



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

KRIOUTCHKOV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Russian Translator (P-3) at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), contests his “non-consideration/selection” for a vacancy of Russian Reviser (P-4), Russian Translation Section (“RTS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”).

2. As remedies, he requests to be “afforded the UN obligations of good faith and due process in the full and fair consideration of [his] case”, as well “as any relief customary in such instances at the discretion of the Tribunal”.

## **Facts**

3. The post at issue was advertised through Internal Vacancy Announcement (“IVA”) DCM 4/2014 from 25 July to 7 August 2014. The message from the Executive Office, DCM, UNOG, circulating the IVA stated that it was “for lateral movements of staff only”. The Applicant applied by email of 28 July 2014, reading: “If I do not qu[a]lify for the lateral move on [that IVA], please disregard my application and let me know”.

4. By memorandum of 11 August 2014, the Officer-in-Charge, RTS, recommended to the Director, DCM, the selection of another candidate, stressing that, out of the two candidacies received, that of the Applicant had not been considered due to his grade (P-3) whereas the other candidate met all the criteria for the post.

5. By memorandum of 14 August 2014, the Director, DCM, requested the Under-Secretary-General, Department for General Assembly and Conference Management (“DGACM”), New York, to approve the lateral transfer of the recommended candidate from DGACM to UNOG. He approved it on 4 September 2014.

6. After the Applicant inquired, on 25 September 2014, on the outcome of the recruitment exercise, the Executive Office, DCM, advised him, by email of 10 October 2014, that the post was limited to lateral moves only and, “because [he was] at the P-3 level, [he] was not eligible for a P-4 under a lateral move arrangement”.

7. The Applicant requested management evaluation of the impugned decision on 3 November 2014. The Management Evaluation Unit (“MEU”) replied by letter of 19 January 2015, upholding the decision.

8. The instant application was filed on 17 March 2015. The Respondent replied on 17 April 2015, annexing a number of documents recording the process leading to the contested decision.

9. Pursuant to Orders Nos. 122 (GVA/2015) of 18 June 2015, 176 (GVA/2015) of 21 September 2015 and 209 (GVA/2015) of 22 October 2015, this case, together with a number of other cases filed by the Applicant, was referred to mediation, and the proceedings before the Tribunal were suspended for that purpose. However, mediation efforts were unsuccessful, and the proceedings before the Tribunal resumed on 2 November 2015.

10. By Order No. 88 (GVA/2016) of 3 May 2016, the parties were invited to file comments, if any, with respect to the Tribunal’s view that a judgment could be rendered without holding a hearing. The Respondent made no comments. The Applicant filed additional submissions on 14 May 2016, raising in particular that the advertisement of the litigious post though an IVA was a deviation from the rules governing lateral moves, and moving for a hearing on the merits.

11. By Order No. 105 (GVA/2016) of 26 May 2016, the Respondent was instructed to file written comments on the above-mentioned issue raised by the Applicant in his last submission, which the Respondent did on 2 June 2016.

12. On 12 June 2016, the Applicant filed comments on the Respondent’s response to Order No. 105 (GVA/2016), which the Tribunal took into consideration despite being unsolicited.

### **Parties' submissions**

13. The Applicant's principal contentions are:

a. The decision contradicts art. 101.3 of the Charter and staff regulation 4.2, providing that the paramount consideration in the staff's appointment, transfer and promotion "shall be the necessity of securing the highest standards of efficiency, competence and integrity". These provisions cannot be respected by covertly selecting candidates instead of conducting transparent competitive selection processes or by limiting selection to DGACM candidates only, as not only it prevents candidates from applying, but also limits the selection of candidates;

b. The disputed decision also breached General Assembly resolutions 33/143, 51/226 and 63/250, requesting that all vacancies be announced, so as to give equal opportunity to all qualified staff and to encourage mobility, and runs contrary to the requirement of mobility of all internationally recruited UN staff, stressed in General Assembly resolution 53/221;

c. Sec. 4.1 of ST/AI/2010/3 (Staff Selection System) prescribes that immediate and anticipated job openings for positions for one year or longer be advertised through a compendium of job openings. The instruction exempts lateral moves from, *inter alia*, the advertisement requirement and the screening of candidates, but is silent on the criteria for when such a move is appropriate; however they may be seen as an expedited method of recruitment, comparable in this respect to pre-screened rosters referred to in General Assembly resolution 61/244, which made it clear that the use of such expedited recruitment process should be "confined to surge needs, with established procedures for recruitment being waived only in exceptional cases". If so, such moves should only be resorted to in exceptional cases, as held in *Nwuke* UNDT/2013/160. Accordingly, they might be justified in extraordinary emergency situations, such as a peacekeeping or natural disaster operations;

d. There was no “extraordinary emergency situation” at the post’s unit at the material time. As a matter of fact, the General Assembly’s session was in full swing and the New York Russian, Translation Section required temporary assistance to cope with the volume of documentation. Moreover, it is not the first time that the Chief, RTS, UNOG, fills a position by lateral transfer in disregard of the Organization’s needs. By contrast, the litigious post was not critical in RTS, being only one of 17 other P-4 posts therein;

e. Pursuant to staff rule 12.3(b), “Exceptions to the Staff Rules may be made ... provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected”. In the present case, the exception consisting in advertising the post for lateral move only violated staff regulation 4.2, it was not agreed by the staff member directly affected and was prejudicial to his interest and those of any other qualified P-3 staff member that was prevented from applying;

f. According to sec. 2.5 of ST/AI/2010/3, heads of departments/offices may transfer staff members to job openings at the same level without advertisement of the job opening. From a procedural point of view, the Administration deviated from this provision, inasmuch as the litigious post was advertised. In addition, it was advertised outside DGACM, effectively making it open to every qualified staff member. It should thus not have been restricted to lateral move, but filled through an open regular competitive selection process;

g. The definition of lateral move ST/AI/2010/3 provided in ST/AI/2010/3 states that it “will normally involve a change functions”. The contested transfer implies no change in functions, as the post was a regular Russian Reviser post;

h. Any lateral move must be in accordance the established procedures, not be arbitrary or motivated by factors inconsistent with proper administration or based on erroneous, fallacious or improper considerations. The lateral transfer was made in the interest of the successful candidate and to prevent the applicant from applying. The Chief, RTS, decided to limit the vacancy to lateral moves when the Applicant filed several appeals affecting him, clearly showing prejudice and ill-will, based on which he should have recused himself before making such decision. As to the selected candidate, he had been promised the next vacant post in RTS, UNOG as part of a prearranged deal after he was not selected for the previous P-4 post therein;

i. For the past over 25 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all duty stations where Russian translation services exist. Some UNOG vacancies even stated at some point that Geneva candidates were preferred. The promulgation of Administrative Instruction ST/AI/2010/3 (Staff selection system) further diminished the Applicant's chances, as its sec. 2.5 allows Heads of departments/offices to transfer staff members at the same level within their departments or offices, including in a different location, without advertising the vacancy or any review by a central review body ("CRB"). Since then, all P-3 Russian Translator posts have been filled without a competitive process. This, coupled with the system-wide practice of promoting to P-3 and P-4 posts staff within each unit, eliminated any career development and mobility chances for him. In Bangkok, no P-4 post is expected to become vacant before 2022, by which time, even if successful, the Applicant will have served at the P-3 level for 30 years;

j. Considering the above and his history of lack of success in applying for posts in Geneva for the last 20 years, the Applicant believes he is a victim of duty station-based discrimination. He is penalized for serving in a regional commission, which is not part of a DGACM system. Also, given that back in 2006, in the context of a different recruitment process for a post in RTS, UNOG, the Applicant opposed the recruitment of the person that

the Chief, RTS, wished to hire, he believes to have suffered from personal retribution by the latter. The pattern of using various techniques to prevent the Applicant's selection is indicative of personal bias and prejudice against him;

k. The Applicant has been repeatedly rostered for promotion to the P-4 level since 2008. This created a legitimate expectation of being promoted within a reasonable average period on a par with other rostered Russian Translators; and

l. While being a P-3 translator, the Applicant has been translating and self-revising his work, which by the Organization's own standards corresponds to tasks at the P-4 level, without granting him in return any practical recognition or real chance of promotion; and

m. The text of the Applicant's email applying for the post does not estop him from contesting the decision. DCM acknowledge receipt of his candidacy by email of the same day, and for that he assumed that it had been accepted.

14. The Respondent's principal contentions are:

a. The Secretary-General enjoys broad discretion in matters of assignment, selection, promotion and appointment of staff, including their reassignment. The Tribunal must conduct a limited review of such decisions, respecting their presumption of regularity, and not substitute its own judgment to that of the Administration;

b. The regulatory framework explicitly permits lateral transfers, notably Annex 4 of ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules) and sec. 2.5 of ST/AI/2010/3. The use of lateral transfers to meet the needs of a department/office is specifically provided for in sec. 1(q), 2.5 and 3.2(l) of ST/AI/2010/3. It was within the discretion of the USG/DGACM to have the vacancy in question advertised in Inspira and conduct the standard selection process or to proceed to a lateral transfer as a

course of action to fill the position. The second option was chosen for the effective delivery of services, given the demands of RTS, since the procedure required much less time and the staff member could then begin work upon transfer and without much oversight. It was lawful and reasonable;

c. The wording of sec. 2.5 of ST/AI/2010/3 does not oblige to issue an IVA, but does not prohibit either to internally advertise posts. It is thus allowed. The IVA was issued to assess internal DGACM internal staff's interest for the position, which is a reasonable measure in the exercise of delegated authority. The Applicant incorrectly claims that the IVA was advertised under ST/AI/2010/3; its sec. 4 requires that job openings be published electronically through a compendium and such compendium is contained in the UN careers portal of Inspira, whereas the post at stake was circulated internally, rather than published on Inspira;

d. The Applicant did not meet the requirements for a lateral transfer since he is at the P-3 level, and a lateral transfers requires that the concerned staff member hold the same level than the position;

e. Since in the same email by which he sent his candidacy the Applicant requested the recipients to disregard it if his P-3 grade disqualified him for a lateral transfer, he is estopped by his own conduct from contesting the issue. A staff member can consent to the variation of a rule by his words, actions or inactions. The Applicant acquiesced to the internal advertisement of the vacancy and to the rejection of his candidacy for the transfer;

f. The Applicant has not discharged the burden of proof that he was deprived of a contractual right;

g. The Applicant's claims on past selection exercises are not receivable, his submission on the violation of the "mobility principle" is without merit; and



h. The allegations about personal retribution, bias and duty station-based discrimination are unsupported.

### **Consideration**

#### *Motion for a hearing on the merits.*

15. Pursuant to art. 16 of the Tribunal's Rules of Procedure, the judge hearing a case "may hold oral hearings". Therefore, it is within the Tribunal's discretion to hold or not to hold a hearing.

16. The Tribunal notes that in the Applicant's motion for a hearing he insisted that the publication of the post's IVA was not in compliance with sec. 2.5 of ST/AI/2010/3, and that this ultimately vitiated the lateral transfer under review. The Tribunal specifically sought the Respondent's position on this point.

17. Having obtained the views of both parties on the issue that the Applicant suggested necessitated further discussion, the Tribunal considered having before it all relevant information to determine the case on the basis of the parties' written pleadings and the documents on file. Hence, it found no need for an oral hearing.

#### *Estoppel*

18. There is no merit in the Respondent's contention that the Applicant is estopped from contesting his non-consideration/selection for the post as a result of a sentence he wrote when applying, namely one requesting to disregard his application if he did not qualify for the lateral move.

19. Such statement is not tantamount to an acquiescence. At most, it shows that the Applicant might have harboured some doubts that he would be considered eligible, knowing, as he obviously does, the rules governing lateral transfers.

20. That being said, the Applicant's argument that a mere acknowledgment of receipt of his candidacy led him to conclude that he would be further considered is implausible. An acknowledgment of receipt is no more than notice that a communication has attained its addressee; it is generally known to entail no assessment or prejudgment of its content.

*Legal basis for lateral transfers*

21. Sec. 2.5 of ST/AI/2010/3 establishes that:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

22. This provision mirrors Annex 4 of ST/AI/234/Rev.1, that lists powers vested on the Heads of department/office, and enumerates among them the possibility of laterally transferring their staff.

23. Sec. 2.2 of ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills) also caters for the possibility of lateral transfers in the specific scenario of language professionals during their first five years of service, although this was not the case of the staff member moved to the litigious post. The Secretary-General's authority to laterally transfer language staff is reiterated in para. 19.4 of the Inspira Hiring Manager's Manual.

24. In line with the above-quoted provisions, sec. 3.2(l) and 3.2(e) of ST/AI/2010/3, respectively exclude from the scope of application of the staff selection system laid down in ST/AI/2010/3 lateral moves within a department, as well as those of language Professional staff to another linguist post in their first five years of service.

25. The claim that lateral transfers are, as a matter of principle, contrary to art. 101.3 and staff regulation 4.2, which are indeed higher norms than ST/AI/2010/3, is unconvincing. These two provisions set a general obligation to secure “the highest standards of efficiency, competence and integrity”. None of them rules out lateral moves, and there is no self-evident contradiction between them and the resort to lateral transfers. On the contrary, staff regulation 4.2 explicitly contemplates “transfers”. Additionally, staff regulation 1.2(c) establishes the Secretary-General’s power to assign staff to any activities within the Organization, and the Appeals Tribunal has upheld as lawful the option of laterally transferring staff (see, e.g., *Rees* 2012-UNAT-266, *Pérez-Soto* 2013-UNAT-329). This clearly counters any interpretation to the effect that lateral transfers are intrinsically against the goal of efficiency, competency and integrity prescribed in the Charter.

26. As to the General Assembly resolutions prescribing the advertisement of all vacancies to enable open competition for such posts—notably resolution 51/226 of 3 April 1997—it is apparent, when read in context, that they aimed at reminding the Secretary-General of the necessity to generally fill available positions following the competitive recruitment procedures, which requires the publication of vacancies. This does not amount to banning the use of lateral transfers.

27. In the same vein, sec. 4.1 of ST/AI/2010/3, in prescribing that immediate and anticipated job openings be published in the compendium, does not prohibit lateral transfers. Read in conjunction with the rest of the administrative instruction—notably sec. 2.5 and 3.2(e)—it becomes quite clear that sec. 4.1 is setting the first step of the standard staff selection procedure, to wit, the publication of the posts for which a competitive recruitment is to be conducted.

28. In conclusion, lateral transfers are unambiguously provided for in several provisions of the Organization’s internal legal and they do not breach any superior rule. Their use in order to fill vacant posts is in conformity with the applicable framework.

*Conditions for resorting to lateral transfers*

29. The Applicant's assertion that the transfers constitute an exception to the rules, therefore subject to the conditions spelled out in staff rule 12.3(b), is misguided. An exception to the Staff Rules as envisaged in staff rule 12.3(b) is an *ad hoc* departure from the prescriptions set out in the rules. By contrast, the possibility of transferring a staff member already in service instead of following the standard competitive procedure is, as seen above, built in the staff selection system. As such, far from being a departure from the rules, it amounts to their plain regular application. Accordingly, it is irrelevant to examine whether the conditions to make an exception to the Staff Rules were met.

30. Similarly misconceived is the submission that lateral transfers should be confined to "surge needs, with established procedures for recruitment being waived only in exceptional cases". In claiming so, the Applicant relies on General Assembly resolution 61/244. As the Applicant himself concedes, said resolution does not refer to lateral moves, but to pre-screened rosters; hence, it is such pre-screened rosters that the General Assembly intends to limit to surge needs and exceptional cases only. Extending this clearly defined and limited request to lateral transfers is an inappropriate extrapolation of a statement aimed at a significantly different situation. As the Applicant rightly points out, neither ST/AI/2010/3 nor any other related provision set out criteria for resorting to lateral moves, rather than to a competitive selection process. The UN legislator could have confined the use of lateral moves to certain hypothesis but, as a matter of fact, he chose not to establish any such condition. Had he wished to introduce some, he would have done so explicitly. Therefore, restrictions that were intended for different mechanisms cannot be applied to lateral transfers.

*Alleged violations of sec. 2.5 of ST/AI/2010/3*

31. The Applicant holds that, in any event, the disputed transfer departed from the material and procedural conditions laid down in sec. 2.5 of ST/AI/2010/3 for lateral moves.

32. Firstly, the post was advertised, despite the stipulation that lateral transfers within the same department be effected “without advertisement of the job opening”. According to the Applicant, the advertisement of the post, all the more since it was disseminated beyond DGACM, triggered the application of the staff selection system general regime.

33. The Tribunal emphasises that the vacancy was advertised through an IVA. It is obvious that this cannot be considered as a proper publication in the compendium of vacant posts pursuant to sec. 4.1 of ST/AI/2010/3. The IVA was never posted on the careers portal of Inspira; it was disseminated by email to the head of different offices, mainly within DGACM, albeit also outside it—like ESCAP. Both the IVA and the accompanying email specified that the advertising was strictly internal and for lateral move only; hence, no one could have been misled by the reach and conditions of the vacancy. Although sec. 2.5 of ST/AI/2010/3 expressly sets aside the duty of advertisement, it does not prohibit some kind of publication. Considering that advertisement of the post, even limited, tends—if anything—to render the process more transparent, the course of action consisting of circulating an IVA could hardly be deemed to harm potential candidates’ rights or somehow to undermine fairness. For that, the Tribunal is satisfied that the dissemination of an IVA did not amount to a violation of sec. 2.5 of ST/AI/2010/3.

34. Secondly, the Applicant highlights that sec. 1(q) of ST/AI/2010/3 defines “lateral move” as a

[M]ovement of a staff member to a different position at the same level for the duration of at least one year ... Within the same department or office, a lateral move will normally *involve a change in functions* with or without a change of supervisor. (emphasis added)

35. On this basis, he argues that the disputed transfer was improper because the successful candidate did not change functions, as he already discharged the duties of a P-4 Russian Reviser before his move to UNOG. In this respect, the Tribunal cannot but note that the successful candidate moved to a completely different

position with its own post description in a different duty station and under different supervisors; as such the posts are clearly distinct. At any rate, the above-quoted definition specifies that a change in functions will “normally” be involved, indicating by the use of this adverb that it is not even a mandatory requirement.

*Improper motivation*

36. Lateral reassignments, like any discretionary decision, must not be arbitrary or capricious, tainted by improper motives, based on erroneous or irrelevant considerations, procedurally flawed or resulting in a manifestly unreasonable outcome (see generally, *Assad* 2010-UNAT-021, *Sanwidi* 2010-UNAT-084, *Abbassi* 2011-UNAT-110).

37. The Applicant suggests that the decision was unduly influenced by personal retribution from the Chief, RTS, UNOG, further to a disagreement in a past selection exercise and, at the same time, because he had promised the post to the eventually reassigned candidate.

38. It is well-established that the burden of proving any allegations of ill-motivation or extraneous factors rests with the applicant (*Jennings* 2011-UNAT-184, *Obdeijn* 2012-UNAT-201, *Beqai* 2014-UNAT-434). In this case, the Applicant has not provided any evidence backing either of these claims. His history of unsuccessful applications for Geneva-based posts falls short to demonstrate personal prejudice. Likewise, no evidence shows that the incumbent of the post at issue had been pre-determined or enjoyed some sort of favouritism.

39. Having concluded that no conflict of interest was proven, the Tribunal cannot entertain the Applicant’s claim that the Chief, RTS, should have recused himself even before determining that the post would be filled by transfer rather than by a competitive recruitment.

40. Against this background, the Tribunal is unable to find that the disputed transfer was based on extraneous or improper factors.

*Other allegations*

41. Regarding the allegations such as the pattern to promote translators within each duty station, or his prolonged placement on the P-4 roster without that leading to his actual promotion, the Tribunal cannot but note that they fall beyond the scope of the present proceedings, which are intended to review the legality of the specific decision impugned. In fact, said allegations exceed the jurisdiction of the Tribunal, which is not the proper venue to examine previous recruitment decisions or to inquire on general complaints about broader systemic issues.

42. As to the Applicant's expressed grievance that he has been performing for many years functions that, by the Organization's own standards, correspond to P-4 level, while being remunerated at the P-3 level, this, again, falls outside the scope of these proceedings. In case the Applicant is not satisfied with the current classification of the post he encumbers, he should address such concerns in specific administrative proceedings which, if unsuccessful, could be subject to judicial review.

**Conclusion**

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

The application is rejected in its entirety.

*(Signed)*

Judge Thomas Laker

Dated this 27<sup>th</sup> day of June 2016

Entered in the Register on this 27<sup>th</sup> day of June 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva