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ADMINISTRATIVE TRIBUNAL

Judgement No. 462

Case No. 492: MURPHY

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Jerome Ackerman, Vice-President, presiding;  
Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, at the request of Maria Luisa Murphy, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 5 January 1989 the time-limit for the filing of an application to the Tribunal;

Whereas, on 23 December 1988, the Applicant filed an application, the pleas of which read as follows:

"With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

- (a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;
- (b) To find that the present application is receivable under article 7 of its Statute;

On the merits of the case, the Administrative Tribunal is respectfully requested:

- (a) To order that the Appellant is to be treated to having been promoted to the P-4 level in the 1986 Promotion Register - and to the extent that such retroactive promotion cannot be implemented;

- (b) To order that in the event that the aforementioned order cannot be implemented retroactively that it is to be recorded in the Appellant's official status file that her seniority is to [be] based on having been promoted to the P-4 level in the 1986 Promotion Register and that she be granted damages in an amount equivalent to the difference between the P-4 and P-3

level from the effective date of the 1986 promotion up to the time the Appellant is eventually promoted to the P-4 level."

Whereas the Respondent filed his answer on 3 February 1989;  
Whereas the Applicant filed written observations on 12 April 1989;

Whereas, on 19 October 1989, the Tribunal put questions to the Respondent and, on 23 October 1989, he provided answers thereto;

Whereas, on 20 October 1989, the Applicant submitted comments on the questions put by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 August 1967 as a Clerk/Stenographer at the G-3 level. She served on a series of fixed-term appointments at the Office of Legal Affairs until 25 November 1967, when she was offered a probationary appointment and 1 August 1969, when she was offered a permanent appointment. On 1 April 1972, she was promoted to the G-4 level. Effective 1 August 1978, the Applicant was assigned, as an Administrative Officer, to the Office of the Commissioner for Namibia and granted a Special Post Allowance to the P-1 level. On 1 January 1979, she was transferred to that Office. The Applicant was subsequently promoted to the P-1 level, effective 1 April 1979, without having to pass the competitive examination, as a result of a special review of General Service staff eligible to be promoted to the Professional category, pursuant to administrative instruction ST/AI/268/Add.1.

The Applicant was promoted to the P-2 level on 1 April 1981.

In 1983, the Commissioner for Namibia recommended the Applicant's promotion to the P-3 level, on an accelerated basis. The appointment and promotion review bodies did not endorse his recommendation, in spite of his personal, written intervention on 27 May 1983 with the Chairman of the Appointment and Promotion Board (APB). In his written intervention, the Commissioner stated that in the light of the Applicant's work assignments, he had "decided to

propose the upgrading of her post to the P-4 level within the context of the 1984-85 proposed Programme Budget." The Applicant's personnel file does not contain such request.

On 26 July 1983, the Applicant instituted a recourse procedure before the Appointment and Promotion Committee (APC) requesting that her name be incorporated in the P-3 1983 Promotion Register. On the same day, the Commissioner again wrote to the Chairman of the Board in support of her recourse. The Applicant, however, was not successful in this regard. She was subsequently promoted to the P-3 level on 1 April 1984, in connection with the regular promotion review exercise.

On 30 October 1984, the Applicant submitted a request for the reclassification of her post from the P-3 to the P-4 level, in connection with the 1986-87 Programme Budget. Her request was endorsed by the Applicant's supervisor and by the Commissioner for Namibia. On 1 February 1985, the Assistant Secretary-General for Personnel Services confirmed the classification level of the post at P-3 and commented that "no further classification analysis [was] required for [the] post unless there [was] a change in assigned responsibilities and duties."

On 5 August 1985, the Commissioner for Namibia appealed the decision by the Office of Personnel Services (OPS), to classify the Applicant's post at the P-3 level. In addition, he included a provision for the upgrading of the Applicant's post in his statement of programme budget implications for the 1986-87 Biennium, submitted to the Controller on 16 November 1984 and in his statement of programme and financial implications of the draft resolutions on Namibia for the fortieth session of the General Assembly, submitted on 13 November 1985. According to the representative of the Respondent before the Joint Appeals Board (JAB), the Classification Appeals and Review Committee (CARC) established under ST/AI/277 became inactive. Consequently, the Commissioner's appeal for a review of the reclassification of the Applicant's post could not be heard. No decision could be taken in time to make a submission to

the General Assembly, making it impossible to include a request for budgetary appropriation for the reclassification of the post in connection with the 1986-87 Budget Biennium.

Subsequently, the Classification Section of the Office of Human Resources Management<sup>1</sup> (OHRM), had conducted an overall review of posts of Administrative and Executive Officers at Headquarters and had recommended the reclassification of the Applicant's post to the P-4 level. The appeal submitted by the Applicant and the Commissioner therefore became moot. In addition, the 1986 promotion review exercise for promotion to the Professional category had been delayed until 1987, owing to the financial crisis of the Organization.

According to the Applicant and to a statement by the Special Assistant to the Commissioner for Namibia during the JAB proceedings, it was the intention of the Commissioner to recommend the Applicant for promotion to the P-4 level in connection with the 1986 promotion review exercise, but he was prevented from doing so by OHRM's specific instruction that any recommendation for promotion should identify an already existing post at the higher level which could be used to implement the proposed promotion. According to the representative of the Respondent before the JAB, "when the classification decision on the appellant's post was taken and approved by the Assistant Secretary-General, OHRM, in March 1987, there was still time to convey the information to the appropriate appointment and promotion body." The Applicant's file, however, does not contain such recommendation and the Board did not include the Applicant's name on the 1986 First Officer P-4 Promotion Register.

On 17 February 1987, the Applicant was assigned to a new post with the functional title of Programme Officer. On 16 March 1987, the Personnel Action Form that had been issued to record the assignment was cancelled. The classification notice by OHRM,

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<sup>1</sup> Successor of OPS.

classifying the post at the P-4 level was dated 18 March 1987. The Applicant asserts that her Department was not informed officially of this fact until July 1987, when the decision was communicated verbally to the Commissioner's Office.

In a letter dated 20 July 1987, addressed to the Chief, Political, Legal and Common Services, Budget Division, the Special Assistant to the Commissioner, referring to the decision to reclassify the Applicant's post to the P-4 level, requested that the post be incorporated at the correct level into the staffing plan for the new Department of Special Political Questions, Regional Co-operation, Decolonization and Trusteeship (SPQRCDT), into which the Office of the Commissioner for Namibia and the Department of Political Affairs, Trusteeship and Decolonization had been combined.

In a reply dated 23 July 1987, the Assistant Secretary-General for Programme Planning, Budgeting, Monitoring and Evaluation, informed the Under-Secretary-General for SPQRCDT, that since classification of posts could only be implemented within the financial provisions approved by the General Assembly, and the Programme Planning and Budgeting Board had decided against entertaining any requests for reclassification of posts in the budget submission for 1988-89, the reclassification of the post encumbered by the Applicant could only be implemented through redeployment of posts available to the Department of SPQRCDT.

On 6 October 1987, the Applicant instituted a recourse procedure before the APC, requesting the Committee to incorporate her name in the 1986 P-4 Promotion Register, but was unsuccessful in this regard. In her letter of recourse, the Applicant informed the Committee of the reclassification of her post to the P-4 level and of the Commissioner's intention to recommend her for promotion.

In a letter dated 6 October 1987, the Applicant requested the Assistant Secretary-General, OHRM, to review the administrative decision of 1 February 1985 to classify her post at the P-3 level, and the Administration's failure to act on the classification appeal as well as the Administration's failure to act when the post was

finally classified at the P-4 level. She argued that these failures of the Administration resulted in the omission of the budgetary provision for the upgrading of her post to the P-4 level in the 1986-87 Biennium, which, in turn, prevented the Commissioner from recommending her for promotion in connection with the 1986 P-4 promotion review exercise. She requested that these "failures" be corrected retroactively. In a reply dated 24 November 1987, the Assistant Secretary-General, OHRM, informed the Applicant that he found no grounds on which to recommend the relief sought by the Applicant.

On 21 January 1988, the Applicant requested the Secretary-General to review the administrative decision by the Assistant Secretary-General, OHRM. This letter was treated as a preliminary statement of appeal to the JAB, the Secretary-General having informed the Applicant that he had completed administrative review of her case. On 2 March 1988, the Applicant filed an appeal with the Joint Appeals Board. The JAB adopted its report on 30 June 1988. Its conclusions read as follows:

"Conclusions

28. The Panel finds:

- (i) That the classification exercise is a technical one based on a number of factors and the JAB [Joint Appeals Board] cannot substitute its judgement for that of the Classification Section.
- (ii) That while the Classification Appeals Review Committee did not review the appeal of the Commissioner for Namibia submitted on 5 August 1985, this had not impaired the consideration of the appellant's case for promotion by the review bodies in the 1986 promotion review.

28[sic] Accordingly, the Panel makes no recommendation in support of the appeal."

On 8 July 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the

Secretary-General, having re-examined her case in the light of the Board's report, had decided to take no further action on her case.

On 23 December 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of March 1987 to classify the Applicant's post at the P-4 level demonstrates that the former classification at the P-3 level was objectively incorrect and erroneous.

2. The denial of the Applicant's promotion to the P-4 level, in connection with the 1986 promotion review exercise, was intrinsically linked to the incorrect classification of the post at the P-3 level.

3. The Commissioner was prevented from recommending the Applicant for promotion on account of inaction by CARC. Failure by the Respondent to obtain a decision by the CARC prevented the Budget Division from submitting a budgetary proposal to the General Assembly.

Whereas the Respondent's principal contentions are:

1. The Respondent's liability cannot be established on the basis of the essentially speculative argumentation developed by the Applicant.

2. The reclassification of the post encumbered by the Applicant to the P-4 level in 1987 does not mean, or imply, that the Administration's decision of February 1985 denying such reclassification was "incorrect".

3. The Applicant had no right to promotion, and the reclassification of the post to which she was assigned would not have conferred any such right upon her.

4. The Applicant's procedural rights to be considered for promotion were not impaired by any act or omission of the Respondent regarding the classification of the post encumbered by the Applicant.

The Tribunal, having deliberated from 19 October to 14 November 1989, now pronounces the following judgement:

I. The basic facts in this case are not in dispute but considerable differences of opinion exist between the parties about the details and significance of various procedures followed in deciding on the Applicant's claim to promotion to the P-4 level and for reclassification of her post to the P-4 level at the material time (1984-86).

II. As regards the upgrading of the Applicant's post from the P-3 to the P-4 level, the Office of the Commissioner for Namibia was informed by the Office of Personnel Services that the proposal (supported by the Commissioner himself) was not acceptable. The Commissioner appealed to the then Assistant Secretary-General for Personnel Services against this decision, but received no reply.

III. Meanwhile, the Commissioner wished to recommend the Applicant for promotion to the P-4 level. The Joint Appeals Board (JAB) summary of the facts states:

"The Special Assistant to the former Commissioner for Namibia ... had confirmed that it was the intention of the Commissioner to recommend the appellant for promotion to the P-4 level in the 1986 promotion exercise but he was precluded from doing so because of the specific instructions of the then Assistant Secretary-General, Office of Personnel Services in February 1986 which required all Heads of Department offices to have their recommendations supported by the classification notice of the post."

Thus, on the one hand the proposal for upgrading the post remained dormant and on the other hand the Applicant could not be recommended for promotion as her post had not been upgraded.

IV. However, on 20 July 1987, the Special Assistant to the



Commissioner for Namibia sent a memorandum to the Budget Division stating: "It has just been brought to my attention that on 18 March 1987 the post of Administrative Officer [encumbered by the Applicant] ... was upgraded from P-3 to P-4." He went on to say that "the P-4 level of the Administrative Officer's post having now been confirmed by OHRM [Office of Human Resources Management], it would be appreciated if the post could be incorporated into the staffing plan for SPQRCDT [Special Political Questions, Regional Co-operation, Decolonization and Trusteeship] at that level." If such information had been received earlier, it could have helped the Office of the Commissioner for Namibia to formulate a proposal for promoting the Applicant if they so wished. Instead, they were informed by the Assistant Secretary-General for Programme Planning, Budgeting, Monitoring and Evaluation, that:

"As the Programme Planning and Budgeting Board has decided against entertaining any requests for reclassification of posts in the budget submission for 1988-1989, the reclassification of a P-3 to P-4 post as outlined ... in your memorandum could only be achieved through re-deployments of posts available to the Department for Special Political Questions, Regional Co-operation, Decolonization and Trusteeship. I presume, therefore, that this question will be considered in the context of your overall review of the structure and staffing of your Department."

In the absence of any other indication, the Tribunal is left with the impression that this was related to the financial stringency the U.N. was facing at that time.

V. Be that as it may, the implication of all these developments was that the Applicant could not be considered for promotion for want of an appropriate post, and when, eventually, such a post became available, it could not be budgeted for.

VI. Financial considerations have also been explained by the Respondent as the reason for the delay in activity by the Classification Appeals and Review Committee. While the Tribunal

does not underestimate the importance of these considerations, it is concerned that the need for economy may come in the way of protection that should normally be available in a timely fashion to staff members, as provided in the Staff Regulations and Rules. For, in some cases this can be tantamount to deprivation of rights. On the facts of this case, the Tribunal finds no such deprivation.

VII. The Tribunal accepts that if all the normal measures and remedies had been available and had been taken, the Applicant could not, as a matter of course, expect to be promoted. The Tribunal has repeatedly held that promotion is at the discretion of the Secretary-General who has, under the authority of the General Assembly, provided in the Staff Regulations and Rules suitable machinery for determining who should be promoted and who should not.

The Applicant was not included in the 1986 P-4 Promotion Register.

The Tribunal finds no reason to hold that the Applicant would have been approved for promotion by the competent bodies if a P-4 post existed and had been included in the budget for the Office of the Commissioner for Namibia, even if she had been presented to the promotion bodies with the best recommendation. In the circumstances, any question of retroactive promotion, or the protection of seniority on the assumption of such a promotion, becomes irrelevant.

VIII. The Tribunal further accepts the Respondent's contention that the classification of the Applicant's post at the P-4 level in 1987 does not necessarily mean that an error was made in classifying it, with the same job description, at the P-3 level in 1985. The criteria for classification in different periods can well be different, as indeed has been explained by the Respondent at some length. In 1986-87, the reclassification came within the framework of measures adopted by the Administration in order to draw a clearer distinction between the roles of programme managers and the administrative staff of the executive offices and to avoid

ambiguities under the programme budget heading "Executive Direction and Management". In 1985, the criteria applied were apparently based on the type of work the Applicant was performing in the Office of the Commissioner for Namibia. These diverse criteria can produce different results and there is nothing to suggest that these classifications have been tainted by prejudice or other extraneous factors.

IX. The Tribunal regrets any administrative irregularities and confusion which may have occurred, but does not consider that they affected the Applicant's interests in any significant manner.

X. In view of the above, the Tribunal rejects the application.  
(Signatures)

Jerome ACKERMAN  
Vice-President, presiding

Samar SEN  
Member

Ioan VOICU  
Member

New York, 14 November 1989

R. Maria VICIEN-MILBURN  
Executive Secretary