

**Administrative Tribunal**

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**ADMINISTRATIVE TRIBUNAL**

Judgement No. 1276

Case No. 1359

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Ms. Brigitte Stern;

Whereas, on 28 May 2004, a staff member of the United Nations (the named Applicant), along with 18 other staff members\*, filed an Application requesting the Tribunal, inter alia:

- “1. With respect to *competence and procedure* ...  
...  
(c) *to decide* to hold oral proceedings ...
2. On the *merits* ...  
(a) *to find and rule* that the Joint Appeals Board’s [(JAB’s)] proceedings violated the requirements of the Staff Regulations and Rules and pertinent Administrative Instructions and that it erred in matters of law and of fact;  
(b) *to rescind* the 14 June 2000 decision of the Secretary-General denying that the Applicants were recruited after successfully passing a competitive examination and refusing, since 1997, to give them full and fair consideration for permanent appointments under the terms of General Assembly resolutions 51/226 and 53/221;

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\* Suzanne Denommée, Patricia Desnel, Louise Dupras, Lihai Dong, Irina Feoktistova, Xiomara Fiallo-Hernandez, Lanping Fu, Irina Galitschkaia, Guozhen Geng, Maria Griaznova, Natalia Kananykina, Nadia Lakrim, Line Lemieux, Svetlana Nedzvetskaya, Louise Paré, Lidya Shibanova, Xinlu Wu, Huaibo Yang.

(c) *to order* that the Applicants be granted permanent appointments in accordance with pertinent administrative instructions and procedures;

(d) *to order in the alternative* that the Applicants be compensated in an amount equivalent to two years of net base salary;

(e) *to award* the Applicants appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential *and* moral damages suffered by the Applicants as a result of the Respondent's actions or lack thereof since 1997, for the harm to their dignity, their career, their family life and for the abusive delays in the handling of their cases;

(f) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance ... at three years' net base pay in view of the special circumstances of the case;

(g) *to award* the Applicants' Counsel the sum of \$10,000.00 for legal fees and expenses in bringing this Application, in view of its complexity and multiple Applicants."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2004 and periodically thereafter until 28 February 2005;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas the Applicants filed Written Observations on 18 May 2005;

Whereas, on 28 October 2005, the Applicants submitted three additional documents;

Whereas, on 17 November 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts contained in the report of the JAB reads, in part, as follows:

***"Summary of the facts***

... [The Applicants] are members of the Chinese, French, Russian and Spanish Text Processing Units, [Department for General Assembly and Conference Management (DGACM)], who were internationally recruited between September 1987 and June 1997 after having undergone examinations prescribed by the Organization.

... After the 1991-1992 freeze on conversion (...) to permanent [appointment] ended, and before the current freeze was instituted in 1995, the [fixed-term appointment] of one member of the Russian Text Processing Unit was converted to permanent.

.. In April 1997, the General Assembly adopted resolution 51/226, which reads, in part,

‘19. *Also requests* the Secretary-General ... to offer or to continue to offer probationary appointments to all staff members who have passed a competitive recruitment examination and to consider all such staff members for conversion to permanent appointment after completion of the period of probationary service’.

... In a memorandum dated 13 April 1998 to [the] ... Staff Committee, responding to representations by the staff, ... [the] Assistant-Secretary-General, [Office of Human Resources Management (OHRM)], wrote

‘the text of paragraph 19 of ... resolution 51/226 is broad enough to encompass staff *recruited* through a competitive examination, both at the Professional and at the General Service level; and,

provided it is determined in each case that the General Service staff members concerned [have] indeed been recruited internationally through a competitive language examination, they may be considered for conversion of fixed-term to permanent appointment if they meet all applicable requirements for the purpose.’

... Responding to a request of 18 December 1998 from ... OHRM, ... [the] Chief, Rules and Regulations, OHRM, ... described three situations: (a) text processing staff recruited from designated countries after testing by the Examinations and Tests Section, OHRM, (b) text processing staff recruited through the Moscow and Beijing language institutes, and (c) text processing staff recruited in New York. It was her view that the first two categories of GS staff could claim a right to be considered for permanent appointment. (...)

... On 15 September 1999, ... [the] ... Chief, Examinations and Tests Section, [was requested to] provide ‘an analysis of the relevant elements of the various tests and examinations administered to GS in order to determine whether any ... could be seen as a “competitive recruitment examination”’.

... In a note of 18 November 1999, [the Chief, Examinations and Tests Section,] stated that only the examinations for accounting and statistical clerks and for editorial and language reference assistants could be seen as competitive. All other recruitment tests for GS staff - including ‘conference typist tests’ (*sic*) - could not.

... On 7 April 2000, ... [the Applicants] sent a request for administrative review to the Secretary-General. In her reply of 14 June 2000, [the Assistant-Secretary-General, OHRM,] replied that, after ‘a detailed review of all tests and examinations administered by the United Nations’, OHRM had concluded that the tests for text processors are ‘qualifying’ and not ‘competitive’, and that, therefore, the GS staff did not qualify for conversion to permanent appointments.”

The Applicants lodged an appeal with the JAB on 19 and 27 July 2000. The JAB first met to deliberate the appeal on 1 May 2003, but had to reconvene a new

panel, which met on 11 December 2003. The JAB adopted its report on 31 December 2003. Its considerations and recommendation read, in part, as follows:

*“Considerations*

18. [The] Respondent contended that as [one of the Appellants] had not submitted a request for administrative review, her Appeal was not receivable (...). The Appellants did not contest this contention and the Panel agreed. It then turned to the substance of the Appeal.

19. The Panel, having reviewed the mass of material submitted by both parties, reluctantly came to the conclusion that there was no sufficient argument of proof provided for all cases which would allow it to arrive at a responsible decision. The Panel then decided to undertake a case-by-case review of the Official Status files of each of the Appellants in the hope that they would provide a sufficient basis for a decision. Before beginning the review, the Panel noted:

(a) by the fact that English language text processors were not included in the Appeal, [the] Appellants had, in effect, stipulated that, in at least some cases, the examination could be qualifying and not competitive;

(b) subject to a possible further evaluation at its conclusion, the Panel would apply [the] Respondent’s standards for a qualifying exam, i.e.

‘[a] competitive examination refers to a competitive process where the persons selected are the best qualified in relation to other eligible persons being considered, as is the case in the [United Nations] National Competitive Examination ... One of the main differentiating characteristics of competitive examinations is that [the] selection decision is based on relative merit. ...’

20. The Panel began with the French language Appellants. In the [Official Status] file of [one of them] is a copy of a letter of 14 June 1991, [from a Recruitment Officer, OHRM,] which reads:

‘J’ai le plaisir de vous informer que vous avez subi avec [succès] les épreuves d’examen de dactylographe de conférence (traitement de texte) de langue française qui ont eu lieu à Montréal du 24 mai au 7 juin 1991.

Le nombre des candidates reçus excédant celui des postes devant être pourvus dans l’immédiat, les nominations seront effectuées selon un ordre de mérite établi à partir des résultats obtenus à ces épreuves.

...’

[Translation: ‘I am pleased to inform you that you have successfully passed the French language conference typist (text processing) examinations given in Montreal from 27 May to 7 June 1991.

As the number of successful candidates exceeds the number of posts to be filled at the present time, candidates will be recruited in accordance with a ranking based on their scores on these examinations.’]

An identical letter with the exception of the rank - tenth in 28, is in [one of the other French language Appellants’] file. In both files is a copy of a memo from [an] Associate Administrative Officer, Department of Conference Services ... [of] 26 November 1991 [to the same Recruitment Officer, OHRM,] which reads:

‘A vacancy has recently become available in the French Word-Processing Unit of the Stenographic Section through [a] resignation ... Another one is anticipated upon ... retirement on 31 December 1991 ... I should be grateful, therefore, if you would recruit on a two-year fixed-term basis, the two next-ranking candidates in the roster of French Conference Typists. ...’

[The above-mentioned Appellants were] recruited effective 23 February 1992 ... [and] on 1 March 1992[, respectively]. The Panel concluded that by the standards defined by Respondent, both had been recruited on the basis of a competitive examination.

21. The ... files of [two additional French language Appellants] show that they sat the May-June 1991 exam in Montreal and that offers of employment were sent to them on 25 July ... and 5 August 1991 respectively, i.e. well before the recruitment offers of [the two above-mentioned Applicants]. ... [A fifth French language Appellant] was recruited in April 1993. The Panel concluded that all three ... were recruited following a competitive examination.

22. [With regard to three other French language Appellants, the] Panel did not find sufficient evidence ... to conclude that their exams had been competitive.

23. Turning to the Russian language [Appellants], the Panel [took note of the Official Status] files [of two of them] ... [and] ... concluded that there was no basis to the claim that [these] two ... [Appellants] were recruited on the basis of a competitive exam.

24. [T]est results for [additional Appellants] from the Chinese and Russian text processing units ... were not available. ... In the circumstances, the Panel was unable to find for the [Appellants] concerned.

...

26. Finally, the Panel reviewed the ... file of [a Spanish language Appellant]. ... The Panel concluded that [she] had not been recruited on the basis of a competitive examination.

...

### ***Recommendation***

28. The Panel *unanimously recommends* to the Secretary-General that he confirm that [five of the French language Appellants] were recruited after successfully passing a competitive examination and that they be favourably

considered for permanent appointment under the terms of General Assembly resolution 51/226.

...”

On 28 May 2004, the Applicants, having not received any decision from the Secretary-General regarding their appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 16 August 2004, the Under-Secretary-General for Management informed the Applicants as follows:

“The Secretary-General has carefully considered this case in the light of its serious implications for all staff in the text processing units and finds that he is unable to accept the JAB’s conclusions concerning the above-mentioned five French language [Applicants] on either legal or policy grounds. Legally speaking, the JAB’s recommendation (that those five [Applicants] should be considered as having passed a competitive examination and that, by necessary implication, the others should not), appears to be based on insufficient evidence arising from the making of distinctions according to the state of the records existing in [the Applicants’ Official Status] files. In the Secretary-General’s view, the fact that the records contained in the [Official Status] files of the Chinese and Russian language [Applicants] were perhaps less well maintained than the records in the French language [Applicants’] ... files is not a sufficient reason to discriminate between similarly situated staff and to accord them unequal treatment with regard to the opportunity for permanency of appointment.

Furthermore, the legal and policy basis for the JAB’s conclusion that five of the French language [Applicants] had passed competitive, rather than qualifying, examinations is highly contentious. The nature of the examinations undertaken by all of you was the same in each case, that is, you all had to demonstrate that you could meet pre-established minimum requirements in the fields of typing, grammar and direct dictation. Your suitability as staff in the text processing units was measured against a standard of competence, as opposed to your being compared to other candidates and selected as being the best person for the position. Although in the case of the five French language [Applicants] from Canada, candidates were ranked on the basis of their scores, this was for the purpose of reflecting an order of recruitment, and not because the nature of the examination was essentially competitive. It is notable that the French language [Applicants] sitting the same type of examination administered in Paris were not ranked. It would be grossly unfair to hold that staff members who had sat the same type of examination and were performing the same function should receive differing terms of appointment. The same is true for the Chinese, Russian, and Spanish language [Applicants]. The fact that there may have been some confusion of terminology over the years with regard to the use of the term ‘competitive examination’ is unfortunate, but it does not alter the fact that the examinations

administered for recruitment of staff for the text processing units are essentially qualifying or aptitude examinations.

For the above reasons, the Secretary-General is unable to accept the JAB's recommendation and has accordingly decided to take no further action on any of the appeals. ..."

Whereas the Applicants' principal contentions are:

1. The Applicants contend that, under the terms of General Assembly resolutions 51/226 and 53/221, they are entitled to consideration for conversion of their appointments to permanent, as they were recruited after successfully passing a **competitive** examination.
2. The Respondent erred when he stated that the Applicants were recruited in "non-competitive, **qualifying** examinations".

Whereas the Respondent's principal contention is:

The Applicants are not entitled to consideration for conversion of their fixed-term appointments pursuant to General Assembly resolutions 51/226 and 53/221, because those resolutions did not change the Organization's policies concerning the requirement that candidates for certain occupational groups in the General Service and related categories pass qualifying, or aptitude, tests.

The Tribunal, having deliberated from 31 October to 23 November 2005, now pronounces the following Judgement:

I. The Application involves 19 Applicants who claim a right to full and fair consideration for a permanent position with the Organization. They claim that they were recruited through a competitive examination and, consequently, should benefit from the provisions of operative paragraph 19 of General Assembly resolution 51/226 of 25 April 1997 and operative paragraph 21 of General Assembly resolution 53/221 of 23 April 1999.

II. There are two main issues in this case: the first, whether the Applicants may be considered to have passed a competitive examination; and, the second whether resolutions 51/226 and 53/221 apply to the Applicants.

The Tribunal has carefully examined both resolutions and is satisfied that the Applicants fall within their scope. Both instruments refer, in their respective sections

on recruitment, to the need to recruit different categories of staff through competitive examinations. Although the resolutions focus mainly on the holding of National Competitive Examinations for staff in the Professional category (P-1, P-2 and P-3 staff members) and staff members recruited for posts requiring special language competence for conference services, the Tribunal notes that there are also several references to competitive examinations that do not include the word “national” such as a request to the Secretary-General that only staff recruited through competitive examinations and who meet the highest standards of efficiency, competence and integrity established in the Charter are granted permanent appointments; and, the request to the Secretary-General “to offer or to continue to offer probationary appointments to all staff members who have passed a competitive recruitment examination”. The terms “competitive examination” and “competitive recruitment examination” appear to be used interchangeably. The question then is whether the Applicants could be considered to have been recruited through “*competitive* examinations”.

III. The Tribunal is satisfied that the fact that both resolutions emphasize the requirement of a competitive examination in the case of Professionals does not mean that competitive examinations are not held for General Service positions, particularly when recruitment of staff members to encumber such positions is made through national examinations. In fact, the record shows that the examinations through which the Applicants were recruited, were called “competitive”. This is evident from the circulars issued over the years to announce the holding of examinations to recruit editorial assistants and language reference assistants: they all bear the heading “competitive examination”, and thus the word “competitive” is prominent.

Moreover, the relevant text of the pertinent article in both resolutions is clear. Operative paragraph 21 of resolution 53/221, which is almost identical to operative paragraph 19 of resolution 51/226, reads in relevant part as follows

“[*Requests*] the Secretary-General to offer or to continue to offer probationary appointments to *all staff members* who have passed a competitive recruitment examination and to consider *such staff members* for conversion to permanent appointment after successful completion of the period of probationary service”. (Emphasis added.)

Operative paragraph 19 of resolution 51/226, also includes the following wording: “notwithstanding the provisions of section V of the present resolution”. That



“notwithstanding” refers to the “ratio of career and fixed-term appointments” and it means that, in spite of the ratio therein mentioned, the Assembly “[u]nderlines the importance of the concept of career service for staff members performing continuing core functions”. “Continuing core functions”, then, and not simply the performance of Professional functions, seems to be an important criterion for the adjudication of permanent posts.

IV. Historically, that seems to have been the interpretation of the Administration. In 1998, the Assistant Secretary-General for Human Resources Management wrote to the President of the 38<sup>th</sup> Staff Committee that

“the text of paragraph 19 of ... resolution 51/226 is broad enough to encompass staff *recruited* through a competitive examination both at the Professional and at the General Service level; and,

provided it is determined in each case that the General Service staff members concerned [have] indeed been recruited internationally through a competitive language examination, they may be considered for conversion of fixed-term to permanent appointment if they meet all applicable requirements for the purpose”.

This was further elaborated by the Chief, Rules and Regulations, OHRM, who described three situations: (a) text processing staff recruited from designated countries after testing by Examinations and Tests Section, OHRM, (b) text processing staff recruited through the Moscow and Beijing language institutes, and (c) text processing staff recruited in New York. It was her view that General Service staff in the first two categories, both recruited overseas and not in New York, could claim a right to be considered for permanent appointment.

However, on 14 June 2000, in her reply to the Applicants’ request for administrative review, the Assistant Secretary-General for Human Resources Management replied that, after “a detailed review of all tests and examinations administered by the United Nations”, OHRM had concluded that the tests for text processors are “qualifying” and not “competitive,” and that, therefore, the General Service staff did not qualify for conversion to permanent appointment. Clearly, she made a distinction between “competitive examinations” and “qualifying examinations” that did not seem to have been utilized before. She said that

“[t]he essential features of a ‘competitive examination’ are that: (i) candidates are compared *against each other*, and (ii) the global scores of all candidates to a particular examination are *comparatively examined* in order to determine what will constitute a passing grade for that examination. By contrast, tests and examinations where the results of candidates are measured against *pre-determined* standards and lead to success for all those who meet those standards, are not ‘competitive’ but ‘qualifying’.”

V. Perhaps a good question would be why those examinations are not called “qualifying” by the Administration and why, on the contrary, they continue to be referred to as competitive in the circulars announcing the holding of such exams, even at the present time. The Respondent seems to consider that a merely semantic question. The Tribunal is far from agreeing with that opinion.

In the first place, what has been described by OHRM as “qualifying” is not incompatible with the notion of competition. A minimum standard may be fixed in order for candidates to qualify and pass an exam. However, those who qualify still may - and should - be ranked by merit. Likewise, if there are fewer vacancies than qualifying persons, some have to be eliminated, and comparison between exam results is inevitable. So, a supposedly “qualifying” examination may be transformed, by force of circumstances, into a competitive one.

VI. Even in the hypothetical case where all of those who have qualified are included on a roster and all are successively called to occupy positions in the United Nations, they would be called in the order they are ranked, and such ranking cannot but have been established by order of merit. It is inconceivable that an Organization applying rational criteria for selection would use a different ranking. Moreover, this appears to be confirmed by the above-mentioned circulars each of which state that “the purpose of this examination is to establish rosters from which present and future vacancies ... will be filled”. Thus the candidates are placed in some sort of order following the examinations. So, some candidates are called before others in successive order of merit, and the former enjoy the privileges of seniority over the latter. This means that the former become eligible for promotion before those selected at a later time, and they may enjoy other advantages that seniority grants. In consequence, an apparent “qualifying” examination is, in fact, a “competitive” one.

The Tribunal, then, is satisfied that the distinction as presented, which, in any event, has all the appearances of being a *post hoc* explanation, is not applicable in the present case.

VII. The Tribunal turns now to the JAB's conclusion that some of the Applicants did, indeed, pass a competitive examination, while determining that there was no evidence that others competed for their posts and that the latter were, consequently, prevented from being considered for permanent posts. The Tribunal is of the opinion that the Administration called for competitive examinations in the case of all Applicants. They were all advised that a competitive examination would be held for editorial and language reference assistants. Whether or not the mentioned examinations were actually conducted in a competitive manner is not for the Tribunal to examine: they should have been so conducted by the Administration, and the Administration should have taken all necessary measures to assure competitiveness as the first criterion of selection of candidates. Such is, after all, the obligation imposed by Article 101.3 of the United Nations Charter:

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

That being the case, the Tribunal cannot now permit the Administration to take refuge in the negligence of its own responsibility and deny the Applicants a right granted by the General Assembly resolutions. Moreover, the Applicants cannot be held responsible for the Administration's failure to provide the necessary evidence regarding the nature and consistency of the examinations. If, indeed, the details concerning those examinations are in the Applicants' Official Status files in New York, they should have been provided to the JAB by the Respondent, who must loyally cooperate in the establishment of the facts. If they are back in Moscow, or Beijing, or Havana, and are not available, they should have been retrieved as they should be kept at Headquarters. The Administration must keep reliable records of the facts which are important in the establishment of staff members' rights.

VIII. Nonetheless, the Tribunal cannot order, as the Applicants have requested, that the Respondent now grant each of them a permanent appointment; they only have a right to full and fair consideration for conversion of their appointments to permanent. Had their rights been respected, they might, or might not, have been appointed on a permanent basis. Some of them might not have been selected in the first try but have had better luck in a second try. As such, there is no way to truly quantify their loss.

For the breach of their rights, caused by the Respondent's refusal to consider the Applicants for conversion to permanent appointment, the Tribunal finds that each of the Applicants is entitled to compensation, as well as to be duly considered for a career post, possibly preceded by a probationary period.

IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to consider each of the Applicants for conversion to permanent appointment;
2. Orders the Respondent to pay each of the Applicants US\$ 7,000 as compensation, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

*(Signatures)*

**Julio Barboza**  
President

**Spyridon Flogaitis**  
Vice-President

**Brigitte Stern**  
Member

New York, 23 November 2005

**Maritza Struyvenberg**  
Executive Secretary