

EIGHTIETH SESSION

***In re* FLORES**

Judgment 1497

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roberto Flores against the World Health Organization (WHO) on 21 October 1994, the WHO's reply of 20 January 1995, the complainant's rejoinder of 1 March and the Organization's surrejoinder of 31 May 1995;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Peruvian, joined the staff of the WHO on 18 September 1989 under the first of three short-term appointments. He was an accounting assistant at grade G.5 in the Organization's Regional Office for the Americas (AMRO) at Washington, D.C. His last appointment expired at 29 February 1992.

On 11 October 1991 the WHO issued a notice of vacancy, No. 91/PAHO/127, about two grade G.6 posts for accounting assistants II, and he applied for both of them. The ad hoc selection committee interviewed him, but he learned on 24 June 1992 that the Regional Director had chosen two others, one of whom was Miss Victoria Merino, an internal applicant.

On 21 August 1992 he appealed to the regional Board of Appeal against the appointment of Miss Merino to one of the posts. In its report of 24 June 1993 the regional Board recommended rejecting his appeal as irreceivable because as the holder of a short-term appointment he did not enjoy "the same terms and conditions as a fixed-term appointee". By a decision dated 20 August 1993 the Regional Director endorsed the Board's recommendation.

On 19 October 1993 the complainant put his case to the headquarters Board of Appeal. In its report of 18 June 1994 the headquarters Board held his appeal to be receivable but recommended rejecting it on the merits. In a letter of 12 July 1994, which he impugns, the Director-General endorsed that recommendation.

B. The complainant submits that the decision to appoint Miss Merino is unlawful. He has three main pleas.

First, he argues, she lacked the language skills which the notice stated to be a basic requirement for the post she was appointed to. Secondly, the Administration disregarded his own qualifications: at the material time he had two years' experience on the job and a degree in economics, and he was studying for a higher degree in finance and accounts at the Virginia Polytechnic Institute. And thirdly, the interviews were unfair. Other candidates knew beforehand that there was to be a formal examination and had time to prepare. Two of the three questions were the same for everyone but since the examination was not written the questions were unlikely to be put in the same terms to each candidate and in any event there was no hiding the candidates' identity.

He claims damages and costs.

C. In its reply the WHO contends that the process of selection fully complied with the rules. The appointment of staff is at the Director-General's discretion and it is not for the Tribunal to compare the merits of candidates. Miss Merino did have a "working knowledge" of English, which was what the notice required. The selection committee took full account of the complainant's qualifications before unanimously rejecting him. The Organization denies holding a "formal examination" during the interviews.

D. In his rejoinder the complainant submits that the evidence the selection committee had of Miss Merino's

language skills was circumstantial and at odds with the facts. There is but one statement on record about his own fitness for the post - from the chief of the unit to which the two vacant posts belonged - and it mistakenly says he lacked the "educational and work experience qualifications". If there was no examination during the interviews why did the regional Board describe the use of tests as "documented in this case"?

E. In its surrejoinder the WHO answers the complainant's objections in his rejoinder and maintains that the evidence it is relying on is sound. According to the case law, questions and answers at interviews do not amount to examination.

CONSIDERATIONS:

1. The World Health Organization employed the complainant as an accounting assistant at grade G.5 in the Department of Finance of its Regional Office for the Americas. He held three short-term contracts, from 18 September 1989 to 31 August 1990, from 1 October 1990 to 31 July 1991 and from 30 August 1991 to 29 February 1992. On 11 October 1991 the Organization issued a notice about two vacant posts at grade G.6 for accounting assistants in the Department. On 15 October the complainant applied for both posts. The qualifications that the notice required included some training in accounting, very good knowledge of English or Spanish and a working knowledge of the other language.

2. Officials of the Department interviewed the candidates and examined their qualifications. On 9 December 1991 the chief of the Department sent the chief of Personnel a report containing detailed comments on each of them and recommended appointing Mr. Silvio Otero to one post and Mr. Luis Proaño to the other. The selection committee then considered the candidates. In its report of 22 January 1992 it decided by a vote of four to one to recommend Mr. Otero for the one post and Miss Victoria Merino for the other. The chief of Administration approved the recommendations and the two candidates were accordingly appointed.

3. The complainant did not object to the appointment of Mr. Otero but on 21 August 1992 lodged an internal appeal against that of Miss Merino on the grounds that she did not meet the minimum requirements of the notice, that neither the Department of Finance nor the Selection Committee had paid proper heed to his own qualifications, that the process of selection had included an examination that had not been announced beforehand and that the interviews had been unfairly carried out.

4. In its report of 24 June 1993 the regional Board of Appeal recommended rejecting the appeal on the grounds that it was irreceivable, and the Regional Director concurred on 20 August 1993. The case then went to the WHO's headquarters Board of Appeal. In its report of 18 June 1994 the headquarters Board held the appeal to be receivable but recommended dismissing it on the merits. By a letter of 12 July 1994 the Director-General adopted that recommendation. That is the impugned decision.

5. What, then, is the scope of the Tribunal's power of review in cases of this kind?

(a) As many judgments declare, a decision by an international organisation to make an appointment is a discretionary one and as such subject to only limited review. It may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence: see, for example, Judgment 1077 (in re Barahona). Moreover, the Tribunal will exercise its power of review with special caution when the decision is to make an appointment, not being competent to replace the organisation's assessment of the candidates with its own.

(b) Anyone who applies for a post to be filled by some process of selection is entitled to have his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever his hopes of success may be.

6. Within the ambit of its power of review as so defined the Tribunal will consider the formal aspects of the process of selection for the post at issue in this case. The notice of vacancy stated one of the basic requirements to be a very good knowledge of either Spanish or English and a working knowledge of the other. Though Miss Merino had a "very good knowledge" of Spanish the officials of the Department who were in charge of the interviews felt that she did "not meet the language requirements as her command of English is very elementary". The selection committee did say of her "weakness in English":

"This latter factor was not given great weight by the majority since Ms. Merino has been serving successfully in posts in [the Organization] which have a higher requirement for English."

But the Committee does not state on what evidence it came to this conclusion, let alone that that evidence related to duties involving the use of the English language. Moreover, though the Organization identifies the posts that Miss Merino held earlier, it has failed to put acceptable evidence before the Tribunal to justify the conclusion that her good performance in those posts comprised a "working knowledge" of English.

7. The conclusion is that in appointing Miss Merino the Organization broke the basic rule of any process of selection that the successful applicant must have all the minimum qualifications required in the notice of vacancy.

8. The defendant argues that since Miss Merino was an internal candidate it was right anyway to give her priority in the process of selection. The plea fails. As the Tribunal held, for example, in Judgment 519 (in re Carbo), priority is not due to an internal applicant who does not have the minimum qualifications.

9. The complainant's other pleas fail. As was said above, the Tribunal will not assess candidates on merit or rule on an organisation's choice. Nor will it go into the matter of interviews. An organisation has discretion in holding interviews according to its own rules. The interviewers may have put questions to the applicants in this case and given them paper to jot down accounting exercises or make calculations; that does not mean they put the applicants through any formal examination.

10. The complainant states that he "has no interest in returning to the Organization". He asks the Tribunal simply to "grant compensation for the legal wrongs done to him and legal costs". The Tribunal therefore grants him compensation in accordance with Article VIII of its Statute, and it sets the amount at 5,000 United States dollars. It also awards him costs.

DECISION:

For the above reasons,

1. The World Health Organization shall pay the complainant damages in the amount of 5,000 United States dollars.
2. It shall pay him \$2,000 in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Mark Fernando
Julio Barberis
A.B. Gardner