

**Administrative Tribunal**

Distr.: Limited  
30 September 2005

Original: English

---

**ADMINISTRATIVE TRIBUNAL****Judgement No. 1230**

Case No. 1299

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Dayendra Sena Wijewardane;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 July 1999 and periodically thereafter until 30 June 2003;

Whereas, on 25 June 2003, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 June 2003, the Applicant again filed an Application requesting the Tribunal, *inter alia*:

“8. ... [T]o order ...:

a) Payment of the monetary equivalent of two years special post allowance (SPA) at the P-5 level (which would correspond to the amount recommended by the [Joint Appeals Board (JAB)], for the period 1 January 1997 to 31 December 1998) and corresponding benefits;

b) Payment of two years' net [base] salary to compensate for the mental anguish she suffered during the four years from 1995 to 1998 due to the maladministration of the Respondent ...

9. ... [T]o conduct oral hearings ...

10. ... [O]r ... to declare the JAB report defective and to order compensation to the Applicant in the form of:

- a) Payment of the monetary equivalent of two years' [SPA] at the P-5 level (...) and corresponding benefits;
- b) Payment of two years' net salary to compensate for the mental anguish she suffered ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2004 and twice thereafter until 30 April;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas, on 30 November 2004, the Applicant filed Written Observations amending her pleas as follows;

"The Applicant ... adds one new and supplementary plea:

7(k) *[The Department of Public Information (DPI)] failed to appoint the Applicant three months after [Ms. B.] was initially appointed [Officer-in-Charge (OiC)] of the [User Service Section] in conformity with paragraph 4 of [the] memorandum [of the Assistant Secretary-General for Human Resources Management] of 10 July 1997 which provides that: 'should [such] a post remain vacant for longer than three months, another staff member should be assigned to it'.*"

Whereas, on 11 July 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the employment record as contained in the report of the JAB reads, in part, as follows:

***"Employment History***

... [The Applicant] was recruited on a two-month fixed-term appointment in October 1977 as an Associate Social Affairs Officer [at the P-2 level] in the Department of Economic and Social Affairs. In January 1978, her appointment was extended for one month, and she was transferred to the Dag Hammarskjöld Library (DHL)[, as an Associate Librarian]. Her contract was subsequently extended [several] times ... Effective 1 April 1981, she was promoted to [the P-3 level]. Effective 1 May 1986, [the Applicant was granted a] permanent [appointment]. She was promoted to P-4 on 1 October 1987[, and her functional title was changed to External Relations Officer]."

Whereas the facts in the case are as follows:

On 19 September 1995, the Director, Library and Publications Division (LPD), informed the Assistant Secretary-General, Department for Public Information (DPI), that an exchange of posts had been effected whereby, in exchange for a P-2 and a P-3

post, DHL received a P-5 post from the United Nations Information Centre, Paris, “resulting in a P-5 position being available for promotion of Ms. B.”. She further stated that “a full submission of the case will most likely not be necessary”. In a note dated 20 October 1995, the Executive Officer, DPI, requested her Deputy “to implement Ms. B.’s promotion with effect from the date that the post became available”.

On 31 October 1995, the Director, LPD, informed the Head Librarian of changes in assignments of posts at the P-4/5 levels, and that, accordingly, Ms. B. had been assigned to the post of Chief, User Services Section, on “an [OiC] basis, until the [Office of Human Resources Management (OHRM) had] completed the necessary paperwork”.

On 8 November 1995, DPI requested OHRM’s approval to submit its recommendation that Ms. B. be promoted to the P-5 level “without resorting to circulation of the post”, to the Appointment and Promotion Board (APB). On 17 November, OHRM rejected this request. On 6 February 1996, the Director, LPD, requested that an internal vacancy announcement be issued for the P-5 post of Chief, User Services Section.

On 23 February 1996, OHRM approved retroactive placement of Ms. B. against the post of Chief, User Services Section, effective 1 November 1995, while stating that the approval was granted “on the basis that it will in no way prejudice the outcome when [the] post is circulated internally”.

The Applicant applied for the P-5 post in March 1996. After a suspension of consideration caused by the issuance of ST/AI/415 of 2 April 1996 on redeployment, OHRM submitted to DPI the names of the Applicant and Ms. B. On 12 August 1996, the Director, LPD, submitted an evaluation of the two candidates, stating that while both candidates were highly qualified, “Ms. B. ... would bring to the position significant management experience”, as Ms. B. had been performing the functions of the post for almost a year, “the Section and the Library [could] only benefit from [her] continued service in her current functions”.

On 16 October 1996, a DPI Departmental Panel considered the proposed candidates. According to the report of the meeting ...:

“9. ... The Panel members were unanimous in their opinion that both staff members seemed to be fairly evenly matched but that [Ms. B.] had an edge over [the Applicant] in terms of supervisory experience. ...

10. After further review the Panel was unanimous in its decision to forward two names, in alphabetical order, for consideration for promotion to the post:

[Ms. B. and the Applicant].”

Having received the Panel’s report, on 5 November 1996, the Assistant Secretary-General, DPI, recommended to the APB that Ms. B. be promoted. On 11 November 1996, the Applicant was informed that another candidate had been recommended by DPI, and on 25 November, she submitted additional information to the APB on her qualifications.

Having reviewed the case on 12 December 1996, the APB concurred with the recommendation of the Department for the promotion of Ms. B. to the P-5 level. At the same time, having taken note of the very good qualifications of the Applicant, the APB requested the Department to identify a suitable vacancy where her promotion could be accommodated. The APB’s recommendation was approved by the Secretary-General on 20 December 1996.

On 30 December 1996, the Applicant requested the Secretary-General to review the administrative decision not to select her to the P-5 level post.

On 25 April 1997, the Applicant lodged a “preliminary statement of appeal” with the JAB in New York. On 23 October 1998, the Applicant was advised of the composition of the JAB panel assigned to hear her case. On 29 October, the Applicant requested the Secretary of the JAB to advise her of the deadline for submitting her agreement to the proposed Panel and informed him of her intention to submit supplementary material, however, on the same day, the Panel considered her case.

The JAB adopted its report on 12 November 1998. Its considerations and recommendation read, in part, as follows:

***“Considerations***

...

14. Having examined the material before it, the Panel could find no evidence of bias or prejudice in the promotion procedure. It did find a procedural irregularity that was clearly in violation of administrative instructions. Paragraph 9 of [administrative instruction] ST/AI/413 [dated 25 March 1996 on placement and promotion] is quoted in full in [the] Respondent’s reply [and it] is interesting to note that the emphasis added by Respondent stops short of the sentence found significant by the Panel, *i.e.* ‘Such exceptional assignments [to the higher level vacant post] shall be limited in duration to three months and shall not give an advantage to the staff

member concerned over other candidates'. The language does not appear to allow for exception.

15. Yet [Ms. B.] was assigned to the post for [14] months. The Panel found unacceptable [the] Respondent's explanation ... for the failure to respect the clear language of the [administrative instruction]. Not only did [Ms. B.] serve for [14] months in the post of Chief, User Services Section, but ... [i]n its consideration of the case, the [Departmental] Panel noted that '... both staff members seemed to be fairly evenly matched but ... [Ms. B.] *had an edge over [the Appellant] in terms of supervisory experience*'. ...

16. The Panel did not feel it need speculate as to the result of the promotion process had it been [the] Appellant, and not [Ms. B.], who served 14 months in the post of Chief and who, as a consequence, 'had an edge in terms of supervisory experience'. Or had both candidates served the maximum three months specified in the [Administrative Instruction]. ...

...

The Panel did not find evidence of discrimination in this case; it did find that the Administration failed to respect its own rules. Just as 'a staff member has a right not to be discriminated against in the promotion process', he or she has a right to fair and equitable procedures in every phase of that process. The Panel agreed that [the] Appellant had been denied that right.

#### ***Recommendation***

17. The Panel unanimously recommends that

(a) The request of the [APB] ... be implemented at the earliest possible date, that is that the Department 'identify a suitable vacancy where [the Appellant's] promotion could be accommodated,' and

(b) [The] Appellant be paid a special post allowance to P-5 from 1 January 1997 until the effective date of her promotion or until the date of her retirement, whichever is earlier.

18. The Panel makes no other recommendation with respect to this appeal. It notes, however, that the violation of the [Administrative Instructions] which it found in this case is - on the basis of the direct knowledge of individual Panel members - all too common in the Secretariat. It would, therefore, urge the Secretary-General in the interest of good administration and the morale of the staff to put an end to it."

On 13 November 1998, the Applicant was informed by the JAB that the Panel assigned to her case had already met and written its report, which had been sent to the Under-Secretary-General for Management that morning. In her reply of 18 November 1998, the Applicant complained that the JAB had not waited for her agreement regarding the composition of the Panel and that, despite being aware of her intention to submit additional material, the Panel had proceeded with its consideration of her case.

Effective 1 January 1999, the Applicant was promoted to the P-5 level post of Chief, User Services Section, upon the retirement of Ms. B.

On 5 February 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General is not in agreement with the Board’s conclusion above. The record in this case indicates that the successful candidate’s supervisory experience derived not only from the period she served in the higher level post but also from the considerable period when she had served as [OiC] of another Section in the [DHL]. She thus had an edge over you in terms of supervisory experience even without counting the period she subsequently served on the higher level post in question. The Secretary-General further observes that the placement of the successful candidate on the higher level post for longer than the period prescribed in the administrative instruction was due to the unforeseen suspension of placement and promotion procedures in 1996 pursuant to ST/AI/415 ... This did not violate your rights. The Secretary-General thus considers that all applicable procedures were properly followed in this promotion exercise.

In light of the foregoing, the Secretary-General cannot accept the Board’s recommendation that you be paid [an SPA] to P-5 from January 1997 until the date of your promotion or that of your retirement, whichever is earlier. The Secretary-General further notes that this recommendation is not in accordance with [s]taff [r]ule 103.11 which sets out the terms and conditions for the granting of [an SPA].

The Secretary-General, however, agrees with the Board’s recommendation that the request of the [APB] be implemented at the earliest possible date, namely, that DPI identify a suitable vacancy where your promotion could be accommodated. He notes that this recommendation has been implemented as you were promoted to the P-5 level with effect from 1 January 1999. The Secretary-General has therefore decided to take no further action on your appeal.”

Effective 31 December 1999, having reached the mandatory retirement age, the Applicant separated from service.

On 27 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent failed to carry out proper and correct promotion procedures.
2. The Applicant faced prejudice and disparate treatment as another person had been virtually pre-selected for the P-5 post by the Department. The Applicant did not receive full and fair consideration.

3. The Applicant's rights of due process were violated at various stages of the promotion process, which process was tainted by procedural irregularities.

4. The JAB proceedings in the Applicant's case were highly irregular, and vitiated by violations of due process and maladministration.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to fair consideration for promotion. The Applicant was properly considered for promotion in accordance with the established procedures, and her rights were not violated by the decision to select another candidate to the P-5 post she sought.

2. The decision contested by the Applicant was not vitiated by prejudice or any other improper motivation.

The Tribunal, having deliberated from 24 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant was recruited as a fixed-term appointee in October 1977, at the P-2 level. In 1978, she was transferred to the DHL. In 1986, she was granted a permanent contract and she was promoted to a P-4 post on 1 October 1987. At the time, there was another P-4 Librarian serving in the DHL, with the same level of seniority as the Applicant, Ms. B.

At the time, there were no P-5 Librarian posts in the DHL. However, in September 1995, an exchange of posts was effectuated between the DHL and the United Nations Information Center, Paris: the latter transferred a P-5 post to the DHL in exchange for a P-2 and a P-3 post.

On 20 October 1995, the Executive Officer, DPI, requested her Deputy to implement Ms. B's promotion to the new P-5 post "with effect from the date that the post became available". A few days later, on 31 October 1995, Ms. B. was assigned to the post of Chief, User Services Section, on "an [OiC] basis". DPI's subsequent request to OHRM to allow Ms. B.'s promotion without circulation of the vacancy was rejected on 17 November. On 23 February 1996, OHRM approved DPI's request to retroactively approve Ms. B.'s placement to the post of Chief, User Services Section, as of 1 November 1995 "on the basis that it [would] in no way prejudice the outcome when the post [would be] circulated internally".

Meanwhile, the P-5 post of Chief, User Services Section, was circulated and the Applicant, as well as Ms. B. applied for it.

During the selection process, the Director, LPD, submitted her evaluation, expressing the view that while both candidates were highly qualified, Ms. B. would bring to the position significant management experience having held prior positions as OiC and having served for almost a year in her current function.

A DPI Departmental Panel considered both candidates and submitted its report on 16 October 1996. The Panel members were unanimous in their opinion that both staff members seemed to be fairly evenly matched but that Ms. B. had “an edge over the Applicant in terms of supervisory experience”. It presented the two names in alphabetical order. The Assistant Secretary-General, DPI, seconded the recommendation and, on 20 December 1996, Ms. B. was promoted to the post on which she was already serving.

II. In considering this case, the Tribunal recalls its Judgment No. 1156, *Fedorchenko* (2003). In that case, it was also the person who had filled the post for some time on a temporary basis who was ultimately promoted, despite the fact that the APB “did not take into account the reference made by the Departmental Panel to the fact that [the other candidate] had acted as [OiC] of the Section since this would be tantamount to giving unfair advantage to her candidacy” and would, consequently, be unfair to the Applicant. The Tribunal then stated:

“... it is not possible to revise the substantive decision taken, according to which the other candidate was promoted to the P-5 post; to do so would be usurping the Secretary-General’s discretion in promotion proceedings. The Tribunal recalls that it has been a long standing jurisprudence that in scrutinizing promotion cases, the Tribunal will restrict itself to examining whether the decision was tainted by any element of arbitrariness.”

In the instant case, the Tribunal finds that Ms. B.’s performance as OiC was a major, if not the determinative, factor in her promotion. This is clear from the letter from the Director, LPD, to the Executive Office, DPI, where she states that “under Ms. B.’s direction [as OiC] the entire Section has functioned smoothly”; that the Section and the Library could “only benefit from her continued service”; and, that she should be considered “the priority candidate” for the post. It is also clear from the 5 November 1996 memorandum from the Head of the Department to the Chairperson of the APB, transmitting the recommendation of the Departmental Panel, which contains



similar language, and finally from the APB's review itself, which states that Ms. B. had an edge over the Applicant "in terms of supervisory experience". Thus, the Tribunal cannot but agree with the JAB's finding that the Respondent failed to respect the clear language of administrative instruction ST/AI/413, which stipulates that "[s]uch exceptional assignments [to the higher level vacant post] shall be limited in duration to three months and shall not give an advantage to the staff member concerned over other candidates". In the view of the JAB, this "language does not appear to allow for exception". According to the JAB, there was no need to speculate as to the result of the promotion process had it been the Applicant, and not Ms. B., who had served for 14 months as OiC and, as a consequence, "had an edge in terms of supervisory experience": obviously, the Administration failed to respect its own rules. Therefore, the JAB recommended that the Respondent find a suitable post to accommodate the Applicant's promotion and that she be paid an SPA until such time. For this procedural irregularity, the Tribunal agrees that the Applicant deserves compensation.

III. In addition, the Tribunal finds that the entirety of the circumstances under which Ms. B. was promoted give the clear impression that the procedure was "tailor made" for her. In fact, the Administration did everything possible to promote her to the position of Chief, User Services Section, DHL, first by putting her in the job without any procedure whatsoever, and second by attempting to promote her to that position without advertising the post, then assigning her to the post as OiC, and finally by promoting her, counting her time served on the post as contributing to her "edge in supervisory experience".

The Tribunal recalls that in *Fedorchenko*, under circumstances of a certain similarity, it was decided that:

"This procedure cannot be acceptable, even when taking into consideration that the APB eliminated from the selection criteria the fact that the successful candidate had the experience of being the temporary incumbent of the post ..."

And then again:

"It is the Tribunal's view that procedures, especially in matters where the Organization's employees' career and personal work satisfaction are involved, must be thoroughly respected in order to avoid injury - substantive or moral - to its staff members. Decisions should be taken ... with the necessary care, so as not to create any suspicion that procedures are tailor made".

In light of the above, the Tribunal finds that the Applicant should also be awarded compensation for this violation of her rights.

IV. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation of US \$10,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
2. Rejects all other pleas.

*(Signatures)*

Spyridon **Flogaitis**  
Vice-President, presiding

Jacqueline R. **Scott**  
Member

Dayendra Sena **Wijewardane**  
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**  
Executive Secretary