



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case Nos. 2010-177 and 2012-288

**Akyeampong  
(Respondent/Appellant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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**Before:** Judge Kamaljit Singh Garewal, Presiding  
Judge Luis María Simón  
Judge Inés Weinberg de Roca

**Judgment No.:** 2012-UNAT-192

**Date:** 16 March 2012

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Appellant:** Anne Marie Demmer

**Counsel for Appellant/Respondent:** Phyllis Hwang  
Stéphanie Cartier

**JUDGE KAMALJIT SINGH GAREWAL, Presiding.**

**Synopsis**

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General on 3 December 2010 against UNDT Judgment No. 2010/189 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 19 October 2010 in the case of *Akyeampong v. Secretary-General of the United Nations*. On 8 February 2011, Ms. Victoria Akyeampong filed an appeal against UNDT Judgment No. 2010/189 together with an answer to the Secretary-General's appeal.<sup>1</sup> On 5 December 2011, the Secretary-General filed his answer to Ms. Akyeampong's appeal.

2. Ms. Akyeampong was recommended for promotion from the P-5 to the D-1 level by the Appointments, Postings and Promotions Board (APPB) of the United Nations Commissioner for Refugees (UNHCR). Ms. Akyeampong cannot be denied promotion by the High Commissioner on account of reprimands for acts of misconduct. She was performing at the D-1 level with a special post allowance in 2008. She was considered for promotion by the APPB and was one of 10 out of 102 candidates recommended by the APPB. She was promoted a year later. All this shows that her conduct was not a hurdle at all in her career. The reprimands should have been overlooked. The appeal filed by the Secretary-General is dismissed. The appeal filed by Ms. Akyeampong is allowed in part. The administrative decision of the High Commissioner denying her promotion on the ground of the two reprimands is rescinded or, in lieu of rescission, Ms. Akyeampong shall be paid compensation in the amount of CHF 10,000. Ms. Akyeampong's prayer for the award of moral damages is dismissed. Judge Weinberg de Roca appends a dissenting opinion.

**Facts and Procedure**

3. Ms. Akyeampong joined UNHCR in 1993. In June 2008, while she served at the P-5 level, she was appointed to underfill the D-1 post of UNHCR Deputy Representative in the Democratic Republic of the Congo. She took up her functions in September 2008 and, in January 2009, the High Commissioner extended her responsibilities. This was despite two

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<sup>1</sup> By Order No. 70 (2011), the Appeals Tribunal waived the time limit for Ms. Akyeampong's appeal.

reprimands that Ms. Akyeampong had received in 2007 and 2008 “for instances of lapses of judgment which had occurred in 2006”.<sup>2</sup>

4. Ms. Akyeampong was a candidate for promotion from the P-5 to the D-1 level during the 2008 promotion session which was held from 15 March 2009 to 21 March 2009. For the 10 available slots for promotion from the P-5 to the D-1 level, the APPB considered the record of 102 candidates. Ms. Akyeampong was one of the 10 candidates recommended by the APPB for promotion. An eleventh candidate was recommended super numerically. Ultimately, 19 candidates were promoted.

5. The APPB minutes show that candidates who were under-filling were placed in a different group: “With respect to under fillers, the [APPB] gave priority consideration to each candidate performing on a higher level position within their initial groups. Candidates were moved up based on excellence of performance already demonstrated at a higher level confirming potential to continue to perform at the higher level. Within group 1 priority consideration was given to those candidates who have been under filling for over a year.”<sup>3</sup>

6. On the basis of priority consideration given to underfillers, the recommendation by the APPB in favour of Ms. Akyeampong was phrased as follows:

S/m was initially ranked in group 3 on the basis of scores attained in relation to the overall performance, diversity of experience including service in the field and hardship locations and seniority as well as recommendations for promotion. On further thorough review of the available information, the Board noted:

- the staff member was the only female candidate at this level who was under-filling on a D-1 post,
- that she had been recommended in the 2008 annual promotion exercise by the former and current supervisors separately,
- that the staff member had a good performance record, and had achieved excellent quality of work, was proficient in two UN languages (English and French)[,] had performed on a Representative position prior to this assignment and had a good rotation history.

Based on the information available at the time of the session, the Board concluded that the staff member was substantially equally qualified to candidates in group 1

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<sup>2</sup> Ms. Akyeampong’s Appeal, para. 7.

<sup>3</sup> Confidential APPB minutes.

in terms of performance, under-filling and having performed Representative duties in the field and moved her to this group. Promotions slots were attributed to staff members starting with the top ranked group and proceeding to the next group until no further slots were available. *The staff member was therefore recommended for promotion.*<sup>4</sup>

7. The APPB minutes reflect that Ms. Akyeampong was among the 10 recommended candidates.

8. On 28 April 2009, the High Commissioner issued a list of staff members who had been promoted, as a result of the 2008 promotion session. Ms. Akyeampong was *not* among those promoted. On 8 May 2009, Ms. Akyeampong filed a recourse application with the APPB, requesting reconsideration of her non-promotion. According to the minutes of the APPB's recourse session held between 22 June 2009 and 25 June 2009, she claimed that she:

- [was] eligible for promotion since 2006[.]
- was not recommended in 2007 due to change of supervisors[.]
- was recommended by the Board in 2008 and [the] name was taken off the list before the list was released[.]
- [was the] only female candidate under filling - as noted by the APPB[.]

9. The APPB reviewed Ms. Akyeampong's recourse application but found that:

[t]here are no new elements in the submission and given that the Board had recommended the s/m for promotion the recourse cannot be made to the APPB. The Board wishes to reiterate that it advises and recommends to the High Commissioner, and that the final decision with respect to postings and promotions is his. The Board took note of the HC's reasoning and the Board considers that it is not the competent authority to respond to the staff member's questions.

10. The High Commissioner announced the results of the recourse session on 28 July 2009. Ms. Akyeampong was not among the staff members promoted after the recourse session.

11. On 23 September 2009, Ms. Akyeampong submitted a request for management evaluation and, on 19 November 2009, she filed an application with the UNDT.

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<sup>4</sup> Ibid. Emphasis in the original.

12. The UNDT issued Judgment No. UNDT/2010/189 on 19 October 2010. It found that the High Commissioner committed a procedural irregularity in the promotion session by promoting two staff members to the D-1 level who had not been subjected to prior review by the APPB. The UNDT concluded that such irregularity “vitiat[e] necessarily the legality of the decision to deny [Ms. Akyeampong] a promotion, since there were a limited number of promotion slots”. The UNDT rescinded the contested decision and ordered, as an alternative to the rescission, that the High Commissioner pay compensation in the amount of CHF 10,000.

13. The UNDT rejected Ms. Akyeampong’s claim for material damages noting that its order to rescind the contested decision or in the alternative pay compensation, sufficiently addressed any material losses. The UNDT further rejected Ms. Akyeampong’s claim for moral damages, finding that Ms. Akyeampong “had no chance of being promoted even if the High Commissioner had not committed any irregularity by promoting non-eligible staff members”.

### **Submissions**

#### **Secretary-General’s Appeal**

14. The Secretary-General submits that the UNDT erred in law and exceeded its competence in awarding compensation in lieu of the rescission of the non-promotion decision.

15. The Secretary-General submits that not every procedural irregularity will lead to the conclusion that an administrative decision is unlawful and warrants compensation. The award of compensation is appropriate where the UNDT found that the staff member suffered actual damage. The very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations.

16. Ms. Akyeampong suffered no loss as a result of the procedural irregularity committed by the High Commissioner. The UNDT therefore erred in law and exceeded its competence in awarding compensation in lieu of the rescission of the non-promotion decision.

17. The Secretary-General further submits that the UNDT erred in law in finding that the procedural irregularity it identified rendered the contested administrative decision unlawful, thereby compelling the Dispute Tribunal to apply Article 10(5) of the UNDT Statute and order the rescission of the decision or compensation in lieu of rescission.

18. The UNDT failed to examine the nature and severity of the procedural irregularity and to analyze whether the procedural irregularity had any relevance to the impugned administrative decision; and by concluding on the basis of such irregularity, that the decision not to promote Ms. Akyeampong was unlawful. Where a procedural irregularity is not of such gravity as to adversely affect the contested administrative decision, the lawfulness of the contested administrative decision is not vitiated by procedural irregularities. The UNDT found that Ms. Akyeampong had no chance of being promoted even if the High Commissioner had not committed the procedural irregularity. The contested administrative decision need not be rescinded.

19. Finally, the Secretary-General requests that the Appeals Tribunal consider the implications of holding the Organization financially liable even in cases where a procedural irregularity has not adversely affected the administrative decision or resulted in any loss to the staff member.

#### **Ms. Akyeampong's Appeal and Answer**

20. Ms. Akyeampong submits that the UNDT erred in finding that she had no chance of being promoted, when the APPB recommended her for a promotion to the D-1 post. She submits that the UNDT erred in finding that a reprimand prohibits the promotion of a staff member. Ms. Akyeampong submits that the UNDT erred in dismissing her claim that the decision not to promote her was unfair. She had already been performing duties satisfactorily at the D-1 level at the time that her promotion to the D-1 level was denied. She requests the Appeals Tribunal to overrule the UNDT's decision to dismiss her claim for compensation and grant her appropriate compensation for the personal and professional harm suffered.

21. Ms. Akyeampong refutes the Secretary-General's contention that procedural irregularities committed by the Administration should only warrant a rescission of the decision or, in the alternative, an award of compensation, if the irregularities adversely

affected the staff member. Ms. Akyeampong requests that the Appeals Tribunal dismiss the Secretary-General's appeal and uphold the UNDT order to rescind the contested administrative decision not to promote her to the D-1 level or, in the alternative, to pay compensation in the amount of 10,000 CHF.

### **Secretary-General's Answer**

22. The Secretary-General submits that the UNDT properly held that Ms. Akyeampong had no chance of being promoted in 2008 given the High Commissioner's decision not to promote her because of two written reprimands in 2007 and 2008.

23. The Secretary-General further submits that the UNDT properly held that the High Commissioner was not obliged to follow the APPB's recommendation to promote Ms. Akyeampong given the existence of the two reprimands against Ms. Akyeampong.

24. The Secretary-General contends that the UNDT properly held that the decision not to promote Ms. Akyeampong "[could] in no way be deemed to be a sanction for actions that [had] already been punished by reprimands".

25. The Secretary-General submits that Ms. Akyeampong has established no errors by the UNDT warranting compensation in the present case.

### **Issues**

26. In light of the two reprimands, can it be said that Ms. Akyeampong had no chance of promotion whatsoever or was the High Commissioner in error in using the reprimands to deny promotion to Ms. Akyeampong, who had been recommended by the APPB as one of the 10 out of 102 candidates to fill the 10 promotion slots.

### **Considerations**

27. Ms. Akyeampong's case must be distinguished from the cases of *Vangelova*,<sup>5</sup> *Bofill*<sup>6</sup> and *Dualeh*<sup>7</sup>. Ms. Vangelova had 192 candidates above her for the 42 available promotion slots. Ms. Bofill had 78 candidates above her. Mr. Dualeh was ranked 27<sup>th</sup> out of 102

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<sup>5</sup> *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172.

<sup>6</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174.

<sup>7</sup> *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175.

candidates against 10 posts for promotion. The Appeals Tribunal reversed the UNDT judgments granting compensation, because in none of these cases the staff members had a significant chance of promotion. However, in the case at bar, Ms. Akyeampong did have a significant chance of promotion.

28. Earlier in *Mebtouche*,<sup>8</sup> *Andrysek*,<sup>9</sup> and *Ardisson*,<sup>10</sup> similar awards of compensation had been upheld by us. In the first two cases, the promotion of three ineligible staff members led to the rescission of the decision not to promote Mr. Mebtouche and Mr. Andrysek. As Mr. Mebtouche was left with no opportunity for promotion as he had retired, the award of compensation was upheld and the amount enhanced. Mr. Andrysek was too far down in the ranking and had no chance of promotion. He sought moral damages which were declined but the award of compensation in lieu of rescission was upheld, as the Secretary-General had not appealed. In *Ardisson*, the irregularity committed by the High Commissioner was the failure to establish clear rules for reconciling gender parity and merit-based promotions. The High Commissioner could not merely request the APPB to apply quotas. Mr. Ardisson was ranked 12<sup>th</sup> out of 314 candidates and if the procedural irregularity had not occurred, he along with 32 candidates would have been promoted. The award of compensation in lieu of rescission was upheld but moral damages were not awarded.

29. The question to be considered in the present case is whether or not Ms. Akyeampong could be denied a promotion on account of the two reprimands. We rely on the minutes of the APPB, reproduced above, to hold that Ms. Akyeampong, as one of the 10 candidates recommended for promotion, had a good chance of promotion had the reprimands been considered in the correct perspective, as corrective measures.

30. Ms. Akyeampong's dossier before the APPB reveals an excellent record. A reprimand is not an adverse entry in the same way as an entry relating to sanction post-disciplinary proceedings would be.

31. A reprimand is recorded in the staff member's file to serve as a reminder, should the staff member misconduct herself again. In such an event, the Administration may

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<sup>8</sup> *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033.

<sup>9</sup> *Andrysek v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-070.

<sup>10</sup> *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052.



administer a harsher sanction. But we are not concerned with the future use of reprimands. Suffice it to say that Ms. Akyeampong was entrusted a D-1 post in 2008. Therefore, one can presume that the reprimands had not stood in her way at that stage of her career. The APPB also considered the performance appraisals of the candidates when reviewing them against the criteria specified in the APPB procedural guidelines. Indeed, the APPB conducted a meticulous exercise and made recommendations after strictly observing the guidelines. The procedural irregularity was committed by the High Commissioner in appointing two candidates who had not appeared before the APPB.

32. In Ms. Akyeampong's case, no unsuccessful candidate had a better chance than her as she was on the promotion list recommended by the APPB. The two reprimands had not been a hindrance when Ms. Akyeampong was under-filling a D-1 position and had not come in the way of the APPB when Ms. Akyeampong was recommended for promotion. It is important to note that Ms. Akyeampong was actually promoted during the 2009 annual promotion session. Therefore, the presence of the two reprimands had not debarred her from being promoted a year later.

33. The Secretary-General submits that once the UNDT found that Ms. Akyeampong had no chance of promotion (on account of reprimands), compensation of 10,000 CHF under Article 10(5)(a) could not be awarded. For reasons stated in the previous paragraphs, we do not agree.

34. By majority, Judge Weinberg de Roca, dissenting: The Secretary-General's appeal is dismissed. Ms. Akyeampong's appeal is allowed in part, and with due deference, the administrative decision of the High Commissioner denying her promotion on the ground of the two reprimands is rescinded. As an alternative in lieu of rescission, Ms. Akyeampong shall be paid compensation of CHF 10,000. Ms. Akyeampong's prayer for personal and moral damages is declined.

### **Judgment**

35. By majority, Judge Weinberg de Roca dissenting: The appeal of the Secretary-General is dismissed. Ms. Akyeampong's appeal is allowed in part and the UNDT Judgment is modified to the extent indicated above.

Judge Weinberg de Roca appends a dissenting opinion.

Original and Authoritative Version: English

Dated this 16<sup>th</sup> day of March 2012 in New York, United States.

*(Signed)*

Judge Garewal, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 7<sup>th</sup> day of April 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**DISSENTING OPINION OF JUDGE WEINBERG DE ROCA**

1. With respect, I disagree with today's decision of the majority granting Ms. Akyeampong's appeal, in part, and dismissing the Secretary-General's appeal.

*Ms. Akyeampong's appeal*

2. In my view, the UNDT rightfully held that the High Commissioner did not err in exercising his discretion in rejecting Ms. Akyeampong's promotion on the basis of the reprimands. The Secretary-General has a broad discretion in taking decisions regarding promotions and appointments. Having considered Ms. Akyeampong's appeal as well as the relevant legal provisions, I find no basis to conclude that reprimands cannot be taken into account in a promotion process.

3. A reprimand is an *administrative* measure not a *disciplinary* measure within the meaning of Staff Rule 10.2. The former Administrative Tribunal correctly held that "this [the fact that a reprimand is not a disciplinary measure] does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material..."<sup>11</sup>

4. The Administrative Instruction ST/AI/292 on "Filing of adverse material in personnel records" does not prevent the drawing of negative consequences from adverse material in a promotion exercise. ST/AI/292 protects the staff members' rights to be informed of, and be given the opportunity to rebut, adverse material that is included in his or her file. At the time that adverse material is considered by the Administration, as here, during the promotion exercise, the staff member will have had the opportunity to provide his or her comments and to have them included in the file as well.

5. Under Article 101.3 of the Charter, staff members must meet "the highest standards of efficiency, competence and *integrity*" (emphasis added). It would seem to me that a reprimand is an important factor in deciding whether or not a staff member meets the required standard of integrity.

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<sup>11</sup> Former Administrative Tribunal Judgment No. 1176, *Parra* (2004), para. IV.

6. In the case at bar, it is not disputed that Ms. Akyeampong was fully aware of the two reprimands. The UNDT found that by taking the reprimands into account and deciding against Ms. Akyeampong's promotion, the High Commissioner properly exercised his discretion.

7. I find no error in the UNDT Judgment and would reject Ms. Akyeampong's appeal in its entirety.

*Secretary-General's appeal*

8. I am unable to accept the majority's decision to reject the Secretary-General's appeal.

9. The Appeals Tribunal has consistently held that "[t]he direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation."<sup>12</sup>

10. The UNDT therefore erred in ordering the rescission of the non-promotion decision or in the alternative, compensation in the amount of CHF 10,000, when – as the UNDT correctly found – Ms. Akyeampong had no chance of being promoted.

11. I would allow the Secretary-General's appeal.

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<sup>12</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174, para. 28.

Original and Authoritative Version: English

Dated this 16<sup>th</sup> day of March 2012 in New York, United States.

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 7<sup>th</sup> day of May 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar