr. M.O., Director, DGACM; Ms. M.H.L, Director, OHRM, Department of Management; and Ms. D.S., Director, Department of Public Information.

87. The Tribunal notes that Mr. M.O., Director, DGACM, participated as a member of the assessment panels for both JO 19376 and JO 21524. As a member of

the assessment panel for JO 19376, he already assessed the Applicant as not being suitable to be recommended for the Post. The Tribunal appreciates that this member of the panel was no longer in a position to make an impartial decision regarding the Applicant's competencies for the post and he should not have been assigned by the Hiring Manager as a member of the second assessment panel. The Applicant who was not informed until August 2012 that he was not recommended by the panel for JO 19376 was not in a position to exercise his right to recuse this panelist. Therefore, the condition of impartiality of all members of the panel, required by para. 3(c)(i) of sec. 9.3 of the Recruiter's Manual was not respected.

The assessment and evaluation of the candidates

Different treatment of candidates

88. The Tribunal appreciates that the fundamental human rights principle of equal treatment of staff members from art. 8 of the United Nations Charter, which includes, *inter alia*, equal treatment, fairness and transparency during the entire selection procedure for promotion, is fully respected only when all the candidates for each job opening are assessed and/or interviewed by the same assessors. Section 9.2 of the Hiring Manager's Manual and sec. 9.3 of the Recruiter's Manual are an expression of this principle and these mandatory provisions must be respected by the Organization.

89. In the present case, only two of the candidates considered for JO 21524, Ms. L and Ms. V, were evaluated on both the essay test and the competency-based interview by the same assessors—the panel for JO 21524. The rest of the candidates were evaluated by two different panels of assessors—the essay was evaluated by the assessment panel for JO 19376 and the interview was conducted and evaluated by the assessment panel for JO 21524. This resulted in different treatment of the candidates, without an objective and reasonable justification, and despite the fact that all of them had an identical status—short-listed candidates for JO 21524. The Tribunal notes, that being assessed and interviewed by the same panel (assessors for JO 21524) appeared to have created an advantage for Ms. L and Ms. V, who were both

recommended for the post and each offered the post: Ms. V was the initially selected for the Post and after she declined the offer of appointment, Ms. L was offered the Post.

90. The Tribunal considers that the panel for JO 21524, in order to conduct a new, direct, fair and impartial evaluation of each candidate for JO 21524, was required to convoke the most suitable candidates to write an essay and based on the results from the written assessment, invite them to a competency-based interview.

91. The Tribunal is of the view that, even if the panel for JO 21524 decided to expedite the procedure and to use the essays written on 3 June 2011 to assess the candidates who applied for JO 19376, the new assessors for JO 21524, in order to conduct a fair and impartial process, were to directly and anonymously assess these essays together with the ones taken on 1 December 2011 by Ms. L and Ms. V, and not to use the scores awarded by the previous panel for JO 19376. By using the scores awarded by a different panel, the candidates for JO 21524 were divided into two groups.

92. The Tribunal notes that the listed assessment method was identical for all three job openings, each of which stated: “Eligible applicants will be assessed via an essay, which may be followed by a competency based interview depending on the result of the essay”.

93. In a memorandum to the Management Evaluation Unit dated 24 July 2012, the USG/DGACM indicated:

For each job opening [JO 19376 and JO 21524], the review had three components. First, screening of eligible applicants against the evaluation criteria (education, work experience and languages). Second, administration of a written assessment. Third, a competency-based interview by a panel of five members.

Screening review

94. Paragraphs 5 to 7 of sec. 9.1 of the Hiring Manager's Manual and sec. 9.2 of the Recruiter's Manual stated :

5. The preliminary analysis includes the evaluation of the applicant's:
 - a. work experience
 - b. education
 - c. languages
6. The Hiring Manager is required to prepare a reasoned record of the evaluation of the candidates against the evaluation criteria. In doing so, the basis for this evaluation (e.g. application, cover letter, e-PAS, assessment exercise or interview) is indicated. The record should compare the candidates against the evaluation criteria and the job opening, not against one another. The Hiring Manager reviews and modifies the scores for each applicant, followed by short-listing the most promising applicants for the assessment exercises to be conducted by the assessment panel.
7. Applicants who meet all required qualifications but do not meet the desirable qualifications are considered qualified for the job and should be considered for a long list. Applicants who meet both required and desirable qualifications are considered most promising applicants for the position.

95. No evidence was presented to the Tribunal regarding the first component of the review—the preliminary evaluation made by the Hiring Manager for the short-listed candidates for JO 21524 or for JO 19376. Therefore, there is no evidence of the ratings received by each candidate for JO 21524 and JO 19376 during this stage of the assessment.

Essay / written assessment

96. Section 5.1.2.5 of the Hiring Manager's Manual stated:

Essay Exercise

An Essay Exercise could be used to test a candidate's written communication skills, ability to make a case for a particular position

and/or argue a particular point and to persuade others. Usually the candidate is given an issue statement and must explain in writing his/her position on the issue. There is not necessarily a right or wrong position, rather the Hiring Manager is looking for how well the candidate has structured the argument and used facts to prove his/her point.

97. Paragraphs 4 and 5 of sec. 9.3, “Conducting Assessment Exercises”, of the Hiring Manager’s Manual stated:

4. The same written assessment exercise is used for each applicant who must complete the test within the prescribed time and in accordance with the instructions given. The exercise may be conducted in person, or where this is not possible, via e-mail. In order to be fair to all applicants, the same method should be used for all candidates.
5. With the passing grade pre-determined, the assessors rate each individual applicant on the range of set indicators, using the prescribed performance scale and response guide. In a written exercise the components would typically be:
 - a. Clarity of thought and of presentation;
 - b. Capacity to exhibit, in concise writing, logical and sequential thinking;
 - c. Ability to articulate a position, conveying the maximum necessary information whilst making and defending recommendations;
 - d. Proficiency in word processing;
 - e. Thinking logically and analytically;
 - f. Proficiency in presentation techniques.

98. The Respondent indicated in a response, dated 6 February 2015, to Order No. 9 (NY/2015) that the candidates who participated in the written test for JO 19376, including the Applicant, were not invited to sit a written assessment for JO 21524. The assessment panel for JO 21524 took into consideration their results as awarded by the assessment panel established for JO 19376. On 1 December 2011, a written assessment was administrated for JO 21524 and only two new female candidates participated: Ms. L and Ms. V. No evidence was presented by the Respondent to show the final scores received by the two candidates assessed on 1 December 2011

and the Respondent expressly indicated that all the available documents regarding the selection processes for JO 19376 and JO 21524 were presented to the Tribunal.

99. Documents submitted by the Respondent, including one titled “Applicants Scores for the Essay Test” indicate that each member of the assessment panel for JO 19376 awarded a score for the essay. However, the marking sheets submitted by the Respondent providing evidence of these scores only related to the assessment of one member of the assessment panel (the first assessor mentioned in the document). This panel member awarded the Applicant (referred to as applicant A) a score of 93 points for the essay, which, in terms of the scores allocated by this panel member, placed him in the third position, after applicant C (110 points) and applicant J (105 points). No other documents were filed to reflect the rest of the scores received by the Applicant for the essay. Therefore, the contention that the Applicant received the lowest total score for the essay is not supported by evidence.

100. The Applicant was not informed of his final score and/or if he passed the written assessment and he was not aware of the fact that after the interview the panel for JO 19376 did not recommend him for the Post until he received the management evaluation decision from 1 August 2012. The scores included in the document titled “Applicants Scores for the Essay Test” are not supported by the individual signed scoring sheets of the panelists.

101. The Respondent produced to the Tribunal the essays written by the candidates for JO 19376. Each document has the date 27 May 2011 typed at the bottom. It appears from a blank essay scoring sheet filed by the Respondent and dated 30 May 2011, that the essay scoring system was established after the essays had been written on 27 May 2011. It appears that the scoring system for the essay was established only after the written assessment took place and the applicants for JO 19376 were not informed about it as required by section 9.3.4(d) from the Recruiter’s Manual:

When inviting the [applicants] to participate in an assessment process, the Hiring Manager informs them in advance (at least 5 working days)

of the anticipated date of the assessment exercises and provides them with sufficient information on the exercises which should include:

...

d. scoring /ratings to be used – provides a sample assessment record sheet;

...

102. Section 9.3.5 from the Hiring Manager’s Manual states: “With the passing grade pre-determined, the assessors rate each individual applicant on the range of set indicators, using the prescribed performance scale and response guide”.

103. The Tribunal notes that as results from the document “individual ranking of each Panelist/Assessor” from 9 and 10 June 2011, the total score for the eight short-listed candidates for JO 19376 resulted from the weighted scores for the essay, presentation and interview. As results from JO 19376 and the supporting documents regarding the selection process for it, the announced assessment method was an essay, followed by an interview. As results from section 5.1.3.5 of the Recruiter’s Manual, the assessment exercises can consist of: written exercises, case studies, presentations, simulation exercises, technical tests, essay exercises, or other assessment methodologies.

Presentation

104. The section of JO 19376 and JO 21524 titled “Assessment Method” does not include any reference to a presentation as part of the assessment method used to assess candidates for the Post.

105. Section 5.1.3.5 of the Recruiter’s Manual, which defines a “Presentation” for the purpose of assessment exercises, states:

The presentation exercise will provide the candidate with the opportunity to demonstrate his/her knowledge on a particular subject, as well as oral communication skills. Typically, the topic should be given to the applicant with adequate time (at least an hour) to prepare a presentation. The applicant should be made aware that supplementary questions about the presentation may be asked by the

audience. The time limit for the presentation should be clear at the outset.

106. Section 5.1.3.5 of the Recruiter’s Manual, also provides an explanation of an “Essay Exercise”, stating:

An Essay exercise could be used to test a candidate’s written communication skills, ability to make a case for a particular position, and/or argue a particular point and to persuade others. Usually the candidate is given an issue statement and must explain in writing his/her position on the issue. There is not necessarily a right or wrong position, rather the Hiring Manager is looking for how well the candidate has structured the argument and used facts to prove his/her point.

107. It is clear from the parties’ submissions, supported by the available evidence, that the candidates were assessed only through an essay and an interview. The Tribunal concludes that there is no explanation or proof for the scores established for the presentation. The score for the presentation of the essay was the first assessment criteria for the essay, so it cannot be considered being identical with the “presentation” which was scored as a separate exercise and included in the total score of the candidates for JO 19376. There are no explanatory documents in reference to the scores awarded for this separate type of assessment exercise, which was not indicated as being part of the assessment method, and why they were included in the total score.

Competency-based interview

108. Section 9.4, “Conducting Competency-Based Interviews”, of the Hiring Manager’s Manual stated (emphasis added):

1. Candidates scoring high in the assessment exercise are invited to an interview Ideally, all applicants are interviewed in the same manner in order to reduce the risk that the bias of any one individual will prevail.
2. At the time of the preparation of the job opening, the interview questions were prepared. These questions must be competency-

based *and build and expand on the knowledge-based tests and/or the other assessment exercises.*

3. The interview applies the United Nations Secretariat competency-based interviewing techniques. All competencies listed in the evaluation criteria must be consistently applied and covered in the evaluation of all interviewed candidates. Some competencies will be covered in the interview, others in another assessment method commensurate with the functions of the position.

9.4.1.1 What is a Competency-Based Interview

1. A competency-based interview (sometimes referred to as a 'behavioural-' or a 'criterion-based' interview) is a particular type of structured interview in which the assessor's questioning is directed at ascertaining the candidate's qualities or capabilities on a number of job-related dimensions of behaviour (competencies), as defined in the job opening.
2. In contrast to the 'traditional interview', questions from the interviewing panel usually focus on eliciting specific examples from the candidates in which they describe situations where they might (or might not) have demonstrated the required behaviours. These are probed in a systematic way by the assessors *to build up a picture of the relative strengths and weaknesses* of the applicant on the specific competencies.

109. As results from the document from 10 June 2011, the eight short-listed candidates for JO 19376 were scored for the following exercises: essay (weight 15 percent), presentation (weight 25 percent), and interview (weight 60 percent). The Tribunal concludes that 25 percent from the total score for JO 19376 was awarded based on an exercise which never took place.

110. The Tribunal notes that no documents regarding the comparative total scores awarded to the candidates for JO 21524 by the panel for JO 21524 were available to be presented to the Tribunal in the case and finds that there is no evidence regarding the final scores of the candidates for JO 21524, based on which the interview panel for JO21524 decided to recommend three candidates and not to recommend the Applicant. Therefore, it remains unclear if the "presentation" exercise was also used as part of the assessment method for JO 21524, even if it was not mentioned in the JO and if the scores for it, together with the scores for the essay awarded to the

candidates for JO 19376 were automatically included in the total score of the same candidates for JO 21524 by the panel for JO 21524 together with the new scores at the interview. It is also unclear if the “presentation” as an assessment method was part of the total score for the two candidates assessed on 1 December 2011. Moreover, there were no available records for the assessment of interview of the recommended candidates for JO 21524 by Ms. M.H.L. and one of the marking sheets for one of the other candidates was not completed.

111. The “work experience” requirement in JO 19376 and JO 21524 indicated: “Knowledge of and experience in conference management issues is a decided advantage”. The comparative analysis of all interviewed candidates for JO 19376 and JO 21524 indicated that the Applicant’s direct conference management experience was taken into consideration by both panels during the interview assessment. However, the Tribunal observes that the panel for JO 21524 (with different panelists, except one person) made an almost identical evaluation to the one made by the panel for JO 19376: “While the candidate has direct conference management experience ... all examples [related] to his work at the ICTR dating back to [the period from] 1998—2001. Though verbose, [his] responses were vague and not on point. Partially meets the requirement”.

112. The Tribunal notes that the Applicant’s electronic performance appraisal (“e-PAS”) reports for 2009-2010, 2010-2011 and 2011-2012 reflect the Applicant’s performance before, during and after the selection process. The selection process started on 31 December 2010 and ended in June 2012 when the selected candidate was appointed.

113. The e-PAS report for 2009-2010 for the performance period 1 April 2009 to 31 March 2010 was finalized on 28 May 2010 and the e-PAS report for 2010-2011 for the performance period 1 April 2010 to 31 March 2011 was finalized on 16 October 2011. On both performance appraisals, the Applicant was evaluated as “outstanding” for all core values (integrity, professionalism, respect for diversity), six of the eight core competencies (communication, teamwork, accountability, client

orientation, technological awareness, commitment to continuous learning), and all managerial competencies (managing performance, vision, leadership, building trust, judgment/decision making and empowering others). In the 2009-2010 e-PAS report he received an overall rating of “consistently exceeds performance expectations” and in the 2010-2011 e-PAS report he received an overall rating of “exceeds performance expectations”.

114. The e-PAS report for 2011-2012 for the performance period 1 April 2011 to 31 March 2012 was finalized on 14 June 2012. For the core values of integrity and respect for diversity, the Applicant received a rating of “outstanding”. For the core value of professionalism he received a rating of “fully competent”. For the core competencies of communication, planning and organizing, creativity, and technological awareness he received a rating of “fully competent”. For the core competencies of teamwork, accountability, client orientation, and commitment to continuous learning he received a rating of “outstanding”. For the managerial competencies of vision and leadership he received a rating of “fully competent”. For the managerial competencies of managing performance, building trust, judgment/decision making and empowering others he received a rating of “outstanding”. The overall rating was “successfully meets performance expectations”.

115. The Applicant’s performance was also confirmed by the uncontested written statements of Mr. MG, the former direct supervisor of the Applicant during the period 1994 to 1999 and the former Director of the Documentation Division from 2000 to 2001, and Mr. SS, the Applicant’s former direct supervisor as Director of the Documentation Division from 2005 to 2008.

116. In uncontested testimony before the Tribunal, the Applicant noted that he had served as Officer-in-Charge for several months in the period preceding the contested decision and that after June 2012, he continued, until his retirement, to represent or assist the new Director before oversight bodies (Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee of the General Assembly), providing all of the substantive answers.

117. It results that the scores awarded to the Applicant after the interview are contradicted by the rest of the documents (e-PAS) and facts which reflect that he did not need improvement in some crucial areas like leadership and management performance as assessed by the panel.

118. In the light of the above considerations, the Tribunal concludes that the mandatory provisions for the selection process were not followed for the Post and the Applicant's right to be fully and fairly considered for the Post was not respected. Consequently, this ground of appeal is granted.

Allegation of improper motives and bias

119. The Applicant submits that the selection decision was tainted by improper motives. He submits that there was a strong element of bias against him, rooted in the arbitrary conduct of the USG/DGACM, who chaired the selection panel for JO 21524. The Applicant indicates that the USG/DGACM was a member of the assessment panel for the same position in 2008 when he was not selected for the Post. He also stated in testimony that he and the USG/DGACM had been involved in disagreements and held opposite points of view regarding different issues in the French Translation Unit, which affected the impartiality of this panel member.

120. The Tribunal reiterates that members of the assessment panel have a legal obligation and the correlative right to withdraw, on their own initiative, from the panel if they have made a prior assessment regarding one or more candidates and/or their impartiality as a member of the panel could be open to question on reasonable grounds. The Tribunal is of the view that, in order to preserve the fairness of the entire selection procedure, the applicants invited for an interview have the right to recuse any panelist(s) where that applicant has reasonable grounds to believe that the impartiality of the panelist could be open to question. However, such a recusal request, which can be formulated orally or in writing, must be made in good faith and submitted diligently, as soon as possible, after the panel members are announced. Such a request may be made before the interview, during the interview or after the

interview, but must be made before the panel's decision regarding the recommended candidate(s) for the Post is taken.

121. The Tribunal appreciates that the fact that the USG/DGACM was a member of the assessment panel for the same position four years ago, in 2008, does not itself constitute an element of bias against the Applicant. No recent events related to the result of the selection process from 2008 were presented, the Applicant did not contest the selection process from 2008, he did not bring any of these issues before the panel for JO 21524 and he did not diligently exercise his right to recuse the chair of the panel as soon as possible after the panel was constituted and known to the Applicant, accepting that the entire panel is impartial. No evidence was presented by the Applicant indicating that the USG/DGACM acted arbitrarily. Consequently, the Applicant's contentions regarding the presence of a strong element of bias against him, rooted in the arbitrary conduct of the USG/DGACM, who chaired the selection panel for JO 21524, are rejected.

Allegations that the requirements of the job opening were not respected

122. The Applicant submitted that the job opening requirement for working experience was not respected and that the selected candidate lacked the crucial competency element of the necessary years of experience in conference management as compared with his experience.

123. JO 21524 required “[a]t least 15 years of progressively responsible experience in programme management ... of which ten years should be at the international level” and not fifteen years’ experience in conference management as stated by the Applicant.

124. The job opening also expressly stated that “knowledge of and experience in conference management issues is a decided advantage” without making any distinction between direct and indirect knowledge of and experience in conference management. The record shows that the panel established the fact that the selected

candidate had the required experience in programme management and indirect experience in conference management. Therefore, because the panel correctly took into consideration the selected candidate's indirect knowledge and experience in conference management, this requirement of the job opening was respected, and the Applicant's contention that the contested decision was taken against the requirements of the relevant job opening is not supported by evidence. This ground of appeal is therefore rejected.

Remedy

125. As established by the jurisprudence of the Appeals Tribunal, a staff member has no right to be selected for a post, but has the right to be fully and fairly considered for the post. This right has a fundamental nature.

126. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated (emphasis in original):

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

- (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee [footnote omitted].
- (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or

procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

127. The Applicant testified that he was adversely affected by the delays in the selection process and the fact that his evaluation did not reflect his real performance, which resulted in him not being recommended for the Post. However, he stated that he brought the case before the Tribunal only in the interest of justice and not for financial reasons. Consequently, the Tribunal finds that in the absence of an express request for compensation for moral damages arising from the breach of the Applicant's due process right to be fully and fairly considered for the Post, the present judgment itself represents the reasonable and sufficient relief requested by the Applicant in this regard.

128. The Tribunal concludes that in the present case, the Applicant's right to be fully and fairly considered for the Post was not respected, but even if he was recommended, he had no right to be selected for the Post. In *Ljungdell* UNDT/2011/208 (affirmed by the Appeals Tribunal in Judgment No. 2012-UNAT-265), the Dispute Tribunal held that it is for the Administration to determine the suitability of each candidate and the Tribunal should not substitute its judgment for that of the Secretary-General in the assessment of a candidate's suitability for a given post.

129. In *Abbassi* 2011-UNAT-110, the Appeals Tribunal held that the Secretary-General has a broad discretion in making decisions regarding promotions and appointments and, in reviewing such decisions, it is not the role of the Dispute Tribunal or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

130. Taking into consideration this consistent jurisprudence, together with the fact that the Applicant retired from the Organization on 30 April 2014, the Tribunal rejects the Applicant's request to set aside the contested decision and to award him compensation equivalent to the salary at the D-2 level from the date of entry on duty

as Director, DD/DGACM on 1 August 2012 until the date of his mandatory age of retirement on 30 April 2014.

Conclusion

131. In the light of the foregoing, The Tribunal DECIDES:

132. The rules governing the selection process were not entirely followed and consequently the Applicant's right to be fully and fairly considered for the Post was not respected. These grounds of appeal are granted and the rest of the application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of June 2015

Entered in the Register on this 19th day of June 2015

(Signed)

Hafida Lahiouel, Registrar, New York