



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

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SCHEEPERS *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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 2010–2011.¹ 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 (*Chen* 2011-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

¹ Case Nos. UNDT/NY/2011/042 (Scheepers); UNDT/NY/2011/043 (Toriano); UNDT/NY/2011/045 (Sitarek); UNDT/NY/2011/048 (Pauksens); UNDT/NY/2011/049 (Aitcheson).

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 selection. Furthermore, the Applicants submit that the five-year requirement was improperly promulgated as it was not introduced by an official administrative issuance. They state that, although management had discussions with staff representatives regarding the five-year requirement, it would have been prudent to also have held individual consultations with individual staff members. As a result of the implementation of this improper requirement, they were excluded from the 2010–2011 promotion exercise. They seek, *inter alia*, the issuance of a job description accurately reflecting the K-9 Handlers' 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.

4. The Respondent submits that the applications are not receivable and are without merit. With regard to the issue of *classification of posts*, the Respondent states, *inter alia*, that the Applicants failed to follow the proper administrative procedures for seeking a review of the classification of the posts they encumber. Further, the evidence before the Dispute Tribunal clarified that the Applicants did not and could not have performed work equivalent to the senior S-3 level. With regard to the issue of SPA, the Respondent states that the Applicants did not meet the minimum requirements for consideration for its payment. With regard to the issue of the 2010–2011 promotion exercise, the Respondent submits that the Applicants' claims are not receivable as the establishment of the minimum work experience for promotion to the S-3 level was of general application, did not affect the Applicants' terms of appointment, and the Applicants' claims are in any event time-barred. Further, the Respondent submits that the requirement of five years of work experience for promotion to the S-3 level was reasonable and lawful.

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 documents, seeking additional categories of documents.

Respondent's response to the motion for discovery of documents

10. On 23 September 2013, the Respondent responded to the amended motion for discovery of documents, requesting the Tribunal to reject it on the grounds that the requested documents were either in the Applicants' possession, were irrelevant, or would result in a breach of the confidentiality rights of other staff members. On 25 September 2013, the Applicants filed a motion seeking leave to reply to the Respondent's response, attaching their reply to the motion. On 23 October 2013, the Respondent filed a submission objecting to the Applicants' motion of 25 September 2013 and asking for leave to respond to it further.

11. The Tribunal disposed of the motion for production of documents in due course, as discussed below.

Proposed hearing dates

12. On 10 October 2013, the parties filed a joint submission covering all five cases whereby they declined informal resolution of the cases and included a list of agreed facts and proposed witness lists. The Respondent proposed seven witnesses, and the Applicants proposed a total of eight witnesses. The parties proposed hearing dates in the week of 13–17 January 2014 (Monday–Friday).

Agreed bundle and initial list of witnesses

13. Following further case management, by Order No. 288 (NY/2013), dated 6 November 2013, the Tribunal set the cases for a hearing on 13–17 January 2013. The parties were ordered to file an agreed bundle of documents as well as their final witness lists. The submissions were duly filed on 10 December 2013.

Applicants' request for release

14. On 8 January 2014, Applicants Scheepers, Toriano, Sitarek, and Pauksens filed a request for an Order for (i) Applicants Scheepers, Applicant Toriano, and Sergeant Ranelli—to be released from work to testify at the hearing, and (ii) for Applicant Scheepers to be released from work for the full duration of the hearing to instruct the Applicants' Counsel throughout the proceedings.

15. On 8 January 2014, the Tribunal issued Order No. 3 (NY/2014), directing that the Respondent make appropriate arrangements to ensure that the five Applicants, including Applicant Scheepers, be available to attend the hearing set for 13–17 January 2014, and that there be no impediments to the giving of evidence by any of the proposed witnesses, including Sergeant Ranelli.

Production of further documents

16. Following an in-chambers meeting with the parties on 16 January 2014, the Tribunal issued Order No. 20 (NY/2014) on 24 January 2014, indicating that it would make discovery-related orders in due course, as it considered that several categories of documents requested by the Applicants were relevant to the issues in this case. The Tribunal noted that some of the categories of documents sought by the Applicants on 9 and 30 August 2013 (such as documents for all SPA payments in the K-9 Unit since its inception in 2004) appeared overly broad and undefined, and reserved its decision as to the relevance and production of those categories of documents to a later stage. During the hearing held on 13–17 January and 29–31 January 2014, the Tribunal determined that those documents were in fact not needed. The Tribunal, however, by Order No. 20 (NY/2014), ordered that the Respondent produce posting and announcements for the promotion exercises for S-3 positions promulgated in 2010–2011. The Respondent was further ordered to file, on an *ex parte* basis, relevant documents pertaining to Officer P.S.

The submissions were duly filed on 28 January 2014, and no further document disclosure or discovery requests were made by the parties.

Hearing on the merits

17. The substantive hearing took place on 13–17 January 2014 and 29–31 January 2014 (Wednesday–Friday), due to the large number of witnesses called by the parties.

18. The following witnesses testified for the Applicants in person:

- a. Applicant Scheepers (S-2 level Security Officer);
- b. Applicant Aitcheson (S-2 level Security Officer);
- c. Sergeant Frank Ranelli (S-4 level Security Officer);
- d. Senior Security Officer Timothy Kennedy (S-3 level Senior Security Officer).

19. With respect to the testimony of Applicants Pauksens, Toriano, and Sitarek, the parties agreed to submit sworn statements in lieu of their testimony, which were marked as exhibits. Security Officer C.I., previously identified by Applicant Aitcheson as one of his witnesses, was withdrawn by Applicant Aitcheson at the commencement of the hearing.

20. The following witnesses testified on behalf of the Respondent:

- e. Chief David Bongi;
- f. Inspector Matthew Sullivan;
- g. Ms. Christine Asokumar, Chief, Staff Unit C, Headquarters Staff Service, Strategic Planning & Staffing Division, OHRM.

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:

GENERIC JOB PROFILE

Security Officer – S-2

Organizational Setting and Reporting Relationships: Under the overall command of the Chief of Security, the security officer is required to perform armed security functions and reports directly to the security sergeant.

Responsibilities: Within delegated authority, the Security Officer will be responsible for the following duties:

- Provides security coverage of entry points throughout the United Nations complex to prevent entry to unauthorized person and the unauthorized removal of UN property.
- Screens all personnel, packages and vehicles entering the premises including clearance through metal detectors; checks packages both visually and by use of x-ray equipment; identifies and retains custody of weapons entering the premises with the authority to either confiscate or return said weapons upon owners' exit from the premises.
- Conducts exterior, garage, garden and watch-tour patrols throughout the Headquarters district and annex buildings for the purpose of intercepting unauthorized persons attempting to have gained entry to the premises, reporting all security, fire and safety violations to the Security Control Centre.
- Provides information and directions to all persons associated with the organization.
- Controls, identifies and clears pedestrian and vehicular traffic entering and exiting the premises; maintains log books and records as required.
- Maintains alertness for any potential or actual breaches of security and any disturbances or unusual activity; and reports these immediately.
- Ensures that all UN property being carried from the complex is checked for appropriate documentation.
- Performs all other related duties as assigned.

...

Qualifications:

...

Experience: Several years of experience in security operations, including in civilian police force, military police, or other relevant military operations.

Generic Job Profile, S-3

30. The Generic Job Profile (rev. May 2008) at the S-3 level, applicable at the relevant period, states:

GENERIC JOB PROFILE

Security Officer – S-3

Organizational Setting and Reporting Relationships: Under the overall command of the Chief of Service, the security officer is required to perform armed security functions and reports directly to the security sergeant or supervising officer.

Responsibilities: Within delegated authority, the Security Officer may be responsible for the following duties:

- Screens all personnel, packages and vehicles entering the UN complex to ensure authorized access.
- Provides continuous coverage of cameras, telephone and radio communications systems and associated recording units in the Control Centers.
- In the event of emergencies and incidents, alerts relevant units and New York City emergency units and dispatch security personnel to the site under the direction of the Lieutenants in charge of the Control Centers.
- Maintains logs and rosters and initiates chronological logs of events during emergency situations.
- Prepares daily and weekly work schedules and various periodic reports.
- Provides information and directions to all persons associated with the organization.
- Controls pedestrian and vehicular traffic.
- Is alert for any potential or actual breaches of security and any disturbances or unusual activity and reports these immediately.
- Ensures that all UN property being carried from the complex is checked for appropriate documentation

- Performs other related duties as required.

...

Qualifications:

...

Experience: Several years of experience in security operations, including in civilian police force, military police, or other relevant military operations.

5 May 2010 draft request for classification of the Applicants' posts

31. On 5 May 2010, Applicant Scheepers sent an email to his superior, Sergeant Ranelli, with the subject line "Request for the classification or reclassification of a post (DSS/SSS/K-9)". Other members of the K-9 Unit, including the Applicants, were copied on this email. The email identified the subject as the "request for the classification or reclassification of a post". The email requested input of all those concerned and stated that Officer Kennedy (S-3 level Senior Security Officer, K-9 Unit) as a staff representative was in the process of applying for SPA on behalf of the S-2 level K-9 Handlers. Applicant Scheepers' email was not copied to the Executive Office. The email stated:

Subject: Request for classification or reclassification of a post (DSS/SSS/K-9)

Please find appended draft application,

Could you please insure that the application for post classification are forwarded to the relevant role players including the Job Descriptions amended accordingly.

I would also [e]ncourage the participation of all handlers in this effort to obtain additional input on the relevant Job descriptions, specifically for the additional supervisors post if you look at additional duties being performed by other members in case of the absence of the [Officer-in-Charge] and logistical officer.

Also to inform those performing duties at a higher level that they are currently being reimbursed for, [Officer Kennedy] is in the process of applying for applicable SPA on our behalf as staff representative and all inputs are welcome specifically for the S-3 post classification. [Senior Security Officers] and supervisors are encourage[d] to

participate to [e]nsure a collective effort even for those wishing to apply for S-4 and S-5 SPA.

Regards

...

Draft Document

Att: SSS Executive Officer

Please assist us in the request for the classification or reclassification of a SSS K-9 post to The Assistant Secretary General, OHRM, in accordance with ST/AI/1998/9 System for classification of post and for the purpose of implementing staff regulation 2.1.

In accordance with ST/AI/1998/9 Section 1

1.1 Request for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not been previously been classified;

The SSS K-9 unit recently (2009) increased its size to 17 handlers and apart from generic job profiles in SSS these very specific duties and responsibilities in addition to the normal functions performed by Security Officers has not been previously classified.

DSS/SSS classification of post starts on appointment at S-1 level and progresses depending on professional background to S-2 level. When a substantive change in the function of a post has occurred since the previous classification the following S-3 classification would be applied as is the case with the additional duties and responsibilities that the K-9 handlers are performing at a higher level post. Similar to the handlers the officer in charge (OIC) of the unit and the relevant supervisors post has not been previously classified.

The OIC and additional supervisors must be K-9 Handlers and in addition to the normal functions performed by these supervisors as handlers they also must perform supervisory functions at a higher level post than what they are currently classified at.

The recommendation for the classification of the applicable post are as follows;

1 x S-5 Lt. OIC K-9 Handler

2 x S-4 Sgt Supervisors K-9 Handler

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 Bonghi

33. On 4 June 2010, Officer Kennedy sent an email to Chief Bonghi, 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 Bonggi, 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. On 6 June 2010, Chief Bonggi forwarded the email of 4 June 2010 to Mr. Michael Browne, Deputy Chief, SSS, and asked him to "review this for me and report back".

9 July 2010 response from Chief Bonggi to Officer Kennedy

35. By memorandum dated 9 July 2010, Chief Bonggi replied to Officer Kennedy's request for SPA dated 4 June 2010. Chief Bonggi stated that the relevant posts were not classified at the S-3 level and, in line with the rotational policy in

place in SSS, security officers selected for temporary assignment with a specialized unit (such as the K-9 Unit) move on a lateral basis at their current rank. Chief Bongi further stated that, in accordance with the rules, staff members on temporary assignments were generally not entitled to a SPA. He further stated that Officer Kennedy's request for a classification study in relation to the Applicants' posts "would have to be conducted on a Service-wide basis and not unit by unit". Chief Bongi's letter is reproduced below:

1. I am writing in response to your e-mail dated 4 June 2010 in which you requested a Special Post Allowance (SPA) for security officers assigned to the Canine Unit.
2. I refer you to the Security and Safety Service (SSS) Administrative Instructions 14.01 regarding the rotational policy that took effect on 1 April 2010. In accordance with GA resolution A/57/726, Section C, this policy was intended to broaden the skills set of security officers and enhance career development by making several temporary posts available within specialized units for a designated period. Although these posts are encumbered by security staff at the S-2 or S-3 levels, they are not classified at the S-3 level. Rather, the officers selected to this temporary assignment move on a lateral basis to their temporary assignments at their current rank.
3. Furthermore, Section 11.01.02 outlines the following SPA policy: "Note: Since assignment to temporary posts is considered as training and development, the occupants of such posts will not be entitled to an SPA while on their temporary assignments. However, if the said officer is retained in the unit against a fixed post at a level higher than his/her grade level, then that officer will become eligible for SPA, as per UN Staff rules, once all the other administrative requirements are met."
4. In recognition of the additional responsibilities borne by each Canine Handler, for the care of his/her partner, Security Officers assigned to the Unit are compensated for their services through an arrangement that provides a \$1,000 monthly stipend to care for their dogs, an E-Z Pass for commuting to work, and afforded the ability to park within the UN garage upon purchase of a ticket. This allowance which is considered as a result of the necessity to bring the UN's Canine into the premises, grants the Handler another benefit, for which other senior officers are often by-pas[sed].
5. In regards to your request for a classification study to be conducted, please note that any such study would have to be

conducted on a Service-wide basis and not unit by unit. While it is acknowledged that members of the Canine Unit are given additional responsibilities, there are other specialized units within the Service whose members have similarly received specialists training, and are equally vested with significant responsibilities. It would therefore be necessary for the purpose of maintaining consistency in the responsibilities attributed to each grade-level, for a broader approach and overview to be taken in any reclassification exercise, to retain transparency, and ensure the maintenance of a competitive recruitment and selection process.

6. I hope this will clarify the situation.

June–October 2010 consultations regarding the promotion exercise

36. Starting June 2010, SSS consulted with the Office of Human Resources Management (“OHRM”) and SSS staff representatives on the minimum seniority requirements for promotion. In particular, on 9 June 2010, several staff representatives of SSS (including Mr. Kenneth Rosario, Ms. Katy Joseph, and a third staff representative) were provided with a proposal that promotion to the S-3 level should require seven years of experience with SSS. The staff representatives, after considering the proposal, responded with their own assessment of the requirements for promotion, and proposed a requirement of five years of service with SSS, as evidenced by email exchange dated 30 September 2010, discussed below.

30 September 2010 email regarding the agreement between SSS management and staff representatives on the years of service requirement

37. On 30 September 2010, Mr. Schmidt, Administrative Officer, Executive Officer, DSS, sent an email to Mr. Rosario, one of the SSS staff representatives, with a copy to senior management of SSS, with the subject line “SSS Promotion Exercise—Minimum Seniority in Grade”. Mr. Schmidt noted that SSS management and staff representative were able to “arriv[e] at an amicable and fair solution to the vexing problem of seniority in service”. Mr. Schmidt stated that the results of this exercise were “well received amongst the staff representative’s constituencies”. He further stated that the S-level promotion exercise was moving forward “at full

steam” and that the promotion job openings were being reviewed by OHRM. Mr. Schmidt also stated that, in addition to “Inspira instructions/guidelines published in the [Daily Orders] for the past [two] months”, DSS, in collaboration with OHRM, arranged for a coach to be available for approximately three weeks in October 2010 to assist those colleagues who have experienced difficulties with Inspira process. Attached to Mr. Schmidt’s email was a table with hand-written remarks indicating that, for S-3 level posts, the proposed requirement of seven years was reduced to five years. The table appears to contain signatures of Chief Bonggi and at least one staff representative. Mr. Schmidt’s email is reproduced in full below:

Subject: SSS promotion Exercise—Minimum Seniority in Grade

...

As requested yesterday, please find a scanned image of the original signed SSS and Staff Representative document on the establishment of minimum seniority in grade for the “S” category.

You will recall that the current S salary scale in conjunction with ST/IC/1993/66/Add.1 [Placement and promotion] formed the basis for arriving at an amicable and fair solution to the vexing problem of seniority in service. The ST/IC is at page 2 of the attached document.

As indicated by you, I am pleased to note that the result of this exercise has been well received amongst the staff representative’s constituencies.

We are moving forward, at full steam, with the S promotion exercise. The Inspira JO’s are currently with OHRM for review. Furthermore, and in addition to Inspira instruction/guidelines published in the [Daily Orders] for the past [two] months, the Service in collaboration with OHRM have arranged for a coach to be available in the Coed-lounge (to be confirmed) from 6 October to 29 October to assist/guide those colleagues, on a voluntary basis, in the Service who have been challenged by Inspira as regard setting-up their respective profiles and created their [Personal History Profiles]. More details on this coaching service will be published in the [Daily Orders] today or tomorrow.

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 openings at the S-3 Senior Security Officer, S-4 Security Sergeant, S-5 Security Lieutenant, and S-6 Security Captain are currently posted in Inspira. Please note that Security Officers will be required to submit applications through Inspira. Officers will be evaluated based upon a completed application (including meeting the required education and work experience), performance record, a written assessment test, and a competency-based interview. Recommended candidates who demonstrate that they meet all requirements will either be selected for the post or their names will be placed upon a roster of candidates for future vacancies.

...

Seniority Issue:

Please refer to Chief Bongi’s inter-office-memorandum entitled, “Promotion within the Security and Safety Service ‘S’ Category” dated 8 October 2010, which was electronically distributed to all Service personnel. In the memo, it is mentioned the following regarding seniority: “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. 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 Safety 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

Applicants and the promotion exercise

43. As stated in the parties' agreed facts, filed on 10 October 2013, in order for applications to be accepted, the Inspira system required that all questions in the electronic application form be answered.

44. As stated in the parties' agreed written stipulation, filed on 29 January 2014, "The INSPIRA system indicates that there is no record of Applicants Sitarek's, Toriano's or Aitcheson's attempts to apply for the Promotion Exercise". This was confirmed by the evidence of Ms. Asokumar.

45. Based on the evidence and the parties' agreed facts, filed on 10 October 2013, Applicant Sitarek did not attempt to apply for the promotion exercise announced on 3 November 2010.

46. There is no evidence that Applicant Toriano attempted to apply for the promotion exercise, and the record before the Tribunal indicates that he made no such attempt.

47. Applicant Aitcheson testified that he tried to apply through Inspira, but as he did not have five years of service with SSS, his application apparently did not go through. Applicant Aitcheson stated under cross-examination that he attempted to apply sometime before the deadline for applications (i.e., prior to 31 December 2010), but he was unable to submit his application as he indicated that he had less than five years. He acknowledged under cross-examination that he understood at that point that he would not be part of the promotion exercise.

48. As stated in the parties' agreed facts, Applicant Scheepers logged into the Inspira system to apply for the S-3 level job opening. He attempted to submit his application both with and without his entry on duty date. However, his application was not processed by Inspira. This was confirmed by Applicant Scheepers during his oral testimony, who stated that he attempted to apply but was unable to submit his

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 eligible staff members

50. On 18 March 2011, an email was sent by SSS to staff members deemed eligible to participate in the 2010–2011 promotional exercise, stating:

Dear All,

On behalf of the Deputy Chief of Service please be advised of the following;

The Written Assessment Test Guideline and the Assessment Workbook for the 2011 Promotion Exercise are available for pick-up at the Control Centre.

Please pick up your copy as soon as possible so that there is sufficient time for you to prepare for the written test scheduled for Saturday, 16 April 2011. The exact time and location for the written test will be communicated to you at a later date.

Please note that you will need to sign for the above documentation at point of pick up and that the Assessment Workbook must be returned to the Service on Saturday 16 April, BEFORE commencement of the written assessment.

Thank you for your attention and cooperation.

51. The Applicants submit that they were among those who did not receive the 18 March 2011 email, and were thus effectively excluded from participation in the promotion exercise. The Tribunal accepts that the Applicants became aware of the 18 March 2011 email on the same date it was circulated.

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 classified as S-3 (Appendix B) On 04/06/2010 the applicant requested he 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 his respective promotion 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

[the Applicants] have been, and continue to be performing duties at the S-3 Level as K9 Handlers. (Appendix C)

Firstly the applicant requested the following decisions to be evaluated on the ground that management failed to classify K-9 handlers post at the S-3 level. The difference in treatment resulted in inappropriate inequalities in the treatment of different duties and in the application of the concept of equal pay for equal work.

Secondly the applicant were under the impression that the reason for not addressing the SPA application in a timely matter was because it would be addressed through a current promotional exercise being implemented as was the case with K-9 handler [Officer P.S.] who received SPA and subsequent promotion to S-3 as direct result of the additional duties and responsibilities of a K-9 handler.

Thirdly newly implemented desired years in service implemented by Program Manager for advertised S-3 post for staff already appointed in permanent post higher than their current grade S-2 who were eligible at time of appointment to higher post became newly established eligibility requirements and subsequently disqualified applicant to be considered for promotional exercise in contradiction of ST/AI/2010/3 (Staff selection system) applicable to S-3 post eligibility requirements clarified in previous ST/AI/2006/3 [sec. 5 of ST/AI/2006/3 quoted].

When was the decision taken/when did you become aware of it?

22/03/2010 Staff members received e-mail notifications (S/O [C.I.]) of their eligibility for participating in the current promotional exercise but the remaining applicant was excluded based on newly implemented required years of service to be considered eligible for promotion.

Who took the decision?

Program Manager (Mr. D. Bongi)

Have you discussed the matter with your supervisor(s)/the decision maker?

Yes, as per e-mail correspondence to firstly apply for post classification and second e-mail correspondence to apply for SPA.

If so, when?

Respectively on 05/05/2010 and [o]n 04/06/2010.

Have you received a response?

No.

...

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 the Applicants' posts, although the exact date and the wording of that communication cannot be ascertained—notably, the substance of the email of 5 May 2010 indicates that it was not a final document, but rather a draft intended for further discussions among members of the K-9 Unit.

60. The Tribunal further finds that Chief Bonggi made a decision on the Applicant's request (made through Sergeant Ranelli) for classification or

reclassification. On 9 July 2010, Chief Bongi replied to Officer Kennedy's request for SPA dated 4 June 2010, stating, *inter alia*, that Officer Kennedy's request for a classification study in relation to the Applicants' posts "would have to be conducted on a Service-wide basis and not unit by unit". The Tribunal thus finds that Chief Bongi (through Sergeant Ranelli) made a negative decision on the Applicants' request to consider the classification or reclassification of their posts to the S-3 level.

61. However, there is no evidence that Chief Bongi's memorandum of 9 July 2010 or any decision regarding the classification request was communicated to them either verbally or in writing. For time limits to run, however, it is generally required that the staff member be properly notified of the contested decision (*Schook* 2010-UNAT-013, *Bernadel* 2011-UNAT-180, *Rahman* 2012-UNAT-260, *Roig* UNDT/2012/146 (affirmed in *Roig* 2013-UNAT-368)). In this case, Chief Bongi's letter dated July 2010 was addressed to Officer Kennedy, with none of the Applicants being copied on it. No evidence has been adduced that this letter was made available to them, that they were made aware of the outcome of their request, or notified of the decision in any manner whatsoever.

62. The Tribunal finds that the Applicants were only able to conclude that the request for classification or reclassification of their posts would not be granted around March 2011, when they also became aware that they were not included in the 2010–2011 promotion exercise and would thus remain in service as S-2 Security Officers.

63. Therefore, the Tribunal finds that the Applicants' claims regarding the Administration's decision not to proceed with their request for classification or reclassification, made through Sergeant Ranelli and Officer Kennedy, are receivable.

Request and decision

64. The Applicants state that they performed the same functions as S-3 level K-9 Handlers in their unit and the Administration's failure to classify or reclassify their

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 responsibility, including acting as officers-in-charge in the absence of a supervising officer.

66. ST/AI/1998/9 (System of the classification of posts) prescribes the circumstances and the manner in which the process of classification or reclassification of a post is to be initiated either by the Administration (sec. 1.1) or by the incumbent of a post (sec. 1.3):

Section 1

Request for the classification or reclassification of a post

1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

(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; rather, in their email of 5 May 2010, the Applicants requested the SSS Executive Officer, through the chain of command in accordance with SSS operating structure, to "assist [them] in the request for the classification or reclassification" under sec. 1.1(a) of ST/AI/1998/9.

68. The Applicants stated in their closing submissions that, rather than making a formal classification request, the purpose of their 5 May 2010 email was to ask management, via Sergeant Ranelli, "to consider filing a request for classification" on their behalf in accordance with the hierarchical command structure (see pp. 6–7 of the Applicants' closing submissions). The Applicants submitted that the K-9 Handler

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,

act as Officers-in-Charge, and provide regular mentorship and guidance to more junior officers. Chief Bonggi and Inspector Sullivan testified that when the K-9 Unit was developed in 2004, the idea behind staffing it initially with S-3 level Security Officers was to have some senior officers at the S-3 level so that policies and procedures could be developed. The K-9 Unit subsequently evolved and regularized as one of the specialized units. Each specialized unit has its standard tools and structure, including S-2 and S-3 Security Officers. In 2009, a class of S-2 Security Officers was brought on board. He testified that, SSS is in line with other comparator organizations and institutions with K-9 capacity. K-9 Handlers are generally not promoted to senior level upon receiving training. Chief Bonggi testified that other specialized units, such as the Locksmith Unit, receive as much or even more training.

75. According to Chief Bonggi, the tasks associated with utilizing the canines are recognized as junior level work not only by SSS, but also by host country police authorities and military units. Security officers enter the service as junior officers, irrespective of the number of years of external work experience. Junior officers then develop the necessary skills specific to United Nations security operations through training and teaming up with Senior Officers and through exposure to increasingly demanding assignments, including in various specialized units. Security Officers serve at various levels against the appropriate generic job descriptions. The K-9 Unit contains posts at the senior S-3 level and the junior S-2 level, which is consistent with the structure of other specialized units.

76. The Tribunal notes that the differences between the responsibilities and functions performed by the S-2 and S-3 level officers are also corroborated by the documentary record before the Tribunal, including the evaluation records, as explained below.

Responsibilities as reflected in performance records

77. The Applicants submit that their responsibilities were in fact identical in all respect to those of S-3 level Security Officers in the K-9 Unit, and that their

performance records demonstrate that the same criteria were applied to evaluate the duties and responsibilities of S-2 and S-3 level Officers in the K-9 Unit.

78. Having reviewed the performance records of the Applicants (S-2 Officers), Officer Kennedy (S-3 Officer), Officer P.S. (S-3 Officer), and Sergeant Ranelli (who was promoted in 2007 to the S-3 level and, in 2013, to the S-4 level) during the relevant period, the Tribunal is not persuaded by the Applicants that their responsibilities were in fact identical in all respects to those of S-3 level Security Officers in the K-9 Unit or S-3 level Security Officers generally.

79. For instance, the performance records of Officer Kennedy, who was at the S-3 level in the K-9 Unit at the relevant time, indicate that, as part of his S-3 level duties, he: maintained the medical bills of all the canines in the Unit ensuring that there was money to pay for the medical expenses; acted as the “focal point for all canine procurement issues for the unit”; initiated Short Purchase Orders, which permitted the handlers to use veterinarian services as needed; acted as the co-coordinator of the training of the canines and their handlers within the unit (see, e.g., Officer Kennedy’s performance evaluation report for 2007–2008). With respect to his 2007–2008 performance evaluation, Officer Kennedy agreed with the positive performance assessment given to him, noting in his comments dated 29 January 2009 that in his view he had “demonstrated the necessary leadership traits and supervisory skills”. In his performance evaluation document for 2011–2012, Officer Kennedy noted that his “nine years of supervisory experience” made him an ideal candidate for promotion. He further referred to being “a role model in setting a good example for those around [him]” and discussed his “budgeting and acquisition of goods and services” in collaboration with the “K-9 Unit, Finance and Budget Unit, and the Procurement Services Division”.

80. As a further example, the performance report for Officer P.S. (S-3) for 2008–2009 states that, among other duties, he acted as the “unit transportation focal point taking on the responsibility for all aspects of vehicle maintenance, usage (logging),

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

logs of events during emergency situations” and “prepares daily and weekly work schedules and various periodic reports”. Both generic job profiles state, under “responsibilities”, that Security Officers “perform other related duties as required”.

84. The Tribunal notes that the S-3 level duties in the job opening for S-3 level Security Officer posts, advertised on 3 November 2010, is generally consistent with the performance evaluations and generic profiles.

Whether the Applicants are situated similarly to Officer P.S.

85. The Applicants submit that another Security Officer in the K-9 Unit (Officer P.S.) received SPA and was promoted to the S-3 level in or around 2007, thus resulting in unequal treatment afforded to the Applicants in violation of the principle of equal pay for equal work. The Applicants argue that since this officer received SPA and was later promoted to the S-3 level, the Applicants’ post should be classified or reclassified at the S-3 level.

86. Indeed, correspondence between January 2007 and January 2008 between OHRM and the Executive Office of DSS, filed by the Respondent on an *ex parte* basis pursuant to Order No. 20 (NY/2014), indicates that Officer P.S., as a result of there being no S-2 level posts in the K-9 Unit in 2005, was assigned against an S-3 post. Officer P.S. was subsequently found by DSS to have performed at the S-3 level, and was qualified to serve at the S-3 level. Officer P.S. was therefore granted SPA with retroactive effect and, following the publication of a S-3 level vacancy announcement, was promoted to the S-3 level in or around 2007.

87. Chief Bonggi testified that the granting of SPA to Officer P.S. and his promotion took place before Chief Bonggi joined SSS. He stated, however, that Officer P.S.’s situation was different from that of the Applicants. There was a vacant S-3 post and Officer P.S. was deemed by the Chief of SSS at the time to have satisfactorily performed higher level functions at the S-3 level. This is in contrast to

the Applicants in this case, who were classified and performed at the S-2 level, with no vacant S-3 level posts.

88. The Tribunal finds that the circumstances of Officer P.S.'s promotion in or around 2007, well before S-2 level posts were assigned to the K-9 Unit and when the Applicants joined the K-9 Unit, appear to be different from the Applicants' cases. Therefore, the Applicants are not similarly situated to him.

Chen judgment

89. The Applicants also referred the Tribunal to *Chen* 2011-UNAT-107, in which the United Nations Appeals Tribunal affirmed *Chen* UNDT/2010/068. In *Chen*, the Dispute Tribunal found that the post in question had been formally associated with a job description at a higher level. Senior management recognized this difference of treatment resulted in inappropriate inequalities, and that a decision was made not to rectify the inequalities due to budgetary considerations. However, in the present case, the Organization has not recognized the Applicants' work or posts to be at a level higher than the one they were placed against (S-2). The Tribunal finds that, unlike in *Chen*, the Applicants in this case did not have the same duties and responsibilities as the higher level S-3 Security Officers.

Conclusion

90. The Tribunal finds the Applicants' claims regarding the Administration's decision not to proceed with their classification or reclassification request receivable.

91. There is no doubt that the Applicants are capable staff members and have undergone the same training and have the same basic duties with respect to the handling of canines as the S-3 level Security Officers in the K-9 Unit. However, the evidence in this case—including oral testimony as well as contemporaneous documents—demonstrates that, in addition to general responsibilities, S-3 level Security Officers, including those in the K-9 Unit (such as Officer Kennedy), perform additional higher level tasks that are not assigned to Officers at the S-2

level. The evidence in this case demonstrated that S-3 level Security Officers, including those in the K-9 Unit, are tasked, as part of their job assignments, with various team leadership and managerial assignments, including the preparation of weekly schedules, attendance at various management meetings, and increased procurement responsibilities.

92. Accordingly, the Tribunal finds that the Administration's decision not to proceed with the classification or reclassification of the Applicants' posts at the S-3 level was based on proper considerations—namely that the functions performed by S-2 level Security Officers in the K-9 Unit were not in fact identical to those of their S-3 level colleagues—and was therefore lawful.

Special post allowance

Receivability

93. The Applicants' request for SPA was first brought to the Administration's attention by Officer Kennedy's email dated 4 June 2010. The Applicants were copied on Officer Kennedy's email of 4 June 2010, and for all intents and purposes it was their request, for which Officer Kennedy acted as a mere transmitter. The response to that request was provided by Chief Bongi by memorandum dated 9 July 2010. However, the Applicants were not copied on Chief Bongi's memorandum, and there is no evidence that they were properly notified of the negative decision. The Tribunal finds that the Applicants were able to conclude that the request for SPA would not be granted in March 2011, when they also became aware that they were not included in the 2010–2011 promotion exercise and would thus remain in service as S-2 Security Officers and be compensated accordingly.

94. Accordingly, the Tribunal finds that their requests for management evaluation, filed in April 2011, were timeous, and their claims in relation to the special post allowance are receivable.

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 Mercére* 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 1 March 2011 (i.e., 60 calendar days from 31 December 2010). Applicants Scheepers and Aitcheson only filed their management evaluation requests on 7 April 2011, more than one month after the deadline.

108. 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 Scheepers and Aitcheson did not produce evidence explaining the delay, the Tribunal finds their claims regarding the promotion exercise not receivable.

(d) Applicant Pauksens

109. It is common cause that Applicant Pauksens was able to submit his application. No evidence has been produced as to how or why this occurred, and whether it was due to some technical failure in Inspira or for other unknown reasons. Applicant Pauksens was found either not eligible or not suitable only at some later point, after his application was released to the hiring manager, and the hiring manager determined that the Applicant was either not suitable or not eligible.

110. The Tribunal therefore finds, with respect to Applicant Pauksens, who was able to submit his application for reasons unknown to the Tribunal, that it was not until 18 March 2011 when he became aware of the email circulated to all those still included in the process and thus became aware, with certainty, that he was definitely excluded from the promotion exercise. He submitted his requests for management evaluation on 7 April 2011, within the established time limits.

111. Therefore, the Tribunal finds that, with regard to the 2010–2011 promotion exercise, the claims of Applicant Pauksens are receivable. The claims of Applicants Sitarek, Toriano, Scheepers, and Aitcheson, however, are not receivable.

Requirement of five years of service in SSS

112. The Applicants submit that the requirement of five years of service for promotion to the S-3 level was unlawful in that the relevant administrative instruction on selection, ST/AI/2010/3 (Staff selection system), makes no reference to time-in-grade or time-in-post requirements for promotion, thus indicating that time-in-grade and time-in-post do not apply in staff selection. The Applicants state that the earlier redaction of the same instruction, ST/AI/2006/3 (Staff selection system), specifically stated that “eligibility requirements regarding time-in-grade and time-in-post that were formerly in use shall no longer be applicable”. The Applicants further state that the requirement of five years of service is inconsistent with ST/AI/2010/3 and was not introduced properly, in that it should have been promulgated through a formal administrative instruction.

113. Section 9.1 of ST/AI/2010/3 states:

Section 3

Scope

3.1 The system shall apply to the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules at the ... S-3 and above levels in the Security Service category. ...

...

Section 9

Selection decision

9.1 Staff members holding a permanent, continuing, probationary or fixed-term appointment should normally serve in a position for at least one year before being eligible to be appointed to another position.

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. The Respondent submitted that, due to the particular nature and context of SSS functions, Security Officers are promoted within and up the ranks as they acquire relevant experience, knowledge and skills. The testimony of Chief Bongzi reflected this position. However, the Organization has not promulgated any unique selection rules that apply exclusively to SSS. On the contrary, ST/AI/2010/3 states specifically that for positions at the S-3 level and above, the standard provisions of that administrative instruction apply.

119. The agreement reached in September 2010 by SSS staff representatives and management provided the following years of experience with SSS for eligibility to be promoted:

- a. S-3 Senior Security Officer – 5 years;
- b. S-4 Security Sergeant – 9 years;
- c. S-5 Security Lieutenant – 12 years;
- d. S-6 Security Captain – 15 years; and
- e. S-7 Security Inspector – 18 years.

120. It is clear from the record and submissions that the required number of years was expressed in years *with* SSS. This was acknowledged by the Respondent in his reply dated 1 July 2011 (paras. 10, 15) and closing submission dated 24 March 2014 (paras. 36, 40, 41), which state at para. 36 that the requirement was that of “five (5) years of service with the SSS” (see also para. 40 of the Respondent’s closing submission). This is consistent with the bulletin of 23 December 2010, which specified that “‘S’ category experience can only be acquired while serving as a Security Officer within the Security and Safety Service (SSS), UNHQ New York”. Further, Job Opening No. 16958 specifically required “Five (5) years of experience [in] all areas of the security operation *within the UN Security Service*” (emphasis added).

121. Therefore, as part of the 2010–2011 promotion exercise, the discretion afforded under sec. 9.1 of ST/AI/2010/3 to establish a period of in-service eligibility of “normally ... at least one year” was apparently exercised in a way that resulted in the range of *five to eighteen* years of work with SSS. The need for such a lengthy period of service within SSS has not been explained or substantiated to the Tribunal’s satisfaction, and is well in excess of what could be considered reasonable, particularly when compared to the language of sec. 9.1, which refers to “one year”.

122. Notably, when the range of five to eighteen years of service with SSS was introduced in 2010, it was explained by reference to ST/IC/1993/66/Add.1 (Placement and promotion), dated 2 December 1993. See, for instance, the email of 30 September 2010 and the SSS bulletin of 23 December 2010, stating that ST/IC/1993/66/Add.1 formed the basis for seniority requirements.

123. ST/IC/1993/66/Add.1 was promulgated in 1993 pursuant to para. 7 of ST/IC/1993/66, which stated that “[f]or staff in the General Service and related categories, the established requirements of minimum seniority in grade will be announced in separate circulars. ST/IC/1993/66/Add.1, provided the following requirements for minimum seniority with respect to security personnel:

Information circular

...

Subject: Placement and promotion

1. With reference to paragraph 7 of ST/IC/1993/66 of 2 December 1993 on placement and promotion, the present established requirements for minimum seniority in grade for the General Service and related categories in New York are as follows:

...

Security and Safety

S-1 to S-2 – 2 years

S-2 to S-3 – 2 years

S-3 to S-4 – 3 years

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 (*Nguyen-Kropp and Postica* UNDT/2013/176), which could be compensated under art. 10.5(b) of the Tribunal's Statute. However, the Tribunal has decided not to award costs considering there is no information before the Tribunal regarding the fees incurred and the fact that his application only succeeded in part. Nor does the Tribunal find that there was a manifest abuse of the proceedings by either party (art. 10.6 of the Tribunal's Statute). Accordingly, no costs will be ordered under arts. 10.5(b) or 10.6 of the Statute.

Conclusion

134. The Tribunal finds that Applicant Pauksens claims regarding the promotion exercise are receivable, whereas the claims of the other Applicants are not. The Tribunal finds that the eligibility requirement introduced as part of the promotion exercise held in 2010–2011 was contrary to formally promulgated administrative issuances, including the Organization’s rules on selection, was arbitrary, manifestly unreasonable, and unlawful.

Observations

Generic job profiles

135. The main claim that appears to underpin the Applicants’ case in relation to each of the three components of their application (SPA, classification, and eligibility requirements for the 2010–2011 promotion exercise) is that they perform S-3 level functions and should be paid in accordance with the principle of equal pay for equal work. Members of security units generally, including in the United Nations, function within a hierarchical command structure. It is reasonable to expect that security officers at the S-2 and S-3 level would have certain core functions and duties in common, and the evidence of witnesses was quite clear in that the core K-9 handling functions of S-2 level and S-3 level Security Officers were in fact similar. The difference, however, is that, hierarchically, S-3 level Security Officers, including in the K-9 Unit, are considered to be senior to S-2 level officers and are therefore also tasked with supervisory, managerial, and additional administrative responsibilities.

136. However, there is an understandable sense of frustration among the members of the K-9 Unit—and, quite possibly, among members of other specialized units within SSS—that the generic job profiles used by SSS do not accurately reflect the actual duties performed by them. The Respondent referred, in this regard, to the S-2 and S-3 generic job profiles, which contain the catch-all phrase “[p]erforms

all other related duties as assigned”, stating that the generic job profiles covered all the different functions of various specialized units, who all performed similar basic security functions, but using different tools (canines, scanning machines, etc.). Whilst one appreciates the difficulties that may be associated with the creation of individual generic job profiles for all the specialized units, there may be ways for the Administration to resolve these concerns by re-visiting the existing generic job profiles and conducting appropriate consultations and actions to address this issue. Although there may well be some broader structural considerations at the departmental level, it may also be true that different units within SSS have their own peculiarities that should be reflected in separate generate job profiles.

SSS matters

137. The Tribunal was informed by some of the Respondent witnesses that, due to the nature of the work performed by SSS, it is, unlike other departments, run on “paramilitary” lines. This appears to have given rise to some practical difficulties in the administration of contractual and recruitment matters, particularly as compared to the rest of the Organization, raising various concerns on the part of the staff members of that department (see, e.g., *Adundo et al.* UNDT/2012/118). The issues in the present case are due in large part to a lack of clarity with regard to the administration of security personnel. Although ST/AI/2010/3 on selection specifically covers selection processes for security staff at the S-3 level and above, some of the decisions pertaining to security personnel appear to be made on an *ad hoc* basis, perhaps for good reason, but with all the resultant issues and pitfalls inherent to this kind of decision-making. The Tribunal has previously noted, for instance, that the hiring of S-1 and S-2 level Security Officers is excluded from the scope of ST/AI/2010/3, with no clear legislative framework available in formally promulgated administrative issuances as to how it should be carried out. The Tribunal made observations on this point in *Adundo et al.* (paras. 71–73). It may be advisable to adopt a structured approach to the issues faced by DSS and its Security Officers, who perform functions of crucial importance. It appears that, in

some cases, rather than follow the standard selection and promotion rules of the Organization, maybe for sound reasons, DSS creates its own procedures. However, in trying to reconcile the practices of DSS with the formal rules of the Organization, inconsistencies are inevitably created.

Conduct of the proceedings

138. The Tribunal observes that at times the tenor of the proceedings did not auger well for encouraging good working relations. Counsel for the Applicant at one stage had difficulty in accessing the Secretariat premises for a hearing and this caused a regrettable disruption of the proceedings. Given the scope of issues involved, the Applicants, as well as Counsel for both parties, are commended for their best efforts in ensuring the attendance of the appropriate number of witnesses for completing this matter and providing the necessary assistance and submissions to the Tribunal.

139. The performance records of each of the Applicants show that they are very capable and valuable Security Officers who no doubt have a bright future in the Organization. The Applicants, as all staff members, have the right to appear before this Tribunal in relation to matters affecting their employment and this should not be held against them. They raised important and complicated matters that warranted production of extensive records, submissions, and witness testimony. Likewise, the attendance of witnesses for both sides and their testimony was crucial in enabling the Tribunal to reach its findings and bring this matter to a conclusion.

Conclusion

140. In all the circumstances, the Tribunal finds that:

- a. With respect to the issue of *classification* of the Applicants' post at the S-3 level, the Applicants' claims regarding the Administration's decision not to proceed with their classification request are receivable. However,

based on the evidence in this case—including oral testimony as well as unrebutted contemporaneous performance reports—the Applicants did not perform the same exact functions as their S-3 level colleagues. In addition to general responsibilities, S-3 level Security Officers, including those in the K-9 Unit (such as Officer Kennedy), performed additional higher level tasks that are not assigned to officers at the S-2 level. The evidence in this case demonstrates that S-3 Security Officers, including in the K-9 Unit, are tasked, as part of their job assignments, with various team leadership assignments, including preparation of weekly schedules, attendance at various management meetings, and increased procurement responsibilities. Accordingly, the Tribunal finds that the Administration's decision not to proceed with the classification or reclassification of the Applicants' posts at the S-3 level was based on proper considerations—namely that the functions performed by S-2 and S-3 level Security Officers were not in fact identical—and was therefore lawful;

b. With respect to the issue of *special post allowance* to the S-3 level, the Applicants' claims are receivable. The Tribunal finds, however, that the Applicants did not satisfy the criteria for SPA and that the Administration's decision not to provide them SPA was based on proper reasons and considerations and was lawful;

c. With respect to the *promotion exercise* held in 2010–2011, the application of Applicant Pauksens is receivable, whereas the applications of Applicants Sitarek, Toriano, Scheepers and Aitcheson are not. The Tribunal further finds that the requirement of five years of service with SSS for a promotion to the S-3 level was contrary to formally promulgated administrative issuances, including the Organization's rules on selection, and was arbitrary, manifestly unreasonable, and unlawful;

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 26th day of June 2014

Entered in the Register on this 26th day of June 2014

(Signed)

Hafida Lahiouel, Registrar, New York