

The Administrative Tribunal,

Considering the complaints filed by Ms C. B., Mr J. G.-T., Ms N. H., Mr R. S., Ms L. T., Ms J. V. and Ms D. Z. against the International Telecommunication Union (ITU) on 24 October 2005 and corrected on 8 and 27 December 2005, the Union's reply of 29 March 2006, the complainants' rejoinder of 19 May and the ITU's surrejoinder of 25 July 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Service Order No. 99, entitled "Personal Promotion", was issued on 17 September 1998. The annex to that service order lays down the following:

**"I. CRITERIA**

1 As conditions for the granting of a personal promotion, it shall be required that:

a) the staff member has completed at least

– **18 years** (Professional category)

– **20 years** (General Service category)

of continuous service in ITU [...];

b) the staff member has not been promoted during the last

– **10 years** (Professional category)

– **15 years** (General Service category)

c) the staff member has spent more than

– **1 year** (Professional category)

– **3 years** (General Service category)

at the top step of his/her grade;

d) no promotion prospects exist for the staff member in the occupational area to which his/her post belongs, for a period of two years following the date on which he/she meets criteria a), b) and c) above. [...];

e) the staff member has shown a superior level of performance, in both quantitative and qualitative terms;

f) the staff member has shown evidence of self-development (capacity for maintaining state-of-the-art expertise in his/her domain of activities, enhancement/updating or acquisition of general and technical skills required not only for the full accomplishment of the tasks of his/her post but also for the enlargement of his/her career prospects).

2 It is clearly understood that a staff member will be considered eligible for personal promotion only if he/she meets all the aforesaid criteria.”

This personal promotion scheme was to apply only to staff members in grades G.1 to G.6 inclusive and in grades P.1 to P.4 inclusive. The total number of staff members receiving such promotion was at no time to be “greater than 5% of the posts in each category (i.e. 5% of General Service posts and 5% of Professional posts)”. Paragraphs 4 and 5 of section III of the annex, which is headed “Procedure”, are worded as follows:

“4 The Personnel Department shall maintain an up-to-date list of staff members who, **as at the 1<sup>st</sup> of January of each year**, meet the criteria relating [to] length of service, i.e. criteria 1 a) to 1 c) above. When a staff member meets these criteria, the Personnel Department shall inform the head of the unit accordingly. Both shall verify that the staff member meets criteria 1 d) to 1 f) and so certify in a report.

5 Once a year, the Personnel Department shall submit the list of candidates for personal promotion to the Appointment and Promotion Board, which shall formulate a recommendation to the Secretary-General. The final decision shall be taken by the Secretary-General, having regard to the 5% limit [...].”

Apart from Ms B., who holds a P.3 grade, the other six complainants are in the General Service category. Pursuant to the above-mentioned service order the complainants’ candidatures for personal promotions with effect from 1 January 2003 or 1 January 2004 were submitted to the Appointment and Promotion Board in 2004. The Board recommended their promotion.

Service Order No. 04/19, issued on 22 December 2004, announced the immediate suspension of the personal promotion scheme in view of the Union’s severe financial situation. Nevertheless, in this service order the Secretary-General stipulated the following:

“Personal promotions recommended by the Appointment and Promotion Board for staff members having been declared eligible for a personal promotion effective 1 January 2003 and 1 January 2004 are being reviewed by the Personnel and Social Protection Department and will be granted, as appropriate, once this review has been finalised.”

In letters dated 4 or 22 March 2005, the complainants were notified of the Secretary-General’s decision not to grant them a personal promotion on the grounds that they did not meet all of the criteria stipulated in section I, paragraph 1, of the annex to Service Order No. 99. The complainants requested reconsideration of this decision, but they were informed in letters dated 30 March, 31 March or 13 April 2005 that it was being maintained.

Between 25 April and 1 June 2005 the complainants lodged appeals with the Appeal Board challenging the refusal to grant them a personal promotion. In its report of 5 July the Appeal Board acknowledged that the Secretary-General had discretion in matters of personal promotion, but held that he must take into consideration the “joint report” of the Personnel Department and the head of the unit concerned. It took the view that he could not ignore the Appointment and Promotion Board’s recommendation since that would be tantamount to “altering the procedures he ha[d] himself prescribed”. In its recommendation the Appeal Board indicated that the Secretary-General should request a “review of the reports [drawn up by the Personnel Department and the head of unit] which are submitted to him for a final decision”. This review should be carried out by the Appointment and Promotion Board in order to “remove the obstacles relating to the fact that the assessments differed”, as emphasised by the Secretary-General. By letters of 27 July 2005, which constitute the impugned decisions, the complainants were notified of the Secretary-General’s final decisions whereby he maintained his initial decisions.

B. The complainants contend that the examination of the files of candidates for a personal promotion must “follow a well-established path” and that “nowhere in this procedure is there any explicit reference to an additional stage consisting in the Secretary-General’s reconsideration of the whole process and of the criteria leading to a decision to grant a promotion”. Noting that the Secretary-General nevertheless felt that he was entitled to review all aspects of the files, they submit that “the Administration infringed the applicable rules of procedure by arrogating the right to contradict and revise the unanimous conclusions of the persons responsible for compiling the files”.

The complainants point out that under Staff Regulation 4.9 f) a decision which is contrary to the recommendations of the Appointment and Promotion Board must be referred to the ITU Council. Since the Secretary-General took the impugned decisions without complying with this formal requirement, he breached his obligations under the

## Staff Regulations.

They further submit that no reasons were provided for either the decisions of March 2005 or those of 27 July 2005. The Secretary-General has thus committed an error of law and has deprived them of their right of defence and their right to reply.

The complainants observe that before their files reached the Secretary-General they had been examined by the Personnel Department, the head of unit concerned and the Appointment and Promotion Board, and it was concluded that they met all the criteria required for a personal promotion. Hence by going against this conclusion in the impugned decisions the Secretary-General made a mistaken appraisal of the facts. Describing their individual cases in detail, they strive to show that the Secretary-General failed to take account of essential facts and drew plainly erroneous conclusions from their files.

The complainants are of the opinion that the economic reason to which the Secretary-General referred in Service Order No. 04/19 of 22 December 2004 prompted the inexplicable refusal to grant them a personal promotion. But since the Administration could not lawfully use this reason, it preferred to cite “spurious reasons”, thereby using its powers for ends unconnected with the purpose of Service Order No. 99. In so doing, the Union misused its authority.

Lastly, the complainants accuse the Union of arbitrariness, of “breach of fundamental principles and duties of the ITU” and of unequal treatment and they criticise the slowness with which their cases were handled.

They ask the Tribunal to take the following action:

- “1. To quash the decision of 4 [or of 22] March 2005 of the Secretary-General of the International Telecommunication Union refusing to grant a personal promotion and to declare his decision unlawful.
2. To quash the decision of 27 July 2005 of the Secretary-General of the International Telecommunication Union confirming his decision of 4 [or of 22] March 2005 and to declare that decision unlawful.
3. To grant [them] the personal promotion to which [they] are entitled under ITU Service Order No. 99.
4. Subsidiarily, to refer [their] files [...] to the Secretary-General of the ITU for a new decision with the recommendation that [they] be given [...] the personal promotion to which [they are] entitled under ITU Service Order No. 99.
5. To restore [...] [their] rights with respect to the salary and emoluments which should have been [theirs] with retroactive effect from the date on which [they] ought to have received [their] personal promotion.
6. To award [them] substantial moral damages for injuries suffered as a result of the breach of the fundamental duties and obligations of the International Telecommunication Union.
7. To award [them] substantial compensation for the improper dilatoriness of the Administration of the International Telecommunication Union.
8. To order the International Telecommunication Union to pay all the costs including compensation for part of the fees of their counsel.

### Subsidiarily

To direct the complainant[s] to prove by all legal means the reality of the facts set out in [their] written submissions.”

C. In its reply the ITU emphasises that the Appointment and Promotion Board is a strictly advisory body which issues recommendations addressed to the Secretary-General, and that he alone has the power to take decisions in matters of personal promotion. It denies the existence of any additional stage, and argues that the Secretary-General’s discretion in respect of promotion according to merit, which must by nature be wide, may not be confined to the examination of the sole question of whether the 5 per cent ceiling laid down in section II, paragraph 3 d), of the annex to Service Order No. 99 has been exceeded. In the present case, the Secretary-General

considered that he was not obliged to follow the Appointment and Promotion Board's recommendations because, in his opinion, the complainants clearly did not meet one or more of the criteria governing personal promotion. Moreover, the ITU draws attention to the fact that a decision taken at the discretion of the Secretary-General cannot be termed flawed simply because it is not in line with an advisory body's recommendation.

The Union contends that in the case of a personal promotion – which is essentially based on merit and which, unlike when a post is advertised, does not entail any competition between staff members – there is no justification for applying Staff Regulation 4.9 f).

It submits that both the initial decisions of March 2005 and the final decisions of 27 July 2005 are properly substantiated. It states that “however succinct they might be”, the reasons given “are nonetheless clear [...] so that they certainly make it possible for the Tribunal to rule on this dispute and for the complainants to defend their rights”. It notes that the complainants have not disputed the sole reason given in the initial decisions, namely that they did not meet all the criteria for a personal promotion.

The Union rejects the accusation that it misused its authority. On the other hand, it acknowledges that as a result of the serious financial crisis which the Union faced in 2003 it was decided that the criteria stipulated in the annex to Service Order No. 99 should be applied more strictly.

It submits that the delay in the procedure was caused by discussions in 2004 concerning the very future of the personal promotion scheme.

Moreover, the Union endeavours to show that the complainants did not meet one or more of the above-mentioned criteria.

Lastly, it rejects the accusations of unequal treatment, arbitrariness and “breach of fundamental principles and duties of the ITU”.

D. In their rejoinder the complainants reaffirm that the true reason for refusing all personal promotions was a financial one. They add that the criteria listed in Service Order No. 99 merely served as pretexts and that refusing personal promotions on financial grounds is unlawful.

With regard to the reasons given for the impugned decisions, they state that they were unable to develop detailed arguments to contest “terse allegations”.

They take the view that the Secretary-General's discretion is limited when rules have been communicated to the staff.

Moreover they see no objective reason for departing from the rule contained in Regulation 4.9 f) when a personal promotion is involved.

They assert that the Union has not indicated the reasons why, in its opinion, one or more of the criteria for personal promotion were not satisfied.

E. In its surrejoinder the ITU considers that most of the arguments set forth in the rejoinder add nothing new to the submissions contained in the complaint. It therefore considers it unnecessary “to paraphrase the ample and sufficient explanations it has already provided” in its reply, which it maintains in full.

## CONSIDERATIONS

1. (a) The seven complainants challenge the final rejection of their candidatures for a personal promotion with effect from 1 January 2003 or 1 January 2004. Each of them filed an individual complaint but their counsel has submitted a single brief for reasons of procedural economy. In its reply the ITU states that it is not opposed to the joinder of the complaints. As these are based on similar facts and raise identical issues of law, they shall be joined and the Tribunal will rule on them by a single judgment.

(b) In its reply the ITU also requests that the seven complaints be joined with the complaint filed earlier by another of its staff members (see Judgment 2606, also delivered this day). However, that staff member has stressed

the difference in the treatment she received throughout the procedure. In addition, the issues of law she raises in her complaint and those raised in the present complaints are not absolutely identical. In these circumstances the joinder requested by the Union is not justified.

2. Service Order No. 99 on personal promotion was issued on 17 September 1998 following the Council's adoption of resolution 1106 in which it announced its decision to implement a personal promotion scheme to "give staff in occupational groups with limited career opportunities the possibility of being treated on an equal footing with staff members having more frequent promotion opportunities".

In order to receive personal promotion staff members must satisfy the six criteria a) to f) listed in section I, paragraph 1, of the annex to Service Order No. 99, which are quoted under A above. According to section I, paragraph 2, all the criteria for promotion must be met.

3. Personal promotion comes at the end of a procedure the rules of which are established in section III of the annex to the service order. Under this procedure, the Personnel Department maintains an up-to-date list of staff members who, on 1 January of each year, meet the three criteria relating to length of service, to wit criteria a) to c). When a person satisfies these criteria the Personnel Department informs the head of the unit accordingly. Both verify and certify in a report that this person also meets the other three criteria. Once a year the Personnel Department submits the list of candidates to the Appointment and Promotion Board. The Board formulates a recommendation to the Secretary-General, with whom the final decision lies.

4. Paragraph 3 d) of section II of the annex to Service Order No. 99 reads: "at no time may the total number of staff members who have received a personal promotion [...] be greater than 5% of the posts in each category". When this ceiling has been exceeded, "preference shall be given on the basis of seniority in ITU" (section III, paragraph 6, of the annex, *in fine*). Candidates who have not been granted a personal promotion for this reason are placed on a "personal promotion list" and their case is re-examined the following year subject to certain conditions (section III, paragraph 7).

5. On 23 March and 19 April 2004 the Appointment and Promotion Board recommended that a personal promotion should be granted to each of the complainants. These recommendations were based on reports signed by the Chief of the Personnel Department and the head of unit concerned.

6. By Service Order No. 04/19 of 22 December 2004, the Secretary-General suspended the personal promotion scheme with immediate effect "[i]n view of the [...] severe financial situation" of the ITU. Paragraph 3 of the new service order reads as follows:

"Personal promotions recommended by the Appointment and Promotion Board for staff members having been declared eligible for a personal promotion effective 1 January 2003 and 1 January 2004 are being reviewed by the Personnel and Social Protection Department and will be granted, as appropriate, once this review has been finalised."

7. The complainants were informed in letters dated 4 or 22 March 2005 that their candidatures for personal promotion had been examined "having regard to the provisions of Service Order No. 99 of 17 September 1998 and within the framework of Service Order No. 04/19 of 22 December 2004", and that it had been decided not to follow the Appointment and Promotion Board's recommendations of 23 March and 19 April 2004. The reason given was that the complainants did not meet all the criteria laid down in section I, paragraph 1, of the annex to Service Order No. 99.

When the complainants individually asked the Secretary-General to reconsider those decisions, he confirmed them and the complainants were informed accordingly in letters of 30 March, 31 March or 13 April 2005.

8. The complainants challenged these decisions in appeals resting on similar grounds but filed separately between 25 April and 1 June 2005. They pointed out that the refusal to give them a personal promotion ran counter to the Appointment and Promotion Board's recommendations.

On 5 July 2005 the Appeal Board transmitted its report to the Secretary-General. Having drawn attention to the fact that the Secretary-General must exercise his discretion "within the limits of the rules in force", the Appeal Board found that the Secretary-General should "rightly consider that the joint reports of the Personnel Department and the head of the unit contain a correct assessment of the appellants' performance". The Appeal Board therefore

recommended that the Secretary-General request a “review of the reports which are submitted to him for a final decision”. This review was to be carried out by the Appointment and Promotion Board in close consultation with the Personnel Department and the heads of unit concerned in order to “remove the obstacles relating to the fact that the assessments differed”, as emphasised by the Secretary-General.

The complainants were informed by letters of 27 July 2005 that the Secretary-General was nevertheless maintaining his decision not to grant them a personal promotion; it was also pointed out that six of the complainants had never challenged the substantive reasons he had given for not granting them such promotion.

The complainants’ principal claim is for the quashing of these decisions of 27 July and those of 4 or 22 March 2005.

9. They contend essentially that the impugned decisions are tainted with abuse of the discretion of the Secretary-General, who in their opinion breached various formal and procedural rules. They add that the decisions are arbitrary and breached the principle of equal treatment as well as the “fundamental principles and duties of the ITU”.

10. The refusal to grant the complainants a personal promotion is not based on the fact that the 5 per cent ceiling provided for in section II, paragraph 3 d), of the annex to Service Order No. 99 had been exceeded.

11. The complainants clearly satisfied the three criteria a) to c), relating to length of service, and it is not disputed that they satisfied criterion d). Their candidatures for personal promotion were rejected solely on the grounds that they did not satisfy either criterion e) or f) or both of those criteria.

12. It was considered that Ms H. and Mr S. did not meet criterion e) “because [their] performance evaluations [did] not indicate that [they] ha[d] shown a superior level of performance, in both quantitative and qualitative terms, throughout the evaluation period”. In the case of Ms B. it was concluded that she did not meet criteria e) and f) “because [her] performance evaluations [did] not indicate that [she] ha[d] shown a superior level of performance, in both quantitative and qualitative terms, throughout the evaluation period, or at least for a significant period” and because she had not “shown evidence of any self-development efforts with a view to promotion or career development”. It was considered that the other four complainants did not fulfil criterion f) as they had not “shown evidence of self-development efforts with a view to promotion or career development”.

13. A question therefore arises as to whether the reasons given for the decisions of 4 or 22 March were sufficient in the light of the Tribunal’s case law.

These decisions are plainly decisions adversely affecting the complainants. The obligation to state the reasons for such decisions is a general principle of international civil service law (see Judgments 1911, under 6, and 2124, under 3).

The scope of this obligation varies according to the actual circumstances of each case and the nature of the decisions in question. A mere reference to the applicable rule, the reproduction of its text and an indication of whether or not it applies to the case under consideration may suffice in some circumstances. Where the applicable rules confer discretion on the authority responsible for taking the decision, it is all the more necessary to comply with the obligation to specify the reasons for the decision.

In all cases, the reasons given in support of the decision must be set forth in such a manner as to enable the persons concerned objectively to challenge the decision before an appeal body and to enable the latter to rule on the dispute in full knowledge of the facts (see Judgment 1369, under 28).

14. According to Service Order No. 99, the final decision on personal promotion lies with the Secretary-General and to that end he must be allowed a margin of discretion (see Judgment 1973, under 5). This discretion must not, however, be confused with arbitrariness and the person exercising it must take account of essential facts. If this person intends to depart from the recommendation or opinion formulated for him by an advisory body established for the purpose of enlightening him as to the decision to be taken, it is incumbent upon this person to indicate, even briefly, why his appraisal of the pertinent facts leads him to conclusions which differ from those reached by the said body.

At all events, the Secretary-General’s discretion does not permit him, without valid reasons, to ignore completely

such an opinion or recommendation, particularly when it is the recommendation from the Appointment and Promotion Board which must be submitted to him before he takes his decision and which itself rests on a joint report drawn up by the Personnel Department and the head of the unit. Indeed, the purpose of this report, which is drawn up by the bodies best placed objectively to judge the abilities and performance of candidates for personal promotion, is to certify that they meet the criteria d) to f) listed in section I, paragraph 1, of the annex to Service Order No. 99.

15. (a) The joint report intended for the Appointment and Promotion Board contained three questions. Two of the questions asked whether the complainants satisfied criteria e) and f) and were worded as follows:

**“Has the staff member shown a superior level of performance, in both quantitative and qualitative terms?”**

– Please supply details

**Has the staff member shown evidence of self-development** (capacity for maintaining state-of-the-art expertise in his/her domain of activities, enhancement/updating or acquisition of general and technical skills required not only for the full accomplishment of the tasks of his/her post but also for the enlargement of his/her career prospects)? If so, please give examples.”

(b) In each case, the two signatories of the report provided precise answers to these questions.

16. The Secretary-General disregarded these opinions – on which the Appointment and Promotion Board had based its recommendations – without indicating even briefly why they were deemed to be unfounded. The decisions of 27 July 2005 contain only general considerations regarding the discretion enjoyed by the Secretary-General and they specify that the Appointment and Promotion Board’s recommendation does not “bind him”.

Thus the refusal to follow the recommendations that were given to the Secretary-General under the procedure laid down in section III of the annex to Service Order No. 99 was insufficiently substantiated in the light of the case law. The decisions under challenge must therefore be quashed, and the Tribunal need not examine the complainants’ other pleas.

It shall be incumbent upon the Secretary-General again to express an opinion on the complainants’ candidatures in the light of all the circumstances and to take new decisions in each case.

17. The complaints are allowed and the complainants should therefore each be granted compensation of 3,500 Swiss francs for all the injuries they have suffered as a result of the unlawful nature of the impugned decisions.

The complainants are also entitled to costs, which the Tribunal sets at the overall sum of 4,000 francs.

## DECISION

For the above reasons,

1. The decisions of 4 or 22 March 2005 and those of 27 July 2005 are quashed.
2. The cases are referred back to the Secretary-General of the ITU in order that he may take new decisions in accordance with 16 above.
3. The ITU shall pay each of the complainants 3,500 Swiss francs in compensation for all the injuries they have suffered as a result of the unlawful nature of the impugned decisions.
4. It shall pay the complainants an overall sum of 4,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr

Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.