

incurred by the Applicant. The Tribunal decides to award him the sum of \$800 to cover costs and expenses.

VIII. The Tribunal takes note specifically of the undertaking given by the Respondent—if the Applicant wishes to initiate and does in fact initiate action against UNESCO in the appropriate fora to obtain a ruling (i) that his contract should have been extended until 30 June 1979 and (ii) that he was entitled until that date to sick leave on half pay, and if judgement is given in his favour—to recalculate the Applicant's disability benefit in the light of such judgement and make the appropriate adjustments in the periodic payments to the Applicant.

IX. For these reasons the Tribunal decides that:

1. The Applicant's disability benefit became due on 1 October 1978.
2. On that date he was entitled to a disability benefit of \$8,522.16 per annum.
3. The Respondent is ordered to pay the Applicant all the sums that he should have received by way of disability benefit from 1 October 1978.
4. The Respondent is ordered to pay the Applicant a sum equivalent to the interest at 10 per cent per annum on the amount of the overdue benefit from 1 October 1978 until the date on which the Respondent pays the amount due to the Applicant by virtue of this judgement.
5. The Respondent is ordered to pay the Applicant the sum of \$800 to cover expenses.
6. All other claims are rejected.

(Signatures)

Endre USTOR
President

T. MUTUALE
Member

New York, 17 October 1983

Roger PINTO
Member

Jean HARDY
Executive Secretary

Judgement No. 314

(Original: English)

Case No. 309:
Tomiak

Against: **The Secretary-General
of the United Nations**

Request by a staff member of the United Nations to rescind the administrative decision to omit her name from the G-5 Promotion Register for 1977; request for compensation for loss of salary expectancy.

Conclusion of the Joint Appeals Board that the recommendation of the Appointments and Promotion Panel which led to the contested decision had been taken on the basis of irregular procedure.—Recommendation to place the Applicant's name on the 1977 G-5 Promotion Register.—Recommendation rejected; Secretary-General's decision to refer the Joint Appeals Board report to appropriate bodies for future promotion reviews.

Consideration by the Tribunal of the circumstances of the case.—Finding that the carry-over of a staff member's name from one promotion register to the next one for three consecutive years

and failure to promote her was unusual.—Unusual nature of the Applicant's assignment on a "trial" basis to another office on which a negative evaluation report was made.—Nature and purpose of the rebuttal procedure of performance evaluation reports established by administrative instruction ST/AI/240.—Finding that the applicant was wrongly denied the benefit of this procedure.—Respondent's contention that the Applicant was afforded adequate redress through the recourse procedure under information circular ST/IC/77-1.—Contention rejected.—Distinction between the rebuttal procedure under ST/AI/240 and the recourse procedure under ST/IC/77-1.—Respondent's contention that the contested report was not an official evaluation report.—Contention rejected.—Conclusion of the Tribunal that the failure to allow the Applicant to invoke the rebuttal procedure under ST/AI/240 vitiated the proceedings of the Appointment and Promotion Panel to the detriment of Applicant's rights.—As in Judgement No. 293 (Nayyar), the Applicant is entitled to compensation.

The 1977 Promotion Register no longer having any effect, the Tribunal cannot rescind the decision to omit the Applicant's name.—Award of compensation in the amount of \$US 7,500.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Herbert Reis; Mr. Luis de Posadas Montero;

Whereas at the request of Miss Gladys Stephanie Tomiak, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 17 January, 31 January, 14 February, 22 February and 25 February 1983 the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 February 1983, the Applicant filed an application in which she requested the Tribunal to order

"A. The rescission of the administrative decision to omit the Applicant's name, Gladys Stephanie Tomiak, from the 1977 General Service Promotion Register Principal (G-5) Level,

"B. The restoration of the Applicant's name to the General Service Promotion Register Principal (G-5) Level from 1977 and

"C. Compensation for net G-5 salary expectancy difference from 1 April 1977 through 31 December 1982: \$10,947.59.

"This calculation is to be brought from 31 December 1982 to the date of restoration to the General Service Promotion Register Principal (G-5) Level.";

Whereas the Respondent filed his answer on 27 May 1983;

Whereas the Applicant filed written observations on 26 August 1983;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 March 1950 as a clerk-typist. She was placed at the G-2 level on 1 January 1951, was promoted to the G-3 level as a Secretary on 28 January 1951, received a permanent appointment on 17 May 1954, and was promoted to the G-4 level on 1 July 1960. On 12 February 1963 the Applicant's supervisor Mr. I. V. Chechetkin, Director of Policy Co-ordination, Office of the Controller, recommended to the Controller that she be placed on the 1963 G-5 Promotion Register on the grounds that she had been working as Administrative Assistant since September 1959 and that she performed functions which could be classified as of G-5 or higher level. On 25 March 1966 Mr. A. I. Roslov, then Director of Policy Co-ordination, recommended to the Executive Officer of the Offices of the Secretary-General that the Applicant's title be changed from Secretary to Administrative Assistant as her duties and responsibilities fully warranted her post being considered as at the G-5 level. On 20 February 1967

the Applicant requested in a memorandum to the Executive Officer of the Office of the Controller that her functional title be changed from Secretary to Administrative Clerk. On 16 March 1967 the Executive Officer, noting that both Mr. Roslov and the Controller had indicated their approval of the Applicant's request, asked the Deputy Chief of Staff Services to review the request and, if possible, make the change. On 6 June 1968 Miss H. Seymour, Deputy Director of the Office of the Controller, informed the Administrative Officer of that Office that the Controller and the Deputy Controller had agreed that the Applicant should "take on the continuing duty of being a part-time clerical and semi-professional assistant" to Miss Seymour. On 2 January 1969 Miss Seymour, then Deputy Director of Policy Co-ordination, wrote again to the Administrative Officer concerning an arrangement under which she could make assignments to the Applicant calling for statistical/clerical work or library research assistance, one condition being that the Applicant's qualifications for the G-5 roster should be recognized and her promotion to that level accomplished. The Controller wrote on a copy of that proposal:

"O.K. in principle but it would need to be in terms of the 1970 register—after a reasonable period of actual performance."

On 23 January 1969 Miss Seymour advised the Administrative Officer that the Applicant was performing well as a research assistant and that there was no need of a probationary period in which to judge whether she could perform satisfactorily at the G-5 level; Miss Seymour accordingly asked the Administrative Officer to proceed with the change in title. On 4 April 1969 Miss Seymour informed the Deputy Controller that the Applicant was performing some work of a clerical and library research nature for her on "an off and on, as possible basis", and asked to be assigned a G-5 post for such work on a regular basis to be offered to the Applicant.

On 21 February 1973, in a memorandum to Mr. W. H. Ziehl, Acting Head of the Office of Financial Services, Mr. V. F. Ulanchev, then Director of Policy Co-ordination, noted that many of the Applicant's functions had become more complicated and distinctly higher than those of her G-4 level and that she actually performed the duties of an assistant to the Director with great competence and efficiency; he recommended that her post be upgraded to G-5 or that some other means be found "to bring her salary scale in line with others engaged in similar activities". On 22 February 1973 Mr. Ziehl referred that memorandum to Mr. C. E. Goode, Principal Administrative Management Officer, noting that should the Administrative Management Service concur in Mr. Ulanchev's evaluation of the level of the Applicant's post, the Office of Financial Services would be prepared to pursue the matter further. On 20 March 1973 Mr. Goode replied that the Administrative Management Service had not recommended the G-5 level for the Applicant's post in its report to the Office of Financial Services, adding: "As to whether the post now requires that grade, we cannot say because we have not reviewed the position in the light of any changed conditions". On 1 March 1974 the Office of Financial Services recommended the Applicant for inclusion in the 1974 G-5 promotion register, stating that she performed the duties of an assistant to the Director of Policy Co-ordination. The Applicant's name appeared on the G-5 promotion register in 1974, 1975 and 1976, but the promotion was not effected. On 11 November 1976 Mr. B. G. Boldyrev, then Director for Policy Co-ordination, sent to the Executive Officer of the Office of Financial Services a job description according to which the Applicant served as "administrative assistant to the Director for Policy Co-ordination" and performed various "administrative functions" for

the Salaries, Allowances and Insurance Section. On 22 December 1976 the Controller, Mr. H. Debatin, proposed to assign the Applicant to a G-5 post in the Accounts Division where her performance could be evaluated over a two-month period; he undertook to do whatever was within his power to obtain promotion for her to the G-5 level if she performed satisfactorily on that job. On 1 January 1977 the Applicant was accordingly assigned for a two-month period to the post of Senior Clerk in the Inter-Office Voucher Processing Unit of the Accounts Division, classified at the G-5 level. On 11 March 1977 the Deputy Controller, Mr. Ziehl, reported in a memorandum to the Assistant Secretary-General for Personnel Services that during the two-month trial period the Applicant had not performed to an acceptable level; the memorandum concluded as follows:

“3. Under the circumstances, the Office of Financial Services has been unable to find a basis of promoting Miss Tomiak to the G-5 level, even though the Appointments and Promotion Panel placed her on this register and established her eligibility for such promotion.

“4. This matter is, therefore, remanded to the Office of Personnel Services for possible further action in this matter. It would appear that your Office must either find a position outside the Office of Financial Services in which she could perform at that level or that this Office will be obliged—by not later than 31 March 1977—to reassign her to her G-4 post as secretary to the Director for Policy Co-ordination.

“ . . . ”

An evaluation report prepared by the Accounts Division was attached to Mr. Ziehl's memorandum, the conclusion of the evaluation being that the Applicant had not demonstrated herself capable of performing in the Accounts Division at the G-5 level. Copies of the memorandum and of the evaluation report were sent to the Applicant on 18 March 1977. On 22 March 1977 the Assistant Secretary-General for Personnel Services advised Mr. Ziehl, in reply to his memorandum of 11 March 1977, that it was the responsibility of the Office of Financial Services to honour the promotion of the Applicant to the G-5 level in the area and post for which she had been originally recommended. On 29 March 1977 Mr. Debatin answered that the Office of Financial Services had done everything possible to effect the promotion of the Applicant, except to give her an increased salary not in line with her secretarial duties in the Division for Policy Co-ordination. In the meantime the Applicant had, on 23 March 1977, informed the Assistant Secretary-General for Personnel Services of her intention to submit a rebuttal to the evaluation report. On 14 April 1977 the Applicant submitted her rebuttal, in which she contended that her assignment to the Accounts Division had not been made in good faith and requested an impartial review by persons outside the Office of Financial Services in whose selection she would be permitted to participate. On 15 April 1977 the Applicant sent a copy of her rebuttal to the Secretary-General, asking him to exercise his good offices to obtain an impartial review, and on 21 April 1977 she sent a copy to the Appointment and Promotion Board. On 5 May 1977 the Vice-Chairman of the Board informed her that the matter had been discussed by the Board on 27 April 1977 and that it had been decided that the matter should be referred to the Office of Personnel Services for action together with her Department “as the implementation of promotions is not a matter within the competence of the appointment and promotion bodies”. On 23 June 1977 Mr. Ziehl appeared at his own request before Working Group I of the Appointment and Promotion

Panel in the course of the 1977 promotion review and made a statement which was recorded in the minutes of the meeting as follows:

“Mr. Ziehl regretted that the staff member has been on the G-5 register for three years and also that, in retrospect, his dept. had made a recommendation for her promotion in 1974, since, he felt, she has been doing G-4 secretarial work all that time. He outlined all the pertinent factors of this case, and informed the Group that the Controller had taken a special interest in the case, given the fact that the staff member had been on the register for so long, and had personally asked that her name be retained on the '76 register, in the hope that a spot could be found for her which would justify the G-5. However, as Mr. Ziehl pointed out this had not worked out. Miss Tomiak had been assigned general clerical duties in the Accounting Section under Miss I. Lester, which could have justified a G-5, and a post would have been made available for her. Mr. Ziehl stressed that the nature of duties assigned to Miss Tomiak were clerical rather than accounting skills etc. He regretted that the staff member had not applied herself at all, being very rarely at her desk, and taking a long time to carry out given tasks. A report was compiled by Miss Lester after the trial period, in which it had been stated that Miss Tomiak had proved to be quite unsatisfactory. On that basis she has again been assigned to her previous functions as secretary to the Director, Policy-Co-ordination, a G-4 function. Mr. Ziehl recognised the morale problem caused in the staff member by her name having appeared on the register for three years without implementation. He pointed out however, that the Dept. had tried everything in its power to honour her name being on the list, and that Miss Tomiak had been apprised of the seriousness of her new assignment in the Accounts Division and the implications if she were not to apply herself. Given all the circumstances, the OFS asked formally that the name of Miss Tomiak be not included in the 1977 G-5 register.”

According to the minutes, the Working Group “deliberated at some length *in camera*. It was agreed, with reluctance, that the inclusion of Miss Tomiak's name could not be justified any longer.”

In a report dated 20 July 1977 from the Chairman of the Working Group to the Assistant Secretary-General for Personnel Services, the Working Group offered the following explanation of its recommendation:

“This year, a special presentation was made by the Deputy Controller regarding this case. He stated that the original departmental recommendation was a mistake since, in retrospect, it was felt by the Department that the staff member has always performed as a Secretary and was properly graded at the G-4 level. The Group feels very strongly about the complete misrepresentation perpetrated by the Department for the past three years and hopes that similar cases will not occur in the future. After very careful evaluation of all pertinent factors, however, the Group decided that the inclusion of Miss Tomiak's name in the 1977 G-5 register could not be justified.”

Accordingly, the Applicant's name did not appear in the G-5 promotion register in 1977. On 23 February 1978 the Applicant requested in a memorandum to the Assistant Secretary-General for Personnel Services that the provisions of Administrative Instruction ST/AI/240 be applied in respect of her rebuttal of 14 April 1977 so that she might choose a panel to investigate her case. On 21 March 1978, in a further memorandum to the Assistant Secretary-General for

Personnel Services, the Applicant submitted that she could not remain indefinitely the mere object of the evaluation report of 11 March 1977 which had been "so detrimental" to her "expectation of promotion"; she asserted that neither the evaluation report nor her rebuttal might properly be filed anywhere before a completion was provided in the form of a proper review, and expressed her belief that

"the extraordinary delay in according me a proper review has been highly detrimental to my case and has played its part in the removal of my name from the G-5 promotion register of 1977 after three years, 1974, 1975 and 1976, of recommendation for promotion by the Appointment and Promotion Panel on the G-5 registers."

On 31 March 1978 the Applicant contended in a letter addressed to the Chairman of the Appointment and Promotion Board and to the Chairman of Working Group I of the Appointment and Promotion Panel that the decision to remove her name from the register was unjustified

"In any case, I maintain that the decision was unjustified, for the excellent record of many years which earned the recommendation of the Panel and the decision of the Secretary-General to place my name on the G-5 register in 1974, 1975 and 1976 was still available to the Panel, and no derogatory information concerning my abilities had been put forth publicly in a proper review under a proper procedure of evaluation, nor should have been received within the procedure of the Panel without such prior investigation."

On 19 May 1978 the Applicant asked the Secretary-General to review

"the administrative decision that is implicit in the lack of response I have had to my written reminder dated 21 March 1978 to the Assistant Secretary-General, Office of Personnel Services . . . to accord me the proper procedure of review under the provisions of Administrative Instruction ST/AI/240 of my statement of rebuttal to the evaluation report of my performance dated 11 March 1977.

"I request also review, concomitantly, of the decision to remove my name from the G-5 Promotion Register of 1977 (after it had appeared on the register for three years, 1974, 1975 and 1976) for this action was directly related to the above-mentioned decision to deny me the proper procedure of review under Administrative Instruction ST/AI/240."

On 7 June 1978 the Director of the Division of Personnel Administration replied to the Applicant's memorandum of 21 March 1978 and to her request for review as follows:

" . . .

"Your memorandum of 14 April 1977 was carefully considered by the Office of Personnel Services and we had requested Mr. Krishnamoorthy, Personnel Officer for the Office of Financial Services, to explain to you our decision on the matter. Hence, no written reply was sent to you. It was at my instruction that Mr. Krishnamoorthy discussed with you in person and explained to you in very clear terms that the report on your performance of a particular assignment within the Accounts Division is not a performance evaluation report in terms of ST/AI/240 and can not be treated as such. In fact that report has to be considered as an internal correspondence between two officials of a particular department and is of no direct concern to the Office of Personnel Services. Therefore, the said report should not have been put into your official status file. Consequently, your memorandum

dated 14 April 1977 concerning that report cannot be considered as a rebuttal requiring investigation under the provisions of paragraph 13 of ST/AI/240.

"In view of the above the said report as well as your rebuttal are being withdrawn from your official status file and returned to the Executive Office, OFS. As concerns your recent request to review the decision to remove your name from the G-5 Promotion Register of 1977, you are certainly aware of the recourse procedure established in this regard. As you know under the said procedure recourse letters by staff members who have not been included in the promotion register should be addressed to the Chairman of the Appointment and Promotion Panel."

On 13 August 1978 the Applicant lodged an appeal with the Joint Appeals Board. The Board submitted its report on 9 June 1982. The Board's conclusion and recommendation read as follows:

"Conclusion and recommendation

"55. The Board concludes that the Working Group's recommendation which led to the decision to omit the appellant's name from the 1977 G-5 Promotion Register was taken:

"(a) on the basis of incomplete and irrelevant information,

"(b) in disregard of the presumption arising from the inclusion of the appellant's name in earlier promotion registers that the appellant was capable of performing at the G-5 level,

"(c) in disregard of the appellant's legitimate expectancy of being promoted from the promotion register,

"(d) in disregard of the appellant's service record, and

"(e) contrary to established practice.

"56. Accordingly, the Board recommends that the contested decision be rescinded and that the appellant's name be placed on the 1977 G-5 Promotion Register.

"57. The Board finds that the Evaluation Report of 11 March 1977 rebutted by the appellant should be investigated and appraised as provided in Administrative Instruction ST/AI/240 before being made part of the appellant's service record. Since the appellant's performance in the two-month assignment to the Accounts Division covered by the Evaluation Report is irrelevant to the issue of the appellant's expectancy of promotion from the Register, the Board considers that it would be infructuous to make any recommendation concerning that Report."

On 24 September 1982 the Assistant Secretary-General for Personnel Services informed the Applicant that the Under-Secretary-General for Administration and Management, having re-examined her case in the light of the Board's report, had decided on behalf of the Secretary-General:

"(a) to take note of the report of the Board, and

"(b) that the report of the Board, together with the attached memorandum, be included in your official status file so that it is available together with all other evidence—to the relevant promotion bodies in future promotion reviews."

The attached memorandum, dated 27 August 1982, contained *inter alia* the following observations from the Under-Secretary-General for Administration and Management:

“4. With regard to the conclusion reached by the Board, I agree that the Working Group of the Appointment and Promotion Panel should in 1977 have been advised not only of the existence of an unfavourable report, but also of the fact that the staff member had indicated her desire to rebut that report. I therefore agree with the Board’s conclusion that the information before the Working Group in 1977 was not complete. However, there is no basis whatsoever to assume that, had this information been before the Working Group, its recommendation would have been in any way different.

“5. As regards the Board’s conclusion that the Working Group’s recommendation was taken ‘in disregard’ of a certain number of facts which were well known to the Working Group, I would point out that the Board is, of course, fully within its competence in making judgements of value different to those of the Working Group. However, it cannot and should not substitute its judgements for those of the Working Group. If the Board feels that the Working Group gave insufficient or undue weight to specific facts, surely the correct procedure is to advise the Working Group accordingly, in order that it may give further consideration to those facts in the light of the Board’s views. Whether or not that further consideration would result in a different recommendation is a matter for the Group to decide—not the Board. But, in any event, it is wrong for the Joint Appeals Board to assume that the Working Group’s recommendation was made ‘in disregard’ of those facts, particularly when the record shows that the history of this case has been thoroughly considered by the Group.

“6. For the reasons set out in paragraphs 4 and 5 above, I have come to the conclusion that the appropriate decision would have been to refer the Board’s views to the Appointment and Promotion Panel for further consideration of this matter. In respect, however, of the contested issue—i.e. the inclusion or non-inclusion of Ms. Tomiak in the 1977 G-5 Promotion Register—it does not seem that referral to the Panel would be helpful, in view of the time elapsed since 1977. Even if the Panel, after reconsideration, were to recommend Ms. Tomiak’s inclusion in the 1977 Promotion Register, this of course would not mean that her promotion necessarily would or could be effected, particularly since the 1977 Promotion Register lapsed upon the approval of the 1978 register. In these circumstances, the utility of the action requested by Ms. Tomiak—in terms of actual redress—is questionable. Also in view of the lapse of time, and of the fact that a number of the persons involved have since left the Organization, it is doubtful that an adequate investigation of the evaluation report of 11 March 1977, recommended by the Appeals Board, can in fact be made.”

On 28 February 1983 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The decision of 24 September 1982 offers to the appointment and promotion bodies a task not within their competence; averts the issues raised by the Applicant; averts the very substance of the considerations, conclusions and recommendations of the Joint Appeals Board; distorts the identity of the Applicant’s case and the terms of her claims; and maintains as a *fait accompli* the incomplete state of the evaluation report and the results of the consequent vitiation of the procedures of the Appointment and Promotion Panel.

2. The removal of the Applicant's name from the G-5 promotion register of 1977 was improperly obtained, by:

(a) Pre-arrangement by means of a re-assignment of two months duration that was not in good faith;

(b) Deprivation of the proper procedure of investigation of the evaluation report; and

(c) Consequent vitiation of the procedures of the Appointment and Promotion Panel, which worked with an incomplete document and incomplete information.

3. The appearance of the Applicant's name on the G-5 promotion register in 1974, 1975 and 1976 created a legitimate expectancy of promotion which was unfairly withdrawn. This deprivation unfairly disregarded her service record and the presumption arising from the inclusion of her name in the earlier registers that she was capable of performing at the G-5 level.

Whereas the Respondent's principal contentions are:

1. The Applicant has no valid claim to inclusion of her name on the 1977 G-5 promotion register or any subsequent G-5 promotion registers

2. The administrative decision contested by the Applicant was not arbitrary or motivated by prejudice or other extraneous factors

3. The procedures followed by the Working Group of the Appointment and Promotion Panel in the course of the 1977 review of promotion did not violate the Applicant's procedural rights.

The Tribunal, having deliberated from 5 to 18 October 1983, now pronounces the following judgement:

I. Having long occupied a G-4 post as Secretary to the Director of Policy Co-ordination in the Office of Financial Services, the Applicant was assigned on a "trial" basis on 1 January 1977 to a G-5 position as Senior Clerk in the Accounts Division. This assignment was made by the Controller on the stated ground that successful performance in this G-5 position would best enable the Applicant to achieve a promotion to G-5 for which the Appointment and Promotion Panel had successively recommended her in 1974, 1975 and 1976. It is not surprising that at the time of her "trial" assignment, the Applicant raised a number of questions concerning its propriety, contending, *inter alia*, that there already existed a vacant G-5 position in her own office to which she could be promoted. In the end, however, she accepted the new assignment on the basis of the Controller's undertaking that, if her performance was adequate, a way would be found to effect her promotion to G-5.

II. The Tribunal notes that staff members who have been included on a promotion register are normally promoted by the time the Appointment and Promotion Panel meets in the following year to draw up the promotion register for that year. Indeed, a promotion register remains effective only until the register for the next year is drawn up, and the carry-over of the name of a staff member from one promotion register to the next is unusual. Promotion from a register is necessarily subject to the availability of positions, but a promotion to the G-5 level does not involve so elevated a rank as to explain an inability on the part of the Administration to find an appropriate G-5 post at Headquarters within the context of manning table resources. It appears to the Tribunal to be unusual, given all the circumstances of the case, for the Applicant to have been assigned on a "trial" basis to another office.

III. In fact, the Applicant's performance during the two-month assignment to the G-5 position was found seriously inadequate. A negative report entitled "Miss G. S. Tomiak—Evaluation" was prepared by her immediate superior and handed to her on 11 March 1977 at a meeting held in the Deputy Controller's office and attended by such senior officers as the Director of Policy Co-ordination and the Executive and Administrative Officers of the Office of Financial Services. Although the circumstances of that meeting are controverted, the report handed to the staff member was emphatically negative. It described her work as requiring the coding of UNDP inter-office vouchers and assisting in reconciling United Nations and UNDP inter-office voucher clearing accounts, and recorded recurrent tardiness, frequent absences from desk, lack of initiative, inadequate volume of work and concentration on career rather than work. This substantial report concluded that:

"From the specifics above and based on her total conduct, the Section Chief has reached the reluctant conclusion that Miss Tomiak has not demonstrated herself capable of performing in the Accounts Division at the G-5 level. Certainly as far as the Section Chief is concerned, we would feel handicapped by the continuance of her services within this Division."

IV. Recognizing the effect this report would have on consideration of her promotion, the Applicant sought to invoke the rebuttal procedure of Administrative Instruction ST/AI/240, "Performance Evaluation Report System", dated 3 January 1977. This basic Administrative Instruction explained the new reporting system then being introduced and established a rebuttal procedure according to which the staff member could make a written statement in explanation or rebuttal of part or all of a biennial performance evaluation report on his or her work. If timely made, such a rebuttal would lead promptly to an impartial investigation, including hearing of interested parties, and an appraisal of the matter in writing by the head of the department or office to which the staff member was assigned. The appraisal, together with the contested performance evaluation report and the staff member's statement, would be included in the staff member's official status file and submitted to the Appointment and Promotion Panel for its review in drawing up the annual promotion register.

V. In the current case the staff member's attempts to invoke the rebuttal procedure of ST/AI/240 were unavailing. The Appointment and Promotion Panel responded to her attempted timely invocation of that procedure by focusing on the claim she made of wrongful denial of a promotion to G-5. The Panel informed her

". . . the matter was discussed at the Board's meeting No. 947 on 27 April 1977 and that it has been decided that it be referred to the Office of Personnel Services for action together with your own Department as the implementation of promotions is not a matter within the competence of the appointment and promotion bodies."

The Tribunal finds that this determination constitutes a wrongful denial to the Applicant of the rebuttal procedure that ST/AI/240 sought to assure.

VI. The Respondent is constrained to admit that the Applicant's request to rebut the evaluation of 11 March 1977 "ought to have been granted" but asserts that "the Applicant was afforded adequate redress through the administrative review of her case and the recourse procedure initiated by her letters to the Chairman of the Promotion Panel . . . in accordance with Administrative Instruction ST/IC/77-1, in which she detailed the grounds upon which she challenged the basis of her evaluation." This assertion fails to distinguish

between the rebuttal procedure established by ST/AI/240 and the recourse procedure of ST/IC/77-1. As the Tribunal has noted, a staff member, by invoking ST/AI/240, causes an investigation to be made and an appraisal of the matter by the head of the department or office concerned to be written, the results of which, together with the staff member's rebuttal, are sent to the Appointment and Promotion Panel and thus form an essential basis for the Panel's decision whether or not to include the name on the promotion register. By contrast, the recourse procedure, under ST/IC/77-1, is a procedure posterior to the original recommendation of the Appointment and Promotion Panel and is limited to submission of a written statement by the staff member which triggers a review by the Appointment and Promotion Panel of its decision not to include the individual's name on the promotion register. In the recourse procedure, the only new material is a written statement by the staff member of the reasons why he or she considers non-inclusion of his or her name to have been in error. There is neither an investigation nor a separate written appraisal by the head of the department or office concerned. While the ST/IC/77-1 procedure has value, it is plain that it was never intended to and cannot be a substitute for the ST/AI/240 procedure.

VII. In the proceedings before the Joint Appeals Board, the Respondent sought to show that the critically negative report of 11 March 1977 was not an official performance evaluation report and sought to assert that, for this reason, ST/AI/240 was inapplicable. Indeed, the Respondent states that the report of 11 March 1977 should never have been included in the Applicant's official status file, that that report was included in the official status file not during 1977 but only in 1978, and that it was removed later that same year when the Administration recognized its irregularity. The Respondent thereby tries to demonstrate that the Appointment and Promotion Panel meeting in 1977 did not consider the report of 11 March 1977. In the opinion of the Tribunal, however, a careful reading of the record does not bear out this assertion. The minutes of the meeting of the Panel's Working Group I held on 23 June 1977 show that the Group in fact considered the report or its substance. The Deputy Controller is recorded as having raised the question of the Applicant's temporary assignment to the G-5 post:

"He regretted that the staff member had not applied herself at all, being very rarely at her desk, and taking a long time to carry out given tasks. A report [dated 11 March 1977] was compiled by Miss Lester after the trial period, in which it had been stated that Miss Tomiak had proved to be quite unsatisfactory. On that basis she has again been assigned to her previous functions as secretary to the Director, Policy Co-ordination, a G-4 function . . . Given all the circumstances, the OFS asked formally that the name of Miss Tomiak be not included in the 1977 G-5 register."

VIII. Accordingly, the Tribunal finds that the proceedings of the Appointment and Promotion Panel were vitiated by serious irregularity to the detriment of the Applicant's procedural rights. Failure to allow her to invoke the procedure of ST/AI/240 made it impossible for the Panel to consider her rebuttal, the results of an investigation, and the Controller's written appraisal of the evaluation report of 11 March 1977. The Tribunal is of the opinion that this violation of her rights has been so serious as to warrant an award of compensation. As in Judgement No. 293 (*Nayyar*),

"even if it is impossible to prove whether the Applicant's possibilities of promotion have or have not suffered as a consequence of such error, the

Administration is liable and consequently adequate compensation should be given to the Applicant.”

IX. The 1977 promotion register no longer having any effect, the Tribunal cannot rescind the omission of the Applicant's name from that register, as the Applicant requests. Nor can the Tribunal effect her promotion as from 1977, promotions being within the discretionary powers of the Secretary-General. Bearing in mind the absence of any other way of correcting the situation brought about by the violation of the Applicant's rights under ST/AI/240, the Tribunal awards compensation to the Applicant in the amount of \$7,500.

(Signatures)

Arnold KEAN
Vice-President, presiding

Herbert REIS
Member

New York, 18 October 1983

L. de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary

Judgement No. 315

(Original: French)

Case No. 252:
Denis

**Against: The Secretary-General
of the United Nations**

Request by a former staff member of the United Nations to rescind the decision terminating his probationary appointment, to rescind the decision refusing his admission to an examination for French translators, to rescind the report of the Joint Appeals Board and the letter of the Assistant Secretary-General for Personnel Services taking note of the report, and to award compensation.

Conclusion of the Joint Appeals Board, pursuant to Judgement No. 260, that the appeal was time-barred and therefore not receivable and that the Applicant failed to establish the existence of exceptional circumstances warranting waiver of the time-limits.

The Tribunal rules that the Applicant, not having raised the issue of allegedly improper composition of the Joint Appeals Board before the Board itself, is barred from raising it before the Tribunal.—The Tribunal decides that the report of the Board is not vitiated by any procedural irregularity.—The Tribunal observes that there is no particular form which the Secretary-General must use to accept the recommendations of the Board.—Requests to rescind the report of the Joint Appeals Board and the letter of the Assistant Secretary-General for Personnel Services rejected.—The Tribunal considers that the refusal to grant a waiver of the time-limits falls within the discretionary power of the Joint Appeals Board and is not vitiated by any arbitrary assessment.—The Tribunal concurs with the decision of the Board not to waive the time-limits.—Applicant's contention that the decision refusing his admission to an examination for French translators may be appealed against at any time as it did not contain any statement of reasons thereof.—Contention rejected.—Staff rule 111.3 (a) which provides for a time-limit of one month for the appeal to the Secretary-General must be met in all cases, even if the contested decision contains no statement of reasons.—No waiver of the time-limits having been granted by the Joint Appeals Board and the Applicant having failed to justify the exceptional nature of his case, the appeal is not receivable.—Request that the Tribunal invite the Administration to let the Applicant know the