



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/019/
UNAT/1622
Judgment No.: UNDT/2011/058
Date: 30 March 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

KOZLOV & ROMADANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant

Duke Danquah, OSLA

Counsel for Respondent

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicants challenge a promotion exercise conducted in 2006 for the P-3 level post of Russian Editor (“the Post”), Official Records and Editing Section (“ORES”), Department of General Assembly Conference Management (“DGACM”), in relation to which they applied but were unsuccessful.
2. Briefly stated, the Applicants and a third candidate were interviewed as internal candidates for the Post, with the third candidate being recommended. The third candidate was later disqualified by the Office of Human Resources Management (“OHRM”) from assuming the Post because he was not officially rostered on the list of Russian Editors following a competency examination. Both Applicants had passed this examination in 1987/88 and were so rostered. (The third candidate also lacked a second competency requirement for the Post, namely having prior editing experience.)
3. Once the third candidate was found to be ineligible to occupy the Post, the third candidate (hereinafter referred to as “the initially-successful candidate”) was eliminated, but the Applicants at that point in time were not considered anew for the Post. Rather, the Post was awarded to a candidate (hereinafter referred to as “the ultimately-successful candidate”) whose terms of appointment and whose qualifications to fill the Post will be discussed elsewhere in this Judgment.
4. The Applicants challenge the selection procedures used to fill the Post.
5. Each Applicant seeks monetary compensation for improper denial of full and fair consideration for the P-3 post, for loss of opportunity to pursue the new P-4 level post of Russian Editor that was created in ORES after the Applicants had been denied the P-3 post, and for moral injury damages.

Procedural history

6. In October 2006, the Applicants separately sought administrative review of the decision to appoint the initially-successful candidate, and not either of the Applicants, to the Post, ultimately appealing the matter in January 2007 to the Joint Appeals Board (“JAB”). The JAB appears to have decided to deal with the Applicants’ separate appeals together, due to the similarities in facts and timing.

7. On 6 March 2008, the JAB issued joint Report No. 1966, concluding unanimously that the Respondent had “failed to shoulder its burden of proving that the [Applicants] were given full and fair consideration for the post”. The JAB recommended four months’ net-base salary for each Applicant as compensation.

8. On 18 June 2008, the Secretary-General rejected the JAB’s recommendation, and on 4 September 2008 the Applicants jointly appealed this decision to the former United Nations Administrative Tribunal.

9. On 6 January 2010, by way of email, the parties were advised that the case had been transferred to the New York Registry of the Dispute Tribunal. The issue of the joinder of proceedings has not been raised by either party, and the Tribunal has deemed it appropriate to deal with the Applicants’ cases in a single judgment.

Issue

10. The main substantive issue to be addressed by the Tribunal may be formulated as follows: did the Respondent properly exercise his discretion and follow proper procedures during the initial selection exercise for the Post, as well as when subsequently filling the Post with the ultimately-successful candidate?

Summary of relevant facts and procedure

11. On 25 July 1988, the (then) Acting Chief of the Russian Translation Service (“RTS”) sent a memorandum to the (then) Department of Conference Services (“DCS”) confirming the names of the 1987/1988 UN Language Training Course graduates. The Applicants were both amongst these graduates, each having passed the examinations in translation and editing that year. According to the Respondent’s Reply to Order 258 (NY/2010) of 29 September 2010, para. 2, this means that, “[h]aving passed the competitive exam, [the Applicants] were automatically placed on the roster [of Russian editors]”. At the time of the selection process in this case, both Applicants also had at least two years’ prior experience in editing.

12. The first Applicant, Mr. Kozlov, joined the Organization on 11 October 1988 as an Associate Translator on a fixed-term appointment at the P-2 level in RTS, Translation Division (“TD”), DCS. On 1 January 1990, he was reassigned in ORES as Associate Editor. Effective 1 May 1992, he was promoted to the P-3 level as an Editor in ORES. On 1 November 1995, his appointment was converted to a permanent appointment. Effective 11 October 2004, he was reassigned to the Russian Translation Service as a Translator.

13. The second Applicant, Mr. Romadanov, joined the Organization on 5 October 1988 as an Associate Translator on a fixed-term appointment at the P-2 level in RTS, TD, DCS. On 22 January 1990, he was reassigned in ORES as Associate Editor. On 1 January 1992 he was promoted to the P-3 level as an Editor in ORES. On 1 November 1995, his fixed-term appointment was converted to a permanent appointment. Effective 1 January 2004, he was reassigned to the Russian Translation Service as a Translator.

14. At the time of the interview, the initially-successful candidate held the post of Verbatim Reporter, ORES, DGACM, at the P-3 level, step 13. The initially-successful candidate received a permanent appointment with the United Nations in

September 1997. The record reflects that the initially-successful candidate had never sat for, nor passed, the competitive exam required to be placed on the roster of Russian Editors (a required competency for the Post). The record also reflects that the initially-successful candidate did not possess two years' prior experience in editing (another required competency for the Post).

15. On 8 August 2006, an "Announcement of Vacancy" ("VA") was advertised internally for the Post with closing date of 22 August 2006 (see Applicants' Application to the former UNAT, Annex 4). This VA did not contain all information required in Vacancy Announcements under ST/AI/2002/4, sec.4.5 (qualifications, skills and competencies required; the classified functions of the post; date of posting; and deadline for receipt of applications). The VA did not include the classified functions of the post, the date of posting, or more importantly, whether the Post was a fixed-term contract or a temporary vacancy.

16. The VA listed the relevant Responsibilities, Competencies and Qualifications and skills as follows:

Responsibilities:

Edits texts of a specialized nature in order to ensure accuracy, clarify, cohesion and conformity with United Nations standards, policies and practice.

Consults with author departments and translators and revisers and carries out research to clarify ambiguities and rectify substantive errors.

Checks his/her language version against the language of the original draft, redrafts incorrect or unclear passages and translates and inserts any passages that have been omitted.

...

Competencies:

Professionalism – Solid writing and analytical skills; ability to spot errors and inconsistencies in a text quickly; sensitivity to nuance; firm grasp of research techniques

Judgment and decision-making – Good judgment, discretion and flexibility; tact and negotiating skills.

Planning and organizing – Ability to manage time well and to set priorities when working under tight deadlines.

Communication – Strong interpersonal and communication skills.

Teamwork – Ability to work in a multicultural team environment, with sensitivity and respect for diversity as demonstrated by the ability to gain the assistance and cooperation of other in a team endeavor.

Qualifications and skills:

Education: Degree from a university or an institution of equivalent status; must have passed the United Nations competitive examination for the recruitment of Russian editors;

Experience: At least two years of experience in editing, preferably within the United Nations.

Language: Perfect command of Russian and an excellent knowledge of English and one of the other official languages.

Other skills: Facility in using word-processing programs and terminology databases.

17. On 13 September 2006, the Applicants and the initially-successful candidate were invited to interviews conducted by a three-person interview panel. This panel consisted of Ms. Elizabeth Hooper, Chief of ORES, DGACM (who was assumedly the Programme Manager for the selection process); Mr. Alexander Fedorchenko, Head of the Russian Language Group; and Ms. Alicia Zavala, Head of the French Language Group and of the Third Committee Editing Team.

18. A 25 September 2006 Note for the file (“File Note”) is on file with regard to each of the three candidates interviewed. The Respondent has confirmed to the Tribunal that this was the only interview record made. The File Note was not signed, either by Ms. Hooper and/or by the other interview panel members. While the File Note bears a typewritten date of 25 September 2006, it is unknown whether the File Note was authored on this date. It is unknown who authored the File Note.

19. In the File Note, the candidates were evaluated based on whether they satisfied the basic eligibility requirements for the Post as outlined in the VA as well as on their interview performance. The File Note states that competencies evaluated in the interviews conducted on 13 September 2006 included “professionalism, planning and organizing, and teamwork.” The File Note, however, omits stating whether the three VA competencies of “judgment”, “decision-making” and “communication” were evaluated.

20. The File Note states that all three candidates were considered to have met the eligibility requirements (a statement that is factually incorrect, as the initially-successful candidate lacked the two requirements of being a rostered candidate and of having prior editing experience) and were therefore invited to be interviewed by a panel on 13 September 2006.

21. By memorandum separate from the File Note, also dated 25 September 2006 (“Memorandum”), Ms. Hooper wrote to the Executive Office, DGACM, recommending the initially-successful candidate for the Post.

22. In the Memorandum, repeating the conclusion of the File Note, Ms. Hooper stated that: (i) all three candidates interviewed were considered to have met the eligibility requirements; (ii) the interview panel’s findings had been recorded in the File Note; and (iii) based on the interview and previous performance and performance appraisal system (“PAS”) reports, the third candidate (the initially-successful candidate) was “the most suitable candidate” for the Post and was thus recommended. The Memorandum mirrors the File Note’s inaccuracies regarding the initially-successful candidate’s eligibility for the Post.

23. The File Note and the Memorandum did not say that the initially-successful candidate was the *only* suitable candidate, or that the Applicants were *not* suitable candidates. Those documents simply stated that the initially-successful candidate was the “most” suitable candidate for the Post.

24. On 27 September 2006 the Applicants were separately informed that they had not been selected for the Post.

25. By email of 29 September 2006, OHRM advised the Executive Office that the candidate who had been recommended for the Post (i.e., the initially-successful candidate) did not meet the eligibility requirements for the Post, as his name did not appear on the roster of Russian Editors. As stated above, the Applicants' names had been on the roster of Russian Editors throughout the entire selection exercise.

26. After the initially-successful candidate was eliminated from the Post, the Applicants were not reconsidered for the Post.

27. The Post was awarded to another candidate (i.e., the ultimately-successful candidate), whom the Respondent terms as an "internal candidate" on a "lateral transfer" under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a) (see Respondent's reply of 3 December 2010 to Order No. 307 (NY/2010) of 18 November 2010, para. 9).

28. However, when the ultimately-successful candidate purportedly was "transferred", the ultimately-successful candidate could not have qualified for a "lateral transfer" under ST/AI/2002/4, Annex I, sec. 1(a), since that provision only applies to "staff" of the United Nations and not to "former staff". At the time of her appointment to the Post, the ultimately-successful candidate was not employed with the United Nations; while the ultimately-successful candidate had served as a permanent staff member of ORES in the 1980s, she had terminated her service with the United Nations, and following her departure was placed on "a roster of eligible retired/former staff members" (see the Respondent's reply of 10 March 2010 to Order No. 68 (NY/2010) of 3 March 2011, para (iii)). This status would convert the ultimately-successful candidate from supposedly being an "internal" candidate, into an "external" candidate.

29. Further complicating the situation regarding the ultimately-successful candidate are the answers provided by the Respondent in his response to Order No. 91 (NY/2010) of 21 March 2011:

... [the ultimately-successful candidate] was not appointed to the post, but hired on a Temporary Appointment. While on that Temporary Appointment, she carried out numerous functions depending on the needs of the department [DGACM] at any given time, including the functions of the post.

Upon examination of [the ultimately-successful candidate's] Personnel Action ('PA') history, she was hired by both the Official Records Editing Section and the Russian Verbatim Reporting Section on a variety of Temporary, When Actually Employed ('WAE') and non-regular Fixed Term appointments from May 2006 to present. ...

From the available records and having regard to chronology, [the ultimately-successful candidate] most likely began performing the functions of the contested post in late 2006 or early 2007, following the cancellation of the initial selection process in September 2006. There she is likely to have commenced carrying out the functions of the contested post while she was employed on a Temporary Appointment from 7 June 2006 to 31 December 2006. However, this is not entirely clear from the available records including the PA history.

...

The available records do not show when [the ultimately-successful candidate] stopped carrying out the functions of the contested post. This is because she was responsible for carrying out several functions in the language department depending on the needs of the department at any given time. Therefore, she was not on a contract against one particular post and so it is difficult to ascertain when she stopped completing one set of functions and began another. ...

30. These answers, in sum, state that:

a. the ultimately-successful candidate was *not* appointed to the Post (if not appointed to the Post, how can the contention be made that the Post was filled with the ultimately-successful candidate?);

b. the ultimately-successful candidate was *not* “on a contract against one particular post and so it is difficult to ascertain when she stopped completing one set of functions and began another”;

c. the ultimately-successful candidate is said to have been hired on a Temporary Appointment (although the VA did not specify that the Post was temporary);

d. the ultimately-successful candidate apparently carried out the responsibilities of a number of different positions within DGACM simultaneously (calling into question which post functions within DGACM the ultimately-successful candidate was performing at any one point in time);

e. the ultimately-successful candidate was hired on “a variety of Temporary, When Actually Employed (“WAE”) and non-regular Fixed Term appointments from May 2006 to the present (in his response to Order No. 91, the Respondent refers for the first time to ST/AI/2010/4, which was only enacted in 2010 and thus did not apply at the time of the staff selection exercise in this case in 2006);

f. “the available records do not show when [the ultimately-successful candidate] stopped carrying out the functions of the Post” (the Tribunal questions how personnel records can be lacking such information).

31. It is not the purpose of this Judgment to comment on the ultimately-successful candidate’s employment with the Organization. However, the Respondent’s contentions in response to Order No. 91 appear at odds with prior submissions to the Tribunal that the Post was done as a “lateral transfer” under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a). The submissions in response to Order No. 91 themselves give the appearance of irregularity in turning to the ultimately-selected candidate to fill the Post, as DGACM appears to move the ultimately-successful candidate from

one position to another, without necessary regard for staff selection rules within the Organization.

32. Further, the procedures outlined in response to Order No. 91 do not conform to the staff selection rules and regulations in effect at the time: nowhere in ST/AI/2002/4 is the category of “Temporary, When Actually Employed (“WAE”)” contracts defined; nor does ST/AI/2002/4 make a differentiation between “regular” and “non-regular” fixed term contracts. The category of Temporary, When Actually Employed Contracts was only articulated under ST/AI/2010/4, which was not in effect in 2006 and which postdates the selection exercise in this case. Thus, that administrative instruction is inapplicable here.

33. In addition, the Respondent has characterized the ultimately-successful candidate’s service on the Post as being *both* temporary and fixed term in nature. The Tribunal considers the information provided by the Respondent—or the processes employed within DGACM for filling the Post—to be misleading, for the Post never was intended to be a “temporarily vacant post” as defined in ST/AI/2002/4, sec. 1 (“Definitions”—Temporarily vacant post). When the Applicants applied for the Post, the Tribunal is of the understanding that the Applicants were applying for a “vacant post”, as defined, and that whoever was selected for the Post would occupy the Post for a longer period of time than permitted for a temporary vacancy.

34. The Applicants claim, and the Respondent has confirmed, that following termination of the initial internal selection process, the ultimately-successful candidate was appointed without any announcement of the vacancy. The reason for this is unknown.

35. The appointment of the ultimately-successful candidate ostensibly was done pending the generation of a new roster of Russian Editors, as the then-existing roster of Russian Editors had become out-of-date. According to the Respondent’s 8 February 2008 Interrogatory Answer, para. 4:

In accordance with required procedure [presumably the staff selection procedure under ST/AI/2002/4, *excluding* Annex I] steps were taken to recruit from a roster of candidates established on the basis of competitive examination results. One candidate could not be considered because of his promotion to the P-4 level. Another candidate notified OHRM that, for family reasons, she could not consider a post away from Moscow at this time. A third candidate, a staff member in another DGACM function, said she could not consider a switch from her current position at this time. While other eligible candidates have been under consideration, temporary assistance has been secured to ensure that the functions associated with the post are fulfilled. (*Ibid.*, para. 4)

36. Other than the Respondent's statement above regarding steps that were taken "to recruit from a roster of candidates [other than the Applicants] established on the basis of competitive examination results", this statement is without further documentary support in the record. The Respondent has not tendered documentary evidence to support his contentions regarding this phase of the selection process used for the Post, namely that the process was a competitive one and that all temporary roster candidates were unavailable, except for the ultimately-successful candidate.

37. Given the out-of-date status of the roster of Russian Editors at the time, and pending creation of a new roster of Russian Editors, DGACM filled the Post by appointing the ultimately-successful candidate, namely the wife of the (then and current) head of RTS, Mr. Kirill Speransky.

38. The selection exercise for the Post occurred in Fall of 2006 and the ultimately-successful candidate occupied the Post until November 2009, which is a period of time greater than one year permitted for temporary posts (see ST/AI/2002/4, sec. 1 ("Definitions" for "temporarily vacant post" and "vacant post")). In November 2009, another selection exercise for the Post occurred.

39. As for the ultimately-successful candidate's qualifications to fill the Post, the Respondent states in his 10 March 2010 reply to Order 68 (NY/2010) that:

[The ultimately-successful candidate] was on a list of approved editing candidates as she had previously passed the language exam. The list is comprised of former and retired staff members. The Official Records Editing Section (ORES) refers to this list when positions need to be filled temporarily, as it did in the present case. [The ultimately-successful candidate] was the only candidate on the list who was locally available and thus was recruited to temporarily fill the post pending the generation of a new roster.

40. With the above answer, the Respondent has not provided any official documentary evidence demonstrating the fact that the ultimately-successful candidate indeed had “previously passed the language exam”, or when this was so (see para. 11 above regarding the Applicants’ competency exam). According to the documentation provided by the Respondent in his response to Order No. 91, at the time of the selection exercise for the Post, the ultimately-successful candidate held a short-term, temporary appointment *as a verbatim reporter and not as an editor*. Where is the documentation of the ultimately-successful candidate’s passing the required competency exam? Did the ultimately-successful candidate pass this exam one, five, ten or more years previously? If she had passed this exam, why was she also not included on the roster of Russian Editors? (See the Respondent’s 15 October 2010 reply to Order No. 258 (NY/2010) of 29 September 2010, Annex 1 (Interoffice Memorandum of 4 August 1988, “Appointment of Russian Translators”).)

41. The Respondent appears to be saying that DGACM maintains two different rosters of editors—one for current staff members and one for former staff members. Yet, it is unclear from the Respondent’s answer, reproduced in para. 39 above, where DGACM retains the authority to keep a “list ... comprised of former and retired staff members” that may be used to fill positions whenever DGACM deems it appropriate to do so.

42. DGACM appears to have maintained an out-of-date roster of Russian Editors, which is required to be updated annually. (See the now abolished ST/AI/2002/4 (Staff selection system) of 23 April 2002, sec. 1 (“Definitions”—Roster).)

Applicable law

43. Under its resolution A/RES/57/305 (Human resources management) of 15 April 2003, the General Assembly:

44. *Notes* that the time needed to complete a national competitive examination cycle from the deadline for the applications until the successful candidate is placed on the roster is one year or more, and requests the Secretary-General to significantly reduce the time needed, and to report thereon to the General Assembly at its fifty-ninth session;

44. Staff regulation 4.4 provides (emphasis added):

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, *to the requisite qualifications and experience of persons already in the service of the United Nations*. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations. The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, *when no internal candidate meets the requirements of Article 101, paragraph 3, of the Charter as well as the requirements of the post*.

45. Former staff rule 104.15(b)(i) required that appointment to posts requiring special language competence be made exclusively through competitive examination.

46. ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills) of 12 January 2000 was operative at the relevant time. It applied to the placement of internal candidates who are successful in a competitive language examination for posts, which include editors, in accordance with the provisions of ST/AI/1998/7, sec. 1.

47. Under ST/AI/2000/1, sec. 2.1, candidates successful in a competitive language examination:

... shall be placed on a roster, in overall ranking order. They shall be selected from the roster as vacancies occur, taking into account not only their ranking but also the needs of service and the combination of languages and skills offered by individual candidates.

48. Under ST/AI/2002/4, sec. 1 (“Definitions”—Roster) (emphasis added):

Roster: list of candidates who have been endorsed by a central review body for a particular vacancy but not selected for it, and who have indicated an interest in being considered for selection for a future vacancy with similar functions at the same level. Roster candidates may be selected without referral to a central review body. *The roster is valid for one year.*

49. ST/AI/2002/4 includes the following relevant provisions:

2.4 Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level.

7.6 For each vacancy, the programme manager 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/or decision by head of the department/office.

50. ST/AI/2002/4, Annex I, “Responsibilities of the head of department/office”), (“Annex I”), in part provides:

1. The head of department /office has the authority:

- (a) To transfer staff laterally within his or her department/office;

[footnote (a): “The Under-Secretary-General for General Assembly Affairs and Conference Services has authority to transfer laterally language staff, including interpreters, translators, editors, verbatim reporters, proofreaders and production editors, up to and including those at the P-5 level, who serve in New York, Geneva, and Nairobi. This authority may be extended in future to language staff at the Economic Commission for Africa, the Economic Commission for Latin America and the Caribbean, the Economic and Social Commission for Asia and the Pacific and the Economic and Social Commission for Western Asia.”];

(b) To assign staff temporarily to a higher-level post that is vacant or temporarily vacant. For temporary vacancies expected to last for three months or longer, staff of the department/office concerned shall be informed of the temporary vacancy so as to give staff members the opportunity to express their interest in being considered. Every effort must be made to limit temporary assignments to vacant posts to the shortest possible period, during which time the post must be filled under the procedures of this instruction;

(c) To make decisions on the selection of staff when the central review bodies are satisfied that the evaluation criteria were properly applied and/or the applicable procedures followed. When these conditions are not met, the decision is made by the official having authority to act in these matters on behalf of the Secretary-General, in accordance with the provisions of section 5.6 of ST/SGB/2002/6;

(d) To select a roster candidate pre-approved for selection at the 15-, 30- or 60-day mark, without further reference to the central review bodies, on the recommendation of the programme manager, provided that the vacancy has been advertised, the new applications have been reviewed and the roster candidate is suitable for the vacancy.

...

51. Ms. Neeta Tolani, Executive Officer, DGACM, explains in an email dated 7 February 2005, with reference to a 6 January 2005 memorandum from the ASG/OHRM regarding lateral transfer of language staff worldwide as follows (emphasis added):

Dear Colleagues,

Please find attached a memorandum from Ms. McCreery [the ASG/OHRM] to Mr. Chen [the Under-Secretary-General, DGACM] dated 6 January 2005 *approving a pilot programme for the lateral transfer of language staff worldwide*.

By way of background, you will recall that following discussions during the July 2004 coordination meeting, Mr. Chen wrote to Ms. McCreery requesting her to approach the Regional Commissions to see if they would like to be included in the arrangements *for lateral transfers of language staff across conferences servicing duty stations*. You will note from the attached memorandum that the Executive Secretaries of ECA, ECLAC, ESCAP and ESCWA have agreed to the proposal.

...

Pending the revision of ST/AI/2002/4 to reflect the inclusion of the Regional Commissions in a pilot programme, the purpose of this email is to advise that effective immediately, all language vacancies up to and including those at the P-5 level can be filled under this arrangement. In other words, vacancies can be circulated internally, i.e., outside galaxy but via e-mail *to all conference servicing duty stations to facilitate lateral movement of language staff.*

Guidelines for the lateral transfer of staff are attached for your reference. I should like to point out that the *authority for lateral transfer to DGACM New York, Geneva, Vienna and Nairobi rests with the USG/DGACM*, whereas for lateral transfers to the Regional Commissions rests with the respective Executive Secretary.

52. The applicable 2 February 2005 Guidelines of DGACM on Procedures Relating to Lateral Transfers of Language Staff Worldwide (“the Guidelines”) read as follows (emphasis added):

Procedure:

- a) circulate internal vacancy announcement (i.e., outside galaxy) by sending email to all conference servicing duty stations; deadline for applications is normally set at two weeks from issuance;
- b) upon completion of evaluation of applicants, the following documents should be included in submission to USG/DGACM (for New York, Geneva, Vienna and Nairobi) or to Executive Secretary for (for ECAM, ECLAC, ESCWA, ESCAP):
 - a copy of the internal vacancy announcement
 - a copy of the applications of the short-listed candidates, including the attachments
 - The Programme Manager’s evaluation of the applicants
 - the Programme Manager’s recommendation with the endorsement of the Director/Head/Chief, Conference Services

Routing:

The above documentation will be routed in the following sequence:

FOR DGACM, New York, Geneva, Vienna and Nairobi

- a) from the requesting office to the DGACM Executive Office
- b) DGACM Executive Office will seek comments from the Director of the respective Divisions at New York, if necessary
- c) From the DGACM Executive Office to the OUSG for Mr. Chen's or Ms. Kane's approval
- d) Upon approval (or otherwise) from the OUSG to the DGACM Executive Office
- e) Information from d) above will be communicated by the DGACM Executive Office to the requesting office, with copy to OHRM
- f) If DGACM, New York, is neither the receiving nor releasing office, *the two duty stations concerned should liaise among themselves on the release date and other particulars of the move.*

...

Applicants' submissions

53. The Applicants' primary contentions may be summarised as follows:

- a. The Respondent erred by admitting an ineligible candidate to the selection process without first consulting with the roster, and the whole selection process was compromised from the onset;
- b. The whole process lacked transparency, because the Respondent did not notify the Applicants about the belated decision to reject the initially-successful candidate;
- c. The initially-successful candidate is described as "the most suitable candidate", rather than the *only* suitable candidate; the Programme Manager discussed with the other members of the interview panel the option of re-evaluating the two remaining candidates and there would have been no reason

to discuss the option of re-evaluating the remaining candidates (the Applicants) if the Applicants' candidacies *a priori* been deemed unsuitable;

d. By rejecting to reconsider the Applicants for the Post, the Respondent violated their right, as staff members, to the guarantee of staff regulation 4.4 that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of staff members already in the service of the United Nations". Staff regulation 4.4 is relevant because the Applicants were deemed unsuitable for the Post not before, but *after* the rejection of the initially-successful candidate;

e. The Respondent extended favouritism to the "temporary assistance" staff member who was granted a fixed-term appointment while performing the Post functions, by failing to establish a new roster and fill the Post on the base of it in almost two years;

f. After failing to apply the roster, the Respondent used the temporary assistance to fulfill the functions associated with the Post; the so-called "temporary assistance" staff member was selected because she was personally known to the ORES Chief's peer, which is improper influence;

g. The "temporary assistance" was provided for more than one year; considering the length and type of this appointment, it cannot be considered a "temporary" position, and the Post was *de facto* filled.

Respondent's submissions

54. The Respondent's primary contentions may be summarised as follows:

a. In his Reply to the JAB (19 April 2007, para. 6) and in his Reply to Order No. 307 (NY/2010) of 2 December 2010, para. 9, the Respondent states that the *Post* was done pursuant to ST/AI/2002/4, Annex I, sec. 1(a) and

footnote (a), where authority is given to the head of department or office to “transfer staff laterally within his or her department or office”.

b. The authority under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a) was amplified under a 6 January 2005 memorandum from the Assistant Secretary-General for Human Resources Management (“the ASG/OHRM”) to the Under-Secretary-General, DGACM, regarding lateral transfer of language staff worldwide, as explained by Ms. Neeta Tolani, Executive Officer, DGACM, in her email dated 7 February 2005 (to which was attached a 28 October 2004 memorandum from the ASG/OHRM) and upon a document entitled “Guidelines on procedures relating to Lateral Transfers of Language Staff Worldwide”; the Respondent quotes from the memorandum that ST/AI/2002/4 stands for the proposition that for lateral transfer of language staff under ST/AI/2002/4, Annex I, vacancies could be circulated internally “to all conference servicing duty stations, to facilitate the expeditious lateral movement of language staff”;

c. The Respondent argues in his 3 December 2010 reply to Order No. 307 (NY/2010), para. 9, that:

The situation qualified as an internal vacancy because the rule in footnote (a) of annex 1 [*sic*] applied. The note provides for the lateral transfer of staff members in language services. A lateral move is the movement of a staff member to another vacancy at the same level within the UN system and, in this case in particular, the language services section. The lateral move is therefore limited to internal candidates. Any vacancy announcement for which only internal candidates may apply is an internal vacancy.

d. The Respondent’s discretion must be exercised fairly and without extraneous considerations or improper motivation. “Full and fair consideration” should be given to all Applicants for a post and the Respondent bears the burden of proof with respect to this issue (citing former UN

Administrative Tribunal Judgment No. 1031, *Klein* (2001), Judgment No. 1118, *Khuzam* (2003));

e. The Administration “must be able to make at least a minimal showing that the staff member’s statutory right was honoured in good faith in that the Administration gave ‘fullest regard’ to it” (citing former UN Administrative Tribunal Judgment No. 362, *Williamson* (1986), para. VII). In this case, the Administration has been able to provide sufficient evidence to show that the Applicants were fully and fairly considered, as they were among only three candidates short-listed for a competency-based interview, and their candidacy was weighed and assessed;

f. The Respondent’s decision was based on a competency-based interview in which the Applicants’ qualifications were fully and fairly considered; the Applicants have failed to discharge the burden of proving prejudice and improper motivation on the part of the Administration;

g. The Respondent should have verified “the roster of candidates, established on the base of competitive examinations, before admitting any candidate to the selection process”, but the relevance of the argument for the Applicants’ case appears to be missing, since none of the Applicants ever passed a competitive examination to enter the United Nations and, therefore, were ever included in such roster. [Note from Tribunal: The Respondent appears not to have appreciated the fact that the Applicants had passed a competitive exam and were placed on the roster of Russian editors in 1987/1988];

h. Consistent with administrative instruction ST/AI/2002/4 governing staff selection system, it is the practice of DGACM to circulate vacancies internally for P-3 language posts to maximize opportunities for mobility in accordance with UN staff regulation 4.4 which establishes that, in filling

vacancies, consideration should be given to “persons already in the service of the United Nations” provided that they fulfill “the requisite qualification and experience”. Should an internal vacancy announcement yield no successful candidates, the programme manager would then proceed, as it has happened in this case, with the selection from a roster of candidates established on the basis of the results of a competitive examination in accordance with General Assembly resolution 55/258. The selection process here did not yield any qualified candidates, and the Respondent “had no option but to seek temporary assistance to ensure that the functions associated with the post are adequately fulfilled”;

i. The File Note demonstrates that the Respondent actually reviewed the Applicants’ abilities and that they were both deficient in their professionalism; hence, it was the lack of qualifications of the Applicants rather than the Respondent’s alleged improper recruitment procedures (and giving full and fair consideration) that was ultimately responsible for the Applicants’ failure to be considered for the Post;

j. After OHRM advised the Executive Office, DGACM, that the initially-successful candidate had not been on the roster of Russian Editors, consideration was given by the Administration to re-evaluating the Applicants, but this option was discarded in light of the fact that the Applicants had already been considered and were deemed non-suitable for the Post following the competency-based interview. Furthermore, following the interview, the Applicants were not listed as pre-approved candidates for subsequent vacancies;

k. The Applicants have failed to provide evidence in support of the allegation of “favouritism” against the Administration;

1. In his Reply to Order 91, the Respondent makes various contentions for the first time, including that the ultimately-successful candidate was not assigned against any particular post within the Organization; further the Respondent now cites as authority ST/AI/2010/4, sec. 13 for the first time.

Consideration

55. As stated in *Liarski* UNDT/2010/134, the Tribunal generally will not substitute its decision for that of the Organization in the discretionary matters of appointment and promotion, but the Tribunal may examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable. (See *Solanki* UNDT/2009/045, *Joshi* UNDT/2009/047, *Tsoneva* UNDT/2009/048, *Krioutchkov* UNDT/2010/065, *Rolland* UNDT/2010/095.)

56. The Applicants challenge the entire selection process as being “compromised from the onset”. The Applicants challenge several aspects of this matter: (1) the fact that they were not given full and fair consideration for the Post; (2) the failure to select one of the Applicants, once the initially-successful candidate was found to be ineligible for the Post; (3) the fact that DCAGM maintained an out-of-date roster of Russian Editors, contrary to the General Assembly’ resolution A/RES/57/305 and ST/AI/2002/4, sec. 1 (“Definitions”—Roster); and (4) the selection of the ultimately-successful candidate to fill the Post on a temporary basis, rather than either of the Applicants.

57. The Respondent in his submissions acknowledges that he bears the burden of proof with regard to whether the Respondent properly exercised his discretion, without extraneous considerations or improper motivation, in not appointing the Applicants to the Post (see para. 48(c) above). In this connection, the Administration “must be able to make at least a minimal showing that the staff member’s statutory

right was honoured in good faith in that the Administration gave ‘fullest regard’ to it” (see para. 48(d) above).

Respondent’s inconsistent legal positions

58. The Tribunal preliminarily notes that the Respondent has presented conflicting and changing legal arguments to the Tribunal. The Respondent argues:

9. The situation qualified as an internal vacancy because the rule in [ST/AI/2002/4] footnote a) of annex 1 [*sic*] applied. The note provides for the lateral transfer of staff members in language services. A lateral move is the movement of a staff member to another vacancy at the same level within the UN system and, in this case in particular, the language services section. The lateral move is therefore limited to internal candidates. Any vacancy announcement for which only internal candidates may apply is an internal vacancy.” (Respondent’s Reply to Order No. 307, para. 9).

59. It may be helpful to differentiate distinct terminological concepts of “lateral transfer” under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a), versus “lateral move” for mobility purposes (ST/AI/2002/4 “Definitions”—Lateral moves, versus the required selection procedures for internal vacancies (see ST/AI/2002/4 “Definitions”—Internal candidacies)). It is clear from ST/AI/2002/4 that a lateral transfer under Annex I, sec. 1(a), is *not* the same as a lateral move.

60. The Respondent has changed the rationale used to justify the selection procedures in this case. The selection for the Post of the initially-successful candidate was first justified on the basis that the selection constituted an internal lateral transfer for purposes of ST/AI/2002/4 Annex I, sec. 1(a) and footnote (a); then it was justified on the basis that the Post constituted an “internal vacancy”; but the Post ultimately was filled with the selection of an external candidate on a temporary basis. All contentions cannot exist simultaneously.

61. As of 21 March 2011 the Respondent yet again changed the legal theory of the case, stating that the ultimately-successful candidate was *not* assigned against any

particular post within the Organization (and not to the “Post”), citing as authority ST/AI/2010/4, sec. 13, for the first time. This administrative instruction is inapplicable to this case, as it was enacted following the filling of the Post.

62. As stated by the Applicants in their Response to the Respondent’s Reply to Order No. 307:

1. The Applicants assert that the characterization of the disputed vacancy as being “internal” contradicts the fact that at some point, right after the rejection of the initially selected [i.e. initially-successful] candidate, the Respondent attempted to fill that vacancy, without changing its status, from the roster of the EXTERNAL candidates. Thus, instead of proceeding to reconsider the remaining internal candidates, i.e., the Applicants, the Respondent unjustifiably rejected them. The Applicants further believe that had the vacancy at issue been either “external” or “internal”, the action taken by the Respondent would still have been erroneous for the following reasons: if the vacancy had been external in nature, the Respondent should have published it in Galaxy and submitted it for CRB approval; but if it had been internal in nature, the Respondent should not have turned down the Applicants in favor of the potential external candidates (original emphasis).

63. The Tribunal concurs with the Applicants’ observations in their entirety.

Did the Post qualify as a lateral transfer under Annex I?

64. ST/AI/2002/4 was in force at the time of the selection exercise and sets out general provisions relating to the appointment and promotion of staff that were relevant at the time of the Post’s selection process.

65. The Respondent, nevertheless, contends that the staff selection system procedures of ST/AI/2002/4 did not apply in cases such as the present one, due to the Post qualifying as having been undertaken pursuant to Annex I, sec. 1(a) and its footnote (a): sec. 1(a) grants permission to the head of department/office to “transfer staff laterally within his or her department/office” and footnote (a) states that “[t]he

Under-Secretary-General for General Assembly Affairs and Conference Services has authority to transfer laterally language staff, including ... editors”.

66. The general authority given to the head of department/office under Annex I was several: the head of department/office had authority: to laterally transfer staff within his/her department/office (sec. 1(a)); to assign staff temporarily to a higher-level post that is vacant or temporarily vacant (sec. 1(b)); to make decisions in the selection processes (sec. 1(c)); and to select a roster candidate pre-approved for selection at the 15-, 30-, or 60-day mark, without further reference to the central review bodies, on the recommendation of the programme manager, provided that the vacancy has been advertised, the new applications have been reviewed and the roster candidate is suitable for the vacancy (sec. 1(d)).

67. The authority provided to the head of department/office to transfer staff in Annex I, sec. 1(a), footnote (a) reflects that of sec. 2.4 of the ST/AI/2002/4. From both provisions it clearly follows that this authority pertains to transfer of United Nations staff members—and *no* other type of candidate, including former staff members—into positions with the relevant department/office. According to the submissions of the Respondent, however, the ultimately-successful candidate was not a United Nations staff member during the time that she was employed on the Post; on the contrary, she had departed from the Organization and was then on a roster of “eligible retired/former staff members”. Accordingly, the filling of the Post with the ultimately-successful candidate cannot be characterized as a “transfer”, be it lateral or not, and the Respondent’s reference to Annex I, sec. 1(a) and footnote (a), is incorrect.

68. Albeit temporarily, the ultimately-successful candidate was therefore rather *selected* for the Post, indicating that the correct legal basis would be Annex I, sec. 1(d), even though only some of the required steps outlined in this provision had been complied with. In addition, filling the Post without any competitive selection

process would seem to be contrary to former staff rule 104.15(b)(i), which demands this for posts requiring special language competences.

69. Furthermore, the procedures adopted in light of Annex I, footnote (a), are announced in a 6 January 2005 memorandum regarding lateral transfer of language staff worldwide and further clarified under the Guidelines (see the Respondent's 3 December 2010 reply to Order No. 307 (NY/2010), paras. 6 and 8.) A review of those documents demonstrates that lateral transfers under ST/AI/2002/4 Annex I, footnote (a), were to be *for transfers of language staff across conferences servicing duty stations*, in order to facilitate lateral movement of language staff "worldwide".

70. The fact that footnote (a) of Annex I allows the Under-Secretary-General to make lateral transfers of language staff seems to relate to the power the head of department/office has under sec. 1(a); that is, a lateral transfer is a power granted to management to allow them to effectively organize their human resources on the basis of their needs. No express right for a staff member to disagree with a "footnote (a) transfer" is apparent from the provision. A lateral transfer under Annex I, sec. 1(a) and footnote (a), by its terms is quite different from the ordinary competitive selection process under ST/AI/2002/4, where candidates apply and compete for posts because they want to—for purposes of promotion, a desired job function, or post location, etc.

71. A review of the Guidelines further supports the Tribunal's conclusion regarding the non-applicability of Annex I, sec. 1 (a), and footnote (a), to this case. Under those Guidelines, an internal vacancy announcement must be made and the routing process indicates: that the "requesting office" must forward documents to the Executive Office of DGACM; that this Executive Office will seek comments from the Director of the respective Divisions at New York, if necessary; that the Executive Office will route the materials to the Office of the Under-Secretary-General ("OUSG") for approval; and that OUSG's approval will eventually be communicated to the requesting office. The fact that none of these processed were used in this

case—especially that there was no “requesting office”—demonstrates that ST/AI/2002/4 Annex I, sec. 1(a) and footnote (a), are incorrectly used to justify the selection procedures in this case.

72. Thus, Annex I, sec. 1(a) and footnote (a), were not intended to be cited in cases involving a competitive selection process within a department.

73. Simply stated, the Post did not qualify as a lateral transfer for purposes of Annex I, sec. 1 (a) and its related footnote (a); those provisions have been improperly relied upon to justify the selection procedures in this case.

Did the selection procedures for the Post meet the requirements under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a)?

74. At the outset, the Tribunal notes that since it was the *Post* that was supposed to have qualified under ST/AI/2002/4, Annex I, sec. 1(a) and footnote(a), the Tribunal’s discussion in this Judgment evaluates both selection exercises (that of the initially-successful candidate, as well as the ultimately-successful candidate) against that administrative instruction.

75. The Respondent effectively interprets Annex I, sec. 1 (a) and footnote (a), to mean that for lateral transfers: (1) a vacancy announcement needs only be circulated internally; (2) the status of candidates (as 15-, 30- or 60-day mark) has no relevance (insofar as all candidates are internal); (3) there is no involvement of the Central Review Body; and (4) there is no requirement to announce the outcome of the selection process.

76. The Respondent’s submissions are troubling in their application to this case for a number of reasons.

77. First, as already discussed, Annex I, has been incorrectly interpreted and relied upon in this case.

78. Second, the procedure employed by the Respondent in this case appears to have been the truncated one stated in Annex I, sec. 1 (d), rather than the one cited by the Respondent as a lateral transfer under Annex I, sec. 1 (a) and footnote (a). To summarise the factual sequence according to the Respondent—that is, to accept his case at its best—the Respondent circulated a vacancy internally, interviewed three candidates that applied, the Head of Office found only one who met the required competencies, but was ultimately ineligible as he was not a roster candidate, reconsidered the roster (without the Applicants, despite the fact they were on the roster) and, claiming to find no other appropriate candidate on it, appointed an external candidate to the Post. The Respondent in fact seems to have (incorrectly) utilized the relevant provisions of Annex I, sec. 1 (d), to fill the Post in this case, while claiming to rely on the lateral transfer provisions of Annex I, sec. 1(a) and footnote (a).

79. Third, even if the Post qualified as a lateral transfer, there is no suggestion that the Under-Secretary-General conducted the purported lateral transfer in this case, as was required under Annex I, sec. 1(a), footnote (a), and the Respondent has not explained how or to whom this authority was properly delegated. As well, the Respondent has not demonstrated that the required documents under the Guidelines were forwarded to the relevant Under-Secretary-General, as would have been the required procedure for a lateral transfer under Annex I, sec. 1(a), footnote (a).

80. Fourth, the Respondent's selection procedure actions are incongruous with the power that Annex I, sec. 1(a) and footnote (a), seem to permit. For example, why was the initially-successful candidate rejected on the basis of his not being on the roster of Russian editors, when footnote (a) contains no reference to a requirement that laterally transferred staff be selected from a roster? And, how was the ultimately-successful candidate placed on the Post (i.e. a non-lateral transfer/appointment) using the power of Annex I, sec. 1(a) and footnote (a), which only make reference to lateral transfers?

Was the selection exercise for the initially-selected candidate proper?

81. When DGACM initially advertised the vacancy for the Post and commenced a selection process, it was obliged to afford to candidates the proper procedures and protections which ST/AI/2002/4 provides for in order to ensure that candidates receive full and fair consideration, in accordance with the Organization's policies. The Respondent went part way towards this process (albeit a truncated one as a result of it being an internal advertisement); he advertised the Post and took the roster into account.

82. Nevertheless, the Respondent invited to the interview a candidate who was not qualified for the Post. The Tribunal does not fully understand how this could have occurred, for Ms. Hooper, Chief of ORES, stated (in her Memorandum to the DGACM Executive Office, repeating from the File Note) that all three candidates were "determined to have met the eligibility requirements" of the Post. If the determination had been made that all three candidates were eligible to assume the Post, then how could it be the case that the initially-successful candidate was later rendered ineligible? Only one of two possibilities exist: either the candidates were *not* screened for eligibility, and the File Note and Memorandum did not accurately represent the status of the candidacies; or the candidates *were* pre-screened for eligibility, and the interview panel knowingly admitted an ineligible candidate to the interview process. Either scenario is problematic.

83. A reading of the File Note suggests that the interview panel found the Applicants not to be suitable for the Post only *after* the initially-successful candidate had been deemed by OHRM to be ineligible as not being on the roster of Russian Editors. The initially-successful candidate was initially recommended by the interview panel as "the *most* suitable candidate"—rather than the "*only* suitable candidate". If the Applicants had indeed been "unsuitable" for the Post, then the File Note should have indicated that fact by stating that the ultimately-selected candidate was the only viable candidate for the Post. The File Note did not make such an

indication, which leads to the ineluctable conclusion that the Applicants were also considered suitable for the Post by the interview panel.

84. Further, the File Note goes no way to persuade that the Applicants failed to meet the required competencies. Indeed, the File Note fails to assess all the applicants on the required competencies stated in the Vacancy Announcement. The File Note is unsigned, calling into question who authored the document, when in fact the document was generated, and whether it was written with the specific goal of eliminating the Applicants from consideration for the Post. The File Note does not meet the required standard of a “reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria” under sec. 7.6 of ST/AI/2002/4. As also stated in *Rolland* UNDT/2010/095, “It is necessary, of course, that accurate and fair records of what transpired be maintained so that a critical examination is possible”.

85. Moreover, it appears unlikely that both Applicants would have failed the interview in the exact same manner of supposedly lacking “professionalism”. Given the Applicants’ prior lengthy experience with the United Nations, given their actual prior experience in the position that was being filled, and given the superior PAS evaluations that the Applicants previously had received, the Tribunal considers it to be a most unlikely possibility that they lacked professionalism.

86. On this basis, the Tribunal finds that the Applicants, although ranked behind the initially-successful candidate, were also “suitable” candidates for the Post. In support of this finding, as the Applicants note, the Respondent stated that the Programme Manager discussed with the other members of the interview panel the option of re-evaluating the two remaining candidates after the initially-successful candidate was found unsuitable for the reason that he was not on the roster. Should they have been considered unsuitable, there would have been no reason to discuss the option of re-evaluation of the Applicants, as this would not have been an option.

87. The Tribunal finds that the selection exercise for the initially-selected candidate was improper.

Should the Applicants have been reconsidered for the Post, after the initially-successful candidate was deemed ineligible?

88. Once the initially-successful candidate had been eliminated, the Respondent's failure to return to consider the Applicants on the roster violated ST/AI/2000/1, sec. 2.1, which states that candidates successful in a competitive language examination:

... shall be placed on a roster, in overall ranking order. They shall be selected from the roster as vacancies occur, taking into account not only their ranking but also the needs of service and the combination of languages and skills offered by individual candidates.

89. Further, staff regulation 4.4 states that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of staff members already in the service of the United Nations". By not reconsidering the Applicants and not returning to the roster, the Respondent disregarded well-established rules and regulations within the Organization for filling vacancies.

90. The Applicants having been deemed by the Tribunal as suitable candidates for the Post, the Tribunal finds that the Respondent breached his obligation to select one of the two Applicants for the Post, since they were the only two remaining eligible roster candidates at the time.

Was the selection of the ultimately-successful candidate to fill the Post proper?

91. The Applicants having been eliminated from consideration for the Post, the Respondent then claims that DGACM turned to the then-existing roster of Russian Editors, but that no viable remaining candidates were on the roster, and that DGACM was required to fill the Post by resorting to a so-called temporary roster of

retired/former staff members and that the ultimately-successful candidate was the only candidate who was “locally available” from this temporary roster.

92. A number of difficulties exist, including: (a) the Respondent now contends that the ultimately-successful candidate was *not* placed on the Post at all, but rather filled a number of positions within DGACM simultaneously; (b) DGACM appears to have maintained an out-of-date roster of Russian Editors, which should have been available to fill the Post; (c) the Respondent has not provided any official documentary evidence demonstrating the fact that the ultimately-successful candidate indeed had previously passed the language exam or when this was so; and (d) it is unclear under what authority DGACM was authorized to keep a “list ... comprised of former and retired staff members” that could be used to fill positions whenever DGACM deemed it appropriate to do so.

93. The candidate who was eventually awarded the Post, i.e., the ultimately-successful candidate, was Ms. Speransky, the wife of the Head of RTS, Mr. Speransky (who then and now holds the position of Chief, RTS, Translation Services, DGACM). While the ultimately-successful candidate had at one time been in the service of the United Nations, at the time the Post was filled, the ultimately-successful candidate was a retired/former staff member, i.e. not a United Nations Staff Member. This means that two qualified candidates for the Post—Mr. Kozlov and Mr. Romadanov—who were in active service to the United Nations were incorrectly passed over in favor of a spouse of an active staff member within DGACM.

94. In a nutshell, the violations outlined above can be summarised as follows:
- a. the selection procedure employed in this case admitted a candidate to the interview who was unqualified in two respects (not on the roster and lack of prior editing experience);
 - b. the File Note is unsigned and its authorship is uncertain;

- c. as per the File Note, the interview panel did not rank on all competencies announced in the Vacancy Announcement;
- d. the Vacancy Announcement does not meet the requirements of ST/AI/2002/4;
- e. the Vacancy Announcement does not specify what kind of a contract the Post held—a “vacant post” or a “temporarily vacant post” under ST/AI/2002/4, sec.1;
- f. the panel improperly rejected the Applicants’ candidacies and did not return to the roster to reconsider one of them when the initially-successful candidate was found to be ineligible;
- g. DGACM kept an out-of-date roster of Russian Editors;
- h. following the ineligibility of the initially-successful candidate, the Post was filled by the ultimately-successful candidate, without any announcement of the vacancy or competitive selection process; and
- i. the ultimately-successful candidate may not have possessed current credentials for the Post at the time of her selection.

95. The Tribunal finds that the Respondent has not made a minimal showing that the Applicants’ statutory rights were honoured in good faith in that the Administration gave fullest regard to them in the selection process for the Post.

96. Further, the Respondent has not met his burden of showing that the Respondent’s discretion was exercised fairly and without extraneous considerations or improper motivation, particularly when appointing the wife of the Head of RTS to the Post.

Compensation

97. The Tribunal will call for further submissions on the issue of compensation in a separate Order before deciding that issue.

Observations

98. The Tribunal offers a brief observation on the staff selection procedures employed in this case.

99. The Tribunal is troubled by the highly-irregular staff selection system employed here—one that deprived one of the Applicants *from in fact being selected* for the Post and one that evidenced favouritism contrary to the principles embodied by the United Nations. The selection process resulted in placing the wife of an active staff member in the Post, without regard to United Nations staff selection rules and in disregard for the rights of both Applicants in this case.

100. It cannot have been an accident that the interview panel “overlooked” the clear ineligibility of the initially-successful candidate, for his lack of required competencies was evident on the face of his resume. It must have been known that the initially-successful candidate would be deemed ineligible by OHRM, for his resume clearly reveals that he lacked the competencies for the Post, which then raises the question: if the initially-successful candidate’s ineligibility was so clear, why did he, nevertheless, apply for the Post? Was he encouraged to apply, knowing that he might later be eliminated, thus creating a situation where the ultimately-successful candidate would be selected? It cannot have been an accident that *both* of the Applicants were not ranked as “suitable” for the Post on the grounds of lack of “professionalism” (no direct mention is made regarding any of them being short of this, either in the File Note or in the Memorandum, plus each of them had served in the same position previously and had received PAS evaluations of “frequently exceeds performance”). Finally, it cannot have been an accident that the only “locally available candidate” on the so-called temporary roster was the wife of the head of RTS.

101. The coincidences are too great to credibly believe that they occurred spontaneously without prior planning among individuals both within and without the selection process.

102. Under the article 101.3 of the Charter of the United Nations:

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.

103. The Tribunal considers it to be a fundamental responsibility of the Respondent to verify all candidate credentials before beginning a selection process, for a failure to do so can lead to the unfortunate set of events that is presently before the Tribunal. The JAB observed that such pre-verification is “not the common procedure within the Organization” and that the selection panel “accepts at face value” a candidate’s credentials. The Tribunal recognizes that, at present, this may not constitute the current practice under the Organization’s staff selection rules, but the Tribunal questions whether that is either good legal practice or good management practice.

104. The Tribunal urges management to implement whatever reform measures are necessary so that staff selection procedures within the Organization are fully respected and applied.

Accountability measures

105. Under art. 10.8 of its Statute, the Tribunal as part of its Judgment may “refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability”.

106. The Tribunal refers this case to the Secretary-General of the United Nations for possible enforcement of accountability measures to determine whether the unfortunate possibility of nepotism may have occurred in this case. It is for the Secretary-General to determine which persons (both within and without the selection process) may have been involved in the matters discussed herein, and who may be held accountable.

107. The Tribunal hopes that the Secretary-General will take this accountability referral seriously so that a complete and full investigation into the described practices within the present Judgment can be made. Managers and staff members, alike, must ensure that the United Nations rules and regulations are applied to their own conduct, regardless of position within the Organization. Such an investigation would promote the rule of law within the Organization:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law abiding. Thomas Carothers, *The Rule of Law Revival*, 77 Foreign Affairs, No. 2 (1998).

Conclusion

108. The Tribunal finds that:

- a. The Respondent has presented inconsistent legal positions to the Tribunal to justify the selection procedures used for the Post;
- b. The Post did not qualify as a lateral transfer for the purposes of Annex I, sec. 1 (a) and its related footnote (a); those provisions were improperly relied upon to justify the selection procedures in this case;
- c. The selection procedures for the Post did not meet the requirements under ST/AI/2002/4;
- d. The selection exercise for the initially-selected candidate was not proper;
- e. The Applicants should have been reconsidered for the Post, after the initially-successful candidate was deemed ineligible;
- f. The selection of the ultimately-successful candidate to fill the Post was not proper;
- g. The Respondent has not made a minimal showing that the Applicants' statutory rights were honoured in good faith in that the Administration gave fullest regard to them in the selection process for the Post;
- h. The Respondent has not met his burden of showing that the Respondent's discretion was exercised fairly and without extraneous considerations or improper motivation.

109. The Tribunal reserves its decision on the issue of compensation to a subsequent phase of the proceedings.

110. The Tribunal urges management to implement whatever reform measures are necessary so that staff selection procedures within the Organization are fully respected and applied.

111. The Tribunal refers this case to the Secretary-General of the United Nations, pursuant to article 10.8 of its Statute, for possible enforcement of accountability measures.

(Signed)

Judge Marilyn J. Kaman

Dated this 30th day of March 2011

Entered in the Register on this 30th day of March 2011

(Signed)

Santiago Villalpando, Registrar, New York