The Administrative Tribunal,

Considering the complaint filed by Mr L.A. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 July 2005 and corrected on 25 November 2005, UNESCO's reply of 8 February 2006, the complainant's rejoinder of 22 March, the Organization's surrejoinder of 4 May, and the memorandum dated 18 August 2006 forwarded to the Registrar of the Tribunal by the Director of the Organization's legal service;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Kenyan national born in 1945, is a former UNESCO official. He was employed from 1981 as Regional Hydrologist, at grade P-4, in the Organization's Office in New Delhi. In July 1999 he was transferred to Headquarters at that same grade and was assigned to the Division of Water Sciences in the Natural Sciences Sector.

On 8 January 2003 UNESCO advertised the grade D-1 post of Director of the Executive Office of the Natural Sciences Sector (post SC-428). The complainant applied for the position. His application was not successful, but the panel that interviewed him recommended carrying out a desk audit of his then current post to determine the level of the "work for which he [was] now responsible".By DG/Note/03/15, dated 30 June 2003, the Director-General announced that another candidate had been selected for post SC-428 and would take up his duties on 1 July. The complainant wrote to the Director-General on 22 July 2003, lodging a protest against that appointment on the grounds that the candidate selected did not meet the qualifications and experience stipulated in the vacancy notice.

By a memorandum of 5 August 2003 the Deputy Director of Human Resources Management (HRM) notified the complainant that the relevant services were dealing with his protest and at "the end of the process" the Director-General's ruling would be communicated to him. By a memorandum of 5 September the complainant was informed that the Deputy Director of HRM would be in touch with him soon – upon his return from annual leave – "in view of an amicable settlement of [the] matter". The complainant wrote to the Secretary of the Appeals Board on 2 October 2003, giving notice of his wish to appeal against the decision contained in the Note of 30 June 2003. He mentioned that following a meeting with the Deputy Director of HRM on 15 September a desk audit of his post was carried out on 17 September, but he had since heard no more. The complainant submitted a detailed appeal on 10 February 2004, requesting, inter alia, that his "legitimate" rights with regard to career advancement be re-established and that he be appointed to post SC-428. He also wanted the Organization to explore all possibilities of assigning him retroactively to a higher grade corresponding to his professional experience.

In its report issued on 13 December 2004, the Appeals Board considered that the complainant's appeal was receivable *ratione temporis*. However, with one dissenting opinion, it considered that the requests put forward in his appeal were irreceivable *ratione materiae*. The Board recommended that the Director-General should conclude that the complainant's requests were not receivable and that he should reject the complainant's claim against the appointment of the selected candidate. It also recommended that the Director-General should "take the necessary measures to implement the desk audit" and should pursue the amicable settlement procedure taking into account the complainant's long service as well as his approaching retirement.

The Director-General informed the complainant in a letter of 23 February 2005, which constitutes the impugned decision, that he accepted the Board's recommendations (i) to conclude that the requests he put forward in his internal appeal were not receivable, and (ii) to reject his claim against the appointment of the successful candidate. He thus rejected the complainant's internal appeal, but said that he had instructed HRM to "ensure that the review

of [the complainant's] post at P-4 grade be duly completed by a regular desk audit". He added that as far as the settlement procedure was concerned he had asked HRM to consider "any appropriate solution" taking into account the complainant's approaching retirement date as well as the Staff Rules.

In a letter to the Director-General, dated 10 May 2005, the complainant indicated that he had not seen a copy of the final decision until 29 April 2005, and that he had so far not received any proposal for an amicable solution. The complainant retired in October 2005.

B. The complainant argues that his complaint to the Tribunal is receivable. His internal appeal was clearly timely filed. After he had filed his written protest on 22 July 2003 he considered that he was justified in letting pass the deadline for challenging an implied negative decision on his protest, because he had been told that an amicable settlement process was under way. As for his complaint, he filed it within ninety days of receiving a copy of the Director-General's final decision. He does not accept the view held by the majority of the Appeals Board, and accepted by the Director-General, that the claims in his internal appeal were irreceivable *ratione materiae*. He points out that he is objecting to the appointment of another candidate to post SC-428 and his case concerns the lawfulness of the procedure that led to that appointment and the effect that the appointment had on his own rights; he clearly has a cause of action as his career opportunities were affected.

The complainant argues that the procedure followed for filling post SC-428 was unlawful. Firstly, he raises objections concerning the way the post was advertised. In particular, he alleges that Staff Regulation 4.3.2 and Manual Item 2415 were breached, given that post SC-428 was advertised for a period of only one month, instead of for three months as laid down in those provisions. He also takes issue with the fact that the post was advertised only internally and not externally as well, as provided for in Item 2415.D.1. Secondly, he submits that no shortlist in order of preference was established. Assuming that a memorandum sent to the Director-General by the interview panel on 6 May 2003 was indeed a shortlist, the complainant says that it is clear from that document that the panel did in fact propose only one candidate to the Director-General. He points out that, based on DG/Note/02/32 of 17 October 2002, shortlists had to include "a total of at least four candidates".

The complainant considers that there was a clear "mistake of assessment" as the panel did not carry out a comparative assessment of the applicants' merits. It also overlooked an essential fact as the successful candidate did not meet the requirements of the vacancy notice. The vacancy notice stipulated that candidates had to have an "[a]dvanced university degree in one of the fields of exact or natural sciences" as well as knowledge of the Natural Sciences Sector, whereas the person appointed had a "B.Sc. (Hons) in modern languages". The complainant contends that by endorsing the recommendations of the Appeals Board, the Director-General drew mistaken conclusions from the evidence, and that the decision to appoint the successful candidate should therefore be set aside.

The complainant asks the Tribunal to declare his complaint receivable *ratione temporis* and *ratione materiae*. He seeks the quashing of the impugned decision insofar as it rejects his claim for the reversal of the decision to appoint the chosen candidate to post SC-428. He claims material damages in an amount equal to one year's salary at D-1 level, including post adjustment; 25,000 euros in moral damages; and 5,000 euros in costs.

C. In its reply the Organization holds that the complaint is irreceivable as the provisions governing the internal recourse procedures were not properly complied with. It argues that the Appeals Board was wrong in considering that the complainant's internal appeal was receivable *ratione temporis*, claiming that it should have been dismissed *in limine* as time-barred. Having received no ruling on his written protest by 22 August 2003, the complainant had until 22 September to submit his notice of appeal. As he did not submit it until 2 October it was filed out of time. The Organization points out that there was nothing in the communications it sent the complainant in August and September 2003 that could allow him to assume that the time limit for filing an internal appeal had been suspended. It agrees with the Appeals Board that the requests submitted by the complainant in his internal appeal were not sufficiently specific for the Board to examine them. It considers that the Board was correct in holding that his claims were irreceivable *ratione materiae* and should not have examined his appeal on the merits.

Subsidiarily, the Organization contends that the complaint is ill-founded. Regarding the provisions governing the recruitment procedure, it points to Staff Rule 112.2(b) whereby the Director-General may "make exceptions to the Rules, in specific cases". Concerning the length of time that the post was advertised for, the Organization points out that Staff Regulation 4.3.2 provides for a three-month period only as a general rule, with the result that the Director-General had discretion in the matter. In advertising the post internally and for only one month, the

Director-General acted by virtue of his authority to "make exceptions" as well as in the interest of the Organization. It was not unreasonable for him to consider that, given the nature of the post, the most suitable candidate was likely to be found internally. Besides which, the decision to advertise the post internally, and for only one month, in no way prejudiced the complainant's interests. Taking up the matter of the shortlist, UNESCO submits that the panel appointed to recommend the most suitable candidate duly examined all four applications received and – in the memorandum it sent to the Director-General – made a detailed comparative assessment of all four candidates.

As regards the requirements of the vacancy notice, it contends that the Director-General was perfectly entitled to conclude that the successful candidate's considerable relevant experience mattered more than the academic qualifications that he held. As was previously pointed out by the Appeals Board, it notes that the successful candidate had academic qualifications in science and had been the liaison officer for the Natural Sciences Sector in the Office of the Director-General. It asserts that his appointment was "unquestionably in the interest of the Organization".

The Organization adds that the desk audit recommended by the Appeals Board had in fact already been conducted. It had taken place previously as part of the attempt to reach a settlement. It showed that the complainant's post was correctly graded and that no reclassification of his post was possible.

D. In his rejoinder the complainant reiterates his views on the receivability of his complaint. He argues that the meeting of 15 September 2003 offered a prospect of solving the matter, and he therefore had good reason to believe that the time limit for challenging an implied negative ruling was suspended and an amicable settlement process would ensue.

He also contends that the desk audit referred to by the Appeals Board in its recommendations to the Director-General has never been implemented. In his view, the desk audit that took place in September 2003 cannot be seen as a substitute for the one recommended by the Appeals Board. Moreover, in breach of the requirements of due process, the outcome of the September 2003 desk audit was never properly notified to him, and he has thus been prevented from appealing against the decision not to reclassify his post at grade P-5.

E. In its surrejoinder the Organization maintains that the complaint is irreceivable. It considers that the matter raised in the complainant's rejoinder concerning the holding of a desk audit is irreceivable, given that the complainant has not exhausted internal remedies on the issue. It adds that the fact that the desk audit was carried out before the Appeals Board issued its opinion and recommendations is of no relevance, as even if it had taken place afterwards the outcome would have been the same.

F. At the request of the Tribunal, the person appointed to post SC-428, Mr M., was invited by the Organization to comment on the complainant's submissions. He supplied his comments in a memorandum of 18 August 2006.

CONSIDERATIONS

1. The complainant, a Kenyan national, joined UNESCO in 1981 as Regional Hydrologist, at grade P-4, in the Organization's Office in New Delhi. In 1999 he was transferred – at the same grade – to Headquarters in the Division of Water Sciences, where he remained until his statutory retirement in October 2005.

2. The post of Director of the Executive Office of the Natural Sciences Sector at grade D-1 was advertised, for internal recruitment, for one month from 8 January 2003. The complainant was one of four applicants for the post. A panel interviewed all four candidates and provided its comments to the Director-General. The panel considered that the complainant was not suitable for the post but recommended in recognition of his service to the Organization that a desk audit be undertaken to determine the level of the work for which he was responsible. The Director-General appointed another of the candidates to the post.

3. The complainant protested the decision and ultimately appealed the decision to the Appeals Board. The Board found that the appeal was receivable *ratione temporis* but was irreceivable *ratione materiae*. The Board, with one member dissenting, recommended to the Director-General that the appeal should be rejected but that the previously recommended desk audit should be carried out. The Director-General accepted the Board's recommendation and determined that the complainant's requests were not receivable; he rejected the complainant's

claim against the appointment of the successful candidate, and directed that the desk audit be implemented.

4. In addition to maintaining that his complaint is receivable by the Tribunal, the complainant submits that the advertisement and selection process were so fundamentally flawed that the Director-General's decision to appoint the successful candidate, Mr M., ought to be set aside.

5. In a memorandum of 18 August 2006, sent in response to a request from the Tribunal, the successful candidate commented in French on the complainant's case, stating, inter alia, as follows:

"On the merits, I consider that it would not be appropriate for me to comment on the action taken by [the complainant]. I wish to state, however, that I reserve the right to initiate an appeal procedure myself, if the Tribunal's ruling in any way affects my personal interests."*

6. UNESCO objects to the receivability of the complaint. In subsidiary argument, the Organization submits that the complainant's assertions in relation to the substantive issues are ill-founded.

Receivability

7. It is well established that if an internal appeal is time-barred and the internal appeals body was wrong to hear it a subsequent complaint to this Tribunal is irreceivable (see for example Judgments 775 and 2297). Relying on this position, UNESCO submits that the complaint is irreceivable because as stated in Article VII(1) of the Tribunal's Statute the internal recourse procedures of the Organization have not been duly complied with since the complainant submitted his notice of appeal outside the time limit set down in paragraph 7(c) of the Statutes of the Appeals Board.

8. There is no dispute between the parties that by lodging his protest against the Director-General's decision of 30 June 2003 on 22 July 2003, the complainant complied with the time limit in paragraph 7(a) of the Statutes of the Appeals Board. As well, both parties acknowledge that since the Director-General did not render a ruling on or prior to 22 August 2003, the complainant had until 22 September 2003 to file his notice of appeal in accordance with paragraph 7(c) of the above Statutes.

9. It should be noted, at this juncture, that the complainant met with a representative of the Organization on 15 September 2003 to discuss an amicable settlement of the matter. A settlement was not reached and the process was terminated.

10. The question is whether the memoranda of 5 August 2003 and 5 September 2003 gave rise to an interruption of the time limit within which the complainant had to file his notice of appeal.

11. It is clear from the communication of 5 August 2003 that the complainant's protest was still under review and that the Director-General had not made a ruling in relation to the protest. The memorandum of 5 September 2003 informed the complainant that the Deputy Director of HRM would contact him with a view to reaching an amicable settlement.

12. Paragraph 7(c) of the Statutes sets a time limit for the filing of a notice of appeal in those circumstances where a ruling has not been given, that is, where a negative ruling is implied. However, given that the memorandum of 5 September 2003 did not spell out that the time limit found in paragraph 7(c) would continue to operate while settlement discussions were under way, it was reasonable for the complainant to infer that the clock had stopped running while attempts at settlement were being pursued.

13. The complainant was informed by the memorandum of 5 September 2003 that the Deputy Director of HRM would be in touch with him soon to discuss the possibility of an "amicable settlement". If an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions as extending the time for the taking of any further step. That is because settlement discussions must proceed on the basis that no further step will be necessary. Where, as here, there has been no actual decision but the Organization has invited settlement discussions, the duty of good faith requires it to treat the time for taking a further step as running from the termination of those discussions and not from some earlier date identifiable as the date of an implied negative decision. That is because the invitation necessarily implies that, no matter what the Staff Regulations or Staff Rules provide, no final decision has been or will be taken during the course of discussions. Accordingly, the time limit did not start to run until 15 September

2003.

14. In the alternative, UNESCO also maintains that the complaint is irreceivable *ratione materiae*. The Organization does not elaborate further other than to submit that the Appeals Board was correct in its conclusion that the types of relief sought by the complainant were irreceivable *ratione materiae* and that the Appeals Board ought not to have engaged in a consideration of the merits of the claim.

15. It is well established that the selection of a successful applicant in a competition is a discretionary decision of the executive head of the organisation. However, the exercise of that discretion "is subject to restrictions in law and the Tribunal will to that extent review the decision" (see Judgment 1223). Where a staff member is of the view that an appointment to a vacancy for which he has applied is improper, he has the right to protest the decision internally and, if necessary, to file a complaint with the Tribunal.

16. It results from the above that the complaint is receivable.

The merits

17. The complainant contends that both the announcement of the vacancy and the selection process by which the successful candidate was appointed to post SC-428 were procedurally flawed and unfair.

18. The determinative issue in the complaint centres on the complainant's submissions that the successful candidate's academic qualifications, a B.Sc. (Hons) in modern languages, did not meet the requirements of the vacancy notice. In this regard, under the heading "Qualifications and experience" the vacancy notice states:

"– Advanced university degree in one of the fields of exact or natural sciences.

– Several years' experience in the field of management/administration, preferably in UNESCO or another UN Organization.

– Experience and knowledge of the Natural Sciences Sector would be an asset."

19. The complainant points out that the interview panel itself recognised the deficiency when it commented in its memorandum of 6 May 2003 to the Director-General that the successful applicant's "academic qualifications only partially match those required of the post".

20. The defendant Organization submits that the panel recognised that the successful candidate did not possess the required academic qualifications but concluded that his experience more than compensated for this deficiency. UNESCO argues that the Director-General was entitled to take the panel's considerations into account in reaching his decision and it also maintains that the selection made was in the interest of the Organization.

21. As the Tribunal has often held, "[w]hen an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process" (see Judgment 1646). In the present case, the Organization chose to specify as a requirement that the advanced university degree had to be in one of the fields of exact or natural sciences. The fact that the selected candidate had other desirable qualifications from the Organization's perspective does not absolve the Organization from the rule that the successful candidate must have at least the qualifications identified in the notice. It follows that the impugned decision must be set aside as well as the decision of 30 June 2003 appointing Mr M. to post SC-428. This is on the understanding that the Organization must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith.

22. The complainant is entitled to 2,000 euros in moral damages. He is also entitled to costs, which the Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The Tribunal sets aside the decision of 23 February 2005, insofar as it rejects the complainant's claim

against the appointment of the selected candidate to post SC-428, as well as the decision of 30 June 2003 announcing that appointment. The Organization must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith.

2. UNESCO shall pay the complainant 2,000 euros in moral damages.

3. It shall also pay him 500 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

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* Registry’s translation.

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