



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/042,  
043, 045, 048, 049  
Judgment No.: UNDT/2014/089  
Date: 26 June 2014  
Original: English

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**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

SCHEEPERS et al.

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicants Scheepers, Toriano, Pauksens, and Sitarek:**

Lennox S. Hinds

Beth S. Lyons

**Counsel for Applicant Aitcheson:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

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## **Introduction**

1. On 31 May 2011, the Applicants, five Security Officers serving at the S-2 level with the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”), filed five separate applications challenging the Administration’s failure to classify or reclassify their posts; its failure to pay them special post allowance (“SPA”) at the S-3 level; and the eligibility requirements introduced for the SSS promotion exercise held in 2010–2011.<sup>1</sup> They seek, in essence, compensation at the senior S-3 level arising from their service with the Canine Unit (“K-9 Unit”) of SSS.

2. Due to the extensive detail of facts and issues, and the procedural history in this case, this Judgment contains a table of contents as an *aide mémoire*

3. Regarding the issue of classification or reclassification of their posts to the S-3 level, the Applicants submit that management’s failure to request classification to the S-3 level or reclassification from the S-2 to the S-3 level was unlawful as the Administration was required to classify their posts at the S-3 level. They state that S-2 level and S-3 level Security Officers in the K-9 Unit (“K-9 Handlers”) perform the same functions and the Administration’s failure to classify their job functions accordingly violated the principle of equal pay for equal work (Chen2011-UNAT-107). They submit that lack of funding cannot be used as a shield to avoid the implementation of the principle of equal pay for equal work. With respect to the failure to pay them SPA at the S-3 level, the Applicants submit that the Administration’s decision was unlawful and resulted in disparate treatment as compared with S-3 level K-9 Handlers, including Officer P.S., a Security Officer who was granted SPA and subsequently promoted to the S-3 level. With respect to their eligibility to participate in the promotion exercise held in 2010–2011, the Applicants submit that the promulgation of the new eligibility requirement of

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<sup>1</sup> Case Nos. UNDT/NY/2011/042 (Scheepers); UNDT/NY/2011/043 (Toriano); UNDT/NY/2011/045

five years' seniority for promotion from S-2 to the S-3 level was unlawful as seniority cannot be used as a criterion for staff select

## **Procedural matters**

### Initial case management

5. The Tribunal held a case management discussion on 18 April 2013 following which, by Order No. 124 (NY/2013), the Tribunal ordered by consent that the five cases would be considered jointly.

6. By Order No. 124 (NY/2013), dated 6 May 2013, the Tribunal tentatively identified the following issues before it: classification of the Applicants' posts, SPA, and requirements for eligibility for promotion to the S-3 level, noting also that there were issues of receivability with respect to each of these matters. The parties were ordered to file, by 21 August 2013, a jointly-signed statement stating whether they agreed to attempt informal resolutions of the matters, failing which the parties were directed to file a consolidated list of agreed facts, an agreed date for a hearing on the merits; and a list of witnesses. The parties were further directed to file, by 4 September 2013, an agreed bundle of documents they intended to rely on at the hearing on the merits.

7. The deadlines set in Order No. 124 (NY/2013) were subsequently extended at the parties' requests, by Orders No. 202 (NY/2013) and No. 218 (NY/2013), until 24 October 2013.

### Legal representation

8. On 2 August 2013, the Tribunal was notified that Applicants Scheepers, Toriano, Sitarek, and Pauksens were to be represented by the law firm of Steven, Hinds, and White, P.C, with Applicant Aitcheson remaining self-represented.

### Applicant's motion for discovery of documents

9. On 9 August 2013, Applicants Scheepers, Toriano, Sitarek, and Pauksens, filed a motion for discovery of documents. The motion was transmitted to

the Respondent on 13 August 2013, for a response. On 30 August 2013,  
the Applicants filed an amended motion for production of

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21. During their oral testimony, each of the Respondent's witnesses (Chief Bonggi, Inspector Sullivan, and Ms. Asokumar) adopted her or his previously produced written statement under oath.

22. With respect to the sworn written statements of Mr. Albert Lyttle (Inspector, SSS), Ms. Holtjona Galanxhi (Administrative Officer, SSS), and Ms. Elza Maharramova (Compensation Officer, OHRM), which were proffered by Counsel for the Respondent and produced to the Tribunal, the Applicants accepted them as evidence and waived their right to cross-examination.

### Closing submissions

23. At the conclusion of the hearing on the merits, the parties were directed to file written closing submissions. The parties requested that, due to the limited availability of their Counsel, their closing submissions be filed at the end of March 2014. The Tribunal found it appropriate to grant this request and, by Order No. 26 (NY/2014), dated 3 February 2014, ordered that the Applicants and the Respondent file their closing submissions by 17 and 24 March 2014, respectively. Both submissions were duly filed and considered by the Tribunal.

### Facts

#### K-9 Unit

24. The following facts are based on the agreed statement of facts, filed by the parties on 10 October 2013, as well as the oral and written evidence produced in the course of the proceedings.

25. Following the creation of the K-9 Unit in 2004, new security and safety officer posts were established within the General Services and related categories in accordance with sec. XI of General Assembly resolution 59/276, dated 17 January 2005.

26. SSS consists of an Operations Section and twenty specialized units. The K-9 Unit is one of the specialized units. The Organization presently has approved Generic Job Profiles for Security Officers at the S-2 and S-3 levels. However, the Organization does not have a Generic Job Profile approved specifically for the S-2 or S-3 level Security Officers in the K-9 Unit, nor are there any Generic Job Profiles approved specifically for the posts within any of the other specialized units. Officers in the K-9 Unit serve against the Generic Job Profiles for Security Officers associated with their posts (S-2, S-3, or S-4).

#### Brief employment history of the Applicants

27. In February 2009, DSS announced vacancies within the K-9 Unit at the S-2 level. The posting required that interested candidates have a minimum of two years of service with SSS. The Applicants expressed their interest in working with the K-9 Unit and were accepted into the K-9 training program. Following their successful completion of the 2009 training program, the Applicants were assigned to the K-9 Unit.

28. The following is a brief employment history for each Applicant:

a. Applicant Aitcheson joined the Organization at the S-1 level on 12 June 2006 on a six-month fixed-term appointment. He was promoted to the S-2 level effective 1 July 2007. He has been issued fixed term appointments of various durations since that time. On 16 October 2009, Applicant Aitcheson signed a letter of appointment at the S-2 level for the period of 1 December 2009 to 30 November 2011.

b. Applicant Toriano joined the Organization at the S-1 level on 1 May 2006 on a six-month fixed-term appointment. He was promoted to the S-2 level effective 1 May 2008. He has been issued fixed-term appointments of various durations since that time. On 21 October 2009,

Applicant Toriano signed a letter of appointment at the S-2 level for the period 1 November 2009 to 31 October 2011.

c. Applicant Pauksens joined the Organization at the S-1 level on 1 May 2006 on a six-month fixed-term appointment. He was promoted to the S-2 level effective 1 May 2007. He has been issued fixed-term appointments of various durations since that time. On 27 August 2009, Applicant Pauksens signed a letter of appointment at the S-2 level for the period 1 November 2009 to 31 October 2011.

d. Applicant Sitarek joined the Organization at the S-1 level on 1 May 2006 on a six-month fixed-term appointment. He was promoted to the S-2 level effective 1 May 2008. He has been issued fixed term appointments of various durations since that time. On 11 April 2009, Applicant Sitarek signed a letter of appointment at the S-2 level for a period of 1 May 2009 to 31 July 2009. The Applicant then signed a letter of appointment at the S-2 level for the period of 1 August 2009 to 31 July 2011.

e. Applicant Scheepers joined the Organization at the S-1 level on 6 August 2007 on a six-month fixed-term appointment. He was promoted to the S-2 level effective 1 August 2008. He has been issued fixed term appointments of various durations since that time. On 1 September 2009, Applicant Scheepers signed a letter of appointment at the S-2 level for two years for the period of 1 March 2009 to 28 February 2011.

#### Generic Job Profile, S-2

29. The Generic Job Profile (rev. May 2008) at the S-2 level, against which the Applicants were hired, stated:

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14 x S-3 K-9 Handlers

Please find appended documents;

Appendix A – Draft Job description for K-9 Handlers classified at S-3 level based on generic Job classification of S-3 Security officer.

Appendix B – Draft Job description for K-9 Handlers Sergeant classified at S-4 level based on generic Job classification of S-4 Sergeant.

Appendix C – Draft Job description for K-9 Handlers Lt. classified at S-5 level based on generic Job classification of S-5 Lt.

Please do not hesitate to contact me or any of the K-9 handlers for any further enquiries or clarification on this matter.

Best Regards

32. At the hearing, Sergeant Ranelli testified that he transmitted Applicant Scheepers' request dated 5 May 2010 up the chain of command to his superior, Inspector Sullivan. However, no record of this transmission has been produced to the Tribunal, and Inspector Sullivan testified that he did not receive any such requests from Sergeant Ranelli. Sergeant Ranelli explained during his testimony that his email transmitting the request should be in his email archives, however, he does not have access to them. Sergeant Ranelli recalled that in his email he asked Inspector Sullivan to look at the request and forward it further, and see what can be done.

4 June 2010 email from Officer Kennedy to Chief Bongji

33. On 4 June 2010, Officer Kennedy sent an email to Chief Bongji, Chief of SSS, requesting that eight Security Officers in the K-9 Unit, including the Applicants, be paid SPA retroactively to the S-3 level, from the time they graduated from the New York State Police K-9 Academy until their respective promotions to the S-3 level come to fruition. The Applicants and other members of the K-9 Unit were copied on the email, which stated:

**Subject: Special Post Allowance**

Chief Bongi, I am writing to you as a Staff Representative. On behalf of S/O's [Security Officers] [C.I.], [Applicant] Pauksens, [Applicant] Sitarek, [Applicant] Toriano, [Applicant] Aitcheson, [G.S.], and [Applicant] Scheepers I am requesting they be paid Special Post Allowance, pursuant to section 4.2 of Secretary-General's bulletin ST/SGB/1997/1 in order to implement staff rule 103.11 and paragraph 10 of section III.B of General Assembly resolution 51/226, retroactively, at the S-3 Level and their respective Steps, from the time they graduated from the NY State Police Canine Academy and to continue receiving such SPA until their respective promotions to the S-3 Level come to fruition. According to ST/AI/1997/17 Section 4 all conditions on eligibility have been met. The ninety (90) day period was met by virtue of the training period at the NY State Police Canine Academy, and the fact that they have been, and continue to be performing duties at the S-3 Level as K9 Handlers.

The only existing classified job description for an S-3 position is a generic job description last reviewed in May 2008. All the above mentioned Security Officers have clear assignments in performing functions at a higher-level than the Generic S-2 position similar to the Generic S-3, but with additional duties and responsibilities assigned. Please be informed that K9 Handler [Officer P.S.] received retroactive SPA until his promotion to S-3.

A request for the classification of the K-9 Handlers position has been submitted through the Chain of Command (Sgt Ranelli), according to Rule 2.1 Classification of Post whereby each post shall be assigned to a suitable level when a post is newly established or has not been classified.

Below, for your convenience, is a reference list of required documentation.

34. O55(ecj/-4)5(p) am



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## 8 October 2010 notice of requirements for promotion exercise

38. On 8 October 2010, Chief Bongi issued a memorandum to all SSS staff members with the subject “Promotion within the Security and Safety Service S Category”. It stated that “when hiring managers create Job Openings in Inspira, they are required to enter a **desirable** number of years of service as part of the evaluation criteria” and that candidates for promotion “**should** meet the work experience requirement in order to be further considered” (emphasis added). For promotion to the S-3 level, five years of service was identified as the “desirable number of years of service”. The memorandum stated, in full:

**To:** All Staff Members of the Security and Safety Service HQ, NY

**From:** David Bongi, Chief a.i., Security and Safety Service

**Subject:** Promotion within the Security and Safety Service “S” Category

1. Please note that when hiring managers create, Job Openings in Inspira, they are required to enter a desirable number of years of service as part of the evaluation criteria. Hence, Security Officers who apply for posts in Inspira should meet the work experience requirement in order to be further considered.

2. In an effort to find a fair and amicable solution with respect to the “S” category promotions, a thorough analysis was undertaken in consultation with OHRM and the SSS Staff Representative. Based on the “S” category salary scale and ST/IC/1993/66/Add.1, the decision was reached to utilize the following table for all “S” promotions within the Security and Service.

S-3 Senior Security Officer – 5 years

S-4 Security Sergeant – 9 years

S-5 Security Lieutenant – 12 years

S-6 Security Captain – 15 years

S-7 Security Inspector – 18 years

Please be guided accordingly.

39. According to the Respondent, throughout October 2010, SSS in collaboration with OHRM arranged for a coach to assist and guide Security Officers with the preparation of their Inspira profiles.

### 3 November 2010 posting of job openings for promotion exercise

40. On 3 November 2010, job openings for Senior Security Officers at different levels (S-3 to S-6) were posted on Inspira as part of the 2010–2011 promotion exercise with a closing date of 31 December 2010. The job opening for promotion to the S-3 level Senior Security Officer posts (“Job Opening No. 16958”) stated:

**Job Title:** SENIOR SECURITY OFFICER, S3

**Department/Office:** Department of Safety and Security

**Location:** New York

**Posting Period:** 3 November 2010–31 December 2010

**Job Opening number:** 10-SEC-DSS-16958-R-New York

...

#### **Org. Setting and Reporting**

The post is located in the Security and Safety Service (SSS), Department of Safety and Security (DSS). The Senior Security Officer reports directly to the Security Sergeant or supervising officer under the overall direction of the Chief of SSS.

#### **Responsibilities**

Under the overall supervision of the Chief of Security and Safety Service, the Security Officer may be responsible for the following duties: ... (4) Maintain logs and rosters and initiate chronological logs of events during emergency situations; (5) Prepare daily and weekly work schedules and various periodic reports; ... (10) Performs all other duties as required.

...

#### **Work Experience**

Five (5) years of experience [in] all areas of the security operation within the UN Security Service, including investigation, physical security, personal protection, strategic and operational planning, fire prevention and suppression, emergency medical and hazardous

material response, video imaging badge systems, methods of instruction or related area.

December 2010 issuances regarding the 2010–2011 promotion exercise

41. On 3, 4, 7, 17 and 23 December 2010, SSS issued internal bulletins to all SSS officers regarding the promotion exercise for S-level staff. The bulletins included the steps necessary to create a personal history profile (“PHP”) in Inspira, and to apply for positions as part of the promotion exercise.

42. In particular, the bulletin of 23 December 2010 stated (emphasis added):

**6. 2010 ‘S’ PROMOTION EXERCISE – AMPLIFICATION OF ‘S’ CATEGORY EXPERIENCE**

Further to the Chief’s memorandum dated 08 October 2010 on Promotion within the Security and Safety Service “S” Category and as elaborated in the Administrative Bulletin dated 06 December 2010, please be reminded of the S-category experience requirement for the promotions exercise shown therein. **“S” category experience can only be acquired while serving as a Security Officer within the Security and Safety Service (SSS), UNHQ New York. Applicants’ PHPs will be reviewed to ensure that the number of years of S-category experience is met. Security experience gained outside of SSS, UNHQ New York will count toward the overall years of work experience. However, it will not count towards the specific S-category requirement.**

**7. PROMOTIONS EXERCISE**

As of 03 Nov. 2010, Job Openings for the promotions exercise have been advertised in Inspira for the following posts:

S-3 Senior Security Officer (JO#16958) – 37 posts

S-4 Security Sergeant (JO#16957) – 9 posts

S-5 Security Lieutenant (JO#16956) – 4 posts

S-6 Security Captain (JO#16954) – 3 posts

These Job Openings will close on Friday, 31 December 2010. **Security Officers interested in applying for these posts must do so through Inspira.**

## **8. “S” PROMOTIONS EXERCISE**

### **Advertisement:**

The Security and Safety Service (SSS) is pleased to announce the launch of the long awaited “S” category promotion exercise. Job



application. The evidence of Ms. Asokumar was that there was a record of Mr. Scheepers attempting to submit an application which, however, was rejected by Inspira because it did not indicate his current level in the required field.

49. As stated in the parties' agreed facts, Applicant Pauksens applied for the S-3 level job opening, but at some later point was found either not suitable or not eligible. The evidence in this case indicates that Applicant Pauksens' application was released to the hiring manager, and that the hiring manager determined that the Applicant was either not suitable or not eligible.

18 March 2011 email to e

## April 2011 requests for management evaluation

52. The Applicants submitted separate requests for management evaluation as follows:

- a. Applicant Toriano – 6 April 2011;
- b. Applicant Scheepers – 7 April 2011;
- c. Applicant Pauksens – 7 April 2011;
- d. Applicant Aitcheson – 7 April 2011; and
- e. Applicant Sitarek – 15 April 2011.

53. Although the requests were filed separately, their wording was identical. The following issues were raised in these requests: (i) the classification of their posts at the S-3 level; (ii) their request for an SPA from the date of joining the K-9 Unit until their eventual promotion to the S-3 level; and (iii) their eligibility to participate in the 2010–2011 promotional exercise. The Applicants' management evaluation requests stated:

***Specify the decision you are requesting us to evaluate. (Please attach a copy of the decision, if any)***

In 2009 the applicant were appointed as K-9 Handler in the UN/SSS K-9 Unit in fixed post as per rotation of post policy. (Appendix A)

On 05/05/2010 an application was submitted for K-9 post to be



***What remedy do you seek through management evaluation?***

Administration must take steps to ensure that the post will be classified without delay so that the present inequality is not perpetuated preventing continuous humiliation and unfair treatment for the applicant. This was compounded by the extraordinary delay between the request and the eventual negative decision.

Assessing compensation for the difference between what the applicants actually earned and what they would have earned at the S-3 level should be calculated from the date the applicant was appointed in the positions of K-9 handlers based on administration's decision to approve SPA already in 2005 that K-9 handlers were indeed performing duties at the S-3 level although the post has never been classified accordingly.

**May 2011 responses to the Applicants' requests for management evaluation**

54. Applicants Scheepers, Toriano, and Sitarek received responses to their management evaluation requests on 13 May 2011 and Applicants Pauksens and Aitcheson on 18 May 2011. The Management Evaluation Unit identified three decisions contested by each of the Applicants: (i) request for SPA; (ii) reclassification of their posts to S-3 level; and (iii) the legality of the eligibility requirements of the current SSS promotion exercise. The Applicants were informed that the Secretary-General decided to uphold each of these decisions.

**Applications filed with the Tribunal**

55. The Applicants filed their applications with the Tribunal on 13 May 2011 (Applicant Scheepers), 1 June 2011 (Applicants Sitarek and Toriano), 4 June 2011 (Applicant Pauksens), and 5 June 2011 (Applicant Aitcheson).

**Consideration**

56. The Tribunal will consider the issues in the following order: classification; SPA; and the five-year eligibility requirement for the 2010–2011 promotion exercise. With respect to each of these issues, the Tribunal will first consider whether the Applicants' claims are receivable.

## Classification of the Applicants' post at the S-2 level

### Receivability

57. The Applicants clarified in their closing submissions that they were not contesting their initial appointments at the S-2 level; rather, they are contesting, in essence, the subsequent failure to reclassify their posts at the S-3 level.

58. The Applicants refer to the email dated 5 May 2010 from Applicant Scheepers to Sergeant Ranelli, which attached a draft classification request. Sergeant Ranelli testified that he had transmitted the request up the chain of command to Inspector Sullivan. The latter, however, testified that he never received any such classification request from Sergeant Ranelli.

59. Nevertheless, there is evidence that a request was indeed transmitted up the chain of command by Sergeant Ranelli: in addition to Sergeant Ranelli's testimony, this is also reflected in Officer Kennedy's email of 4 June 2010 to Chief Bonggi, stating that "[a] request for the classification of the K-9 Handlers position has been submitted through the Chain of Command (Sgt Ranelli), according to Rule 2.1 Classification of Post whereby each post shall be assigned to a suitable level when a post is newly established or has not been classified". There is no record of any refutation by Chief Bonggi of having received, or of being aware of such a request. Rather, on 6 June 2010, Chief Bonggi forwarded Officer Kennedy's email to his Deputy, asking him to "review this for me and report back". The Tribunal finds therefore that, in all likelihood, Sergeant Ranelli did send a request to Inspector Sullivan regarding the classification of th

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job functions accordingly violated the principle of equal pay for equal work. They submit that lack of funding cannot be used as a shield to avoid implementing the principle of equal pay for equal work. They also refer to the case of Officer P.S., a K-9 Handler who, in or around 2007, was first granted SPA to the S-3 level and then promoted to the S-3 level.

65. The Respondent submits that the duties of the Applicants remained within the S-2 generic job profile and that the Applicants did not perform duties at the S-3 level. According to the Respondent, generic job profiles are used throughout SSS, including in each of the twenty specialized units. While the tasks of officers within SSS at the S-2 level may be different, they are all related to physical security/access control and all share similar characteristics. The Respondent also submits that the Applicants are incorrect in stating that S-2 level Officers, including themselves, exercise the same duties as S-3 level Officers. S-3 Officers are Senior Security Officers who exercise greater command res

(c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification;

(d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

1.2 The Office of Human Resources Management, or the local human resources office in those cases where authority for classification has been delegated, shall provide classification advice when departments submit, with their budget requests, job descriptions for new posts and for the reclassification of existing posts.

1.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request the Office of Human Resources Management or the local human resources office to review the matter for appropriate action under section 1.1 (d).

67. The Applicants did not make any requests for review directly with OHRM, under sec. 1.3 of ST/AI/1998/9. This is a matter of record and is confirmed by the Applicants' evidence and the written statement of Ms. Maharramova, Compensation Officer with OHRM. Further, quite contrary to the Applicants' assertions that "it is unequivocal that the request to decide a classification was addressed to the [Assistant-Secretary-General], OHRM" (see page 8 of the Applicants' closing submission), there is no evidence in this case that any such formal classification request was in fact made by the Applicants directly to OHRM;

67.a6()JTJ-1lcation advice

posts were never properly classified and, as such, under sec. 1.1(a) of ST/AI/1998/9, a request for classification was appropriate. The Respondent submitted, in turn, that the Applicants' posts were properly classified—at the S-2 level, as with other junior Security Officer posts in specialized units. The Respondent stated that there are twenty specialized units in SSS, the K-9 Unit being only one of them, and all Security Officers in SSS are hired against Generic Job Openings, which cover various specialized task assignments.

69. Accepting the Applicants' submission that the purpose of their May 2010 email to Sergeant Ranelli was to ask management "to consider filing a request for classification", Chief Bonggi's letter of 9 July 2010 shows that the request was decided in the negative in view of the various considerations discussed in the letter. Chief Bonggi testified that there were no S-3 posts available against which the Applicants could be placed, classified or paid SPA. Further, he stated that the Applicants were not performing higher level duties at the S-3 level and, therefore, following discussions with the staff representatives, their requests were rejected.

Oral testimony regarding functions performed

70. The Applicants testified that, in their view, they performed S-3 level functions. This was corroborated by the testimony of Sergeant Ranelli who gave evidence that basic goals and performance expectations were the same for S-1, S-2, and S-3 level staff. He said that he did not make distinctions between S-2 and S-3 Security Officers in the K-9 Unit with respect to assignments, as they were all treated as K-9 Handlers.

71. On cross examination, however, the Applicants acknowledged that they did not attend certain meetings that were attended by Senior Security Officers at the S-3 level (including S-3 level K-9 Handlers), did not have the approval authority for weekly schedules or the same procurement authority as S-3 level Security Officers. In particular, Applicant Aitcheson testified that he never attended management

meetings, never acted as a mentor, nor did he have final approval for the weekly schedule or any authority to sign off on procurement activity. Applicants Scheepers, Pauksens, Sitarek and Toriano also did not offer evidence of performing these functions as part of their regular duties. Applicant Scheepers, for instance, testified that he had not attended high command meetings which he knew were attended by S-3 level Security Officers.

72. Further, Sergeant Ranelli acknowledged that generally responsibilities of S-3 level Security Officers (including K-9 Handlers) included a greater leadership role (including based on his own experience with the Fire Unit of SSS), and that, according to the Generic Profile, job expectations at the S-2 level were somewhat different than those at the S-3 level. Sergeant Ranelli testified on cross-examination that, although S-2 level Security Officers (including the Applicants) occasionally helped him with the daily work schedule, the preparation of the weekly work schedule was within the purview of S-3 level Security Officers in the K-9 Unit. Further, he testified that 8:30 a.m. command meetings were attended only by S-3 level Security Officers, including Officer Kennedy. Sergeant Ranelli clarified that not all S-3 Security Officers were required to attend 8:30 a.m. command meetings.

73. Sergeant Ranelli testified that the actual procurement functions were carried out by him (S-4) and Officer Kennedy (S-3). Officer Kennedy would complete procurement paperwork, which would then be reviewed by Sergeant Ranelli. Sergeant Ranelli testified that S-2 level Officers would bring plans, and Officer Kennedy and him would then process them. S-2 level Security Officers did not have approval responsibility and would only make expenditures after receiving approval by Officer Kennedy and Sergeant Ranelli. Sergeant Ranelli testified that there were other S-3 Security Officers who were also not as involved in procurement functions as Officer Kennedy.

74. Chief Bonggi testified that S-3 level Security Officers are expected to operate at an increased level. When required, they represent the office in various meetings,

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etc” and prepared the “monthly and daily training regim[e]n of the K-9 Unit”. His performance report also stated that he “should be enrolled in a formal course as a K-9 training instructor” due to his experience “beyond his seniority”. Officer P.S.’s performance report for 2009–2010 also referred to his leadership skills.

81. On the other hand, although the performance evaluation records for the Applicants for the relevant time period contain the same K-9 duties, they do not refer to, nor were they assessed on, their leadership roles and increased procurement/financial and management responsibilities as reflected in the performance evaluation records of their S-3 level colleagues. Notably, the Applicants were in agreement with the content of the performance reports and did not seek their rebuttal.

82. In effect, accepting that all the Applicants should be placed at the S-3 level would mean that they would be placed in the same category as Officer Kennedy, an S-3 level Officer, without actually having performed and being evaluated on those additional S-3 level responsibilities. The Applicants also stated that not all S-3 level Security Officers performed such functions as those performed by Mr. Kennedy. The Tribunal finds, firstly, that the performance records of S-3 Security Officers in the K-9 Unit suggest a higher level of responsibilities as compared to those of S-2 level Security Officers. Secondly, even if, indeed, not all S-3 level Security Officers performed the same procurement and leadership functions as Officer Kennedy (S-3), that does not mean that the Applicants (S-2s) should be treated as if they had performed those duties, when they had not.

Generic job profiles: S-2 v. S-3

83. Notably, the evidence in this case regarding the differences between the functions of the S-2 and S-3 level Security Officers was also consistent with the differences reflected in the generic job profiles. For instance, S-3 level generic job profile states that Security Officers at the S-3 level perform, *inter alia*, the following responsibilities: “maintains logs and rosters and initiates chronological



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### Merits

95. Staff rules 3.10(a)–(b) provide that staff members are expected to temporarily assume, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. Staff rule 3.10(c) provides that staff members may be granted SPA when a staff member is required to serve in a post classified more than one level above their own post for a period exceeding three months. ST/AI/1999/17 (Special post allowance) implements the rules on SPA. Section 4 of the ST/AI/1999/17 on the eligibility for SPA requires that, prior to receiving SPA, a staff member must discharge the full functions of a post classified and budgeted at higher level than their own level. Further, additional prerequisites for consideration of SPA are provided in sec. 5 of ST/AI/1999/17. These include a request for SPA to be initiated by the staff member or his supervisor, a statement indicating when the staff member took up the full functions of the higher-level post, a classified job description of the higher-level post, an explanation as to how a vacancy occurred, and a justification for the selection of the recommended staff member.

96. Even if the 4 June 2010 letter from their staff representative were considered as a proper request for SPA, the requirements of ST/AI/1999/17 were not satisfied since the Applicants were not serving on a higher-level post or regularly performing functions at the S-3 level (see the discussion above in paras. 70–89). The Applicants did not meet the requirements of ST/AI/1999/17 as they were serving on posts that were budgeted and classified at the S-2 level, and not at the higher S-3 level. Further, as discussed above, the Applicants were not assigned nor performing the full functions of a higher level post.

### Conclusion

97. The Tribunal finds that the Applicants' claims regarding the Administration's failure to pay them SPA are receivable. The Tribunal finds, however, that

the Applicants did not satisfy the criteria for SPA and that the Administration's decision not to pay it was lawful.

#### Promotion exercise

##### Applicants' amended application as to the date of the contested decision

98. In their requests for management evaluation and applications before the Tribunal, the Applicants initially identified the date of the contested decision pertaining to the promotion exercise as that of 22 March 2010. The Applicants later clarified that this was a typographical error and, with regard to the issue of the promotion exercise, the contested decision was the email dated 18 March 2011, which was circulated to all Security Officers who applied for Job Opening No. 16958 and who were found eligible.

99. The Tribunal finds that, given that there is no record before the Tribunal of any decision made or communicated to the Applicants on 22 March 2010, the Applicants' initial submissions contained a typographical error and they clearly meant to refer to the date of 18 March 2011.

##### Receivability

100. The Applicants submit that the date of 18 March 2011 was the first time, "after a general announcement about promotion examination", when each "individual Applicant was informed regarding eligibility for the promotion examination". Hence, they state that the date of the contested decision is 18 March 2011, "when they were omitted from eligibility by the emails sent out about the Promotion Exam to eligible candidates". They state that, with regard to the promotion exercise, the clock started to run when they learned of the 18 March 2011 email sent to staff eligible for promotion, which did not include them. They filed their requests for management evaluation the following month, in April 2011, well within the time limits.

(a) Argument regarding general application

101. The Respondent submits that the establishment of the minimum service requirements for the promotion exercise was a decision of general application to all officers within SSS, and cannot be appealed as it did not affect the Applicants' terms of appointment. The Respondent further submits that the Applicants were informed, in writing, of the eligibility requirements on several occasions during the period of October–December 2010, but failed to request management evaluation of this decision within 60 calendar days from the date of notification.

102. The Tribunal is not persuaded by the Respondent's argument that the decision to change the eligibility requirement of five years of service with SSS was of such nature as to render it unchallengeable by the Applicants. The Applicants submit and presented evidence that the requirement of five years of service with SSS was in breach of their rights, and, under art. 2.1 of the Tribunal's Statute, the Tribunal finds that this decision is not immune to being appealed solely on account of it affecting a group of staff members in SSS (Jaen UNDT/2010/165, Bauzá Mercéré 2014-UNAT-404).

103. The Tribunal will now consider whether the claims of all of the Applicants are receivable.

(b) Applicants Sitarek and Toriano

104. It was announced (see, e.g., SSS bulletin dated 23 December 2010) that, for consideration for promotion to the S-3 level, interested Security Officers had to “go through Inspira” and apply for Job Opening No. 16958, which was used to process S-3 level applications for promotion. It is admitted that Applicant Sitarek did not attempt to apply for the promotion exercise announced on 3 November 2010, and there is no evidence that Applicant Toriano applied, the reasons for which were not explained to the Tribunal, as neither chose to give evidence. The Respondent contends that by not attempting to submit applications, Applicants Sitarek and

Torino excluded themselves from consideration for the 2010–2011 promotion exercise and thus have no standing to contest the promotion exercise. The Applicants contend that since the five-year requirement was not properly promulgated, resulting in a due process violation, it is irrelevant whether or not they applied as they have legal standing (relying on United Nations Administrative Tribunal Judgment No. 1122, *Lopes Braga*(2003)). However, to uphold this contention, one would have to accept that the two Applicants aforesaid considered that they were proscribed by the five-year requirement as early as October 2010 and at the very latest by 31 December 2010, which was the last date for applications for Job Opening No. 16958. Therefore, they would have had to have filed for management evaluation by 1 March 2011 (i.e., 60 calendar days from 31 December 2010). Applicant Toriano only filed his request for management evaluation on 6 April 2011, and Applicant Sitarek only filed his request on 15 April 2011, more than one month after the deadline.

105. In view of the consistent jurisprudence of the United Nations Appeals Tribunal that the Dispute Tribunal is not empowered to suspend or waive the time limits pertaining to management evaluation, and noting that in any event Applicants Sitarek and Toriano did not produce evidence explaining the delay, the Tribunal finds their claims regarding the promotion exercise not receivable.

(c) Applicants Scheepers and Aitcheson

106. Applicants Scheepers and Aitcheson testified that they attempted to submit their Inspira applications for promotion sometime before the deadline of 31 December 2010. The evidence before the Tribunal—including their oral testimony—demonstrates that both Applicant Scheepers and Applicant Aitcheson were unable to submit their applications and were aware—or must have been aware—at the time that they were excluded from the promotion exercise. The Tribunal notes, in this regard, the uncontested submission by the Respondent that all applicants can view their application status at any moment in the Inspira

system. Although the dates of their attempts to submit their promotion applications could not be ascertained, it can be safely concluded that it must have been by 31 December 2010 at the latest, as that was the deadline for applications.

107. Therefore, they were required to request management evaluation by

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114. Section 5 of ST/AI/2006/3, the former administrative instruction on selections, which was superseded by ST/AI/2010/3, stated:

**Section 5**

**Eligibility requirements**

5.1 Eligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable. However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.

115. Although sec. 5.1 of ST/AI/2006/3 provided that “[e]ligibility requirements regarding time-in-grade or time-in-post that were formally in use shall no longer be applicable”, it was superseded by ST/AI/2010/3, which does not contain a similar provision and, instead, states in sec. 9.1 that staff members “should normally serve in a position for at least one year before being eligible to be appointed to another position” (emphasis added).

116. Therefore, ST/AI/2010/3, which superseded ST/AI/2006/3, stated that a period of time-in-service of one year could be a lawful, but not an obligatory eligibility consideration, in that a staff member “should normally serve in a position for at least one year”, thus envisaging a degree of discretion regarding the service and duration requirement.

117. Thus, in principle, under sec. 9.1 of ST/AI/2010/3, it is not unlawful to have a requirement of a certain in-service period for eligibility for consideration for other posts provided that reasonable discretion is exercised during the selection decision. Reasonable exercise of discretion means that a determination reached under sec. 9.1 with regard to the period of eligibility must be reasonable and not arbitrary, and take into account relevant and proper factors and considerations and disregard the improper ones.

118.

121.

S-4 to S-5 – 3 years

S-5 to S-6 – 4 years

S-6 to S-7 – 4 years

2. Staff members in the General Service and related categories may apply for posts in any of those categories, provided that they meet the requisite seniority and qualifications for the post.

124. However, ST/IC/1993/66/Add.1 was effectively abolished by sec. 5.1 of ST/AI/2006/3, which stated that “[e]ligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable”. Furthermore, the way in which SSS relied on ST/IC/1993/66/Add.1, even for guidance purposes, was erroneous. ST/IC/1993/66/Add.1 did not state that seniority experience (time-in-service) was to be compounded. For example, for promotion from the S-2 level to the S-3 level, it required “2 years” at the S-2 level, not “five years with SSS”.

125. Therefore, the Tribunal is not persuaded that the requirement of five years with SSS as a condition for consideration for promotion to the S-3 level was based on any proper considerations, if indeed such requirement could even have been agreed to between the staff representatives and managers, without proper consultation or promulgation. From the evidence available, it was an arbitrary number that was inconsistent with ST/IC/1993/66/Add.1 and was well in excess—for no good apparent reasons—of the “normal” period of “at least one year”, specified in sec. 9.1. No such comparable requirement of years of service (from five and up to eighteen years) with a particular office or department is reflected in the selection rules for any category of staff, including at the P or D level. There are, quite simply, no formally promulgated issuances in the Organization requiring, as a condition of promotion, that any category of staff be employed by the same section or department for such an extraordinary number of years.

126. Apparently, an agreement was reached in or around September 2010 between SSS management and staff representatives regarding the years of eligibility, as

reflected in Mr. Schmidt's email dated 30 September 2010. However, the Tribunal finds that the consultations held were improperly or sufficiently informed on both sides. The Tribunal further finds that, in any event, these requirements are contrary to public policy. SSS staff representatives and management cannot agree to a policy that is not substantiated in any formally promulgated administrative issuances, is contrary to the Organization's selection rules, and could result in an abuse of discretion, arbitrariness, and unlawfulness.

127. As the Tribunal stated in *Korotina* UNDT/2012/178, circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only so long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship. In the present matter, the Tribunal finds that the eligibility requirements introduced as part of the promotion exercise held in 2010–2011 were contrary to formally promulgated administrative issuances, including the Organization's rules on selection, and were arbitrary, manifestly unreasonable, and unlawful.

### Relief

128. The Applicants sought the following relief: issuance of a job description accurately reflecting the K-9 Handler duties and responsibilities to replace the generic job profile currently in use; classification of their posts at the S-3 level; and compensation for lost earnings, moral damages, and costs.

129. In view of the findings above, the Tribunal finds that Applicant Pauksens succeeds only with respect to the issue of the promotion exercise, therefore, the relief will be limited to his pecuniary losses as a result of the Organization's unlawful decision to require five years of service within SSS as a condition for his promotion to the S-3 level.

130. It would be speculative for the Tribunal to conclude that Applicant Pauksens would have been promoted to the S-3 level had proper eligibility requirements been applied. In matters of promotion, there is a degree of reasonable discretion exercised by the Respondent. Furthermore, a promotion exercise is a competitive process so there is no certainty that Applicant Pauksens would have been selected if proper eligibility criteria had been applied. However, he suffered the loss of a reasonable chance of promotion to the S-3 level, with the resultant pecuniary loss.

131. The Tribunal finds it appropriate to award Applicant Pauksens USD6,000 each as compensation for the loss of a reasonable chance of promotion to the S-3 level and the resultant pecuniary loss in the form of higher salary, benefits, and entitlements (Hastings 2010-UNAT-109, Lutta 2011-UNAT-117, Sprauten 2012-UNAT-219).

132. As the United Nations Appeals Tribunal stated in Antaki 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered damages. There was no evidence placed before the Tribunal of any emotional distress on the part of Applicant Pauksens such as to warrant compensation. In these circumstances, the Tribunal finds that claims for compensation for emotional distress stand to be rejected.

133. The Tribunal has considered whether, as a result of the breach of their rights, Applicant Pauksens incurred further direct economic loss in the form of attorney fees  
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Conclusion

134.

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d. The Tribunal finds it appropriate to award Applicant Pauksens USD6,000 as compensation for the loss of a reasonable chance of promotion to the S-3 level as part of the 2010–2011 promotion exercise and the resultant pecuniary loss.

### **Orders**

141. The Respondent shall pay USD6,000 to Applicant Pauksens for the pecuniary loss suffered. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

142. All other claims are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 26<sup>th</sup> day of June 2014

Entered in the Register on this 26<sup>th</sup> day of June 2014

(Signed)

Hafida Lahiouel, Registrar, New York