

106th Session

Judgment No. 2788

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. P. against the Pan American Health Organization (PAHO) on 12 May 2007 and corrected on 19 June, PAHO's reply of 4 October, the complainant's rejoinder dated 20 October 2007 together with the addendum thereto dated 4 February 2008 and the Organization's surrejoinder of 27 March 2008;

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

Having examined the written submissions and decided not to order hearings, 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 former official of PAHO, is a United States national born in 1949. He joined the Organization on 16 February 2006 under a two-year contract as Chief of the Accounts Operations Unit at level P.4. His appointment was subject to a probationary period of one year. In April 2006 the complainant and his first-level supervisor, the Manager of the Department of Financial Management and Reporting, signed the Performance Planning and Evaluation Form establishing the former's work objectives for the period from

May 2006 to April 2007. From June to September 2006 the complainant's supervisor also assumed the duties of Acting Director of Administration.

As part of the complainant's performance evaluation, a mid-year Performance Planning and Evaluation Form was completed by his first-level supervisor in November 2006. The work objectives as set out therein were not identical to those that had been established in April 2006. Accordingly, it was noted in the form that they had been modified. In her assessment the complainant's supervisor indicated that four objectives had been fully met, nine had been met only partially and another four had not been met at all. She pointed out a number of areas in which she considered that the complainant had not performed at the expected level and noted that the requirements of his position demanded a significantly greater personal involvement and effort on his part. She stated that his performance within the next few months would determine whether his appointment would be confirmed. The complainant signed the form in December 2006. Expressing his disagreement with his supervisor's assessment, he indicated that during her tenure as Acting Director of Administration she had not provided him with adequate guidance and supervision.

On 8 January 2007 the complainant's supervisor completed the year-end Performance Planning and Evaluation Form. She indicated that the complainant had met three work objectives fully and 17 partially, but that he had failed to meet nine. Referring to specific examples, which in her view demonstrated that his performance had fallen short of expectations, she observed that his failure to meet some very critical objectives would have had repercussions for the Organization's finances, had she not personally intervened. She considered that the complainant lacked the leadership and abilities necessary to fulfil the responsibilities of the Chief of the Accounts Operations Unit, and therefore recommended against the confirmation of his appointment. The first-level supervisor's evaluation and recommendation were approved by the complainant's second-level supervisor, the Director of Administration, on 12 January 2007. The complainant signed the year-end Performance Planning and

Evaluation Form on 16 January 2007, stating his disagreement with the evaluation.

By letter of 29 January 2007 the Manager of the Department of Human Resources Management informed him that the Administration supported his supervisors' conclusion that he had not been able to perform the functions of his position successfully. He was thus advised that his appointment would not be confirmed and that his last day of service would be 28 February 2007.

The complainant appealed that decision to the Director of PAHO on 10 February. By letter of 2 March 2007 the Director replied that she had decided to maintain it. That is the impugned decision.

B. The complainant submits that his first-level supervisor did not provide him with adequate guidance and supervision in the exercise of his functions during the three-and-a-half months she was Acting Director of Administration. He also submits that he did not receive a fair evaluation because PAHO failed to comply with its rules governing performance evaluation. He contends that the work objectives that had been agreed upon between himself and his supervisor in April 2006 were subsequently modified by the latter, and thus his performance was assessed on the basis of work objectives to which he had not consented and of which he only became aware in the course of his mid-year evaluation. Lastly, he draws attention to the fact that his supervisor did not submit his mid-year performance review by mid-August 2006 i.e. within six months of his taking up his duties, as required by the rules governing performance evaluation, but rather in October and November of that year. As a result, he argues, he was not given sufficient time to remedy any perceived deficiencies.

He asks the Tribunal to quash the impugned decision and to order that he be reinstated in the position of Chief of the Accounts Operations Unit. He also asks that his probation be extended by three-and-a-half months, a period equal to that during which his supervisor assumed the duties of Acting Director of Administration. He seeks 500,000 United States dollars in compensatory damages and 1 million dollars in punitive damages for the "deliberate

mis-application” of PAHO’s rules and for the damage caused by his first-level supervisor to his professional reputation as a certified public accountant. He requests the payment of the wages due to him from March 2007 and “until the case is settled”.

C. In its reply the Organization submits that the Director’s decision not to confirm the complainant’s appointment was appropriate and reasonable. It recalls that, in accordance with the Tribunal’s case law, it must be allowed the widest measure of discretion in deciding whether to confirm the appointment of a probationer.

PAHO contends that the impugned decision was exclusively based on the complainant’s unsatisfactory performance and unsuitability for the position of Chief of the Accounts Operations Unit, and was thus in line with Staff Rule 1060, which provides that an appointment shall not be confirmed if the staff member’s performance or conduct is not satisfactory during the probationary period. It argues that, as reflected in his year-end Performance Planning and Evaluation Form, the complainant had a superficial understanding of the issues under his responsibility and lacked the initiative and leadership necessary for fulfilling the functions of his position.

The Organization asserts that it fully complied with its rules and procedures. In its opinion, there was no delay in the complainant’s mid-year evaluation, given that the Staff Rules and Staff Regulations do not provide that such evaluation must be performed exactly six months into the staff member’s term of employment, but at such intervals as the work situation or the staff member’s performance requires. Moreover, the complainant was receiving constant and detailed feedback on his performance throughout his probation and hence may not argue that he was not given adequate warning or the opportunity to improve. PAHO submits that the complainant’s supervisor did not modify the established work objectives, but merely broke them down into sub-points so that it would be clear to the complainant in which specific areas he needed to improve. The Organization rejects as unsubstantiated the complainant’s allegation that he received inadequate guidance and supervision, emphasizing that

his supervisor advised and encouraged him on a regular basis even during her tenure as Acting Director of Administration.

D. In his rejoinder the complainant contests that the decision not to confirm his appointment was appropriate or reasonable. He reiterates that he was not offered proper guidance in the exercise of his duties and denounces what he considers as PAHO's attempt to rely on its discretionary authority to cover up the absence of adequate supervision. He submits that the decision was based on hearsay evidence of unsatisfactory performance, which, in his view, demonstrates lack of good faith on the part of the Organization. He claims additional relief for the "financial and tax damage" he sustained as a result of the Organization's failure to provide him with the information he needed in order to file his United States tax returns for 2007.

E. In its surrejoinder the Organization submits that the complainant's claim for additional relief should be dismissed for failure to exhaust the internal means of redress and for want of merit, given that the relevant tax information was mailed to the complainant in early 2008. It otherwise maintains its position in full.

CONSIDERATIONS

1. The complainant impugns the decision of 2 March 2007 by which the Director of PAHO maintained an earlier decision of the Department of Human Resources Management not to confirm his appointment and to separate him from service at the end of his probationary period on 28 February 2007. Before turning to the complainant's allegations, it is useful to reiterate certain principles governing probation that are of particular relevance to the present case. Its purpose is to provide an organisation with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organisation must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the

unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning that the continued employment is in jeopardy (see Judgment 2529, under 15).

2. In the present case, the complainant alleges a number of flaws in relation to his probation. First, he submits that his first-level supervisor did not provide him with adequate guidance and supervision during his probationary period. According to the complainant, this was particularly evident during the time his supervisor had the additional responsibilities of Acting Director of Administration.

3. The extensive documentation provided by the Organization refutes this assertion. After the work objectives had been established in April 2006, the complainant's supervisor met with him weekly to review his work progress and to discuss the activities of the Accounts Operations Unit. In addition, the documents reflect extensive communication by e-mail. These weekly meetings and e-mail exchanges continued throughout the time during which the complainant's supervisor had additional responsibilities.

4. The documents also detail numerous concerns regarding the complainant's performance starting in April 2006. These concerns included: a failure on the part of the complainant to assume key responsibilities of the post; his inability to answer technical officers' questions; his inability to conduct research in the Organization's main accounting software; his failure to identify significant errors in financial reports; his failure to acquire an understanding of the accounting for three of PAHO's procurement funds; numerous errors in his own travel report; and a failure to demonstrate initiative concerning accounting issues. In addition to making the complainant aware of the problems as they arose, the documents show that throughout the relevant time his supervisor provided him with more than adequate guidance and supervision.

5. Second, the complainant submits that his supervisor substantially altered the work objectives initially agreed upon in April

2006 without advising him of the changes. It is well established that an organisation must inform a probationer of the criteria that will be used to evaluate performance. In the present case, the Organization contends that the work objectives were not changed. Instead, it states that the inclusion of the sub-points was simply an elaboration of the established work objectives to provide additional guidance to the complainant. The defendant also points out that an elaboration of the work objectives should not be necessary for a certified public accountant and a person with the complainant's education and experience. In responding to this argument, the complainant did not identify specific objectives that were new nor did he refute the contention that a person with his education and experience would have known that the sub-points were elaborations of the main work objectives. In these circumstances, the Tribunal accepts the Organization's argument.

6. Lastly, the complainant submits that he was prejudiced by the lateness of his mid-year evaluation in that he was not given sufficient time to remedy the deficiencies perceived in his performance. It should be noted that in making this plea the complainant does not rely on a breach of the Staff Rules and Staff Regulations.

7. The Tribunal observes that, starting as early as April 2006, the complainant was made aware of the numerous deficiencies in his performance and was given extensive guidance regarding the Organization's expectations. In early September 2006 at a weekly meeting his first-level supervisor specifically advised him that the post of Chief of the Accounts Operations Unit might not be "a good fit" for his skills and competencies. In mid-October, she again raised her concerns regarding his skills and competencies for the post. The complainant responded with an emotional outburst and did not acknowledge his deficiencies. She reassured him that she would continue to work with him to determine what was best for the Organization. In early November his supervisor again raised her concerns with the complainant. At this time, he indicated that he was being considered for another post and enquired about the status of an

assignment grant he had received from the Organization should he leave. He later advised that he had not been selected for the post.

8. On 13 December 2006 the complainant's supervisor advised him that his skills and competencies did not match those of the post of Chief of the Accounts Operations Unit and suggested that he might wish to consider other employment options. He responded that he wanted to stay with the Organization and that, if he did, he could facilitate a multimillion United States dollar contribution to the Organization. He also expressed his interest in another post within the Organization. His supervisor informed him that it would be difficult to recommend him for that post, to which the complainant replied that, if she did make the recommendation, he would make sure that there were no audit findings against the Department of Financial Management and Reporting. His supervisor advised him that his suggestions were inappropriate.

9. The Tribunal finds that from at least April 2006 the complainant was told about the deficiencies in his performance and was given adequate guidance and ample opportunity to improve. It was his own inability to recognise his deficiencies that led the Organization not to confirm his appointment.

10. In his rejoinder the complainant raised for the first time a claim that the Organization had caused him financial harm due to its failure to provide him with certain tax information on a timely basis, for which he seeks compensation. As the complainant did not pursue this matter through the internal appeal process, it is irreceivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet