

ADMINISTRATIVE TRIBUNAL

Judgement No. 389

Case No. 380: HRUBANT AND
EIGHT OTHERS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Endre Ustor; Mr. Ahmed Osman;

Whereas at the request of Robert E. Hrubant, Dennis Paul Kehoe, Calvin Nathaniel Parker, Charles E. Pilnacek, Jr., Michael Maigons Pysarenko, William Reid, Thomas Roary, Gudmundur Sigurdsson and David Young, all staff members, or former staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal until 28 February 1986;

Whereas on 24 February 1986, the Applicants filed an application, the pleas of which read as follows:

"The Applicants respectfully request the Tribunal to consider the following:

In the interest of equity and good administration the only practical remedy which can be applied is to accord each of the men seniority at the S-3 level back to April 1981. Such an action could be in the form of a note on their records to be used for determining their eligibility for assignments and for future promotion. This remedy would also require that Messrs. Reid and Sigurdsson be promoted to S-3 with immediate effect and be accorded the same seniority rights as the other appellants.

In addition to compensate for the long delay in the resolution of this case and the consequent effect on moral and conditions of work, an indemnity should be paid as follows: the equivalent of two months of the difference in net pay between S-2 and S-3 for those actually promoted in

1982; four months for 1983; six months for 1984; eight months for 1985; 10 months for 1986."

Whereas the Respondent filed his answer on 7 October 1986;

Whereas the Applicants filed written observations on 26 January 1987;

Whereas on 30 January 1987, Counsel for the Applicants filed an additional document concerning the Applicant Sigurdsson;

Whereas on 24 April 1987, the Applicants filed additional documents;

Whereas on 29 April 1987, the Respondent commented on the documents filed by the Applicants;

Whereas on 30 April 1987, the Respondent filed an additional document and on 8 May 1987 the Applicants commented thereon;

Whereas on 11 May 1987, the Tribunal put questions to the Respondent;

Whereas on 19 May 1987, the Respondent provided answers to the questions put by the Tribunal and on 20 May 1987 the Applicants submitted comments thereon;

Whereas on 19 May 1987, the Tribunal put further questions to the Respondent and he provided answers on 22 May 1987;

Whereas the facts in the case are as follows:

Robert Emmanuel Hrubant entered the service of the United Nations on 23 June 1969. He was initially offered a three-month fixed term appointment as a Security Officer at the S-1, step I level, in the Office of General Services. On 23 September 1969, his appointment was converted to a probationary appointment and on 1 June 1971 to a permanent appointment. Effective 1 June 1971, he was promoted to the S-2 level.

Dennis Paul Kehoe entered the service of the United Nations on 13 April 1970. He was initially offered a three-month fixed-term appointment as a Security Officer at the S-1, step I level, in the Office of General Services. On 13 July 1970, his appointment was converted to a probationary appointment and on 1 April 1972, to a

permanent appointment. Effective 1 April 1972, he was promoted to the S-2 level.

Calvin N. Parker entered the service of the United Nations on 1 May 1970. He was initially offered a three-month fixed-term appointment as a Security Officer at the S-1, step I level, in the Office of General Services. His appointment was extended for further fixed-term periods until 19 December 1970, when it was converted to a probationary appointment. On 1 May 1972, he was granted a permanent appointment. Effective 1 May 1972, he was promoted to the S-2 level.

Charles Edward Pilnacek entered the service of the United Nations on 23 March 1970. He was initially offered a three-month fixed-term appointment as a Security Officer at the S-1, step I level, in the Office of General Services. He served on a succession of fixed-term appointments until 23 September 1970, when he was granted a probationary appointment. On 1 March 1972, his appointment became permanent and he was promoted to the S-2 level.

Michael Maigons Pysarenko entered the service of the United Nations on 1 July 1970. He was initially offered a temporary appointment for a short-term as a Security Officer at the S-1, step I level, in the Office of General Services. His appointment was renewed for a further short-term period, then, on 18 December 1970 converted to a fixed-term appointment, on 18 March 1971 to a probationary appointment and on 1 July 1972 to a permanent appointment. Effective 1 July 1972, he was promoted to the S-2 level.

William C. Reid entered the service of the United Nations on 16 June 1969. He was initially offered a three-month fixed-term appointment as a Security Officer at the S-1, step I level, in the Office of General Services. On 16 September 1969, his appointment

was converted to a probationary appointment and on 1 June 1971 to a permanent appointment. Effective 1 June 1971, he was promoted to the S-2 level.

Thomas L. Roary entered the service of the United Nations on 30 July 1969. He was initially offered a fixed-term appointment of three-months as a Security Officer in the Security and Safety Section of the Department of General Services. His appointment was extended for a further fixed-term period, then converted to a probationary appointment on 1 December 1969, and to a permanent appointment on 1 July 1971. Effective 1 July 1971, he was promoted to the S-2 level.

Gudmundur Sigurdsson entered the service of the United Nations on 3 September 1969. He was initially offered a one-year, three-month, 28-day fixed-term appointment as a Security Officer at the S-2, step I level, in the Office of General Services. He resigned from the United Nations on 27 December 1970. He re-entered the service of the United Nations on 19 September 1974. He served on a series of fixed-term appointments at the S-2, step II level, until 1 May 1977 when he was offered a probationary appointment. On 1 May 1979, he was granted a permanent appointment.

David Chen-Ting Young entered the service of the United Nations on 2 September 1969. He was initially offered a temporary appointment for a short-term at the S-1 level. His appointment was subsequently converted to a three-month fixed-term appointment on 18 December 1969, to a probationary appointment on 18 March 1970 and to a permanent appointment on 1 September 1971. Effective 1 September 1971, he was promoted to the S-2 level.

In a memorandum dated 3 April 1974, addressed to the Under-Secretary-General for the Department of Administration and Management, the Assistant Secretary-General for General Services

summarized a series of points on which understanding had been reached between representatives of the Office of General Services (OGS) and Staff Representatives of the Security and Safety Section, OGS. With respect to promotions from the S-2 level to the S-3 level, the memorandum stated:

"...(b) While Security Officers may expect advancement to S-3 in the normal course of a career, promotions will be based on seniority and satisfactory performance."

Accordingly, from 3 April 1974 the procedure for promotion from the S-2 level to the S-3 level was governed by the terms of that memorandum hereinafter referred to as the "1974 agreement".

During 1980, pursuant to certain recommendations by the International Civil Service Commission (ICSC) concerning salary scales for the General Service Category, Manual Workers and Security Service, the Joint Advisory Committee (JAC) undertook a review of the procedure for promotion from the S-2 to the S-3 level. On 24 November 1980, the Assistant Secretary-General for Personnel Services approved certain JAC recommendations concerning promotions from the S-2 to the S-3 level on an interim basis.

On 13 January 1981, the Office of General Services submitted preliminary recommendations for the 1981 promotion review exercise. Seven Security Officers at the S-2 level (one to be later withdrawn) were recommended for promotion to the S-3 level "based in part on discussions which have taken place in the Working Group [of the Joint Advisory Committee, JAC] to Study the Movement from S-2 to S-3 in the Security Service Category and the transmittal by that Working Group of certain job descriptions for review by the Classification Section, OPS [Office of Personal Services]."

On 8 May 1981, the Chairman of the Working Group (of the JAC) on "Movement from S-2 to S-3" submitted a report to the Chairman of the JAC. The Working Group had decided "to recommend discontinuance of further automatic movement from S-2 to S-3 ..." since "the S-3 level comprises posts of a high degree of sensitivity for which

years of United Nations - on-the-job training - is required." The Working Group confirmed "that the S-3 level can be identified as a separate and distinct level above and apart from S-1/S-2 as functions at these levels are clearly and demonstrably higher than those performed at the S-2 level". The report further described the general criteria to be taken into account by the Appointment and Promotion Panel in its 1981 promotion review exercise, namely:

- "(a) Proficiency in work, and potentiality, as evidenced by the performance and development of the staff member during his/her service with the Secretariat;
- (b) Consideration of the period of time served by the staff member in his/her present grade, as well as time served with the Organization."

The Working Group also "agreed that recommendations to the Appointment and Promotion Panel should be guided by the following additional criteria:

- (a) At least seven (7) years of relevant work experience with the United Nations Security and Safety Service;
- (b) Ability to perform at least 70 per cent of the duties at the S-3 level."

Job descriptions of posts at the S-3 level were attached to the report.

Working Group III of the Appointment and Promotion Panel undertook the review of Security Officers at the S-2 level for promotion to the S-3 level on 19 and 20 May 1981. The minutes of the meetings record the presentation by the Executive Officer, OGS, the Chief of the Security and Safety Service, OGS, and the Personnel Officer. The Executive Officer, OGS, summarized the contents of the report of the JAC Working Group on the movement from S-2 to S-3 and stated that since it had been endorsed by the JAC, "there was every likelihood that the Secretary-General would approve it as presented."

Before presenting the recommendations prepared by the

Department, the Executive Officer stated that "those [Security Officers] recommended [for promotion from S-2 to S-3] had met the seniority requirement established by the Working Group of the JAC and the recommendations were made against the existing vacancies for 1981 ..."

The 1981 Security Service (General Service Category) Promotion Register - S-5, S-4 and S-3 levels was published on 29 May 1981 in ST/IC/81/40. The Secretary-General had approved the inclusion of eight Security and Safety Officers for promotion to the S-3 level. These Security Officers had been selected by the Appointment and Promotion Panel according to the procedure agreed to in the JAC Working Group and described above. The Applicants were not included in the register.

On 3 June 1981, the Chairman of the JAC submitted to the Secretary-General, the report of the Working Group on the "Movement of Security Service Staff from the S-2 to S-3 level" and recommended that he approve it.

In June and July 1981, the Applicants Hrubant, Kehoe, Parker, Pilnacek, Reid, Roary, Young and Sigurdsson instituted recourse procedures pursuant to ST/IC/86/90 of 10 December 1980 before the Working Group III of the Appointment and Promotion Panel. They requested that their names be included in the 1981 S-5, S-4 and S-3 Promotion Register, since in their view, they had met the criteria required for promotion from the S-2 to the S-3 level; namely, seniority in grade and a record of performance that had consistently been rated as more than satisfactory.

On 24 June 1981, the Applicants sought reconsideration of the administrative decision "to change the process under which staff members are reviewed for promotion from S-2 to S-3 [level] and under the terms of which the Working Group III of the Appointment and Promotion Panel subsequently carried out its [annual 1981] review".

They also requested "that the implementation of promotions to the S-3 level from the 1981 register be frozen until such time that proper administrative review can take place." Not having received a

reply from the Secretary-General, on 24 August 1981, the Applicants lodged an appeal with the Joint Appeals Board.

On 10 November 1981, the President of the Staff Committee wrote to the Chairman of the JAC requesting the re-examination of the JAC report on Movement from S-2 to S-3 Level. She stated in particular, that the report set forth "a new policy establishing different criteria for promotion of staff from S-2 to S-3", that was "precluding the recourse procedure from taking place in the Appointment and Promotion Panel, and the non-implementation of the entire Promotion Register for Security and Safety Personnel."

At its meetings No. 28 and 29 held on 19 and 24 November 1981, the Working Group III of the Appointment and Promotion Panel was "informed by representatives of the Office of Personnel Services that notwithstanding assurances given during the general review that the JAC report on the movement from S-2 to S-3 would be soon approved by the Secretary-General, authorization for implementing this report had not been received as yet." The Group was further informed that "the views of the Office of Personnel Services on the matter were that the recourse review should be conducted in the context of the memorandum of understanding of 3 April 1974", i.e. the "1974 agreement", taking into account "seniority in grade and demonstrated good performance." (emphasis added)

In a memorandum dated 25 November 1981 the Acting Chairman of the Appointment and Promotion Panel (APP) informed the Assistant Secretary-General for Personnel Services of the action taken by the APP Working Group III, in connection with the recourse procedures instituted by Security Officers, following the announcement of the 1981 Security Service Promotion Register ST/IC/81/40 of 29 May 1981.

He noted that the APP, after reviewing 26 letters of recourse recommended the addition to the register of those S-2 officers who would have been included in the register, according to the APP's own interpretation of "the 1974 agreement". The names of eight Security Officers were added to the Promotion Register. The new register was announced on 3 December 1981 in ST/IC/81/40/Add.1. None of the

Applicants was included in it. They had all been unsuccessful in their recourses.

Following a further review by the JAC, on 24 February 1982 the Chairman, JAC, wrote to the Under-Secretary-General for Administration and Management, that the JAC continued to believe that the S-3 level should be identified as a separate and distinct level above and apart from S-1/S-2. On the other hand, further study of S-3 job descriptions being necessary, new promotion procedures should not be introduced since they could not be applied without a definite identification of S-3 level functions. Therefore, the "general criteria in force prior to the introduction of the interim arrangements in 1980 should be followed in the promotion review of security staff for the time being."

The Assistant Secretary-General for Personnel Services endorsed these views in a memorandum dated 24 March 1982 to the Under-Secretary-General for Administration and Management, stating that the promotion review of Security Staff from the S-2 to the S-3 level would "continue to be governed by the general criteria in effect prior to the introduction of the interim measure, namely, seniority and satisfactory performance". (emphasis added)

In a memorandum dated 25 March 1982 addressed to the Chairman of the JAC, the Under-Secretary-General for Administration and Management, approved the recommendations of the JAC, stating that the "promotion review of Security Service staff from the S-2 to the S-3 level will continue for the time being to be governed by the general criteria in effect prior to the introduction of the interim measure."

After the Applicants lodged their appeal with the JAB, the Applicant Hrubant was promoted to the S-3 level effective 1 April 1982, his name having been included on the 1982 Promotion Register approved by the Secretary-General. He separated from the service of the United Nations on 31 December 1986.

Not having been included in the 1982 Promotion Register, on 23 June 1982, the Applicant Kehoe instituted a recourse procedure

pursuant to ST/IC/81/78 of 21 November 1981, requesting that his name be included in the 1982 S-3 Promotion Register. He was unsuccessful in this regard. He was promoted to the S-3 level effective 1 April 1983, his name having been included in the 1983 Security Service Promotion Register approved by the Secretary-General.

Not having been included in the 1982 Promotion Register, on 12 July 1982, the Applicant Parker instituted a recourse procedure pursuant to ST/IC/81/78 of 21 November 1981, but was unsuccessful in this regard. He was promoted to the S-3 level, on 1 September 1983, his name having been included in the 1983 Security Service Promotion Register approved by the Secretary-General. The Applicant Parker separated from the service of the United Nations on 31 July 1986.

Not having been included in the 1982 Promotion Register, nor in the 1983 Promotion Register, the Applicant Pilnacek instituted recourse procedures in 1982 and 1983 before the APP, but was unsuccessful in this regard. He was promoted to the S-3 level on 1 April 1984.

The Applicant Pysarenko was promoted to the S-3 level on 1 September 1983.

Not having been included in the 1982, 1983, 1984 and 1985 Promotion Registers, the Applicant Reid instituted recourse procedures in all those years before the APP but was unsuccessful in this regard. He has not been promoted to the S-3 level.

The Applicant Roary was promoted to the S-3 level, on 1 April 1982 his name having been included in the 1982 Security Service Promotion Register approved by the Secretary-General.

The Applicant Sigurdsson instituted a recourse procedure on 8 August 1983, but was unsuccessful in this regard. He has not been promoted to the S-3 level.

The Applicant Young was promoted to the S-3 level on 1 June 1982, his name having appeared in the 1982 Security Service Promotion Register approved by the Secretary-General.

The adopted its report on 18 April 1985. Its conclusions and

recommendations read as follows:

"Conclusions and Recommendation

47. The Panel finds that in the initial 1981 promotion review the APP applied interim measures agreed to by the staff representatives and OGS and recommended by the JAC and OPS with due regard to seniority in grade and demonstrated good performance and taking into account the limited number of posts available in accordance with consistent personnel policy. The Panel finds that whatever might have been the validity of the applied interim measures, the APP conducted in November 1981 a recourse review and examined carefully the claims of the appellants on the basis of the 1974 promotion criteria, taking into account seniority in grade and demonstrated good performance, according to the APP minutes and the memorandum from the Acting Chairman, Working Group III, APP, to the Assistant Secretary-General, OPS, dated 25 November 1981. The Panel finds that as a result of the 1981 recourse review the names of eight staff members were added to the 1981 S-3 Promotion Register and only after the 1981 promotion exercise was completed, OGS implemented the promotion of the 15 Security Officers recommended in strict seniority order as the availability of posts permitted.
48. The Panel finds that unless the appellants prove by concrete evidence that the Appointment and Promotion Panel (APP) was improperly motivated when submitting its recommendations, it is beyond the mandate of the Joint Appeals Board to consider the substantive question of efficiency of the staff and the interpretation of the applied promotion criteria, including satisfactory performance, in accordance with staff rule 111.2(k). The Panel finds that the appellants did not meet the burden of proof to substantiate by concrete evidence that the Appointment and Promotion Panel (APP) was improperly motivated when submitting its recommendations in the 1981 promotion review. The Panel finds, moreover, that the APP as an independent advisory body to the Secretary-General on appointment and promotion has no obligation to accept the recommended promotion criteria of the Department concerned and may make its own interpretation.
49. The Panel finds that the relief sought by the appellants in their letter of appeal - consideration for promotion to S-3 by the APP under the 1974 criteria - had been provided through the 1981 recourse review of the APP and their appeal is therefore at present groundless and moot.
50. Accordingly, the Panel decides unanimously to make no recommendation in support of the appeal."

On 31 May 1985, the Assistant Secretary-General for Personnel Services informed the Applicants that the Secretary-General had taken note of the Board's report and, in the light of the Board's report, had decided to maintain the contested decision and to take no further action in the case.

On 24 February 1986, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Respondent entered into a binding agreement with the staff representatives whereby security officers would be promoted from the S-2 to the S-3 level upon seniority and satisfactory performance.

2. Seniority in grade and satisfactory performance are objective criteria which should be respected.

3. The Appointment and Promotion Panel was misinformed as to the terms of understanding that governed promotion from the S-2 to the S-3 level when in November 1981 it reviewed the recourses filed by the Applicants.

Whereas the Respondent's principal contentions are:

1. Staff do not have a right to promotion, nor do they have a right to be considered for promotion pursuant to a particular procedure. It follows that the temporary abolition and subsequent re-instatement of the 1974 promotion procedure for Security staff did not violate the rights of the Applicants.

2. The promotion recourse procedure respected applicable rules and respected the rights of the Applicants by considering their seniority and performance in comparison with other staff competing for the limited number of senior positions.

The Tribunal, having deliberated from 11 May to 4 June 1987, now pronounces the following judgement:

I. The two questions the Tribunal has to decide upon are as follows:

(a) Whether the agreement between the Assistant Secretary-General for the Office of General Services and the Staff Representatives of the Safety and Security Section dated 5 April 1974 and referred to as the "1974 agreement" is binding for the Administration; and (b) whether this "1974 agreement" was properly applied by the Appointment and Promotion Panel in November 1981 during its review of the recourses instituted by the Applicants.

Accordingly, the Tribunal understands that the various other issues mentioned, e.g. the validity or the applicability of the 1981 system initially recommended by the JAC, are irrelevant to the outcome of the case and should not be considered.

II. With regard to the first point, the Tribunal holds that, just as the Secretary-General's discretion in connection with promotions is limited by the provisions of the existing staff regulations and rules, his discretionary powers are also limited by an agreement, entered into by the Secretary-General, or his authorized representatives, within the exercise of his powers.

Inasmuch as the Respondent has conceded that during the 1981 promotion review, the 1981 system of promotions had not yet been approved on behalf of the Secretary-General and the "1974 agreement" was still in force, it follows that the Secretary-General's discretion was limited by the "1974 agreement" and that any promotion review undertaken at the time should have abided by its terms.

III. With regard to the second point, the Tribunal notes that in November 1981 when the Appointment and Promotion Panel conducted its review of numerous recourses filed by the Applicants and other security guards, eight security guards were added to the 1981 Security Service Promotion Register. The Panel acted, in its

opinion, in accordance with the "1974 agreement". It is against their non-inclusion in the revised register that the Applicants have lodged their appeal. The Applicants assert that their non-inclusion in the revised register resulted from an erroneous interpretation of the "1974 agreement".

IV. Both parties agree that the "1974 agreement" was applied to the recourse procedure. However, they differ as to the manner in which it should be interpreted. In the Applicant's view, under the "1974 agreement" all those with satisfactory performance would have been eligible in principle for promotion, i.e. all those whose performance was outstanding, very good or adequate. Thus, the actual promotion would then be decided on the basis of seniority. In the Respondent's view, among those whose performance was satisfactory (i.e. at least adequate), not only seniority, but also the different levels of performance would be taken into account.

V. The Tribunal notes in this connection that the Appointment and Promotion Panel, in its review of the recourse procedures instituted by the Applicants and others was advised by the Office of Personnel Services that:

"... the recourse reviews should be conducted in the context of the memorandum of understanding of 3 April 1974, ... i.e. taking into account seniority in grade and demonstrated good performance". (emphasis added).

The Tribunal notes that the text of the "1974 agreement" does not refer to "good performance" but to "satisfactory performance". This change of words could have misled the APP as to the correct interpretation of the "1974 agreement".

VI. In the Respondent's interpretation, performance was to be assessed not only on the basis of the periodic reports, but also on the basis of personal comments from the supervisors during the proceedings before the Appointment and Promotion Panel. In a

memorandum dated 23 September 1986 the Deputy Executive Officer, OGS admitted that: "Verbal representations to the APP had the purpose to enable the Panel to determine staff's relative efficiency ...". The Deputy Executive Officer, OGS is also stated to have said, during the course of the JAB proceedings, that "seniority alone and satisfactory ratings in a performance report were per se not sufficient for promotion and that oral input by the staff member's supervisors at the APP meetings was also required and taken into account". In this respect, the Tribunal holds that a practice which in the course of the promotion review exercise takes into consideration oral remarks (not subject to rebuttal by the staff member) is contrary to the terms of the said agreement which should be applied only taking into account objective data.

VII. As regards the interpretation of the "1974 agreement" the Tribunal holds that the Applicants' construction is correct. According to the agreement, having once reached the threshold of satisfactory performance, security guards should be promoted in order of seniority. In other words, those most senior will be promoted first provided they have rendered satisfactory performance.

VIII. For the above-mentioned reasons, the Tribunal orders that the Applicants Hrubant, Kehoe, Parker, Pilnacek, Pysarenko, Roary, and Young be granted as many months of additional seniority at the S-3 level, as are necessary to place them in the position in which they would be, had they been included in the 1981 S-3 Security Service Promotion Register and had their promotion been implemented according to the "1974 agreement", as interpreted by the present judgement. In the course of this correction of seniority, due regard should be given to the number of posts available for such promotions.

As for the Applicants who are still serving at the S-2 level, i.e. Mr. Sigurdsson and Mr. Reid, their future promotion should be governed by the guidelines set forth in the present judgement. Upon

being promoted, they should be granted seniority in their new post in accordance with those guidelines.

IX. As a consequence of the injury suffered by the Applicants, the Tribunal also awards compensation as follows:

(a) For the Applicants who are still in service at the S-3 level or who have separated from the service of the United Nations at the S-3 level, the equivalent of two months of the difference in the net salary between S-2 and S-3 for every year by which their promotion was delayed beyond the date to be established in accordance with paragraph VIII above;

(b) For the Applicants who are still in service at the S-3 level or who have separated from the service of the United Nations at the S-3 level, and whose promotion has been delayed for a fraction of year, the award should be calculated on a prorata basis;

(c) For the Applicants Sigurdsson and Reid who have not been promoted to the S-3 level, the amount of US\$900 each.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Endre USTOR
Member

Ahmed OSMAN
Member

Geneva, 4 June 1987

R. Maria VICIEN-MILBURN
Executive Secretary