UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/029/ JAB/2008/067
Judgment No.:	UNDT/2009/022
Date:	23 September 2009
Original:	English

Before:

Introduction

1. The Applicant is contesting the Administration's decision not to select him for a vacant post of a P-4 interpreter.

2. The vacancy was advertised on 31 December 2007. The Applicant submitted his application on 4 January 2008, and his application met the criteria for eligibility for a lateral move under section 5.4 of Administrative Instruction ST/AI/2006/3. The Applicant's documents were provided to the programme case officer 15 days after the vacancy announcement. He was the only staff member eligible for consideration at the 15-day mark.

3. Although the Applicant's documents were provided to the case officer before the expiration of 15 days after the vacancy announcement, his suitability for appointment was not assessed until the applications of 30-day candidates were also considered. As it happened there was another candidate – also unsuccessful – who was eligible to be considered as a 15-day candidate but did not submit his application within the prescribed period. The pool of applicants considered for appointment contained both 15-day candidates and 30-day candidates and, in the result, the Applicant, the other 15-day eligible candidate and three 30-day candidates were assessed as suitable for appointment but the successful applicant was one of the 30-day candidates.

4. The Applicant's case is that, because he was a 15-day mark candidate who was assessed as suitable for appointment, the other candidates should not have been considered and he must have been appointed.

The applicable instruments

5. The relevant governing instrument provisions are as follows —

Article 101.3 of the Charter of the United Nations —

> which case the deadline shall be 60 calendar days after posting. Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 shall be considered 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 shall be considered 30 calendar days after posting.
>
> 6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark. Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.
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> 6.7 Applications shall be submitted to OHRM or the local personnel office, as indicated in the vacancy announcement. OHRM or the local personnel office shall transmit electronically to the department/office concerned at the 15-, 30- and 60-day marks the applications of candidates eligible to be considered at each of those dates….
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> 7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.
>
> 7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement."

Evaluation and Selection Guidelines for Action by Programme Case Officers and Heads of Department under ST/AI/2006/3 (the "Guidelines") —

> "1. Human Resources Case Officers (HRCO) in OHRM or Local Personnel Offices…will release the applications of eligible applicants at the relevant marks, e.g. 15-day, 30-day and 60-day marks. 15 days after the posting of the vacancy, the PCO [Programme Case Officer] will receive the list of eligible candidates applying for a lateral move,

> i.e., the 15-day mark, candidates who meet the criteria described under sections 5.1 and 5.4 of ST/AI/2006/3. After the 30-day mark, the HRCO will release the 30-day candidates unless the PCO and HOD [Head of Department] have identified one or more suitable candidates from the 15-day list *and* the HOD has submitted a proposal to the Central Review bodies or the submission of the proposal to the Central Review bodies is imminent…
>
> 7. After receiving applications at each stage of the process (15-, 30- or 60-day mark), the PCO proceeds with the evaluation of the candidates. PCOs are required to conduct competency-based interviews and/or apply other appropriate evaluation mechanisms, such as written tests or other assessment techniques, for candidates who are identified by the PCO as meeting all or most of the requirements of the post and who are applying for appointment or promotion at the 30- and 60-day marks. Competency-based interviews are encouraged for applicants applying for a lateral move at the 15-day mark. The competencies can be found in ST/SGB/1999/15 and the booklet *United Nations Competencies for the Future*."

The Applicant's case

6. The Applicant contends that the language of sec 7.1 of ST/AI/2006/3 is specific and binding: lateral candidates must be given first priority, and 30-day and 60-day candidates can be considered only if no suitable 15-day candidates are identified. According to the Applicant, had the Administration applied the proper procedure, he would have been the only candidate, and, because he was found suitable for the post, there was no occasion for considering the other candidates and he would have been selected. Although, of course, the other instrumental requirements are relevant and provide the context in which ST/AI/2006/3 is placed, the very generality of their language does not permit the argument that the plain language of ST/AI/2006/3 should be read down or qualified; indeed, that meaning is entirely consistent with the more general language of the Charter and the Staff Rules. The Guidelines are subordinate to the Administrative Instruction, cannot qualify it and must be interpreted consistently with it. The Applicant submits that, in failing to select him for the vacancy, the Administration was in breach of its own rules concerning the priority given to lateral moves.

7. A secondary argument advanced by the Applicant is that the selection of a P-3 candidate over the Applicant, who was a P-4 staff member, demonstrates that the Applicant was not afforded fair and due consideration for the position. He contended that it would be reasonable to infer that a person of the higher level has a degree of superiority in a selection exercise over a person of a lower level, unless information to the contrary was provided. The conclusion advanced by the Applicant from the fact that a P-3 candidate was selected is a *non sequitur*. Not surprisingly, this argument was not seriously pressed at the hearing. It is, of course, quite possible that an eligible P-3 applicant will be more suitable for a particular position than a P-4 applicant. Suitability for appointment depends upon individual attributes and mere professional level and grade do not give significant information about the comparative attributes of any two or more candidates. The mere fact that a P-3 candidate was preferred to the Applicant is not sufficient to suggest, let alone establish, that the selection process was unfair. In light of my decision on the primary issues in this case, it is not necessary to analyze this part of the Applicant's submission further.

The Respondent's case

8. The crux of the Respondent's argument is that in matters of promotion and appointment the paramount consideration is the necessity of securing the highest standards of efficiency, competence and integrity, and this paramount consideration cannot be overridden by any other factors. The Respondent submits that the interpretation of ST/AI/2006/3 for which the applicant contends would undermine the Charter and the Staff Rules, in short, the duty of the Secretary-General to employ the best person in every position.

9. It is submitted by the Respondent that the priority consideration requirement is satisfied where any advantage provided to 15-day candidates can be identified. In the present case, claims the Respondent, the specific advantage provided to the 15-day candidates is the chance to be considered ahead of the 30-day and 60-day candidates. This gives 15-day candidates the opportunity to be first appraised against

a smaller pool of applicants, but does not preclude the consideration of other eligible candidates later in the process.

10. The Respondent contends that the word "shall" in the last sentence of sec 4.5 of the Administrative Instruction means "may" and does not oblige the Administration to obey the specified requirement to consider the 15-day candidates 15 calendar days after posting. It is submitted that the resources to do so are only rarely if ever available. Indeed, counsel for the Secretary-General argued that the relevant officer was entitled to disregard the requirement even if he or she could comply and simply decide that the 15-day candidates would simply be added to the same pool as the 30-day candidates and the best of the total number of candidates should then be appointed, even if one of the 15-day candidates is suitable for appointment. It was submitted that the officer is entitled to take this course of action to increase the size of the total pool and hence the chance that a more suitable candidate might be found than the suitable 15-day candidate.

The scheme of ST/AI/2006/3

11. Before turning to the terms of these paragraphs, it is useful to set out briefly the context in which they appear. ST/AI/2006/3 is a comprehensive instrument dealing with the system of staff selection which, as para 2.1 says, "integrates the recruitment, placement, promotion and mobility of staff". Para 2.2 states that it is an expectation that the staff "up to and including those at the D-2 level…[will] move periodically to new functions throughout their careers". The paragraph goes on to state —

> "To facilitate and regulate mobility, the system provides for the circulation of all vacancies and anticipated mission needs…, defines maximum periods of occupancy of posts, *requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection* and specifies the lateral mobility requirement applicable before a staff member may be promoted to the P-5 level." (Italics added.)

adopted to distinguish between the mandatory and the indicative requirements. Thus, the second sentence and following read —

> "The deadline for vacancies at the Professional level and above *shall normally* be 60 calendar days after posting, *unless*, as may be done for particular cases of unanticipated vacancies, OHRM has exceptionally approved a 30-day deadline. The deadline for vacancies in the General Service and related categories *shall normally* be 30 calendar days after posting, *unless* it has been established to the satisfaction of OHRM or the local personnel office that there are no suitable internal candidates at the duty station, in which case the deadline *shall* be 60 calendar days after posting. Staff members are encouraged to submit their applications as early as possible, be

What is very clear when the rest of the paragraph is considered, is that this is not either describing or prescribing merely the *normal or usual* case. If it were understood that the consideration of applications might be delayed beyond the 15 or 30 calendar day timeframe, then it would have been easy to phrase the exhortation in language that suggested timely submission because of the risk that applications could be considered from the 15th or 30th day and thus that a late applicant might miss out on the priority. In this event, the drafter could have used the phrase "shall normally" or even "may" or "could be". Having regard to the use in the immediately preceding sentence of the first of these phrases earlier in the paragraph, it seems clear, though perhaps surprising, that no such possibility was considered if the requirement was intended to be merely indicative.

17. It is true that, on rare occasions, "shall" is interpreted as "may", though more often "may" is interpreted as "shall". It is not necessary here to undertake a lengthy discussion on the use of "shall" in legislative or regulatory instruments. By and large, its use is deprecated because it does not have a single meaning in ordinary usage. However, its use will almost always indicate a mandatory and unqualified direction or command or requirement. It has been held to mean "may" when an exception is specified or necessarily implied but there are cases where the exception gives the meaning. In the well known text *Black's Law Dictionary* (West Publishing Co, 1990, 6th ed), under "Shall" the authors write (citing US authority) —

> "As used in statutes, contracts or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the word "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion…"

The authors note that, on occasions, "shall" may be interpreted as "may" but cite exceptional cases which are not analogous to the present. Of course, the interpretation of any word in a legal instrument must take into account the instrument as a whole and anything in it that might suggest a qualification or exception to the

primary meaning or ordinary usage. (See also the useful discussion in Garner, *Dictionary of Modern Legal Usage* 2nd ed, OUP.)

18. It was submitted by Mr Margetts on behalf of the Secretary-General that

management (27 June 2001), Resolution A/RES/59/266, *Human resources management* (15 March 2005), Resolution A/RES/61/244, *Human resources management* (30 January 2007) and the useful history contained in the Secretary-General's Report A/62/215, *Implementation of the mobility policy* (8 August 2007). The fact that both the mandatory language and the timeframe in sec 4.5 of the Administrative Instruction have remained the same over this period could scarcely be regarded as an oversight by either the Secretary-General or the General Assembly.)

21. My attention was brought by Mr Margetts to sec 5.4 of ST/AI/2006/3, which uses "shall" and "may" with apparent inconsistency. It is not necessary to analyse the provision in detail. It is enough to point out that "shall" is used to designate a class to which the relevant staff member belongs certain events and those events "may" occur. The use of "may" designates actions to be taken which might or might not be necessary, depending on whether an application is made by the staff member. There is no inconsistent use. This clause does not provide assistance in the interpretation of sec 4.5.

The meaning of sec 6.2 of ST/AI/2006/3

22. The expectation that internal candidates would (or at least could) actually be considered at the 15-day and 30-day marks is created in sec 6.2. Where an eligible 15-day candidate has put in his or her application after the 15-day period has expired but before 30 days have expired, it must still be transmitted for consideration *only if* the relevant manager "has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15 day mark". This provision therefore envisages the possibility that the process of selection would end with the identification of a suitable 15-day candidate. Thus, if the Respondent's arguments were accepted, some 15-day candidates would be treated in one way and others differently depending merely on timetable rather than on the eligibility which is accorded to them in sec 5.4.

in time. Such a "chance" in these circumstances is plainly illusory. Furthermore, it would reduce the entitlements of 15-day staff members in respect of lateral moves to a lottery in which the management could, if it chose, ensure that the winning ticket was not in the barrel.

27. The Respondent's contentions require the words "If no suitable candidate can be identified at this first stage" in the second sentence to mean, in effect, "If no suitable candidate can be identified at this first stage *because the PCO has not yet assessed the 15-day candidates*, candidates eligible at the 30-day mark under section 5.5 shall be considered". I have already explained that one fundamental objection to this interpretation is that the position of the 15-day candidates would then vary

28. If, then, 15-day candidates can sometimes be considered before the 30-day candidates are considered but sometimes not (upon the case contended for by the Respondent), upon what principle would management decide which course to undertake? If the issue were practicability, so that 15-day candidates would be considered on the 15th day or, at all events, before the 30th day, if it were practicable to do so, but otherwise compete with 30-day candidates, then the outcome would depend on the staffing and priorities at any particular time and place: at one time and place the 15-day candidates would be considered before the 30-day candidates and, if suitable, one of them would be appointed, and the following week or in a different country, the 15-day candidates would join the 30-day candidates in the same pool and, even if suitable, would not be appointed if a more suitable 30-day candidate were found. If practicability were not the touchstone, what else might guide the management's decision? Perhaps the supposition that amongst the likely 30-day candidates there would be one plainly superior in attributes to a 15-day candidate who, though suitable, was not as good. Permitting an assessment of this kind to determine the matter would obviously lead to uncertainty and unpredictability. The essential vice is that there would be, in the hypothesized situation, no guiding principle, clear both to potential and serving staff and management and capable of yielding consistent results that could be applied to lateral transfers by internal candidates.

29. It is no answer to this problem to point to the general language of the Charter or the Staff Regulations, as was attempted by the Respondent here. That language affords no real guidance in the particular situation being considered here. The very necessity for ST/AI/2006/3 is predicated upon the understanding – which cannot be gainsaid – that it is necessary to create a *system* or *structure* designed to deliver the outcomes those instruments mandate and the aspirations they express. It is not appropriate to identify one particular provision in isolation and question its appropriateness. The question must be whether

This provision requires the processes that are listed in the first sentence, though not *necessarily* interviews, to be applied to all candidates. Competency-based interviews are, however, mandatory for recruitment or promotion. The specification of this requirement would not be necessary if all classes of candidate were required to be interviewed. A lateral transfer at the 15-day mark, of course, is not a promotion (as distinct from a lateral transfer at the 30-day mark), nor, in ordinary parlance, is it a recruitment, which implies a movement from outside the particular office, if not from outside the Organization. As used in this Administrative Instruction, the lateral transfer of a 15-day candidate is neither a recruitment nor a promotion and therefore such a candidate need not necessarily be interviewed. (I have assumed that all interviews are competency-based. Even if this assumption is mistaken, the logic is unchanged.)

35. This provision places a further obstacle in the path of the argument advanced on behalf of the Secretary-General. (As has been seen, sec 7.5 envisaged in its first iteration in 2002 that the modes of assessment for 30- and 60-day candidates could differ from those applying to 15-day candidates.) If the 15- and 30-day candidates fell into the same pool so that the most suitable of them would be appropriately appointed, then it would be very difficult to compare them since each class might well have been subjected to different methods of evaluation. It matters not that they *might* have been – because of the encouragement mentioned – subjected to the same process. The point is that the clause unmistakably envisages that different processes might be applied to each class. It must follow that it could not be appropriate to place both classes in the same pool. It is no answer to say that it would be appropriate to do so where, as it happened, both classes were subjected to identical methods of evaluation, since we are dealing with the proper interpretation of sec 7.1. It is an impossible interpretation to say that that clause mandates *both* processes, namely on the one hand one in which the 15-day candidates are considered first and only if none are found suitable are the 30-day candidates considered, and on the other hand one in which the 15- and 30-day candidates are placed in the same pool, the suitable candidates then

the whole system of equal treatment if the choice of the most suitable candidate was from a group some of whom had been evaluated by one process and others by another process. Both 15- and 30-day candidates *must*, in principle, be subjected to the same evaluation procedures if they are to be compared to each other. The provision in sec 7.5 that they might not be demonstrates that this interpretation cannot be correct.

36. There cannot be a pool of suitable candidates identified for the purpose of selecting the most suitable which contains candidates from both these classes, since this could require comparison between candidates whose suitability was assessed by different methods, in one case without a competency-based interview and in the other with such an interview. That this might be the case (which the logic of the language itself compels) is reinforced by the Guidelines (which, however, must be used with caution as they constitute a subordinate instrument; this issue is discussed further below) —

> "7. After receiving applications at each stage of the process (15-, 30- or 60-day mark), the PCO proceeds with the evaluation of the candidates. PCOs are required to conduct competency-based interviews and/or apply other appropriate evaluation mechanisms, such as written tests or other assessment techniques, for candidates who are identified by the PCO as meeting all or most of the requirements of the post and who are applying for appointment or promotion at the 30- and 60-day marks. Competency-based interviews are encouraged for applicants applying for a lateral move at the 15-day mark. The competencies can be found in ST/SGB/1999/15 and the booklet United Nations Competencies for the Future."

The obligations of the Programme Case Officer are differentiated between the applications of 30- and 60-day candidates on the one hand and 15-day candidates on the other. The former group must be subjected to competency-based interviews and the latter need not be, although PCOs are encouraged to require them. Thus the Guidelines envisage two different evaluation processes. Where this occurs suitable candidates from the one group cannot be compared to suitable candidates from the other. The Guidelines are therefore drafted on the assumption that such a comparison will not occur. As I have already explained, it is irrelevant to consider the possibility

that, as it might have happened, these candidates might have been subjected to the same process.

37. It might be helpful if this point were made in another way. If 15- and 30-day candidates are placed in the same pool and the most suitable of them is to be selected, each must be given equal treatment. It follows that 15-day candidates cannot have any "priority" and the distinction between them and 30- day or other candidates is removed. This must destroy the elaborate and carefully constructed scheme designed specifically to encourage mobility by giving preferential consideration to 15-day and, for that reason, in their turn, 30-day candidates.

38. This also follows from para 1(e) of the *Responsibilities of the Programme Manager* as listed in Annex II of the Instruction, which clearly assumes that there may be some candidates who are not interviewed; by elimination, these can only be 15-day candidates.

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too late, so that appointments can be made in a timely way. It is also essential to guarantee a certain level of employment security or else excellent potential candidates will be discouraged from seeking employment or excellent employees will move to other jobs because they are concerned that perhaps they will be without a job next week or next month, so that periodically throwing open every job to open competition could well be counter-productive. Giving employees or would-be employees certain advantages in seeking other jobs within the Organization which can widen their experience and enable cross-fertilization of experience encourages not only employees and would-be employees but is good for the Organization: mobility has obvious advantages not only for the employee but also for the United Nations. An organization as large and multifarious as the UN obviously must use these and many other methods of employee selection and deployment as part of its approach to the complex and changing demands placed upon it.

41. Another extremely important aspect of employment policy must be the creation of and adherence to clear rules to be followed in all these situations so that both staff and management understand what their respective rights and obligations are. This means that, although there must inevitably be permitted – indeed, required – a discretionary judgment as to the ability of the various candidates for any particular selection, the possibility that the rules will have arbitrary or capricious application, especially with unequal effect, for reasons that are unexaminable or, perhaps, just accidental, must be assiduously guarded against. Accordingly, where an Administrative Instruction is clear, unambiguous and unqualified, it will only be in the clearest case that it will be held to have a different meaning because of words of general policy drawn from another, albeit superior instrument: the maxim *generalia specialibus non derogant* (the general does not qualify the particular) is not only a sensible canon of construction, it is also a common sense expression of just and fair dealing. Here, if the argument for the Respondent be accepted, the specific right to appointment on the plain text apparently given to the Applicant was taken from him because the particular manager decided that better candidate might be found in the 30-day pool. The case is not improved by the apparent fact – as I was informed by

Mr Margetts from the bar table – that this has been widely done and apparently approved by the Secretary-General himself. If the Instruction was not to be applied according to its plain terms, why was the Instruction not either amended or staff members informed that they should not rely on its terms?

42. It is not surprising that the injunction of the Charter is to the securing of "the highest standards of efficiency, competence, and integrity…." nor that this standard applies not only to the selection of staff but also to the conditions of service: these two elements are inextricably bound together. It is obvious, moreover, that there are any number of ways by which achievement of these goals may be approached which could well be inconsistent. The balancing of competing or contradictory policy objectives is not only difficult but it is dynamic, as the Organization changes and it responds to changing demands. It is inevitable that there will be legitimate areas of debate and reasonable difference, in which some will say that too much emphasis is given to one aspect or other and others will disagree. This is all a question of judgment and difficult judgment at that. Fundamentally, of course, the role of the Secretary-General is to make that judgment. He or she does not act alone but within the very structure of the Organization, parts of which the other organs of the Organization are also a critically important part. It may be that, in individual cases, the Tribunal will find it necessary to correct administrative decisions made by the Secretary-General – though will do so, almost certainly, by reference to the very rules of the Organization which the General Assembly adopted under Art 101.1 of the Charter and he or his predecessors have promulgated – but it would be only in the most unlikely case that an Administrative Instruction would be held to be outside the authority vested by Chapter XV of the Charter in him as the chief administrative officer. Accordingly an argument – such as that here by Mr Margetts – that the plain language of the Administrative Instruction, if unqualified, is contrary to the requirements of the Charter must be examined with great care before it is accepted.

43. Here, the Respondent's argument amounts to saying that considering only 15-day candidates first and then moving on to considering the 30-day candidates only if

consideration" was "the necessity of securing the highest standards of efficiency, competence, and integrity" and that the Secretary-General was in breach of this requirement by "establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible'" (*vide* the concluding sentence of Art 101.3) which involved, in this case, the appointment of a national from a francophone African country. The Administrative Tribunal held that this requirement had the effect of "eliminating" the paramount consideration set by the Charter in the interests of the service and, accordingly, was in breach of the paramountcy provisions and unauthorized.

45. It is, of course, appropriate that the Tribunal should accord every respect to the decisions of the Administrative Tribunal but they are not binding authority. The decision in Judgment 310 concerns a case, however, rather different to the present. The Secretary-General in that case had made an *ad hoc* decision that cut across the provisions of the Staff Rules that related to appointments of the kind being considered, Rules which gave the Appellant certain legal rights permitting him to apply for the post in question. It was not consistent with the Staff Rules that the Secretary-General, in effect, prevented the Appellant from applying for the post in question and his decision could have been nullified on that ground alone: the Secretary-General attempted, it seems, to make an exception but the power to do so contained in Rule 112.2 did not permit this to be done in these circumstances and in this manner. Here, the question concerns the proper interpretation of the relevant Administrative Instruction and not an *ad hoc* decision.

46. However, the Administrative Tribunal dealt with the case upon a quite different and more fundamental basis by concluding that the impugned decision was inconsistent with the paramountcy provisions. One difficulty in applying this decision is that there is no process of reasoning disclosed that leads to it: it is merely stated as a conclusion. I regretfully find myself in disagreement with the Tribunal's conclusion about this inconsistency. I am, with unfeigned respect, unable to see how the limitation of candidates to francophone African nationals is inconsistent with the

follows that, if the Guidelines are inconsistent with the Administrative Instruction, the Guidelines must be read down.

51. At all events, when properly considered, cl.1 is consistent with rather than contradictory of the interpretation of ST/AI/2006/3 which I have proposed. The first sentence sets out the responsibility of the Human Resources Case Officers to post vacancy announcements after the Central Review Body has approved the evaluation criteria. Then the HRCOs are to "release" the applications at particular "marks", which is a reference it seems to the table of 15, 30, and 60 days after posting of the vacancy. I was informed by Mr Margetts, and it was agreed by Mr Gorlick for the Applicant, that "release" simply meant passing the applications on to the PCO. The next sentence states that 15 days after the posting the PCO will receive the applications of the eligible 15-day mark candidates together with the rostered candidates also eligible to be considered for lateral moves. Then the Guidelines provide that, after the 30-day mark, ie after the period of 30 days has expired from the posting date, the HRCO will "release" (ie forward) the applications of the 30-day candidates *unless* the PCO and the Head of Department have identified one or more suitable candidates from the 15-day list and a submission to the Central Review Body has occurred or is imminent. Thus, it will be seen that the Guidelines envisage at least the possibility that the 15-day candidates will be or might have been assessed for suitability before the period of 30 days has expired, in which event 30-day candidates will not be considered since their applications will not be released. The Guidelines say nothing about considering the suitability of 15-day candidates after the 30-day mark, nor that where that is yet to be done at the 30-day mark, the 15- and 30-day candidates are to be placed in the same pool.

52. Clause 3 of the Guidelines, however, does imply that the 15- and 30-day candidates might be considered in the same pool. This implication arises from the italicized phrase in the clause —

> "3. In the event that the Department has not submitted the proposal to the Central Review bodies or if such submission is not imminent, and

> the PCO asks the HRCO not to release the 60-day eligible candidates *since he/she intends to recommend candidates from the 15- and/or 30-day list*, the HRCO will nevertheless release applications of candidates eligible to be considered at the 30-day mark and staff members eligible to be considered at the 60-day mark, e.g., staff who are at the same level of the post but who have applied after the 30-day mark; staff applying for promotion to posts one level higher but have applied after the 30-day mark; staff applying for promotion two levels or more above their own level; staff whose appointment is limited to service with a particular office; and other staff members serving in entities which are administered by the UN and apply the new staff selection system (e.g., UNEP, Habitat, ODCCP, ICTR, ICTY)." (Italics added.)

It will be seen that the clause assumes that it is possible that the PCO might have decided to recommend applicants from a pool that contains only 15-day candidates, or a pool that contains only 30-day candidates, or a pool that contains both 15- and 30-day candidates. If the correct procedure is that the identification of a suitable 15-day candidate precludes appointment of a 30-day candidate, there could not be a pool of candidates suitable for recommendation that included both 15- and 30-day candidates. This consequence arises from the use of the conjoint expression "and/or".

53. I have already stated why, in my opinion, ST/AI/2006/3 does not permit consideration of 30-day candidates where a suitable 15-day candidate has been identified. In my view the mere fact that the Guidelines appear to assume that the procedure is different does not affect the interpretation of the Administrative Instruction: first, the Guidelines are subordinate to the Administrative Instruction; secondly, even allowing (which, for reasons already given, I do not think is correct) that the Guidelines can be used to authoritatively interpret the Administrative Instruction, an assumption is scarcely an interpretation; and, thirdly, an interpretation that directly contradicts the language of the Administrative Instruction cannot qualify as an interpretation, let alone an authoritative one.

54. The use of the conjoint "and/or" should be regarded as a drafting error and the word "and" omitted to bring the Guidelines

Conclusion

55. In my view management should take seriously the mandatory language in sec 4.5 of the Administrative Instruction and make genuine attempts to comply with its