



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MELPIGNANO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marisa Maclellan, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision to find him ineligible for the post of Human Resources Assistant (GS-6), Reference Verification Unit with the United Nations Logistics Base/Global Service Centre (“UNLB/GSC”), in Brindisi, Italy, advertised under Vacancy Announcement (“VA”) VA-13-14 (046).
2. The selection process has not yet been concluded; it is currently put on hold in compliance with this Tribunal’s Order No. 93 (GVA/2015).¹
3. As remedies, the Applicant requests:
 - a. Rescission of the contested decision, and/or a compensation of six months’ salary for violation of his rights and loss of opportunity in career advancement; and
 - b. Any other order that the Tribunal might find suitable in the circumstances.

Facts

4. The Applicant joined UNLB in 1999 as an Administrative Clerk (GS-3). Since then, he held several different positions, and was promoted to the GS-4 and, subsequently in November 2012, to the GS-5 level. He currently holds a fixed-term appointment as a Human Resources Assistant (GS-5).
5. UNLB was established by General Assembly resolution 49/233 B of 23 December 1994 and started operating in early 1995.
6. By facsimile dated 8 August 1996 entitled *Placement and promotion of locally recruited general service staff members*, the then Chief, Personnel Management and Support Service, Field Administration and Logistics Division, Department of Peacekeeping Operations (“DPKO”), circulated to the Chief Administrative Officers (“CAO”) of various missions the following documents:

¹ Refer further to paragraph 25 below.

a. Terms of reference of the placement and promotion subsidiary panel of General Service staff; and

b. Suggested information circular to which was annexed a document titled *Guidelines for promotion of locally recruited general service at the established mission*.

7. The facsimile specified that these documents related to the then impending replacement of the annual promotion exercise for locally-recruited general service (“GS”) staff members in “established field missions”—where posts had been classified by a placement and promotions system. It further specified that the suggested information circular and its annexed guidelines “should be issued locally to all staff members”.

8. The above-noted Terms of reference did not define their scope of application concerning the entities covered. Instead, their title referred to “established missions”, with a footnote at the end of the document listing five missions, namely, UNTSO, UNMOGIP, UNIFIL, UNDOF and UNFICYP.

9. Similarly, the title of the suggested information circular read:

SUGGESTED INFORMATION CIRCULAR
TO BE ISSUED BY CAO IN MISSION

TO ALL STAFF MEMBERS

PLACEMENT AND PROMOTION:
GENERAL SERVICES STAFF MEMBERS
ESTABLISHED FIELD MISSIONS

while the annexed Guidelines’ title was:

GUIDELINES FOR PROMOTION OF LOCALLY RECRUITED
GENERAL SERVICE STAFF AT THE ESTABLISHED MISSION

(UNTSO, UNDOF, UNFICAP, UNMOGIP, UNFIL.)

10. Paragraphs 5 and 6 of the suggested information circular provide the following:

5. In order to qualify for consideration for internal vacancies, staff-members in the general service category must be recruited through the established recruitment procedures of the United Nations and ... must fulfil among other things, the established requirement of minimum seniority in grade.

6. The established requirement of minimum seniority in grade is as follows:

...

for promotion to GS-6 and GS-7 - four years

11. Along the same lines, paragraph 8 of the Guidelines (Review of Eligibility) reads:

8. The mission's Personnel Section conducts a first screening for eligibility of applicants. Staff members are eligible for promotion if they:

...

(b) fulfill established minimum seniority requirement as outlined below:

...

for promotion to GS-6 and GS-7 - four years

12. In 2002, Administrative Instruction ST/AI/2002/4 (Staff selection system) was promulgated. In sec. 5.3, it provided that "[t]ime-in-grade eligibility requirements formerly in use shall no longer be applicable"; sec. 3 defined the scope of application of this administrative instruction and it did not exclude GS staff in missions.

13. In 2006, the above-referred instruction was superseded by Administrative Instruction ST/AI/2006/3 (Staff selection system). Its sec. 5.1 stipulated that "[e]ligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable"; sec. 3, which defined this

instruction's scope of application, did not, once again, exclude GS staff in missions.

14. On 16 April 2008, the Officer-in-Charge, DFS, issued Standard Operating Procedure ("SOP") on Staff selection in UN peace operations, as well as the SOP on On-boarding of staff for UN peace operations. The latter, in its Section E (Terms and definitions), defines "established mission" as:

recognized as a duty station where assignments of one year or longer give rise to an assignment grant. Current operations which are defined as established missions are UNDOF, UNFICYP, UNIFIL, UNLB, UNMOGIP, UNSCO and UNTSO.

15. By memorandum of 3 June 2008, the Office of Human Resources Management ("OHRM") approved an exceptional waiver to the seniority requirement provided for in the Guidelines for national staff in UNLB regarding a specific UNLB G-5 post that had been advertised. This memorandum stated that the Guidelines were "in use at the time in established peacekeeping missions, including UNLB", whilst mentioning DFS intention to review them "to be in conformity with [Headquarters] duty stations, in particular the above-cited sec. 5.1 of ST/AI/2006/3", which abolished any prior time-in-grade or time-in-post requirements.

16. In 2010, Administrative Instruction ST/AI/2010/3 (Staff selection system) was issued and superseded ST/AI/2006/3. This instruction does not provide for any time-in-grade requirements. According to its sec. 3.1, it applies to "the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules at the G-5 and above levels in the General Service category", although, in its sec. 3.2(h), it excludes from its scope of application "[a]ppointment and selection of staff in the General Service category in peacekeeping operations and special political missions".

17. On 29 October 2012, the Director, UNGSC, addressed to all UNGSC staff a document entitled *Administrative Instruction 12/26-01* on the subject of “Eligibility requirements of minimum seniority in grade”. He stressed that the Field Personnel Division (“FPD”), DFS, in Headquarters, had directed UNGSC to fully implement the Guidelines, which established the eligibility requirements of minimum seniority-in-grade; hence, he advised all UNGSC staff that candidates not meeting such requirements would not be placed against a higher level position. He added that the 3 June 2008 exceptional waiver limited to one specific position should not be regarded as “a blanket authorization” to be applied to all similar cases, and that “any current practice [was] to be discontinued”.

18. On 27 May 2014, a post for Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/UNGSC, was advertised by VA No. VA-13-14 (046), with 26 June 2014 as the deadline for applications. In its final section, the VA stated that “[i]nternal candidates at the GS-5 level are eligible to apply after completion of four years of service at the GS-5 level”.

19. On 3 June 2014, the Applicant applied to Temporary Job Opening (“TJO”) TJO 13-14 (048), Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC. This TJO did not contain any time-in-grade requirement. On 21 June 2014, he was notified of his selection for this TJO.

20. On 26 June 2014, the Applicant applied for VA-13-14 (046).

21. As from July 2014, and following his selection for TJO-13-14 (048), the Applicant took up his functions as Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC on a temporary assignment.

22. In response to the Applicant’s email query of 24 July 2014, followed-up by emails of 15 September 2014 and 3 February 2015, the Chief Human Resources Officer, UNGSC, informed him, on 4 February 2015, that having received direction from FPD, “[they] must apply the time in grade requirements for recruitment of G staff”. On the same day, the Applicant sought clarification as to whether, as a result, he had been determined to be not eligible for VA-13-14 (046). In reply, on 5 February 2015, the Chief Human Resources Officer,

UNGSC, confirmed to the Applicant that he was ineligible “due to the time in grade requirements”.

23. On 31 March 2015, the Applicant submitted a request for management evaluation of the 5 February 2015 decision. On the same day, he filed an application for suspension of action pursuant to art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure.

24. By letter dated 7 April 2015, the Management Evaluation Unit (“MEU”) informed the Applicant that his request for management evaluation was deemed irreceivable. The contested decision no longer being under management evaluation, the Tribunal rejected the suspension of action by Order No. 81 (GVA/2015) of 9 April 2015.

25. On 20 April 2015, the Applicant submitted the present application on the merits, together with a motion for interim measures under art. 14 of the Tribunal’s Rules of Procedure. By Order No. 93 (GVA/2015) of 27 April 2015, the Tribunal granted the requested interim measures. As a result, the litigious selection procedure has been put on hold, pending the determination of the present case.

26. A hearing on the merits of this case was held on 26 June 2015. After considering calling one or more witnesses proposed by the Respondent, the Tribunal found that the evidence they were capable of providing was irrelevant, for it essentially related to the practice currently followed in recruiting UNLB local GS staff. As conveyed to the parties at the hearing, the actual practice is undisputed and this case rather hinges on the question of whether such practice conforms with the applicable legal framework.

27. Pursuant to the directions orally provided by the Tribunal at the hearing, on 1 July 2015, the Respondent submitted comments on the consistency of the Guidelines with the Secretary-General’s bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) and the successive administrative issuances governing the Organization’s staff selection system. On 3 July 2015, the Applicant submitted comments thereon.

Parties' submissions

28. The Applicant's principal contentions are:

Receivability

a. The decision to rule the Applicant ineligible is not merely preparatory, but a final one, even when there had not yet been a final candidate selected. As far as he is concerned, it is a final adverse determination on his eligibility, essentially excluding him from the recruitment process. Thus, it had direct legal consequences for him specifically in this recruitment, in not only being ruled ineligible and not having a chance to further compete and possibly being selected, but also in his ability to apply for any G-6 position;

Merits

b. While the Administration's position appears to be that, as articulated in the Guidelines, the VA at issue correctly reflects the time-in-grade requirements of four years for a G-5 candidate to apply to a G-6 position, it is unclear how these Guidelines apply to UNLB;

c. The Guidelines were not properly promulgated, do not apply to UNLB, and contain a time-in-grade requirement that was previously abolished and never subsequently revived;

d. The Guidelines were not properly issued pursuant to secs. 4 and 6 of ST/SGB/2009/4. Whilst they state that they should be issued by each mission to all staff, there is no evidence that this was ever done, or that a properly promulgated issuance was issued directly by UNLB. At best, the memorandum dated 29 October 2012 purports to do so based on DFS instruction. Additionally, nothing shows that the registry procedure in sec. 6 of ST/SGB/2009/4 was followed. Even if the Guidelines were created according to other instruments available at the time, this does not mean that they are properly promulgated or remain valid;

e. The Guidelines were originally addressed to field missions, although such missions needed to implement them by way of information circular. The Guidelines were addressed to specific entities by name, unlike more general type of guidelines without specific addressee; UNLB is not among these entities, despite the fact that UNLB existed at the time the Guidelines were issued. Hence, on the face of them, the Guidelines are not addressed to UNLB;

f. ST/AI/413, on which the Guidelines were based, has long been superseded, and at least three administrative issuances on the subject of staff selection have been in force since then. The Administration cannot selectively choose to apply outdated Guidelines to UNLB;

g. Time-in-grade requirements were expressly abolished by sec. 5.3 of ST/AI/2002/4, and there is no requirement in ST/AI/2010/3 that GS staff must serve for a specific number of years at a particular level to be eligible for the next higher level. Also, it is documented that DFS had intended to review the regime governing the recruitment of locally-recruited staff at least since 2008; the fact that this revision is still pending does not justify using outdated Guidelines that do not apply to UNLB;

h. The Administration's position is that, under sec. 3.2(h) of ST/AI/2010/3, the instruction does not apply to UNLB, and the Guidelines are thus used where a *lacuna* exists. However, it cannot be taken for granted that sec. 3.2(h) of ST/AI/2010/3 directly excludes UNLB from its scope of application and thereby creates a *lacuna* in the legal framework;

i. The Respondent assumes that the Guidelines apply to UNLB because UNLB is a peacekeeping mission, which is not established. In fact, DFS has instructed UNLB/UNGSC that it is not a mission, as stated in the *Frequently Asked Questions ("FAQ") for Executive Offices/Local Personnel Offices regarding Continuing Appointment*;

j. Sec. 2.6 of ST/AI/2010/3 provides that “[m]anuals will be issued to provide guidance”, but that in case of “inconsistency between the manuals and the text of the ... instruction, the provision of the instruction shall prevail”. Furthermore, the Appeals Tribunal has ruled that not only must inferior issuances not supersede superior ones, but they must not add substantive requirements, unless expressly permitted to do so. Therefore, the Guidelines cannot be the basis for an additional requirement;

k. The Administration’s approach amounts to discrimination. It penalises UNLB locally-recruited staff vis-à-vis external candidates—not subject to time-in-grade requirements—and staff in Headquarters, where time-in-grade requirements are not applied;

l. As per paragraph 5.5.1.6.1 (Work Experience) of the Inspira Recruiter’s Manual (Release 3.0 of 10 October 2012):

if the required experience [in a Job Opening] is too specific, this may eliminate perfectly suitable applicants who lack a narrowly defined requirement. Too narrow a description could also lead to concerns that the job opening has been tailored to suit a particular applicant.

m. In the recruitment at hand, the application of the Guidelines ends up imposing too specific a requirement for internal candidates. The requirement of four years of service at the G-5 level sets a level of specificity to the seven years of progressive work experience stipulated in the VA, that rises to the level of a dangerously specific requirement, as envisioned in sec. 5.5.1.6.1 and places undue restrictions on internal candidates;

n. UNLB has waived the litigious requirement in other recruitments, including in TJO 13-14 (048), covering the same post and for which the Applicant was selected.

29. The Respondent's principal contentions are:

Receivability

a. The instant application is premature and thus irreceivable. A final decision has not been taken in the contested VA. The determination that the Applicant is ineligible for consideration is a preparatory step and, as such, not appealable under the Tribunal's Statute. The Appeals Tribunal held in *Ivanov* 2013-UNAT-378 that only one administrative decision completes the selection process; i.e., the selection of the successful candidate, and this is the decision that may be contested by other candidates. All other decisions within the selection process are preparing the final selection and do not amount to a contestable administrative decision;

b. Given that preparatory decisions can only be disputed in light of the final decision, until a final selection decision has been made, there is no administrative decision carrying legal consequences for the Applicant's terms of appointment;

Merits

c. In giving full and fair consideration to candidates, the Administration is bound by the terms of the VA in question. The Administration has broad discretion in selection and appointment decisions and its acts have a presumption of regularity. It is not for the Tribunal to substitute its own judgment for that of the Secretary-General; it can conduct a limited judicial review of the selection exercise to verify if a candidate was fully and fairly considered, which includes a review as to whether a candidate met the specified eligibility requirements;

d. The eligibility requirement contained in the VA at issue was lawful. That was confirmed in several judgments from the former United Nations Administrative Tribunal ("UNAdT") (*Hrubant and Eight Others* No. 389 (1987), *Nayyar* No. 438 (1988), *Rajan* No. 969 (2000));

e. The eligibility requirements for any position are within the discretion of the Administration. Hence, it had the discretionary power to apply the four years' time-in-grade standard. In all recruitments, eligibility requirements must be set and this standard is a reasonable one. The time-in-grade standard is meant to ensure steady and consistent progression of staff between grades and stability within work units. It ensures that staff possess well-rounded experience prior to promotion and consistency in expectations as to when staff members are eligible for promotion;

f. In each instance, the Administration has the discretion to use the standard set out in the Guidelines or, alternatively, if circumstances dictate, apply a different standard. The fact that the time-in-grade requirement was omitted from the TJO for the same post is irrelevant; that was a separate recruitment process, involving recruitment for a limited period of time, pending recruitment for the substantive position;

g. The Guidelines apply to UNLB/UNGSC. Since the latter functions in support of peacekeeping operations, it is staffed and managed by DFS in the same manner as peacekeeping missions. UNLB/UNGSC was considered as an "established mission" and the same policies governing missions were extended to it. Moreover, UNLB/UNGSC is listed as one of the "established missions" in the SOP on On-boarding of staff for UN peace operations;

h. UNLB/UNGSC is treated as a field mission for administrative purposes. It is designated as a headquarters duty station in certain official documents solely for the purposes of benefits and entitlements. In this context, it means locations where the Organization has no developmental or humanitarian assistance programmes or in member countries of the European Union (see, e.g., Administrative Instruction ST/IC/2014/4 (Classification of duty stations and special entitlements for staff members serving at designated duty stations)). The Applicant's reference to the *FAQ for Executive Offices/Local Personnel Offices regarding Continuing Appointment* is misplaced, as the latter concerns a different issue;

i. The Guidelines date back to the time when staff members in entities administered by DFS did not follow the Secretariat recruitment policies, as DFS required a fast and streamlined recruitment to meet its operational needs. It relied, under its delegated authority, on its own SOP and Guidelines. Staff selection systems prior to ST/AI/2010/3 were inapplicable to DFS-administered staff and, under sec. 3.2(h) of said instruction, appointment and selection of staff in the GS category in peacekeeping operations and in special political missions fall outside its scope;

j. Since the promulgation of ST/AI/2010/3, the general staff selection system of the Secretariat includes internationally-recruited staff under DFS administration. DFS planned to review the Guidelines to suppress the time-in-grade requirements, but it was decided, instead, that ST/AI/2010/3 would be reviewed to cover DFS-administered locally-recruited staff. This revision is ongoing, but until its completion, DFS continues its existing practice;

k. The document entitled Administrative Instruction 12/26-01 of 29 October 2012 is not an administrative instruction promulgated pursuant to ST/SGB/2009/4;

l. The Guidelines were issued before ST/SGB/2009/4, in conformity with Secretary-General's bulletin ST/SGB/276 (Integrated management information system: definition of responsibility for the implementation and operation of the system and terms of reference of the steering committee) and Information Circular ST/IC/1993/66 (Placement and promotion) and Addendum 1, and based on the policy set out in Administrative Instruction ST/AI/413 (Placement and promotion);

m. Inasmuch as the VA for the position expressly states the requirement of four years' in-grade service, the Administration was bound to apply the eligibility requirement set out therein in assessing the Applicant's candidacy to the position;

n. Regarding remedies, the contested decision was lawful, as the Applicant did not fulfil the time-in-grade requirement stipulated in the VA. At the relevant time, he had obtained only 18 months of experience at the GS-5 level;

o. Frustration and disappointment as a result of an administrative process do not warrant compensation. Moreover, art. 11.5(b) of the Tribunal's Statute, as amended by General Assembly resolution 69/203, allows for compensation of harm only where harm is supported by evidence, and the *onus* is on the Applicant to substantiate a pecuniary or non-pecuniary damage suffered. The Applicant has not provided such evidence;

p. Even if the Tribunal finds that an applicant's rights have been fundamentally breached, harm cannot be presumed. The Applicant has failed to substantiate such harm. Accordingly, no compensation may be awarded.

Consideration

Receivability

30. According to art. 2.1(a) of its Statute, the Tribunal is competent to adjudicate applications appealing “an *administrative decision* that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (emphasis added) of the concerned individual.

31. The Respondent asserts that the decision identified and challenged in this application does not constitute an appealable administrative decision within the meaning of art. 2 of the Tribunal's Statute.

32. According to the definition adopted by the Appeals Tribunal (*Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030, *Planas* 2010-UNAT-049, *Al Surkhi et al.* 2013-UNAT-304, *Tintukasiri et al.* 2015-UNAT-526), an “administrative decision” is:

[A] unilateral decision taken by the Administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

33. The Tribunal confirms that which it initially found in Order No. 93 (GVA/2015), namely that the decision to declare the Applicant ineligible for the post at stake falls within the above definition and is, hence, open to challenge before the Tribunal. Importantly, the said decision produces direct legal consequences affecting the Applicant's terms of appointment, in particular, that of excluding the Applicant from any possibility of being considered for selection for this particular vacancy.

34. Thus, the impugned decision has direct and very concrete repercussions on the Applicant's right to be fully and fairly considered for the post through a competitive process (see *Liarski* UNDT/2010/134). From this perspective, it cannot be said to be merely a preparatory act, since the main characteristic of preparatory steps or decisions is precisely that they do not by themselves alter the legal position of those concerned (see *Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173).

35. In this connection, the Tribunal has found in the past that the determination that a staff member was ineligible for a given post is a decision reviewable on the merits (*Gusarova* UNDT/2013/072, *Willis* UNDT/2012/044, *Nunez* Order No. 17 (GVA/2013), *Essis* Order No. 89 (NBI/2015)), and it stated in *Korotina* UNDT/2012/178 (not appealed), that:

[T]he decision that the Applicant was ineligible signified the end of the process as far as she was concerned, and in fact the end of the entire selection process as she was the recommended candidate, and thus this decision cannot be described as merely preparatory. The fact that the particular vacancy was never filled does not necessarily mean that the Applicant lacks standing to claim that her rights were violated.

36. The Respondent submits that the Appeals Tribunal held in *Ivanov* 2013-UNAT-378 that the only administrative decision which completes the selection process is the selection of the successful candidate, and all other decisions within the process do not amount to contestable administrative decisions. However, after careful reading of the *Ivanov* Judgment, it is noted that the Appeals Tribunal at no point made such a far-reaching finding.

37. The *Ivanov* case arose from a particular set of circumstances, entirely distinguishable of those in the case at hand. Indeed, Mr. Ivanov took part in a competitive selection procedure for a P-5 post. At the outcome, two candidates were recommended: one was appointed and the other placed on the roster. Shortly thereafter, the successful candidate was laterally moved and the rostered candidate was appointed as a replacement. Mr. Ivanov did not contest the recruitment decision at the time, but only the subsequent appointment of the rostered candidate. It was against this specific background that the Appeals Tribunal found that:

Mr. Ivanov's rights as a staff member were linked to the administrative decision that completed the selection procedure. As such, any breach of his rights could only be caused by that decision and not the later one which simply executed the previous selection.

...

Hence, his standing to challenge the qualifications of the recommended candidates ... came into effect when both the recommended candidate ... was selected for the Post and [the rostered one] was selected for inclusion on the roster.

... Hence, [Mr. Ivanov] cannot create a new opportunity for himself by trying to challenge the subsequent appointment of one of the recommended candidates.

38. To be precise, the Appeals Tribunal ruled that, in Mr. Ivanov's case, the decision that directly affected his rights, thus conferring on him standing to contest, was the recommendation of the two successful candidates. It made no pronouncement on the nature of a decision declaring a candidate ineligible, nor did it even hold that, in a recruitment process, the final selection of a given

candidate is the only type of decision that may entail direct legal consequences for any of the candidates.

39. Further, it is worth noting the Appeals Tribunal's Judgment *Dhanjee* 2015-UNAT-527. In this case, the Applicant challenged the decision not to shortlist him for interview on the grounds that he fell short of the experience requirement. Indeed, this Judgment, while not expressly stating so, appears to equate the effects of said decision with those of a non-selection. Specifically, in its quotation of the first instance judgment at paragraph 46, the Appeals Tribunal alludes to "the decision not to select the Applicant for the contested post, by not shortlisting him to be invited for an interview", and, at paragraph 49, it refers straightforward to the "decision not to select Mr. Dhanjee".

40. At the very minimum, it should be stressed that the Appeals Tribunal certainly did not find that the decision contested by Mr. Dhanjee was not subject to judicial review, as it entered into the merits of his claim against it. However, like in the case at bar, the impugned decision was taken as part of the recruitment procedure, and had the effect of excluding the concerned staff member from further consideration at a stage where the final selection decision had not yet been made.

41. For these reasons, the Tribunal is satisfied that the present application falls within its jurisdiction and is therefore receivable. As such, it will proceed to examine its merits.

Merits

42. It transpires from the contemporaneous records and the Respondent's submissions that the reason why the time-in-grade requirement was included in VA-13-14 (046) was to comply with the Guidelines, as opposed to any inherent feature of the post making four years' experience at the G-5 level particularly desirable to prepare candidates to discharge its duties.

43. With this in mind, the Tribunal will focus on whether the Guidelines, and in particular the time-in-grade requirement prescribed therein, were valid, in force and applicable to UNLB at the time of the contested decision.

Inapplicability of the Guidelines to UNLB

UNLB is not an “established mission”

44. The Guidelines do not contain any provision delimiting their scope of application in terms of entities covered. However, their title—as well as the title of the Terms of Reference and the suggested information circular issued together with them—purports that they apply to “established missions”.

45. No definition of “established mission” is found in the text of the Guidelines, or anywhere in its accompanying documents. Instead, the Guidelines enumerate five established missions: UNTSO, UNDOF, UNFICAP, UNMOGIP, UNFIL. These are indeed the only five entities to whose CAOs the Guidelines were circulated in 1996.

46. It is noticeable that UNLB was not on this list, although it was already in existence for more than a year when the Guidelines were circulated. The Tribunal views this as a strong indication that the authority from which the Guidelines emanated did not intend at that time to have them apply to UNLB.

47. Many years later, Administrative Instruction ST/AI/2003/3 (Special post allowance for field mission staff) provided a definition of “established mission”. As per its sec. 1.2, “[e]stablished mission’ shall refer to a mission recognized as an official parent duty station where assignments of one year or longer give rise to an assignment”. The SOP on On-boarding of staff for UN peace operations, issued by DFS on 16 April 2008, in its “Terms and definitions” section defines “established mission” along the same lines as ST/AI/2003/3, i.e., one “recognized as a duty station where assignments of one year or longer give rise to an assignment grant”.

48. Otherwise observed, “established” simply signifies the longstanding existence of the concerned entity, as opposed to temporary bodies. Thus, the key notion to ascertain is that of “mission”.

49. In this respect, according to the aforesaid sec. 1.2 of ST/AI/2003/3, “mission” means “a peacekeeping or other field mission administered by the Department of Peacekeeping Operations”.

50. Section E of the SOP on On-boarding of staff for UN peace operations, without giving a definition of “mission”, purports to name the “[c]urrent operations which are defined as established missions”; UNLB is included in this list. Yet, the same SOP states at Section A (Purpose):

The objective of this [SOP] is to define and describe the steps to be taken in the on-boarding of staff for UN *peacekeeping operations and special political missions (henceforth referred to as “missions”)* as applied by [FPD] and missions administered by [DFS]. (emphasis added)

51. This SOP indicates (paragraph 2 of Section B (Scope)) that it should be read in conjunction with the SOP governing recruitment and selection, that is, the SOP on Staff selection in UN peace operations, issued on the same day. According to its Section A (Purpose), its objective is “to establish principles governing the process for selection of staff, up to and including the D-2 level, in United Nations *peacekeeping operation and special political missions (henceforth referred to as ‘missions’)* administered by [DFS]” (emphasis added).

52. More recently, ST/AI/2010/3 defines “mission” (sec. 1(r)) as “a United Nations peacekeeping operation or a special political mission”.

53. The Secretary-General’s bulletin ST/SGB/2010/2 (Organization of the Department of Field Support) does not shed much additional light on the definition of “established mission” or “mission”. It rather uses the new terminology of “field operations”; notably, its sec. 2.1(a) sets out that DFS provides administrative and logistical support to DPKO and the Department of Political Affairs “through the delivery of dedicated support to United Nations

peacekeeping operations, special political missions and other field presences, henceforth referred to as ‘field operations’” (emphasis added).

54. Regrettably, the above depicts, to say the least, a confused, fragmented and imprecise concept of “established mission”, which not surprisingly has led to considerable legal uncertainty. Notwithstanding, from this motley variety of provisions two core criteria may be distilled, as the various definitions consistently revolve around one or both of them:

a. The first criterion is that “mission” is simply equivalent to peacekeeping and special political missions. This is notably established under ST/AI/2010/3, which, as the Secretariat’s central issuance on recruitment matters currently in force and the most recent explicit attempt to provide a definition, carries significant weight. It is further reinforced by sec. 1.2 of ST/AI/2003/3, but also by the respective Sections A of the SOPs on On-boarding of staff for UN peace operations and on Staff selection in UN peace operations; and

b. The second criterion is that, in any event, “missions” are located in the field. This is consistent with sec. 1.2. of ST/AI/2003/3 and, to some extent, with ST/SGB/2010/2. Additionally, the facsimile by which the Guidelines were circulated, as well as the suggested information circular that supposedly should have been used for their issuance at the local level, both refer to “established *field* missions” (emphasis added).

55. After analysis, the Tribunal concludes that, irrespective of which of the above two criteria one follows, UNLB is not an “established mission” for the purpose of the Guidelines.

56. Indeed, UNLB is not a peacekeeping or a special political mission. Its mandate i.e., providing logistical support to all missions—is clearly distinct from that of the missions themselves, which translates into a different structure and functions. In fact, as the Respondent argues that UNLB has been “assimilated” or “treated as” one such mission for administrative and staffing purposes, there is an implicit admission that in reality it is an entity of a different nature. This is

confirmed by sec. 9.2(c) of ST/SGB/2010/2, which describes UNLB as part of the “Secretariat’s global telecommunications infrastructure that underpins field operations”. Even the indicative map on the DFS website shows DPKO operations, on the one hand, and special political missions, on the other, while it marks UNLB separately from both.

57. Neither is UNLB a field presence. According to Annex I of ST/IC/2014/4, Italy is a country where duty stations are classified in the Headquarters (H) category; that is, locations “where the United Nations has no developmental or humanitarian assistance programmes or in a member of countries of the European Union” (sec. 2 of ST/IC/2010/4).

58. In addition, the Administration has plainly recognised that UNLB is not a field mission in official public issuances concerning specifically appointment and selection matters. To wit, Question 16, and its related answer, of the document entitled *Continuing Appointments. FAQ for Executive Offices/Local Personnel Offices*, reads:

How would GS staff in UNLB, Brindisi be treated in terms of eligibility i.e. national staff are excluded and these are national staff, but *Brindisi is not a “mission”*.

UNLB is not a field mission and therefore does not fall under 2.3 of the ST/AI/2012/3. UNLB has its own subsidiary panel for appointment and promotion of locally-recruited staff which was established in 1996, pursuant to former staff rule 104.14(d), for the purpose of the review of staff eligible for consideration of a continuing appointment, the UNLB review body will be considered equivalent to the established Secretariat Central Review Bodies. Under section 2.1 of ST/SGB/2011/9. (emphasis added)

59. Likewise, the memorandum of the then Under-Secretary-General, Department of Field Support, dated 13 October 2008 and entitled *Delegation of Recruitment Authority and Responsibility for National Professional Officers* (“NPOs”), states, at paragraph 4:

While flexibility has been exercised in the functions for which NPOs are engaged, the locations where NPOs can be employed are limited to those where there is a need to strengthen national development. Accordingly, NPOs may not be employed at

headquarters duty stations such as the United Nations Logistics Base, Brindisi or the United Nations Peacekeeping Force, Cyprus. (emphasis added)

60. The Tribunal is mindful that the SOP on On-boarding of staff for UN peace operations explicitly cites UNLP among the “established missions”. However, while this SOP includes UNLB in its enumeration (Section E), it contradicts itself by circumscribing at the same time the meaning of “missions” to UN peacekeeping operations and special political missions (Section A), which, as demonstrated in the analysis above, are distinct from UNLB. In any case, the SOP cannot prevail over administrative instructions and other binding issuances of superior legal force, such as ST/AI/2010/3.²

61. Having determined that UNLB is not an “established mission”, it follows that the Guidelines could not be applicable to UNLB.

Applicability of ST/AI/2010/3 to UNLB

62. It is the Administration’s position that the Guidelines were applied in the present selection exercise as the selection system established by ST/AI/2010/3 does not cover GS staff in UNLB, thereby creating a *lacuna* of law that necessitated to be filled provisionally, until the required normative adjustments were made.

63. Sec. 3.1 of ST/AI/2010/3 sets the instruction’s scope to:

the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules at the G-5 and above levels in the General Service category

whereas sec. 3.2 specifically excludes, among other categories of recruitments:

(h) Appointment and selection of staff in the General Service category in peacekeeping operations and special political missions.

² Refer to paragraphs 84 to 87 below.

64. In examining whether UNLB falls under the exception provided for in sec. 3.2(h) of ST/AI/2010/3, the Tribunal recalls that any exception is to be construed strictly and narrowly (*Kasmani* 2010-UNAT-011, *Tran Nguyen* UNDT/2015/002). With this in mind, it takes note of the Administration's argument putting forward that since its inception UNLB has been treated as a mission. In keeping with this approach, according to the Administration, UNLB GS staff are excluded from the regime of ST/AI/2010/3, by virtue of its above-quoted sec. 3.2(h).

65. However, as already found in paragraph 56 above, UNLB is not a peacekeeping operation or a special political mission.

66. In light of the foregoing, and of the above-referenced jurisprudence on the strict interpretation of exceptions, the Tribunal can only conclude that UNLB does not fall under the exception of sec. 3.2(h) of ST/AI/2010/3. Therefore, the Tribunal finds that ST/AI/2010/3 governs the selection process of GS staff in UNLB, and that, consequently, the alleged *lacuna* does not exist.

67. Further, even if such *lacuna* had existed, the approach taken by DFS to fill it appears oddly selective, if not self-serving.

68. First, the record shows that the time-in-grade requirements in the Guidelines have been applied in an uneven and inconsistent manner. The purported "administrative instruction" of 29 October 2012, in stating that the 3 June 2008 exceptional waiver limited to one specific position should not be regarded as a "blanket authorization" to be applied to all similar cases and that the current practice was to be discontinued, strongly suggests that these requirements had been set aside more often than not, apparently since 2008. Even nowadays their application is not systematic, given that the VA at issue does contain the requirements in question, whilst the TJO concerning the same post and issued around the same period did not.

69. Perhaps more important, most of the provisions in the Guidelines, in the Terms of reference, and in the suggested information circular have fallen into disuse; by way of example, paragraph 3 of the Guidelines provides for the

establishment of a “subsidiary panel” for the appointment and promotion of GS staff; paragraph 5 instructs that the mission’s Personnel Section publishes in the mission area lists of GS vacant posts to be filled internally, and paragraph 6 foresees a general deadline of three weeks for application to any GS locally-recruited vacancy. In addition, paragraph 4 of the suggested information circular related to the Guidelines provides that applications be submitted using the application form attached thereto. The Tribunal takes notice of the fact that these provisions are not applied by the Administration any longer. In fact, the seniority-in-grade requirement appears to be the only part of the Guidelines that DFS persists in enforcing.

70. For all other aspects of the recruitment of GS staff in missions, DFS actually follows the SOP on Staff selection in UN peace operations, an instrument far more complete than the Guidelines in respect of its content but that, in terms of legal bearing, may apply to UNLB GS local recruitments, at best, only inasmuch as it conforms to and implements ST/AI/2010/3.³ In any event, in the Tribunal’s opinion, knowing that the Guidelines are not applied as a comprehensive regime, but just for the time-in-grade requirements, the Respondent’s contention that it was necessary to resort to the Guidelines in order to make up for a gap in regulation becomes particularly unconvincing.

Lack of proper promulgation of the Guidelines in UNLB

71. The facsimile of 8 August 1996, by which DPKO conveyed the Guidelines to the respective CAO of five missions, stated that the Guidelines and its related documents had to be issued locally in each mission. As a matter of fact, only in this hypothesis it made sense to attach also the suggested information circular.

72. The Tribunal was not presented with any circular promulgating the Guidelines in UNLB. The so-called “administrative instruction 12/26-01” of 29 October 2012, may certainly not be considered tantamount to such a locally issued circular.

³ Refer to paragraphs 84 to 87 below.

73. Despite the designation “administrative instruction”, the Respondent, through counsel, admitted that this document does not amount to an administrative instruction in the sense of ST/SGB/2009/4. Not only were the strict procedural steps detailed in said bulletin ostensibly and admittedly not followed, but, crucially, the authority from which it emanates, i.e., the Director of UNGSC, is well below the level of the Under-Secretary-General for Management, who is solely vested with the delegated power to issue genuine and operational administrative instructions (sec. 7 of ST/SGB/2009/4).

74. Besides, a simple reading of the text reveals that this document does not claim to promulgate the Guidelines. Quite differently, it assumed that they were already in effect and aimed at reminding the purported duty to apply them.

75. Last, but not least, the document is dated 29 October 2012, whereas the memorandum of 3 June 2008 is evidence that the Guidelines were applied to UNLB at least since 2008. It is only logical that the 20 October 2012 “administrative instruction” cannot possibly be the circular by which the Guidelines were promulgated in the first place.

76. Accordingly, the Tribunal considers that the Guidelines have not been duly promulgated in UNLB, even by their own standards. This is yet another reason why they did not apply to the recruitment under examination.

Lack of valid legal basis for the time-in-grade requirements

Abolition of time-in-grade requirements

77. By the Respondent’s own admission, the Guidelines were originally founded on the administrative issuance that governed the selection procedures of the Organization’s staff at the time of their issuance, to wit, Administrative Instruction ST/AI/413 of 25 March 1996. This instruction allowed for time-in-grade requirements for candidates to different levels. This explains why the former UNAdT may have ruled, in cases dating back to 2000 and before, that the time-in-grade requirements were compatible with the rules applicable at that time.

78. It is clear that in 2002, Administrative Instruction ST/AI/2002/4 superseded ST/AI/413 and set up a new staff selection system. Its sec. 5.3 unequivocally prescribed that “time-in-grade eligibility requirements formerly in use shall no longer be applicable”. Four years later, Administrative Instruction ST/AI/2006/3 superseded ST/AI/2002/4 and re-crafted the regime of staff selection. Again, its sec. 5.1 clearly specified: “Eligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable”.

79. No explicit exceptions were laid down to any of the two cited provisions, and nothing in their plain wording suggested that they were meant to suppress time-in-grade requirements for certain categories of staff only, whilst maintaining them for others, such as GS locally-recruited staff serving at missions.

80. Moreover, while the Respondent submits that the Secretariat’s staff selection system did not cover DFS-administered staff, the Tribunal stresses that the respective secs. 3 of ST/AI/2002/4 and ST/AI/2006/3 carefully defined the scope of application of each of these instructions, and although they both expressly excluded various types of recruitments, neither of them set aside their applicability to GS staff in field missions.

81. It follows that, after the issuance of the Guidelines in 1996, the time-in-grade requirements that stemmed from ST/AI/413 were abolished in unambiguous terms not once, but twice, by ST/AI/2002/4 and ST/AI/2006/3 respectively.

82. On and from 21 April 2010, Administrative Instruction ST/AI/2010/3, which superseded ST/AI/2006/3, established the staff selection system in effect currently and at the time of the contested decision. This administrative instruction did not introduce, or even mention, any time-in-grade requirements. If ST/AI/2010/3 does not explicitly abolish time-in-grade eligibility requirements, which had already been abolished by then, it certainly did not restore them. By no stretch of imagination can this silence be construed as reviving a set of requirements that had been categorically abolished eight years before. The contrary is the case. The requirements had been removed by ST/AI/2002/4 and

ST/AI/2006/3 and were not reinstated. Any such reinstatement would have to be clear and precise. Such is not to be found.

83. While the time-in-grade requirements set out in the Guidelines may have been in line with the administrative issuance governing selection procedures in force from 1996 until 2002, it is now abundantly clear that such requirements have been abolished by the above-referenced administrative instructions. To this extent, the Guidelines have been, and still are, at odds with the relevant administrative instructions successively promulgated since 2002.

The Guidelines in the hierarchy of norms

84. The Guidelines may not contradict duly adopted administrative instructions.

85. As held in *Villamorán* UNDT/2011/126:

29. 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 (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). *Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances* (emphasis added).

30. Due to the importance of administrative issuances, the Administration must follow specific steps when promulgating them. For instance, ST/SGB/2009/4 sets out in sec. 5 the mandatory procedures for consultative process with respect to proposals for administrative issuances, which are aimed at ensuring, *inter alia*: that all relevant rules are prepared in consultation with major organisational units concerned; that issuances affecting questions of work and conditions of service are prepared in "consultation with the appropriate staff representative bodies"; and that all relevant rules and instructions are up-to-date. Further, sec. 6 of ST/SGB/2009/4 stipulates the procedures for control and clearance with respect to all proposals for administrative issuances. Each such proposed issuance shall go through a "central registry in the Office of Human Resources Management", in order to ensure: that its position in the hierarchy and the authority for its establishment are identified; that it is not inconsistent with issuances higher in the hierarchy; that it specifies prior issuances that are superseded or amended; that the

requirements of sec. 5 of ST/SGB/2009/4 have been met; that it has been cleared by the Office of Legal Affairs in order to ensure compliance with sec. 6 of ST/SGB/2009/4; and that it is concise, clear and appropriately expressed, and complies with the rules and directives on United Nations editorial style. Administrative issuances shall not be submitted for signature without certification that all the above requirements have been satisfied (sec. 6.3). They shall also be “published and filed in a manner that ensures availability” (sec. 6.4).

31. The reasons for the existence of these requirements are quite obvious. Administrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization. As stated in sec. 1.2 of ST/SGB/2009/4, “[r]ules, policies or procedures intended for general application may *only* be established by duly promulgated Secretary-General’s bulletins and administrative instructions” (emphasis added). The detailed consultation and approval scheme envisaged by secs. 5 and 6 of ST/SGB/2009/4 aims to ensure that all staff members and managers are aware of and comply with any changes to the rules affecting conditions of employment (see sec. 2.2 of ST/SGB/2009/4). The elaborate promulgation process also ensures that all those concerned are aware of the legal basis and legal force of any new legal norms and their place in the existing legal hierarchy.

86. The Guidelines at issue in this case were circulated under cover of a facsimile by the Chief, Personnel and Management Support Service, DPKO. They were not promulgated pursuant to ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances). Even if the Director, UNGSC, instructed the application of the time-in-grade requirement in the Guidelines through a document purporting to be the “Administrative Instruction”, the latter was manifestly not an administrative instruction in the sense of ST/SGB/2009/4.⁴

87. Accordingly, the Guidelines would be, at best, a non-binding instrument at the bottom of the hierarchy of the Organization’s norms. As such, they cannot run against or supersede superior rules (*Villamorán* UNDT/2011/126, *Korotina* UNDT/2012/178, *Diatta* UNDT/2015/054). Nor can they, as inferior issuances, add substantive requirements not catered for in higher norms, unless expressly permitted or authorised to do so (*Johnson* 2012-UNAT-240).

⁴ Refer to paragraph 73 above.

88. The foregoing is consistent with sec. 2.6 of ST/AI/2010/3:

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* (emphasis added).

89. In fact, as a matter of principle, guidelines, SOPs and like documents are brought into existence for the sole purpose of implementing higher rules. By nature, they are not designed to subsist disconnected from, and beyond the duration of, the superior instrument that they implement. As the Respondent rightly put it, the Guidelines had “their origin and rationale” in ST/AI/413, and precisely for that, should have disappeared with it. Upon the superseding of administrative instructions upon which any guidelines are based, those guidelines cease to be operative, either in total or to the extent to which the *substratum* upon which they are based has been removed. They are, to that extent, rendered void and of no effect.

90. In conclusion, the Tribunal finds that the Guidelines were not applicable to the recruitment of UNLB GS local staff, because UNLB, not being an “established mission”, does not fall within their remit and, additionally, because the Guidelines were never duly issued in ULNB. In fact, because UNLB is not a peacekeeping operation or special political mission, such recruitments, far from falling in a *lacuna* of law, are covered by ST/AI/2010/3. The Tribunal further finds that the time-in-grade requirements were abolished long ago and are contrary to administrative rules of superior legal status than the Guidelines.

91. Therefore, the time-in-grade requirement was included in the litigious VA without legal basis. In light of it, the decision to declare the Applicant ineligible on account of these requirements is ill-founded and void.

Remedies

92. Having concluded that the impugned decision was unlawful, it is appropriate to rescind such decision. Bearing in mind that the recruitment process has not yet come to an end, as it was put on hold as interim relief ordered by the Tribunal, this rescission implies that, lacking any valid reason for the Applicant to be deemed ineligible, he must be further considered for selection to the post advertised under VA-13-14 (046) on equal footing with other candidates.

93. Given that the Applicant will now be fully considered for selection, he has not suffered any loss of opportunity or any other demonstrable damage that should trigger compensation.

94. Furthermore, this is not a case where the Tribunal is under an obligation to set compensation as an alternative to rescission pursuant to art. 10.5 of its Statute, as the contested administrative decision does not concern “appointment, promotion or termination”. The Tribunal is well aware that the decision at issue is closely related to a potential promotion. However, this very decision, i.e., declaring the Applicant ineligible for VA-13-14 (046), is not one to appoint and/or promote another candidate to the litigious post, or not to select/appoint the Applicant, but rather one preventing the Applicant from competing as a candidate for the post, which is different in nature and scope. In this regard, the exclusion of these specific categories of cases constitutes an exception to the more general power conferred on the Tribunal to order unconditional rescission of decisions and, as such, it must be interpreted restrictively (see *Kasmani* 2010-UNAT-011, *Abu-Hawaila* 2011-UNAT-118, *Cremades* 2012-UNAT-271).

95. The Tribunal will thus not award any financial compensation.

Conclusion

96. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision is unlawful in light of the applicable rules and principles;

- b. The contested decision is rescinded, and the Applicant must be further considered and given a fair chance to compete for the litigious post; and
- c. No financial compensation is awarded.

(Signed)

Judge Rowan Downing

Dated this 24th day of August 2015

Entered in the Register on this 24th day of August 2015

(Signed)

René M. Vargas M., Registrar, Geneva