



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

KUCHEROV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**JUDGMENT**

---

**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Stephen Margetts, ALS/OHRM, UN Secretariat  
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant contests the selection decision for the post of Chief, Russian Verbatim Reporting Section, at the P-5 level (“the Post”), in the Verbatim Reporting Service (“VRS”), Meetings and Publishing Division (“MPD”), Department of General Assembly and Conference Management (“DGACM”).
2. The Applicant requests that the Tribunal rescind the contested decision and that a new, fair and objective recruitment process be initiated. In the alternative, he requests two years’ net base salary as compensation for the violation of his rights and the resulting stress and suffering, as well as for the loss in salary and pension benefits resulting from his non-selection for the Post.
3. The Respondent claims that the application is without merit and submits, in essence, that the Applicant does not have the right to a promotion and that his candidacy was fully and fairly considered.

## **Factual and procedural background**

4. On 27 July 2012, job opening number 12-LAN-DGACM-24475-R-NEW YORK (“the JO”) was issued through Inspira (the online United Nations jobsite). The deadline to apply for the JO was 2 October 2012.
5. The JO included the following requirements:

### **Education**

A first-level degree from a university or institution of equivalent status. Must have passed the United Nations Competitive Examination for Russian Verbatim Reporters.

### **Work Experience**

A minimum of ten years of experience in verbatim reporting, revision of verbatim records or related area, of which at least eight should have been in the United Nations system.

### **Languages**

Must have a perfect command of Russian, which must be his/her main language, and an excellent knowledge of English and another official United Nations Language.

6. Under “Assessment Method” the JO stated:

Evaluation of qualified candidates may include an assessment exercise which may be followed by competency-based interview.

7. Four candidates were released by the Office of Human Resources Management (“OHRM”) after passing the pre-screening process. After the closing of the posting for the JO, the Hiring Manager evaluated these four candidates, including their performance appraisals, and determined that two of them, the Applicant and the selected candidate, were suitable for further consideration.

8. During a preliminary evaluation, the two candidates were assessed against the education, work experience, and language requirements of the Post and allocated points for each requirement based on a four-point grading system: 1—unsatisfactory; 2—partially satisfactory; 3—satisfactory; and 4—outstanding. Both candidates received an overall score of 10 points out of 12. The Applicant was rated satisfactory for education and work experience and outstanding for languages. The selected candidate was rated satisfactory for work experience and languages and outstanding for education.

9. The Applicant was invited to an interview by email dated 28 November 2012. He was notified of the composition of the interview panel and advised that the interview would last approximately 90 minutes. Both the Applicant and the selected candidate were interviewed for the Post on 4 December 2012.

10. The competency-based interview tested five competencies: Professionalism, Planning and Organizing, Technological Awareness, Leadership, and Managing Performance. The panel assessed the candidates’ answers using a four-point scale, and the five members were instructed to use not only full points—1, 2, 3, 4—but also half points—0.50 (1.5, 2.5, 3.5).

11. The Applicant received an overall score of 15 points out of 20 for the interview. He received a rating of satisfactory for all five competencies. The selected candidate received an overall score of 18 points out of 20. She received a rating of satisfactory for two competencies—Technological Awareness and Leadership, and a rating of outstanding for three competencies—Professionalism, Managing Performance, and Planning and Organizing.

12. Both the Applicant and the selected candidate were found to meet the competencies of the Post and were recommended for consideration for selection.

13. In a two-page document addressed to the Acting Head of DGACM on 7 January 2013, the Hiring Manager presented the overall scores of the two recommended candidates from the preliminary evaluation and the competency-based interview. The Applicant received an overall score of 25 points out of 32 (10 points from the preliminary evaluation and 15 points from the interview); the selected candidate received an overall score of 28 out of 32 (10 points from the preliminary evaluation and 18 points from the interview). As follows from the first page of the document, both candidates were recommended “subject to the successful review of the appropriate Central Review body” as indicated by an asterisk next to their names. The second unsigned page of this document states: “Pending clearance by the [Central Review] Secretariat, I recommend that [the selected candidate] be selected for the above-mentioned post” (emphasis in original). The first page of the document is signed by the Acting Head of DGACM under an unmarked section titled “Approved/Not Approved” and dated 14 January 2013.

14. A document titled “Final Transmittal Memorandum to the Central Review Body”, and dated 17 January 2013, summarized the recruitment process for the Post and stated that the assessment panel had determined that both the Applicant and the selected candidate had met all of the evaluation criteria for the JO and been placed on the recommended list.

15. In an email to the Acting Head of DGACM dated 4 February 2013, the Chief of the Central Review Bodies Secretariat stated that the Central Review Board had “endorsed the proposal for filling the [Post]”.

16. On 5 February 2013, the Applicant was informed that he had been placed on a roster of pre-approved candidates for potential consideration for future job openings with similar functions at the same level (P-5).

17. On 27 February 2013, the Applicant was informed via email that the selected candidate had been selected for the Post.

18. On 28 March 2013, the Applicant requested management evaluation of the decision not to select him for the Post.

19. By letter dated 29 April 2013, the Applicant was informed by the Under-Secretary-General for Management that the Secretary-General has decided to endorse the findings and recommendations of the Management Evaluation Unit and uphold the selection decision.

20. On 25 July 2013, the application was filed to the Dispute Tribunal and, on 26 August 2013, the Respondent filed a reply to the application.

21. By Order No. 211 (NY/2013), dated 28 August 2013, the Tribunal (Duty Judge) ordered the parties to file a jointly signed statement producing the following information: (a) a consolidated list of agreed facts in chronological order; (b) a list of agreed legal issues, if any; (c) whether the parties are amenable to resolve the matter informally either through the Mediation Division or through *inter partes* discussions. The joint response was filed by the parties on 11 October 2013.

22. By Order No. 259 (NY/2013), dated 18 October 2013, the Tribunal (Duty Judge) instructed the Respondent to respond to a number of questions in order to clarify the statement included in the reply that “[m]indful of Section 1.8 (a) of the Gender Equality [administrative issuance], the Hiring Manager recommended the

female applicant for selection and the Head of the Department selected the female applicant". The Respondent filed his responses to the above-mentioned order on 24 October 2013 and 4 November 2014, and the Applicant filed his comments on 1 November 2014. In the 24 October 2013 response, the Respondent confirmed that the selected candidate was not appointed because of the policy and principles in ST/AI/1999/9 (Special measures for the achievement of gender equality) but because she had demonstrated that she was the suitable candidate for the Post.

23. By Order No. 297 (NY/2014), dated 7 November 2013, the Tribunal ordered that all further judicial consideration and action be stayed pending the assignment of the case to a Judge for any further case management orders, including the question whether there should be an oral hearing.

24. On 3 July 2014, the case was assigned to the undersigned Judge.

25. By Order No. 271 (NY/2014), dated 2 October 2014, the Respondent was instructed to file and serve factual and legal submissions and documentation regarding: (a) the relevant language qualifications required for a Russian Verbatim Reporter in 2005; (b) the closing date of the JO; (c) the selected candidate's work experience (total length of relevant experience in verbatim reporting, revision of verbatim records, or related areas, as stipulated in the JO) and language qualifications (the JO required excellent knowledge both in English and another United Nations official language) at the moment she applied for the job. The Applicant was instructed to file comments on the submissions and documentation requested to be filed by the Respondent. The Respondent filed his response on 16 October 2014, and the Applicant filed his comments on 22 October 2014.

26. On 5 November 2014, the parties attended a case management discussion ("CMD") during which the Respondent was instructed to file and serve relevant documentation for the case, including:

- a. A chronological outline and calculation of the selected candidate's working experience, including her part-time employment, in a format which, as necessary, protects her personal data;
- b. The comments and accompanying documentation submitted by the Chief, VRS, to the Management Evaluation Unit on 9 April 2013;
- c. Confirmation that the selected candidate passed the required exam for verbatim reporters on 30 August 2005; and
- d. The selection procedure used in 1996 for appointing verbatim reporters.

27. The Applicant was ordered to file his comments on these documents. The parties were also instructed, by Order No. 301 (NY/2014), dated 6 November 2014, to file a list of proposed witnesses for a hearing on the merits together with a statement of the relevant facts which the witnesses were to corroborate.

28. The Respondent filed his responses to Order No. 301 (NY/2014) on 19 November 2014 and 3 December 2014. The Applicant filed his response to Order No. 301 (NY/2014) on 3 December 2014. The Applicant proposed one witness and the Respondent suggested five witnesses. As recorded in Order No. 301 (NY/2014), at the CMD on 5 November 2014, the Applicant had also expressed his interest in testifying himself. In his 3 December 2014 response to Order No. 301 (NY/2014), the Applicant requested the documentation of the 2010 interview/selection for a reviser at the P-4 level in the Russian Verbatim Reporting Section and the investigative report from March 2010.

29. By Order No. 332 (NY/2014), dated 9 December 2014, the Tribunal scheduled a hearing on the merits to take place over three days between 20 and 22 January 2015.

30. On 10 December 2014, the Respondent filed his response to the Applicant's 3 December 2014 request for production of documents.

31. On 11 December 2014, the parties were informed that, for administrative reasons, the hearing had been rescheduled to take place between 26 and 28 January 2015.

32. On 21 January 2015, the Applicant filed a request to postpone the hearing until further notice and, on the same day, the Respondent confirmed that he had no objection to the postponement of the hearing.

33. By Order No. 12 (NY/2015), dated 22 January 2015, the Tribunal interpreted the Applicant's request to postpone the hearing until further notice in accordance with art. 10.1 of the Dispute Tribunal's Statute as being a request for suspension of proceedings and suspended the proceedings until 30 April 2015.

34. By Order No. 75 (NY/2015), dated 5 May 2015, the Tribunal informed the parties that the hearing on the merits was to be held either from 27 to 29 May 2015 or from 1 to 3 June 2015 and that, at the beginning of the hearing, each party was to present his proposed witnesses.

35. On 12 May 2015, the Respondent confirmed the availability of his witnesses between 1 and 3 June 2015. On 13 May 2015 the Applicant confirmed his proposed witness and his own availability to attend a hearing during one or both of the proposed set of dates, preferably from 27 to 29 May

36. By Order No. 82 (NY/2015), dated 13 May 2015, the parties were informed that the hearing would be held from 1 to 3 June 2015.

37. The hearing on the merits took place from 1 to 3 June 2015. Six witnesses gave evidence—Mr. A.F., the former incumbent of the Post, and the five members of the interview panel: Mr. P.F., who is the Chief, VRS/MPD/DGACM, and was the hiring manager and chair of the interview panel; Ms. A.M.A., former Chief,



Spanish Verbatim Reporting Section, VRS/MPD/DGACM; Mr. J.B., Chief, English Verbatim Reporting Section, VRS/MPD/DGACM; Mr. S.D., Chief, French Verbatim Reporting Section, VRS/MPD/DGACM; and Mr. Z.C., Senior Reviser, Chinese Translation Service, Documentation Division, DGACM.

38. On 1 June 2015, the Applicant gave evidence along with two witnesses—Mr. A.F. and Mr. Z.C. On 2 June 2015, Mr. P.F and Mr. J.B gave evidence. On 3 June 2015, Ms. A.M.A. and Mr. S.D. gave evidence.

39. By Order No. 107 (NY/2015), dated 5 June 2015, the Tribunal rejected the Applicant’s requests for disclosure of documents filed by the Respondent on 16 October 2014 and 19 December 2014 and for production of documents set out in the Applicant’s response to Order No. 301 (NY/2014) as not being relevant for the case. The parties were instructed to file their written closing submissions on 26 June 2015, which both parties did.

### **Applicant’s submissions**

40. The Applicant’s principal contentions may be summarised as follows:

- a. The Applicant has an excellent record of performance as well as the skills, qualifications and experience necessary to be appointed to the Post;
- b. Article 101.3 of the United Nations Charter and Staff Regulation 4.2 were not observed. They state that “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”;
- c. The pre-screening/recommendation/selection was tainted by extraneous factors, which affected his right to full and fair consideration for the Post. Objective and impartial scrutiny of his skills, qualifications and experience, and those of the selected candidate, would reveal that he was better qualified for the Post;

- d. The qualifications of the selected candidate were not “substantially equal to or superior” to his, so as to make ST/AI/1999/9 relevant;
- e. The selected candidate did not meet the language requirements set out in the JO, which are an essential requirement of the Post;
- f. The selected candidate’s lack of managerial experience, insufficient linguistic knowledge, and lack of integrity mean that she will be unable to effectively fulfill some of the responsibilities inherent in the role;
- g. None of the panel members were experts in the Russian language familiar with the candidates’ translation and revision skills. The participation of a Russian linguistic expert on the interview panel was an essential precondition for a full and fair consideration of the candidates. The former Chief of Section, who was familiar with the candidates’ skills, was not invited to participate in the Panel;
- h. The competency-based interview was flawed because he was interviewed for twice as long as the selected candidate, the interview panel asked hypothetical questions, and he was not prompted to elaborate on his achievements and successes;
- i. The Hiring Manager was biased in favor of the selected candidate during and before the selection. The outcome of the selection process was decided in advance, thus depriving him of any chance of having a full, fair and objective consideration.

### **Respondent’s submissions**

- 41. The Respondent’s principal contentions may be summarized as follows:

a. The evidence on record shows that the selection process was conducted in accordance with ST/AI/2010/3 (Staff selection system) and that the Applicant was given full and fair consideration for promotion;

b. The interview panel was properly constituted, since there is no provision requiring the incumbents, whose positions are under recruitment, to participate in the interview panel in order to select his/her replacement and the Hiring Manager's Manual advises the opposite (sec. 9.3.1). The interview was not a technical assessment of the Russian language but a competency-based interview to assess the competencies of the Post. The members of the interview panel had the experience and knowledge required for assessors and there was no need to include in the panel an expert on Russian language. All of the members of the panel had the required experience and knowledge. The Applicant did not question the composition of the panel before or after the interview;

c. Each candidate was asked the same set of pre-determined questions by the interview panel. The Applicant's interview took longer because he did not answer the questions directly and was asked follow-up questions;

d. The interview panel's evaluation was correctly based on the answers that the Applicant provided during his interview and the panel determined that he met all of the competencies for the Post and he was recommended for consideration for promotion;

e. The burden of proof falls on the Applicant to demonstrate that prejudice or procedural irregularities tainted the selection decision. He must establish that material errors impacted on his right to full and fair consideration. He has not done so;

f. The Applicant's allegations of discrimination, bias, favoritism and improper motive are baseless;

g. In his response to Order No. 259 (NY/2013), filed on 24 October 2013, the Respondent confirmed that the successful candidate out-performed the Applicant in the competence based assessment and, even though the selected candidate was a women, she was not appointed because of the policy and principles in ST/AI/1999/9, but because she demonstrated that she was the more suitable candidate for the Post.

### **Applicable law**

42. Article 101.3 of the United Nations Charter provides:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

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

1. An application shall be receivable if:

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

44. Article 7.1(a) of the Dispute Tribunal's Rules of Procedure, provides:

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;

45. ST/SGB/2012/1 (Staff Regulations) provides, in relevant parts:

### **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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

### **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.

46. ST/AI/1998/7 (Competitive examinations for recruitment and placement in posts requiring specific language skills in the Professional category), as amended by ST/AI/1998/7/Amend.1, provides:

#### **Section 1**

##### **General provisions**

Language competitive examinations may be held from time to time for the purposes of recruitment or placement in posts requiring specific language skills in the Professional category in accordance with the needs of the Organization. Specific arrangements for such examinations shall be announced well in advance to staff members through the United Nations iSeek intranet and broadcast e-mail messages, and for external candidates through the United Nations Careers Portal. The announcements will provide, *inter alia*, tentative dates on which the examinations will be held and information concerning the application procedure.

#### **Section 2**

##### **Eligibility**

2.1 A staff member at the P-3 level and below may apply to take a competitive examination for placement in a post requiring specific language skills in the Professional category, provided he or she:

- (a) Meets the minimum entrance criteria for that examination, as set out in the relevant announcement;
- (b) Holds a United Nations appointment valid at least until the end of the month when the written examination is scheduled to take place;
- (c) Has a satisfactory record of performance.

...

#### **Section 3**

##### **Applications**

Staff members who wish to apply to take a language examination for recruitment to posts advertised in Inspira shall complete the profile and application sections in Inspira and submit them with all required

documents by the deadline indicated in the relevant announcement, which will be made available through the United Nations Careers Portal on iSeek.

#### **Section 4**

##### **Specialized board of examiners**

4.1 A specialized board of examiners will be set up for each examination. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the specialized agencies or outside experts may also be employed. Each specialized board will have a non-voting *ex officio* member representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.

...

47. ST/AI/2010/3 (Staff selection system), issued on 21 April 2010, provides:

#### **Section 1**

##### **Definitions**

...

(c) *Assessment panel*: a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening. ...

...

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender ...

#### **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.

...

2.3 Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5 below. ...

...

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 body 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 4**

##### **Job Openings**

...

4.6 Each job opening shall indicate the date of posting and specify a deadline date by which all applications must be received. The job opening, including the evaluation criteria, shall be approved by OHRM, the local human resources offices or the Department of Field Support prior to posting.

...

#### **Section 6**

##### **Eligibility requirements**

...

6.3 Staff members in the Professional category shall have at least two prior lateral moves, which may have taken place at any level in that category, before being eligible to be considered for promotion to the P-5 level, subject to the following provisions:

...

(d) The requirement for lateral moves is waived for staff serving against language positions that are subject to the provisions of the administrative instruction setting out special conditions for recruitment or placement of candidates successful in a competitive examination for positions requiring special language skills when applying for another such language position.

...

## **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.

...

## **Section 8**

### **Central review bodies**

8.1 The central review bodies shall review proposals for filling a position-specific job opening or for placing candidates on the roster following a generic job opening, made by the department/office or mission concerned, to ensure that applicants were evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were followed ...

...

## **Section 9**

### **Selection decision**

...

9.2 The selection decision for positions up to and including at the D-1 level shall be made by the head of department/office on the basis of proposals made by the responsible hiring managers (for position-



specific job openings) and occupational group managers (for generic job openings) when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed. ...

9.3 When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions.

...

### **Section 13**

#### **Final provisions**

13.1 The present administrative instruction shall enter into force on 22 April 2010.

13.2 Administrative instructions ST/AI/2006/3/Rev.1, entitled “Staff selection system”, ST/AI/297 and Add.1, entitled “Technical cooperation personnel and OPAS officers”, and ST/AI/360/Rev.1 and Corr.1, entitled “Movement of staff from the Field Service category to the Professional category”, are hereby abolished.

13.3 The provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and information circulars currently in force.

48. ST/AI/2010/3/Amend.1 (Staff selection system), issued on 29 June 2012, provides, in relevant parts:

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.

9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an

occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

49. ST/AI/2010/5 (Performance Management and Development System)

provides:

...

## **Section 2**

### **Purpose**

2.1 The purpose of the Performance Management and Development System is to improve the delivery of programmes by optimizing performance at all levels, which it will achieve by:

...

(d) Recognizing successful performance and addressing underperformance in a fair and equitable manner.

2.2 The function of the Performance Management and Development System is to promote communication between staff members and supervisors on the goals and key results to be achieved and the success criteria by which individual performance will be assessed. The System will also promote continuous learning, recognize successful performance and address performance shortcomings.

2.3 The Performance Management and Development System is supported by an electronic application (e-PAS or e-performance) that captures the main stages of the performance process (workplan, midpoint review and end-of-year performance appraisal).

...

50. The relevant provisions from the Hiring Manager's Manual, issued in April 2012 (updated in October 2012 before the selection decision was made), and applicable to the selection process for the JO (which was for a language position) advertised on 27 July 2012, are incorporated into the considerations where relevant. It is noted that these manuals have since then been updated and reissued.

## Considerations

### *Receivability*

51. The Tribunal notes that the contested administrative decision was notified to the Applicant on 5 February 2013 and he requested a management evaluation on 28 March 2013, within 60 days of the date of notification. The present application was filed on 25 July 2013, within 90 days of the date when the Applicant received the management evaluation decision—29 April 2013. Therefore, the Tribunal concludes that the application is 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.

### *Scope of review*

52. As consistently held by the Appeals Tribunal, staff members do not have a right to promotion, they only have a right to full and fair consideration (*Andrysek* 2010-UNAT-070).

53. In *Ljungdell* 2012-UNAT-265 (recalled in *Scheepers* 2015-UNAT-556), the Appeals Tribunal stated:

30. ... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration [footnote: *Schook* 2012-UNAT-216, quoting *Sanwidi* 2010-UNAT-084].

54. In *Abbassi* 2011-UNAT-110 (recalled in *Scheepers* 2015-UNAT-556), the Appeals Tribunal stated:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

24. The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

55. In *Aliko* 2015-UNAT-540, the Appeals Tribunal summarized its jurisprudence on the judicial review of selection decisions as follows:

30. “[I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged” [footnote: *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32]. Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a “candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration” [footnote: *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 20]. The burden is on the candidate challenging the selection process to “prove through clear and convincing evidence” that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored [footnote: *Ibid.*, para. 21].

*The competitive examinations for recruitment or placement in posts requiring specific language skills in the Professional category and the staff selection system*

56. The Tribunal underlines that the JO in the present case is related to a recruitment exercise for a post requiring specific language skills in the Professional category—P-5 level. The principal document regulating the competitive examination for such posts—ST/AI/1998/7 (Competitive examinations for recruitment and placement in posts requiring specific language skills in the Professional category)—was adopted on 23 March 1998.

57. According to sec. 6.3 of ST/AI/2010/3, adopted in April 2010, in order to be eligible to be considered for promotion to the P-5 level, the staff members from the Professional category must have at least two prior lateral moves. However, as results from sec. 6.3(d), this requirement for lateral moves is waived for staff serving against language positions that are subject to the provisions of the administrative instruction setting out special conditions for recruitment or placement of candidates successful in a competitive examination for positions requiring specific language skills *when applying for another such language position*.

58. Section 3 of ST/AI/1998/7/Amend.1 and sec. 6.3(d) together with sec. 13 of ST/AI/2010/3 confirms that the procedure established in ST/AI/1998/7 continues to be applicable to all competitive examinations for language posts at all Professional levels, including the P-5 level. ST/AI/1998/7/Amend.1, adopted on 8 May 2012, updated and harmonized the procedure from ST/AI/1998/7 with the new staff selection system introduced by ST/AI/2010/3.

59. The Tribunal concludes that the special amended mandatory provisions from ST/AI/1998/7 together with the amended provisions of ST/AI/2010/3 are applicable to any competitive selection process for language posts at the Professional level, including posts at the P-5 level requiring, like in the present case, specific language skills in the professional category.

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

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

31. As the Tribunal stated in *Villamorán* 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.

32. 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).

33. 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 (*Villamorán, Valimaki-Erk* UNDT/2012/004).

61. Section 2.1 of ST/AI/2010/3 states:

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

62. 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.

63. ST/AI/2010/3 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 is of the view 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 binding and form part of the procedures applicable from “the beginning to the end” of the staff selection process. The Tribunal considers that the guidelines provided in these manuals 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.

64. Section 1.1 of the Recruiter’s Manual and sec. 1.1 of the Hiring Manager’s Manual, both issued in April 2012 and applicable in the present case (revised in October 2012 before the selection decision was made), state that the manuals 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.

65. 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, once adopted and published on Inspira, the provisions from these manuals, which must be in accordance with and consolidate the ones from ST/AI/2010/3 (see *Asariotis* 2015-UNAT-496), establish in detail the steps to be followed in the selection process, must be respected by the Administration.

66. 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, para. 28 (not appealed); *Eldam* UNDT/2010/133, para. 50 (not appealed)).

67. The Tribunal will analyze, in light of the grounds of appeal, whether the procedure as laid down in the Staff Regulations and Rules, and the staff selection system, including the manuals, has been applied, and whether it was applied in a fair, transparent and non-discriminatory manner.

*Were there any procedural violations during the promotion exercise that affected the right of the Applicant to full and fair consideration for the Post?*

Job opening No.12-LAN-DGACM-24475-R-New York, Chief Verbatim Reporting Section, P-5

68. As indicated at para. 6 of this judgment, the JO for the Post stated that the assessment method “may include an assessment exercise which may be followed by competency-based interview”. The Hiring Manager used the sample phrase suggested in sec. 5.5.1.8 of the Hiring Manager’s Manual and announced two assessment methods: an assessment exercise and an interview.

69. The Tribunal considers that after the publication of a job opening, the Hiring Manager has no discretion left to intervene and modify the announced assessment methods, but only to indicate the necessary details related to the assessment methods, for example, to identify and communicate the type of the assessment exercise, if not already indicated in the job opening, to select the members of the panel, to prepare the questions for the interview and the scoring scale, etc.

70. Paragraph 1 of sec. 9.2—“Evaluating Applicants”—of the Hiring Manager’s Manual states that the standards set out under that section “must be adhered to organization-wide in order to avoid variance in how evaluations and assessments are *conducted and recorded*”.

Preliminary evaluation

71. In accordance with sec. 9.2—“Evaluating Applicants”—of the Hiring Manager’s Manual, the Hiring Manager short-listed two candidates, the Applicant



and the selected candidate, who were considered the most promising applicants for the job.

72. As results from the records before the Tribunal, both the Applicant and the selected candidate received a score of 10 points out of 12 for the preliminary evaluation when assessing their eligibility for the Post in regards to education, work experience and languages. The Applicant contests the result of the preliminary evaluation, stating that:

- a. the selected candidate was wrongly short-listed because she did not meet the linguistic requirements for the Post; and
- b. she had less than ten years of work experience.

73. Regarding the first issue, the Tribunal notes that the linguistic requirement reflected in the JO for the Post was “must have a perfect command of Russian, which must be his/her main language, and an excellent knowledge of English and another official United Nations language”. In the application, the Applicant challenges a comment made by DGACM, submitted to the Management Evaluation Unit in response to his request for management evaluation, that “the selected candidate, having passed the required exam for Russian verbatim reporters, which had the same language requirements as those of the Post, is regarded as having met the language requirements for the Post”. The Applicant submits that this is not true, because the selected candidate passed this exam in 2005, and the present language requirement was added only in 2009, when changes in generic job descriptions were made.

74. The Applicant also contends that the selected candidate tried twice to pass the Language Proficiency Exam (“LPE”) in French but failed, which means that her knowledge of that language, required for the position, could not be considered excellent. This issue was clarified by the Respondent in his response from 19 November 2014 to Order No. 301 (NY/2014) in which Counsel for the Respondent confirmed that the selected candidate passed the 2005 Russian Verbatim Reporters Examination and the Russian Translators Examination and that according to

DGACM, the selection procedure for appointing verbatim reporters has not changed since 1996. The Respondent's response to this issue was not further contested by the Applicant.

75. As results from the notice issued for the 2005 competitive examinations for Russian language verbatim reporters, editors and translators/precis writers, the applicants were required to:

...

- (b) Have Russian as their main language;
- (c) Have a perfect command of Russian and an excellent knowledge of English and at least one of the other official languages of the United Nations (Arabic, Chinese, French or Spanish);
- (d) Hold a degree or an equivalent qualification from a university or institution of equivalent status at which Russian is the language of instruction or hold a university degree from a school of translation at which Russian is the language of instruction.

76. On 13 July 2006, the selected candidate was informed that, as a result of her performance in the 2005 examination, she had been placed on the rosters for Russian verbatim reporters and for Russian translators. This confirms that the selected candidate fulfilled all the mandatory requirements for a Russian verbatim reporter in 2005, including an excellent knowledge of English and another official language of the United Nations. There is no requirement included in the JO that the applicants must also have successfully passed the LPE for English and for another United Nations official language.

77. Regarding the second issue, as results also from the Respondent's response to Order No. 301 (NY/2014), the Human Resources Services Division of OHRM has verified that as of the closing date of the JO, 2 October 2012, the selected candidate had almost 20 years of work experience (6.35 years outside of the United Nations; 1.47 years as a part-time freelance translator, and 12.17 years within the United Nations in verbatim reporting). The JO required a minimum of ten years of experience in verbatim reporting, revision of verbatim records or related area, of

which at least eight should have been in the United Nations system and it results that the selected candidate fulfilled this requirement.

78. The Tribunal concludes that the preliminary evaluation was correct, both candidates fulfilled the eligibility criteria for the Post, and that the above-mentioned grounds of appeal are unfounded and they are to be rejected.

Composition of the interview panel and its impact on the assessment method(s)

79. The Tribunal notes that sec. 4.1 of ST/AI/1998/7, which was not amended on 8 May 2012, states (emphasis added):

*A specialized board of examiners will be set up for each examination. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the specialized agencies or outside experts may also be employed. Each specialized board will have a non-voting ex officio member representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.*

80. Consequently, the panel involved in the selection for posts requiring specific language skills in the Professional category is to be constituted as a specialized board composed only from language experts.

81. In the present case, the assessment panel did not include a member whose presence was mandatory, namely a non-voting ex-officio member representing the Assistant Secretary-General, OHRM (“ASG/OHRM”). The Tribunal also observes that the chairperson of the panel was not elected by the other members as required.

82. The Applicant submits that none of the panel members were experts in Russian language and that the former Chief of the Russian Verbatim Reporting Section, Mr. A.F., was the person most familiar with the candidates’ work and qualifications and thus was the most appropriate staff member to act as a subject matter expert on the interview panel. The Applicant further submits that, even if Mr. A.F.’s participation was ruled out, the participation of a Russian linguistic expert was

a requirement for a full and fair consideration of candidates given that they were being assessed for a linguistic position.

83. Section 9.3.1 of the Hiring Manager's Manual explicitly states that "[t]he staff members [appointed to an assessment panel] shall normally not be the current or temporary position incumbents that are to be replaced". The fact that Mr. A.F. was not appointed as a member of the interview panel did not violate any regulation, rule or issuance and was in line with the policy of the Organization as set out in the Hiring Manager's Manual. In *Abbassi* UNDT/2010/086, which was upheld on appeal, the Dispute Tribunal held that "it is the conscientious opinion of the [interview] panel members that is the essential element of the process, not the opinion of any candidate's supervisor" (para. 22). The fact that Mr. A.F. was not a member of the interview panel did not violate any rule or procedure and did not affect the Applicant's right to receive full and fair consideration for the Post.

84. The definition of "assessment panel" in sec. 1(c) of ST/AI/2010/3 (Staff selection system) states that a panel shall normally be comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening. Section 9.3.3 of the Hiring Manager's Manual states that the Hiring Manager must ensure that the selected interview panel members fulfil the following requirements:

- a. Professional knowledge and experience:
  - i. Years of professional work and intrinsic knowledge of the subject area or work in the job family.
  - ii. Relevant occupational experience/employment for the previous five years is desirable.
- b. Personal qualities:

Self-responsibility, ability to listen, ability to express him/herself clearly, patience, reliability and flexibility to handle changing circumstances, sense of humour, persistence, judgment and ability to quickly recognize and understand a situation and to be able to think analytically.

- c. Freedom from outside pressure:
  - There is no appearance of a conflict of interest.
- d. Competency-based selection and interviewing skills and follow-up programme:
  - Training module has been completed prior to serving on the panel.
- e. Training in Inspira:
  - Completion of Inspira self-study training.

85. Each of the five interview panel members—Mr. P.F., Ms. A.M.A., Mr. J.B., Mr. Z.C., and Mr. S.D.—gave evidence at the hearing. Having considered their testimony, the Tribunal concludes that all of the members of the panel fulfilled the mandatory requirements, including freedom from outside pressure from the Hiring Manager and/or the Head of the Department before and/or during the interviews.

86. The Applicant alleges that the Hiring Manager was biased and that the selection decision was made prior to the recruitment process. He also questions whether members of the interview panel were influenced in their assessment by extraneous factors. The Tribunal notes that no evidence was adduced by the Applicant to prove that the Hiring Manager made his decision in advance before the interview to select the selected candidate, that he was influenced by extraneous factors, and/or that he exercised any pressure or influence on the other members of the panel.

87. Moreover, the Applicant, who knew the composition of the panel before the interview, did not file, at the time of or before the interview, a request for recusal of the Hiring Manager or of any other member of the panel based on these allegations, in order to prevent an unfair consideration of his candidacy for the Post. The Tribunal underlines that all members of the panel have the obligation to be impartial and to recuse themselves, before or during the assessment of the candidates, if there is any conflict of interest which may affect the selection process. Equally, any candidate has the duty to act diligently and to inform the members of the panel as

soon as possible before the end of the assessment and if necessary to recuse any of the panelists if he s/he knows that there is a conflict of interest. The candidate(s) should not wait until the result of the selection process and invoke such reasons only if they are not selected for the Post.

88. The Tribunal concludes that in the absence of any evidence of bias of the member(s) of the panel, these allegations cannot constitute a ground of appeal and they are to be rejected.

89. The Tribunal will further analyse the Applicant's allegations that since no member of the panel was an expert on Russian language, such an expert should have been appointed also as a member of the panel.

90. The Tribunal notes that the assessment panel was composed of five members as follows: the Chief of VRS/MPD/DGACM; the Chief of the English Verbatim Reporting Section, VRS/MPD/DGACM; the Chief of the French Verbatim Reporting Section, VRS/MPD/DGACM; the Chief of the Spanish Verbatim Reporting Section, VRS/MPD/DGACM and a Senior Reviser, Chinese Translation Service, Documentation Division, DGACM.

91. Section 7.5 of ST/AI/2010/3 states that short-listed 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".

92. The "Assessment Method" section in the JO stated "evaluation of qualified candidates may include an assessment exercise which may be followed by competency based interview", reflecting the sample phrase indicated in the last paragraph of sec. 5.5.1.8 from the Hiring Manager's Manual. In the present case, the short-listed candidates were to be assessed through a written assessment exercise established by the assessment panel and those who passed the assessment exercise were to be invited to an interview—the United Nations Secretariat competency-based

interview. It is clear that only the short-listed candidates that passed the test were to be interviewed and that two different assessment methods were to be used.

93. The test requirement as stated in sec. 6.4.1.6 of the Hiring Manager's Manual reflects the assessment method that will be used to evaluate a short-listed applicant's *substantive knowledge* in line with the requirements of the position and where an assessment was indicated, the short-listed applicants must successfully pass the test for further consideration. As results from secs. 5.4.5.1 to 5.4.5.7 of the Hiring Manager's Manual, the assessment exercise can be: written exercise, case study, presentation, simulation exercise, technical test, essay exercise, or any exercise to measure a particular set of skills.

94. Section 9.5.1 from the Hiring Manager's manual—"What is a Competency-Based Interview?"—defines a competency-based interview (sometimes referred to as a behavioral or a criterion-based interview) as a particular type of structured interview in which the assessor's questioning is directed at ascertaining the Applicant's *qualities or capabilities* on a number of *job-related dimensions of behavior* (competencies) as defined in the job opening. This section also indicates that questions from the interviewing panel, which must be the same for every applicant, usually focus on eliciting specific examples from the applicants in which they describe situations where they might (or might not) have demonstrated the required behaviors. These are to be 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.

95. Section 9.5, para. 3, of the Hiring Manager's Manual states that some competencies *will* be covered in the interview, while others will be tested in another assessment method commensurate with the functions of the position.

96. Section 9.3, para. 2, of the Hiring Manager's Manual indicates that, ideally, all applicants for one job opening are to be assessed and/or interviewed by the same assessors. It results that both assessment methods—assessment exercise and

competency-based interview—are to be conducted by the same panel in order to evaluate the short-listed candidates’ substantive knowledge for the Post and their capabilities on a certain number of job-related dimensions of behavior.

97. In the present case, as results from the JO, the mandatory (“must have”) substantive knowledge requested from the candidates was to “have a perfect command of Russian, which must be their main language and an excellent knowledge of English and another official United Nations language”.

98. Despite the fact that two assessment methods were mentioned in the JO, the substantive knowledge on languages of the short-listed candidates on Russian, English, and another UN language was not tested before the interview. The members of the panel were, *inter alia*, supposed to have intrinsic knowledge of the subject area or work in the job family. The panel included experts on English, French, Spanish and Chinese, but no expert in Russian was included, and this area of substantive knowledge expressly requested for the job was therefore not covered.

99. The Tribunal observes that in the email received by the Applicant on 28 November 2011, it was mentioned, “In reference to your application for the above-mentioned position *and based on the initial assessment exercise*, we would like to invite you to an interview” (emphasis added).

100. The Tribunal notes that, as results from the evidence on the record, in the present case, no assessment exercise was conducted by the panel before the interview and, therefore, the short-listed candidates’ substantive knowledge on Russian, English and another UN language (French) was not assessed before the interview.

101. As results from sec. 5.4.5.5 from the Hiring Manager’s Manual, the technical tests are used to determine if the candidate has the technical skills and/or knowledge required for the position and they can be written knowledge tests or written exercises, case studies and simulations.



102. The interview, according to the panelist's notes, was a typical competency-based interview, and the panel interviewed the candidates addressing only questions related to the job-related behaviors/competencies and did not cover any area of the substantive knowledge. No assessment exercise was conducted after the interview. As results from the interview questions, one of the questions included in the first competency, Professionalism, was: "Please give us an evaluation of yourself in substantive knowledge or specialized area. Could you tell us an occasion where your better understanding of the subject matter had yielded better results?" The substantive knowledge cannot be subject to a self-evaluation made by the candidate during the interview, but must be established through an assessment exercise by the panel, and the candidates scoring high in the assessment exercise are invited for an interview. Such a question included in the interview cannot substitute and replace the assessment exercise for evaluating the substantive knowledge of the short-listed candidates.

103. As results from the Hiring Manager's testimony at the hearing on the merits, the Hiring Manager made the final decision that only an interview will be used because there was no requirement for another assessment. Paragraphs 1, 2, 6, and 8 from sec. 5.4.5—"Determining Assessment Methodologies"—of the Hiring Manager's Manual make no distinction between the level of post to which the assessment exercise is to be applied. Therefore, the Tribunal finds that an assessment exercise is to be used, in addition to an interview, regardless of the level of the post (see, for example, *Wang* UNDT-2013-099).

104. According to sec. 7.5 from ST/AI/2010/3, the panel has the obligation ("shall") to assess the short-listed candidates and to determine whether they meet the technical requirements and competencies for the job. Consequently, in order to respect this mandatory provision, at least two different assessment methods are necessary to be used by the panel after Inspira was launched, or at least starting from March 2011 when the first edition of the manuals on the staff selection system (Inspira) were published, as indicated in sec. 5.1.2.5—"Determining Assessment

Methodologies”—in the Hiring Manager’s Manual published in March 2011 and reiterated in the same manual republished in October 2012 (sec. 5.4.5, para. 6). The assessment panel cannot exercise any discretion to decide that only one of the two elements mentioned above (technical requirements and competencies) will be assessed and determined. On the contrary, the same panel must assess and determine both of them using the appropriate assessment methods.

105. The Professional language posts at P-5 level are not exempted from the above-mentioned rule regarding the assessment of the technical requirements (substantive knowledge) and competencies. The methods elected to be used for assessing the short-listed candidates are having a decisive role in the selection process because each higher level implies a control of the previous level’s functions and accuracy.

106. This interpretation is in line with the one adopted by the Respondent in *Wang* UNDT/2013/099 (upheld on appeal by the Appeals Tribunal in 2014-UNAT-454), a case involving a selection exercise for two Chinese Reviser posts at the P-4 level. As follows from the judgment issued in that case, the Respondent stated, *inter alia*:

38. ... the purpose of the written test was to short-list candidates to be invited for a competency-based interview. Respondent’s counsel conceded at the hearing that at the time the written test for the advertised posts was administered, there were no written rules or guidelines governing written tests other than the provisions of the Inspira Hiring Manager’s Manual (“Inspira manual”) [footnote omitted].

39. Section 7.5 of ST/AI/2010/3 (Staff Selection System) provides that candidates shall be assessed to determine whether they meet the requirements for the job opening; it further provides that the assessment may include the competency-based interview and other appropriate evaluation mechanisms, such as written tests.

40. The then applicable Inspira manual contained some guidelines on the determination of assessment methods by the Hiring Manager. Section 5.3.5 (Determining Assessment Methodologies) directs Hiring Managers to prepare knowledge based test for the candidates—which may take various forms—to “assist in the evaluation of [their]

substantial knowledge against the requirements of the vacant position”.

41. The Manual further provided that the selected assessment method “forms part of the evaluation criteria” and among the elements to be borne in mind by Hiring Managers in conducting assessment exercise is the applicable rating system.

107. In his submissions to the Appeals Tribunal in *Wang* 2014-UNAT-454, the Secretary-General stated:

It was well within the Administration’s discretion to evaluate candidates against objective criteria that had already been developed in assessing the quality of translation of other translators.

108. The Respondent expressly stated in his reply that “the interview was not a technical assessment of the Russian language, but a competence based interview to assess the competencies of the Post. The Applicant’s technical skills were assessed by reviewing his performance appraisals”.

109. It clearly results that in the present case only the competencies for the Post were evaluated by the panel and that the assessment made by the panel did not include an assessment of the technical skills of the candidates regarding their substantive knowledge on Russian, English and another official language of the United Nations.

110. A review of the performance appraisals of the short-listed candidates is not mentioned as an assessment method in ST/AI/2010/3 or among the assessment methods included in the manuals to be used by the assessment panel and cannot substitute the panel’s own assessment of the technical skills required for the Post. Moreover, there is no document on the record prepared by the panel from which results that such a review was made, and the final ratings of the candidates were based on their ratings from their performance appraisals.

111. Moreover, as results from secs. 2.1(d), 2.2 and 2.3 of ST/AI/2010/5 (Performance Management and Development System), the performance appraisal system is recognising the successful performance and is supported by the electronic

performance appraisal system (“e-PAS”), which is an electronic application that captures the main stages of the performance process (workplan, midpoint review and end-of-year performance appraisal). The interview panel has no competence to review the e-PAS reports and cannot substitute the mandatory assessment of the technical skills of the candidates for an advertised post with such a review of the e-PAS.

112. The Tribunal concludes that the mandatory procedural requirement to have a panelist expert in Russian to enable the panel to assess the candidates’ substantive knowledge on Russian was not respected, which is directly linked with another major procedural irregularity—the lack of assessment through an assessment exercise/written test conducted before the interview of the short-listed candidates to test their substantive knowledge against the requirements of the vacant position on Russian, English and another official language of the United Nations.

113. As results from sec. 1—“General Provisions”—from ST/AI/1998/7/Amend.1, in accordance with the needs of the Organization, language competitive examinations may be held for the purposes of recruitment or placement in posts requiring specific language skills in the Professional category. The relevant legal provisions for the present case are the ones from secs. 2.1 (Eligibility) and 4.1 (Specialized board of examiners).

114. The mandatory and cumulative eligibility criteria for a staff member to apply to take a competitive examination for placement in such a post are mentioned in sec. 2.1 of ST/AI/1998/7/Amend.1: (a) meets the minimum entrance criteria for that examination as set out in the relevant announcement; (b) holds a United Nations appointment valid at least until the end of the month when the *written examination* is scheduled to take place; and (c) has a satisfactory record of performance.

115. As results from the above-mentioned considerations, the assessment panel in all cases involving a competitive examination for language posts represents a

specialized board composed only from language experts and these have to directly assess the candidate's technical skills and competencies.

116. In the present case, the assessment panel did not include two members whose presence was mandatory, respectively an expert on Russian language and a non-voting ex-officio member representing the Assistant Secretary-General, OHRM ("ASG/OHRM"). Also, the chairperson of the panel was not elected by the other members.

117. Further, it results that all applicants for a post requiring specific language skills in the Professional category, as in the present case where the JO was for a P-5 post in the VRS/MPD, must take a written examination. This mandatory requirement for the applicants to pass a written examination (ST/AI/1998/7), which constitutes also the assessment exercise according with ST/AI/2010/3 and the Hiring Manager's Manual, was not respected.

118. The Tribunal concludes that the composition of the panel was not in accordance with the mandatory legal provisions and the panel did not assess, as required, the technical skills /substantive knowledge of the short-listed candidates against the requirements of the Post.

#### Length of the interview

119. The Applicant submits that he was disadvantaged as a result of his interview lasting longer than that of the selected candidate because the interview was conducted in English, which is not his mother tongue. He submits that the relative length of the interview compared to that of the selected candidate meant he was "prone to making more mistakes".

120. The Respondent accepts that the Applicant's interview lasted longer but submits that this was because he did not answer the questions directly and was asked follow-up questions. He states that the follow-up questions provided the Applicant an opportunity to demonstrate the required competencies.

121. Section 9.6.2 of the Hiring Manager’s Manual states that the Hiring Manager should inform the Applicant that the interview session will last between 30 and 60 minutes. However, in the email dated 28 November 2012, the Applicant was advised that the interview would last “approximately” 90 minutes. According with para. 4 of sec. 9.5.1—“What is a Competency-Based Interview?”—from the Hiring Manager’s Manual:

The same questions that focus on eliciting specific examples from the applicants in which they describe situations where they might (or might not) have demonstrated the required behaviors are applied to every applicant.

122. As results from the testimony of one of the witnesses (Mr. Z.C.), not all the questions prepared for the interview were actually used because of the time limitation. If all the questions were asked, the total length of the interview would have been 3-4 hours and the members of the panel had to choose which questions to use. The witness also mentioned that no hypothetical questions were used during the interview.

123. It appears that in the present case, as mentioned by Mr. P.H.F., the Applicant’s interview lasted “around 1 hour and 45 minutes”, while the selected candidate’s interview was shorter, less than an hour.

124. The Tribunal concludes that the Applicant’s right to be fully and fairly considered for the Post was not respected since the duration of the interview was not the same for both short-listed candidates and not all the interviewing questions were addressed to the candidates in a similar manner.

The competency-based interview

125. The Tribunal observes that in the present case, as results from the document “Interview Evaluations—JO 24475” and from the witnesses testimony, the candidates were assessed during the interview for six job requirements: professionalism, leadership, managing performance, planning and organizing, technological

awareness, and communication, but the final interview evaluations did not include one of them (communication) and the scores received by the candidates for this competency. This competency was not included in the JO and the Tribunal concludes that this procedural error did not affect the Applicant's right to be considered for the Post.

126. The Tribunal notes that as results from the evidence, the five panel members decided to use half points to evaluate the candidates during the interview, but the average score for each competency was rounded. All the members of the panel stated that a 3.5 score is more close to 4 than to 3. This statement of the panel members is subjective and mathematically incorrect because 3.5 is equally distanced from 3 and 4. For example, 3.49 is closer to 3 and 3.51 is closer to 4, but 3.5 cannot be determined. The members of the panel must allocate the points in the most accurate manner in order to reflect the candidate's performances also keeping in mind that the existing system allows only round average scores to be converted in rates (for example 3 for satisfactory and 4 for outstanding). All scores between 3.01 and 3.99, including 3.5, from the mathematical point of view, are lower than 4 and the corresponding rate is satisfactory and not outstanding.

127. In the present case, no clear explanation was provided by the members of the panel for applying a rounding method, except that the results cannot be introduced in Inspira unless they consist of round numbers. The Tribunal further notes that no evidence was produced to support such a statement and considers that the computer programme must be designed to reflect the real scores of the selection, including decimals and not vice-versa—the results to be adjusted/rounded to be introduced in Inspira. In *Zhao, Zhuang and Xie* UNDT/2014/036 (affirmed in appeal 2015-UNAT-536), this aspect was clarified by the Respondent at para. 27(c):

... Inspira has four categories: “Unsatisfactory”, “Partially Satisfactory”, “Satisfactory” and “Outstanding”.

128. The scoring method used by the panel to round the average scores from decimals to whole numbers for each competency was erroneous for the following

reason: each time when half of point is used to evaluate the candidates during a competitive examination, the average score remains accurate only if it is kept as a decimal number and therefore it must not be rounded. The same principle is applicable to the situation when only round points are awarded by a panel composed from an odd number of members (usually three or like in the present case five) because the total score is divided to three or to five and the accurate result—the average score—must include decimals in all cases where the total score is not a multiple of or divisible by the number of the panelists. The same method must be applied to the assessment exercise, to the interview, and to the average (final) scores resulting from the two assessment methods.

129. The Tribunal underlines that the method used by the panel for the two short-listed candidates to round down the average scores below 3.5 to 3 and to round up the scores above 3.5 to 4 can be used only in case of an individual evaluation and not in case of a comparative competitive review of two or more candidates where the accuracy of the result is always determined by the decimals.

130. The Applicant received a total score of 15 points and the selected candidate received a total score of 18 points after the average scores were rounded by the panel.

131. The unrounded average scores of the two short-listed candidates, resulting from the correct application of the mathematical scoring method described above are:

**Selected candidate:**

Professionalism:	3.60 instead of 4.00
Leadership:	3.30 instead of 3.00
Managing performance	3.60 instead of 4.00
Planning and organizing	3.60 instead of 4.00
Technological awareness	3.00
Average score	17.10 instead 18.00



**The Applicant:**

Professionalism	3.30 instead of 3.00
Leadership	3.00
Managing performance	3.00
Planning and organizing	3.40 instead of 3.00
Technical awareness	3.10 instead of 3.00
Average score	15.80 instead of 15.00

132. It results that the accurate average scores for the Applicant was 15.8 instead of 15 and for the selected candidate 17.1 instead of 18. The corresponding rating for each score indicated above is “satisfactory”.

133. In conclusion, the method for calculating the final scores for the two candidates was not accurate and was not following and reflecting the method applied to evaluate each competency, namely the half points awarded to each candidate. In this way the difference between the final scores of the two candidates was incorrectly established, being artificially increased to the detriment of the Applicant.

134. Moreover, the Tribunal notes that the mathematical method to calculate the total scores of the short-listed candidates had a direct and major impact on the final rating, which as results from the “sample of competency based interview rating sheet” from the Hiring Manager’s Manual is as follows: 1—unsatisfactory: given when interviewee does not meet competency expectations (meets less than half or none of the indicators); 2—partially satisfactory: given when interviewee partially meets competency expectations (meet around half of the indicators ); 3—satisfactory: given when interviewee meets competency expectations (meets most indicators); and 4—outstanding: given when interviewee exceeds competency expectations (meets all indicators).

135. The conversion of the average scores from numbers 3 and 4 to ratings ‘satisfactory’ and ‘outstanding’ was also inaccurate since the unrounded scores of the candidates indicate that none of them obtained a 4.00 score. In the absence of an express rule that the scores between 3.01 and 3.49 correspond to satisfactory and the

ones between 3.50 and 3.99 correspond to the grade ‘outstanding’, all the scores between 3.01 and 3.99, are to be rated as satisfactory.

136. Consequently, the unrounded average scores from the competency-based interview evaluation both for the selected candidate and the Applicant, corresponded in reality to the satisfactory level of rating at all five competencies.

137. Moreover, the Tribunal observes that comparing the conclusion mentioned by the panel in the case of the selected candidate that “the candidate demonstrated full or outstanding possession of all five competencies and is therefore recommended for the post” with the one in case of the Applicant “the candidate demonstrated full possession of all the five competencies and is therefore recommended for the post” it results that both candidates meet all the indicators, which is characteristic for an outstanding evaluation. In both cases, the two short-listed candidates appear as being equally qualified for the Post.

#### Selection decision

138. The Tribunal notes that the final note prepared by the Hiring Manager on 7 January 2013 for the Acting Head of DGACM, signed by the Acting Head on 14 January 2013, mentioned the scores from the preliminary evaluation—10 points out of 12 for each candidate; the scores from the interview—15 points for the Applicant and 18 points for the selected candidate; and the total scores—25 points for the Applicant and 28 points for the selected candidate out of 32. The note reflected a three point difference between the two candidates in favor of the selected candidate (almost double the real one, which was 1.3).

139. As results from secs. 11.1.6 and 11.1.7 from the Hiring Manager’s Manual, the Hiring Manager’s note should have included only the unranked final list of the recommended candidates who met all the competencies assessed by the interview panel.

140. The Tribunal notes that in the two-page document from 7 January 2013, on the first page, the Hiring Manager recommended both short-listed candidates for selection. However, the second page of the document included the following sentence: “Pending clearance by the [Central Review] Secretariat I recommend that [the selected candidate] be selected for ... the post”. The Tribunal observes that the second page is not signed by the Chief of VRS and/or by the Director of MPD. On 14 January 2013, the Acting Head, DGACM, decided to approve the recommendations and signed the first page from the document “Note to Mr. G” (the Acting Head of DGACM).

141. The first page of the document is signed by the Acting Head of DGACM under a section titled “Approved/Not Approved” and dated 14 January 2013. It is not clear which recommendation this signature relates to—the recommendation of both candidates for consideration, which appears on the first page, or the recommendation of the selected candidate for selection, which appears on the second page. In addition, the Acting Head of DGACM did not cross out or circle either option, so it is not clear from the document whether he is approving or not approving the recommendation.

142. On 17 January 2013, the transmittal memoranda concerning the selection exercise was submitted to the CRB.

143. Further, the Tribunal notes that final transmittal memorandum submitted to the Central Review Body (“CRB”) on 17 January 2013, three days after the above-mentioned note was signed by the Acting Head of DGACM had a different content, stating *inter alia* that:

... 2 [candidates] were further evaluated for substantive assessment of their technical/professional knowledge, skills and abilities. The Assessment Panel additionally determined that the following two candidates have met all of the evaluation criteria for the subject job opening and are placed on the recommended list:

1. [The selected candidate]
2. [The Applicant]

144. No scores or ratings were included in this note and, as explained above, it appears that such language indicated that the two candidates are equally qualified for the Post. The required format of the transmittal memorandum was respected only when transmitted to the CRB.

145. It results that two different evaluations were transmitted to the Acting Head of DGACM and to the CRB. Also, the CRB was erroneously informed that the candidates' technical/professional knowledge was evaluated. It appears that the recommendation endorsed by the CRB on 4 February 2013 was different than the one presented to the Acting Head of DGACM and signed by him on 14 January 2013.

146. On 4 February 2013, the CRB "endorsed the proposal for filling the [...] job opening". On 7 February 2013, the Applicant was placed on the roster of pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions at the same level.

147. "Selection decision" is defined in sec. 1(x) of ST/AI/2010/3 as follows:

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender ...

148. It results that only the head of the department must ("will", "shall") exercise the discretion to decide the preferred candidate, who becomes the selected candidate, from the list of proposed qualified candidates only after the CRB finds that the evaluated criteria and the applicable procedures have been followed.

149. In the present case, the preferred candidate (the selected candidate) was recommended by the Chief of VRS and/or the Director of MPD in the second page of the document "Note to Mr. G". The Tribunal notes that this document is not signed by any of the two managers and the Acting Head of DGACM only

approved/endorsed the recommendation of the selected candidate without exercising his mandatory role to decide himself the selected candidate.

150. According with secs. 1(x) and 9.3 of ST/AI/2010/3, the head of the department/office must select the candidate he or she considers to be best suited for the functions taking into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender. It clearly results that the selection decision must include all the reasons why a certain recommended candidate was selected and do not represent a simple act of approval of the preferred candidate indicated by another person involved in the assessment of the candidates. The hiring manager and/or the panelists have no competence to decide the preferred candidate(s), but only to recommend the best candidate(s). Even if the selection decision of the head of the department coincides with the proposal made by the hiring manager, the head of the department always has to justify his/her selection decision.

151. The Tribunal concludes that the selection decision, which does not include any reasons, was made before the CRB's mandatory review of the results of the selection process and the mandatory requirements from secs. 1(x), 8.1, 9.2 and 9.3 of ST/AI/2010/3 were not respected.

### **Summary**

152. In summary, the following procedural irregularities have been identified by the Tribunal:

- a. The JO did not identify the specific assessment method to be used for the evaluation of the technical skills during the selection as part of the evaluation criteria;
- b. The panel did not include an expert on Russian language and a non-voting member representing ASG/OHRM;

c. The panel did not assess the short-listed candidates through an assessment exercise (written test) to evaluate their substantive knowledge against the requirements for the Post;

d. The scoring system used by the panel did not accurately reflect the candidates' performance during the interview, which determined an inaccurate conversion to the ratings of satisfactory and outstanding;

e. The selection decision was made before the CRB's mandatory review based on a different note than the transmittal memorandum sent later to the CRB and do not contain the reasons of the Acting Head of DGACM for the selection.

153. The Tribunal appreciates that as results from the above-mentioned considerations, the Applicant's right to be fully and fairly considered for the Post was not respected.

### **Relief**

154. The Applicant requested that the contested decision be rescinded and that a new, fair and objective recruitment process be initiated or, as an alternative, to be awarded two years' net base salary in compensation for the violation of his rights and for stress and suffering as well as for the loss in salary and pension benefits caused by his non-selection.

155. The Tribunal notes that the Appeals Tribunal stated at para. 48 of *Onana* 2015-UNAT-533 that the direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion.

156. In the present case, both the Applicant and the selected candidate were recommended for the Post and he had a significant chance for promotion. However, even if the Applicant was not selected for the Post, he was endorsed by CRB and he

was placed on a roster for pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions at the same level.

157. In case the contested decision would be rescinded and the entire selection process would restart, the Applicant would lose his rights as a roster applicant as mentioned in sec. 9.4 and 9.5 from ST/AI/2010/3/Amend.1 and reflected in secs. 15.6.3 and 15.7.3 from the Hiring Manager's manual. Such a solution will breach the principle of *non reformatio in peius* (the principle of non-aggravating the situation of a party in its own appeal), an old principle of procedural law, according to which the use of an appeal cannot create, for the party that exercised it, a worse situation than the one from the decision under appeal. The decision under appeal can be reformed only in favor (*in melius*) and not at the expense (*in peius*) of that party. In *Skourikhine* 2014-UNAT-468, the Appeals Tribunal stated:

33. As we held in *Charles*, this is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Sub-sections 9.4 and 9.5 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered candidates. If the head of department's discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

158. Moreover, taking into consideration all the particular circumstances in the present case, together with the fact that the Applicant decided to move to the Translation Unit a couple of months after the selection decision was made, the relief requested by the Applicant is to be rejected.

159. The Tribunal is of the view that even if some of the irregularities in the selection process may have contributed to the Applicant's decision to accept the

invitation to work in another unit, ultimately a non-promotion decision has no such legal effect as forcing the non-selected candidate to work in a different unit.

160. Regarding the alternative relief, the Tribunal underlines that the Applicant has only the right to be fully and fairly considered for a post and not to be selected and therefore he is not entitled to receive compensation consisting of two years' net base salary for violation of his right to be fully and fairly considered for the Post.

161. The Tribunal notes that as results from the Applicant's testimony that, after the selection decision was made, he was stressed and depressed because he was not selected and it was not easy for him to continue to work in the Russian Verbatim Reporting Section. When he was invited to work in the Translation Service he decided to accept this invitation.

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

36. 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.

163. The Tribunal accepts the Applicant's evidence that he was stressed and depressed as a result of the selection decision, which the Tribunal has found was tainted by procedural errors. In the Tribunal's view, the amount of USD3,000, together with this judgment, represents a reasonable and sufficient compensation for the moral damages resulting from substantial procedural errors.

### **Observation**

164. The Tribunal is of the view that the most accurate scoring system in a competitive comparative review like the one used by the staff selection system is a scoring system based on decimal numbers and the current double system of converting scores into ratings or vice-versa for being recorded in Inspira should be modified in order to reflect real differences between the candidates. Such a system will simplify the procedure to reflect the results of the selection process ensuring full transparency and accuracy. The final scores of each candidate must reflect the results from all of the assessment methods used during the selection process (for example, the average between the scores from the written test and the scores from the interview).

### **Conclusion**

165. In the light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;

b. The Respondent is ordered to pay the amount of USD3,000 to the Applicant as moral damages for the breach of his right to be fully and fairly considered for the post.

*(Signed)*

Judge Alessandra Greceanu

Dated this 5<sup>th</sup> day of November 2015

Entered in the Register on this 5<sup>th</sup> day of November 2015

*(Signed)*

Hafida Lahiouel, Registrar, New York