

116th Session

Judgment No. 3295

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. D.A. G. against the Pan American Health Organization (PAHO) on 25 October 2011 and corrected on 25 January 2012, PAHO's reply dated 10 May 2012, corrected on 22 May, the complainant's rejoinder of 26 June and PAHO's surrejoinder of 7 September 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. The complainant, a Brazilian national born in 1950, joined PAHO's Country Office in Venezuela in 1982. From 1989 to 2003 he held a post in PAHO/WHO Headquarters in Washington D.C. With effect from 9 September 2003 he served as PAHO/WHO Country Representative in Venezuela. On 17 December 2008 he was reassigned to a position at the Pan American Foot and Mouth Disease Center in Rio de Janeiro, Brazil.

On 10 September 2009 the Ethics Officer sent an e-mail to the complainant requesting a meeting in order to examine issues that had arisen during the course of a visit that the Ethics Officer had made

to the PAHO Country Office in Venezuela in July of that year. On 18 September the Ethics Officer further explained that he wished to discuss “a situation involving the import privileges of the Organization”.

The complainant met with the Ethics Officer on 16 October 2009. At that meeting it transpired, inter alia, that the Ethics Officer had received a report regarding the importation – in January 2008, while the complainant was serving as Country Representative, – of a vehicle and a shipping container into the Bolivarian Republic of Venezuela using PAHO’s import privileges. The complainant acknowledged that his adult son had originated the shipment in the United States of America and that most, but not all, of the articles on the inventory list for the shipment belonged to his son and his son’s family. Regarding the vehicle, the complainant stated that it was registered in his name when it was imported into Venezuela, but that it had originally belonged to his son and he had purchased it from him. As the complainant had been unable to sell the vehicle prior to his move to Brazil he had left it with his son in Venezuela, but he maintained ownership of it. He indicated that he had asked the Administration for authorisation to import goods into Venezuela and had been informed that he could do so at any time in his private capacity and that he enjoyed the same status as diplomats. He stated that the shipment was made for his private interest and to support the private interests of his son and family and that he had not misused PAHO’s import privileges.

By an e-mail of 21 October 2009 the Ethics Officer forwarded to the complainant a document entitled “Record of Interview” which summarised their discussion of 16 October and he requested that the complainant review it and make any necessary corrections.

By a letter of 3 February 2010 from the Manager of Human Resources Management the complainant was informed that PAHO was investigating whether he had misused PAHO’s duty-free import privileges for the personal benefit of his adult son and his son’s family. She explained that the investigation had been initiated following an anonymous allegation against him and had been carried out by the Ethics Officer. Based on the results of that investigation,

the Administration had concluded that there was *prima facie* evidence to substantiate charges that he had contravened Venezuelan customs regulations, misused PAHO's import privileges and abused his authority as Country Representative by directing PAHO staff to administer a personal shipment of his son and his son's family. She stated such actions constituted a serious breach of PAHO's ethical principles and rules of conduct and, moreover, they constituted misconduct under Staff Rule 110.8.1. Furthermore, if the charges against him were proven, he could possibly be subject to disciplinary measures pursuant to Staff Rule 1110.

The complainant replied in a letter of 11 February 2010. He denied that his actions could be characterised as an abuse of authority and he undertook to inform PAHO as soon as any outstanding administrative and/or tax issues that might exist with respect to the goods imported in January 2008 were resolved. That same day he also provided his amendments to the "Record of Interview" of 16 October 2009, which he had signed and dated 11 January 2010.

By a letter of 8 April 2010 the complainant was notified that, after a careful analysis of all the relevant information and documentation, including his written response of 11 February 2010 and the amended record of his interview with the Ethics Officer of 16 October 2009, the Administration had concluded that there was sufficient evidence to support the charges that had been set out in the letter of 3 February 2009. Based on the serious nature of the findings against him, it had been decided that the appropriate disciplinary measure in his case was summary dismissal for serious misconduct pursuant to Staff Rule 1110.1.6. Furthermore, as a consequence of the nature of his dismissal, under Staff Rule 1075.2 he was not entitled to notice of termination, a termination indemnity, a repatriation grant or end-of-service grant.

On 20 May 2010 the complainant contacted the Venezuelan authorities. He requested a release of the diplomatic franchise under which the vehicle in question had been imported into the country and a calculation of any taxes owed with respect to the vehicle and directions as to how he could pay those taxes.

The complainant filed a statement of intent to appeal with the Board of Appeal on 4 June 2010 and a formal statement of appeal on 6 August 2010, challenging the decision of 8 April 2010. He alleged, in particular, personal prejudice on the part of a supervisor or another responsible official under Staff Rule 1230.1.1, and incomplete consideration of the facts under Staff Rule 1230.1.2. He argued that the challenged decision was illegal inasmuch as it was tainted by procedural irregularities, misuse of authority and error of law.

In its report of 14 June 2011 the Board of Appeal held, among other things, that his due process rights had not been violated, that he had not proven bias on the part of the Ethics Officer, that the disciplinary sanction imposed on him was proportionate, and that he had not suffered substantial material injury given that his separation from service had been effected just one month prior to his mandatory retirement age. The Board unanimously concluded that he had not substantiated his case and it recommended that his appeal and related requests for redress be dismissed.

By a letter of 15 August 2011 the complainant was informed that the Director of PAHO endorsed the Board's conclusions and recommendations. That is the impugned decision.

B. Referring to the Tribunal's case law, the complainant submits that the impugned decision is tainted by numerous procedural irregularities which, in his view, demonstrate a lack of seriousness on the part of PAHO regarding its treatment of his case. First, although the anonymous report triggering the investigation was received in 2008, PAHO did not begin its investigation until the summer of 2009. Second, PAHO failed to provide him with formal notification that he was under investigation. Third, during the investigation the Administration considered evidence which the complainant alleges was obtained illegally. Fourth, PAHO has failed to provide him with records of the witness interviews conducted by the Ethics Officer, or indeed, a copy of the investigation report. Fifth, the impugned decision is dated 15 August 2011, despite the fact that it was transmitted to him by way of an e-mail of 12 August.

He asserts that according to the case law, the impugned decision is tainted by error of law because the disciplinary sanction imposed on him violates the principle of proportionality. PAHO should have considered the mitigating circumstances applicable in his case, in particular, the absence of bad intention on his part. Regarding the charge of abuse of PAHO's import privileges, he states that he decided to combine his personal items with items belonging to his son's family in one single shipment due to concerns about security. Furthermore, his son enquired of the Venezuelan authorities whether he had to pay taxes on the shipment of his family's belongings, but the document he was given indicates that, based on his family's circumstances, their personal furnishings were not subject to taxation. The complainant further disputes PAHO's characterisation of the nature of the household goods contained in the shipping container. Regarding the vehicle, he submits that he was not aware that it was subject to import tax. He subsequently requested the relevant authorities to provide him with the amount owing in this respect and he has paid the importation tax accordingly. Moreover, he argues that PAHO should have considered his almost 28 years of dedicated service when it determined the appropriate disciplinary measure to impose on him.

The complainant contends that the impugned decision is further tainted by misuse of authority on the part of PAHO and the Ethics Officer. He alleges that the investigation was conducted "in a spirit of revenge" and was influenced by events that occurred in 2002. In his view, both the Board of Appeal and PAHO's Director failed to properly consider his arguments related to/on this issue. He points out that the Tribunal does not require conclusive proof in this respect, nor has it held that misuse of authority cannot occur if there has been a lapse of time between events. He provides further examples of PAHO's actions, which, in his view, are evidence of a pattern of misuse of authority.

Lastly, he submits that, as a consequence of the impugned decision, he has suffered moral injury due to the damage to his good name and reputation. In addition he has suffered material injury

because he was unable to benefit from a promised two-year contract extension, and he was not granted any terminal emoluments.

The complainant asks the Tribunal to set aside the impugned decision. He seeks reinstatement in his former post or reassignment to another post in accordance with Staff Rule 1110. He claims payment of his salary, allowances and pension contributions, with retroactive effect from 9 April 2012 until his retirement, and costs.

C. In its reply PAHO contends that the complainant was afforded due process throughout the matter. In its view, the investigation took place within a reasonable time after receipt, by the Ethics Office, of the anonymous allegations and the complainant received proper notice of the investigation. Indeed, he was notified in writing twice, by way of the e-mails of 10 and 18 September 2009 from the Ethics Officer, and he was notified a third time, in person, during the meeting of 16 October. PAHO denies that any evidence it used was obtained illegally and it points out that all the documents in question are official records belonging to it and that its Ethics Officer has unfettered access to any and all such records. Furthermore, the complainant was given full disclosure of all the information and documents regarding the charges against him. Referring to the incongruence between the date of the letter communicating the impugned decision and the date of its delivery, PAHO acknowledges that while this is unfortunate, it is an irrelevant typographical error.

PAHO submits that the Director's decision to summarily dismiss the complainant was not tainted by error of law. Referring to the case law, PAHO states that the disciplinary measure imposed on him was proportionate to his misconduct. As an international civil servant and PAHO's Head of Mission during the material time, the complainant had a duty to obey PAHO's rules and to respect the laws, institutions and public policy of the host state where he was accredited. He had a duty to set an example for his staff and others. Instead, he displayed a disregard for the laws of the host country and exploited PAHO's privileges and immunities for his personal benefit and for the benefit

of his son. It challenges the complainant's interpretation of the national laws and it points to the nature and quantity of various goods that were contained in his shipment. It contends that to date, no taxes have been paid on any of these items. It further challenges his behaviour regarding the importation of the vehicle in question, both prior to and after its arrival in Venezuela in January 2008. PAHO asserts that his actions have had a clear and unequivocal negative impact on it locally and among other international organisations and donors. It considers that any possible mitigating circumstances relating to his years of service are heavily outweighed by his misconduct.

PAHO contends that the complainant's claims of misuse of authority on its part and on the part of the Ethics Officer are unfounded. There is no evidence to suggest that the events in 2002 created any animosity on the part of the Ethics Officer, nor did it affect his ability to objectively conduct an investigation. The defendant points out that, in cases of allegations of misconduct, there is a clear separation of functions between the investigative stage and the decision-making stage. The Ethics Officer had no role in the impugned decision. It was taken by the Manager of Human Resources Management and it was based solely on her evaluation of independent documentary evidence and the complainant's own admissions.

Lastly, PAHO denies that the complainant suffered any moral prejudice flowing from the impugned decision. The pleadings, deliberations and findings of the Board of Appeal and the final decision of the Director are confidential and are shared internally within PAHO on a need-to-know basis. PAHO argues that the complainant has failed to prove that his good name and reputation have been affected and it denies that he was promised a two-year extension of his contract.

D. In his rejoinder the complainant develops his pleas.

E. In its surrejoinder PAHO maintains its position in full.

CONSIDERATIONS

1. This complaint concerns disciplinary action taken against the complainant. He joined PAHO in 1982. In September 2003, after serving in various capacities, he was appointed as PAHO/WHO Country Representative in Venezuela. In December 2008, he was reassigned to the position of Senior Advisor, Communicable Diseases, in Rio de Janeiro, Brazil.

2. In October 2008, PAHO's Ethics Office received an anonymous tip on the PAHO Integrity Helpline. The informant alleged that the complainant had used PAHO's import privileges to import a vehicle and a container of household goods from the United States to Venezuela for the personal benefit of his son. The informant alleged that the imported goods were used by the complainant's son to open a hotel.

3. In July 2009, the Ethics Officer travelled to Venezuela on routine business and investigated the informant's allegations. In the course of his investigation he reviewed a number of shipping documents, official records, and government forms and researched the applicable import and tax requirements. The Ethics Officer met with the complainant in October 2009. The complainant acknowledged that, for the most part, the household goods in the shipping container belonged to his son. He stated that he purchased the vehicle from his son before importing it. However, he was unable to find a buyer for the vehicle when he left Venezuela, so he left it with his son, and uses it when he returns to the country.

4. On 11 December 2009 the Ethics Office submitted the results of its investigation to the Manager of Human Resources Management (HRM). On 3 February 2010 the HRM wrote to the complainant informing him that there was sufficient evidence to prove *inter alia* that he had:

1. Assisted his son and his son's family to obtain special exempt status by importing their household goods and vehicle;

2. Violated PAHO's Code of Ethical Principles and Conduct which requires staff to respect the laws of the country in which they are working;
3. Violated PAHO's Code of Ethical Principles and Conduct by influencing other persons to use official time to perform activities other than those required in the performance of official duties.

5. The HRM asked for a response by 12 February 2010. On 11 February 2010, the complainant sent his reply. On 8 April 2010, the complainant was informed of the decision to summarily dismiss him for serious misconduct pursuant to Staff Rule 1110.1.6. In June 2010, the complainant launched an appeal challenging that decision. Ultimately, on 15 August 2011, the Director of PAHO accepted the Board of Appeal's recommendation and dismissed the appeal. That is the impugned decision.

6. The complainant submits that the impugned decision is tainted by procedural irregularities: that PAHO did not take the matter seriously is evidenced by the fact that the investigation was not started until a year after the anonymous allegations were received; he was not given notice of the investigation; the Ethics Officer used documents he had obtained illegally in the conduct of his investigation; he was not given the Ethics Officer's investigation report or the records of his witness interviews and; although the impugned decision is dated 15 August 2011 it was transmitted to him by the Secretary of the Board of Appeal in an e-mail dated 12 August 2011.

7. It is true that an organisation should investigate allegations of misconduct in a timely manner both in the interests of the person being investigated and the organisation. These interests include, among other things, safeguarding the reputations of both parties and ensuring that evidence is not lost. However, having regard to the source and nature of the allegations that required a preliminary assessment as to whether an investigation should be undertaken, the fact that the complainant was no longer the Country Representative in Venezuela, and the fact that the Ethics Officer had an already

scheduled trip to Venezuela, there was no undue delay in the conduct of the investigation. More importantly, the complainant has not identified any prejudice stemming from the conduct of the investigation itself.

8. Regarding the question of whether the subject of an investigation must be given notice of the investigation, in Judgment 2605, under 11, the Tribunal held as follows:

“The Tribunal considers that informing a person in advance that an investigation into certain allegations will be undertaken is not a requisite element of due process. Although notification prior to the start of an investigation may well be the preferred course of action, in certain circumstances alerting an individual to the fact that an investigation is to be undertaken may well compromise the investigation. As well, it may be through a routine review or audit that irregularities are encountered. It is once irregularities have been identified that the individual must be informed of the allegations of irregularities with sufficient precision to enable him to respond adequately; he should then be given an opportunity to respond, in particular to defend himself against the allegations, and to make such further response as the circumstances require prior to any conclusions being reached.”

9. In this case, the irregularities were identified in the course of the Ethics Officer’s preliminary investigation in July 2009. Subsequently, on 10 September the Ethics Officer informed the complainant that he wished to meet with him to discuss some issues that had arisen during his trip to Caracas. In the Ethics Officer’s response to the complainant confirming the complainant’s availability to meet on 16 October, the Ethics Officer noted that he wished to discuss, among other things, a “situation involving the import privileges of the Organization”. At the 16 October meeting, the Ethics Officer informed the complainant that there was sufficient evidence to conduct a full investigation of the allegations made against him. This was a timely notice of the investigation in the circumstances.

10. The complainant claims that while in Venezuela in July 2009, the Ethics Officer took some documents in relation to the

shipment belonging to the complainant without the Country Representative's approval. As the complainant has not identified the documents in question and established that they were in fact his personal documents this allegation will not be considered.

11. The complainant also takes the position that PAHO failed to give him a warning or the opportunity to correct the situation prior to bringing disciplinary action. In Judgment 1661, under 3, the Tribunal framed an organisation's obligations in the following terms:

“Before an organisation imposes a disciplinary penalty such as dismissal it must warn the staff member and give him the opportunity not only of stating his own case but also of refuting the organisation's: in other words, there must be due process. So he must be told of the charges and of the evidence against him. If the proceedings are to be properly adversarial, he must be free to give his own version of the facts, refute that evidence, adduce his own, take part in the discussion of it, and at least once cross-question the expert and other witnesses. See, for example, Judgments 512 [...] under 5; 907 [...] under 4; 999 [...] under 5; 1082 [...] under 18; 1133 [...] under 7; 1212 [...] under 3; 1228 [...] under 4; 1251 [...] under 8; 1384 [...] under 5, 10 and 15; 1395 [...] under 6; 1484 [...] under 7 and 8.”

12. The complainant's submission is rejected. The letter of 3 February 2010 detailed the charges against him and appended the documents upon which the Administration relied. It warned him that if proven, the actions constituted misconduct for which disciplinary measures, including dismissal or summary dismissal, could be imposed. It gave him an opportunity to respond to the allegations by written arguments, information and documentation. The Organization's procedure was in compliance with the relevant Staff Regulations and Rules and the Tribunal's case law.

13. The complainant alleges that he was not given a copy of the Ethics Officer's investigation report and the records of witness interviews. It is well established in the Tribunal's case law that a “staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him” (see Judgment 2229, under 3(b)). It is observed that the Ethics

Officer's role is investigative and limited to fact-finding. In the present case, the impugned decision was not based on any witness interviews or the investigative report itself. Instead, the decision was based on the evidence disclosed in the letter of 3 February.

14. The complainant claims that the imposition of the disciplinary measure of summary dismissal offends the principle of proportionality. He submits that the Director failed to take into account the mitigating circumstances of his lack of corrupt motive and his previous good record. The complainant makes a number of allegations in support of his claim that his actions were not improperly motivated. It is observed that the assertions are largely attempts to excuse or justify the misconduct. As to his previous good record, it is clear from a reading of the Board of Appeal's report and, in turn, the Director's decision that they were cognisant of it and clearly took it into account.

15. As the complainant points out, the date on the impugned decision is incorrect. This is an unfortunate error, however, the complainant has not been prejudiced by the error.

16. In Judgment 2944, under 50, the Tribunal described the test for proportionality as the disciplinary measure must not be "manifestly out of proportion" to the misconduct. In this case, the Tribunal observes the seriousness of the complainant's actions. He misused PAHO's resources and immunity in a fashion that was deliberate and careless; he risked PAHO's reputation and its relationship with the government of Venezuela; he breached his duty of loyalty to PAHO; and his conduct was incompatible with the performance of his duties as PAHO Country Representative in Venezuela. In these circumstances, it cannot be said that summary dismissal was disproportionate to the misconduct.

17. The complainant alleges an abuse of authority grounded on an encounter that he had with the Ethics Officer in 2002. Leaving

aside the fact that the Ethics Officer had no role in the decision-making process in relation to the misconduct finding, the complainant has not adduced any cogent evidence that would support a finding of abuse of authority.

18. As the complainant has not shown any reviewable error, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet