

SEVENTY-SEVENTH SESSION

In re YATH-CRUCES

Judgment 1347

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Alida Yath-Cruces against the Pan American Health Organization (PAHO) on 30 March 1993 and corrected on 13 May, the Organization's reply of 10 August, the complainant's rejoinder of 22 September and the PAHO's surrejoinder of 3 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article I of the Staff Regulations, Staff Rules 110, 1110 and 1130 of the PAHO and Manual paragraph II.2.1130;

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 PAHO has a "University Assistance Program" (UAP) under which it gives financial aid to staff members engaged in university studies. In 1978 it issued a "Policy statement on staff development and training" which provides under section 15 for costs to be "shared" with a staff member who has been granted approval for his course if it is in the Organization's interest and if he meets certain academic requirements.

The complainant, a Guatemalan citizen, joined the staff of the PAHO in 1975 as a typist-clerk at grade G.3. She has been an office assistant at grade G.6 since July 1984.

On 19 May 1983 she submitted a "training nomination and authorization form" to get financial aid under the UAP for a course in the "Community Studies Program" of the American University at Washington, D.C. She claimed 75 per cent of the cost of tuition and other related fees, the other 25 per cent to be left, according to the form, "for staff member" to pay.

In a memorandum of 18 July 1983 the Chief of Personnel authorised reimbursement of 75 per cent of the cost of tuition but not of "books and course materials". He told her that refund would be subject to satisfactory completion of her course and "evidence of payment".

Having met her first claim in 1983, the PAHO did so for thirteen other courses up to 1989. She also got financial aid from the University during the same period.

In a memorandum of 12 December 1989 the Chief of the Staff Development and Training Unit of the Personnel Department, known as APL/SDT, asked her to say how much she herself had paid towards tuition for each course during the 1988-89 biennium and how much the Program had paid. Some months after returning from maternity leave she provided a statement of accounts from the University dated 4 March 1991 and covering the years 1988 to 1991. On 9 May 1991, in answer to a request from the PAHO and with her consent, the University supplied a breakdown of her account as from 1983.

In a memorandum of 11 July 1991 the Chief of APL/SDT told her that the Organization's policy was to reimburse 75 per cent of "actual payments made by the student only"; that it had overpaid her in the amount of 7,182 United States dollars; that it would be making arrangements to recover the overpayment; and that under the circumstances her re-enrolment in the University Assistance Program did not seem "possible".

In a memorandum of 16 July 1991 the Chief of Administration asked the internal auditor to review her case for "apparent discrepancies in the use of the Organization's funds". The auditor reported on 24 July 1991 that the complainant must have known "she was making money on her courses at PAHO's expense".

By a letter of 19 August 1991 the Chief of Personnel informed her that "financial discrepancies" in her favour which the auditor had revealed were a "very serious matter"; he accordingly gave her notice under Staff Rule 1130 ("notification of charges and reply") of dismissal for misconduct and invited her to reply within eight days to the

charge of intent to defraud the PAHO.

On 27 August 1991 she sent the Chief of Personnel a reply denying dishonourable or fraudulent behaviour on her part and offering to repay the disputed sums.

On 30 August she, her counsel, the Chief of Administration, the Chief of Personnel and a staff representative attended hearings on her case.

In a letter of 7 October 1991 the Chief of Personnel informed her that the Administration had cleared her of intent to defraud; but her having applied for and got more money for university studies than the authorised amounts cast doubts on her judgment; he was therefore relieving her of responsibility for petty cash and called on her to repay the amounts she had got from the PAHO towards tuition.

On 2 December 1991 she sent the secretary of the Headquarters Board of Appeal notice of intent to appeal against "arbitrary removal of duties" and improper disciplinary action. In its report of 4 November 1992 the Board recommended that the PAHO should restore her financial duties and reverse the ban on her rejoining the UAP. But the Board recommended rejecting her claims to refund of the amounts she had already paid back and to moral damages.

In a letter of 29 December 1992, which she impugns, the Director agreed to consider letting her participate in the UAP but failed to restore her former financial duties.

B. The complainant submits that the PAHO took unlawful disciplinary action against her. She has three main pleas.

She contends, first, that there were no grounds for disciplinary action. Staff Rule 1110.1 says that "a staff member who fails to observe the standards of conduct as defined under Article I of the Staff Regulations and Staff Rule 110 shall be subject to disciplinary measures". Of the various obligations that Article I cites only those mentioned in paragraph 1.7 might have a bearing on her case. That paragraph forbids the acceptance of favours, gifts or remuneration, among other items, from sources other than the PAHO only "if such acceptance is incompatible with [the official's] status as an international civil servant". But accepting aid from the American University's Community Studies Program cannot have been at odds with her status since the PAHO approved of her taking part.

As for the two sections of Rule 110 that go beyond the provisions in Article I, paragraph 110.6 requires officials to report to the Director any gifts from outside sources, and she did so. Paragraph 110.8 defines "misconduct", and the only possibly relevant clause is 110.8.3, which forbids "any improper use or attempt to make use of [the official's] position as a staff member for his personal advantage". Since the complainant used all the money for her education she did not stand to gain any "personal advantage" within the meaning of 110.8.3. Besides, the PAHO cleared her of any intent to defraud.

Her second plea is that even if disciplinary action was warranted, the measures actually taken were improper. Under 1110.1 there are five types of disciplinary action: oral reprimand, written reprimand, reassignment with or without reduction in grade, dismissal for misconduct and summary dismissal for serious misconduct. The complainant had to repay with interest - in only twelve months - the monies received and lost "petty cash responsibilities" and her right to participate in the PAHO's University Assistance Program. Such measures were not authorised under 1110.1.

Lastly, she objects to the PAHO's changing the rules ex post facto. There being no mention of the UAP in the rules, the only written guidelines were in the letters authorising reimbursement of the costs of particular courses, none of which addressed the issue of financial aid from other sources. Only after the material time did the PAHO change the letters to require reimbursement of amounts paid to staff members who had received grants from other sources. Having qualified for aid and used the funds she got for none but the intended purpose, she found herself having to reimburse the Organization, which publicly disgraced her and banned her from taking part in the UAP. She had to borrow money to meet the PAHO's "heinous" deadline for repayment: that was not what she had in mind when she offered to pay the PAHO back.

She seeks the restoration of her petty cash responsibilities and the right to take part in the UAP; refund of the \$7,308.72 she has already repaid to the PAHO; payment of the expenses she incurred in the amount of \$7,159.36 to meet the PAHO's deadline; and awards of moral damages and costs.

C. In its reply the PAHO contends that it did not take disciplinary action against her under 1110.1. Having established that she had no intent to defraud, it had no cause to open disciplinary proceedings. But since she "transgressed the intent, letter and legitimate purpose" of the UAP the PAHO had, for the sake of sound administration, to recover any sums mistakenly paid out. Since she had failed to show a firm grasp of financial procedures it was only prudent to take away her responsibility for petty cash.

The PAHO denies changing the rules ex post facto: the purpose of the UAP is to relieve staff members of 75 per cent of their actual tuition costs, as the letter approving her application made plain. But she claimed reimbursement of the costs which the University was meeting. Instead of \$8,602.50 she should have got \$1,420.50. It does not matter how she used the difference inasmuch as it amounted to unjust enrichment.

The PAHO points out that the Director told her in his letter of 29 December 1992 that he was willing to consider her for further participation in the UAP in keeping with established procedure, but she has not applied for further assistance. Nor has she sustained any moral injury.

D. In her rejoinder the complainant points out that over a period of six years she reported payments from the Community Studies Program of the University on fourteen statements of charges, each of which showed plainly that the Program had met her tuition costs. But the Administration consistently granted her aid. In the absence of express provisions in the rules that practice is binding.

If the grant of such aid was wrong the Administration is to blame for failing to take due account of the information she gave it. By removing her petty cash duties the PAHO acted as if she, not the Administration, had authorised the fourteen payments and it besmirched her good name. As she had duly discharged financial duties since 1984 it was vindictive, not "prudent", to take them away.

As to her participation in the UAP she observes that the Director merely said he would "consider" the matter: that is not the same as allowing her back in.

E. In its surrejoinder the Organization presses its earlier pleas in the reply. That the Administration failed to treat a line in her statements of charges as payment of tuition costs does not warrant unjust enrichment. Nor may she plead ignorance of the PAHO's policy on financial aid for study: the Organization had set out its policy in terms any university student should understand. She is wrong to treat any duties as her "property". The Director has acknowledged her right to take part in the UAP.

CONSIDERATIONS:

1. The complainant, who joined the staff of the PAHO in 1975, served from July 1984 as an office assistant at its headquarters in Washington, D.C., at grade G.6. Between May 1983 and June 1989 she followed fourteen courses at the American University in that city. For that purpose she applied for and obtained financial assistance under the Organization's University Assistance Program (UAP), which entitled a staff member following approved university courses to repayment of 75 per cent of tuition costs. In answer to her first application for such assistance the PAHO authorised payment of 75 per cent of the cost of her tuition and explained that "the cost of books and course materials" was not covered.

2. Under its Community Studies scholarship scheme the American University allowed the complainant full remission of 4,986 United States dollars in tuition fees for six courses and substantial remission of \$4,565 for another seven. The PAHO alleges no irregularity over the fourteenth course; but for those thirteen courses the tuition fees came to a total of \$10,401, the University waived payment of \$9,551, and the complainant therefore actually spent only \$850. The PAHO's position is that she was entitled to reimbursement only of \$637.50, or 75 per cent of her actual expenditure, whereas she had claimed and obtained \$7,819.50, a sum purporting to correspond to 75 per cent of \$10,401. So the over-payments, says the Organization, totalled \$7,182.

3. By a memorandum of 11 July 1991 the Chief of the Staff Development and Training Unit, known as APL/SDT, informed the complainant of her obligation to return the sums overpaid and added that in the circumstances her re-enrolment in the UAP did not seem possible.

4. By a letter of 19 August 1991 the Chief of Personnel gave the complainant notice of dismissal under Staff Rule 1130 on the grounds of "misconduct". After reviewing the matter, however, he informed her by a letter dated 7 October 1991 of his conclusion that she had had "no real intent" to defraud the PAHO but he ordered her to refund

the over-payments; he said that because she had obtained the over-payments the matter "raises questions about your good judgment" in the exercise of some of her duties, which related to the handling of petty cash; and he decided that she would therefore be relieved of "those duties relating to financial responsibilities" for petty cash and given "equivalent non-financial duties". The over-payments were in due course recovered from her.

5. On appeal the Headquarters Board of Appeal held in its report dated 4 November 1992, first, that the complainant should not have applied for the reimbursement of tuition costs remitted by the University, that the PAHO had acted correctly in requiring her to refund the over-payments and that her claims to moral damages and to the return of the amounts she had refunded should therefore be rejected; but it held, secondly, that because she had not acted with intent to defraud no disciplinary action should have been taken against her, and it therefore recommended restoring her responsibilities for petty cash duties, letting her take part in the UAP and paying one-half of her costs.

6. In a letter of 29 December 1992 the Director of the PAHO informed the complainant that he disagreed with the second conclusion and recommendation and that the modification of her duties did not amount to disciplinary action but was only an "administrative precaution" which the circumstances justified; however, he was prepared to consider her future participation in the UAP in accordance with its "policies, priorities and procedures". That is the impugned decision.

7. The complainant now seeks (a) the restoration of her right to participate in the UAP; (b) the repayment of the amounts she was compelled to refund to PAHO, including interest, and the further costs incurred by her; (c) the restoration of her responsibilities for petty cash; and (d) awards of moral damages and costs.

8. The PAHO confirms in its reply to the complaint that in the impugned decision the Director has recognised her right to participate in the UAP. That being so, there is no need to entertain claim (a).

9. As to claim (b) the complainant pleads that payment to her of the \$7,182 was justified for two reasons.

10. First, she says that she spent the amount on expenses incidental to the courses she followed, such as books, materials, transportation, parking fees and child-care. She contends that she used for educational purposes all the sums received by her from both sources and that the PAHO had never unambiguously prohibited the receipt of financial assistance from more than one source.

11. It was quite clear, however, that both the Organization and the University provided support only in paying tuition fees, not for any other purpose. The complainant was therefore not entitled to set off any other expenses she had incurred against the remission of tuition fees allowed by the University. What she was entitled to obtain from the PAHO was "reimbursement", i.e. recovery of 75 per cent of sums she had actually spent, not of the charges for tuition. The conclusion is that she might not recover under the UAP any part of what the University had granted, either directly or by way of remission of tuition charges, and that she had acted improperly by claiming reimbursement of anything more than 75 per cent of the \$850 she had actually spent on tuition.

12. Secondly, the complainant says that she submitted statements of charges, supplied at the time by the University, in support of her periodic claims to reimbursement; from those statements APL/SDT was throughout aware that she was receiving financial assistance from the University; yet it paid her the full amounts she had claimed. That, she contends, was its "consistent administrative practice" over a long period, and it conferred on her entitlement to 75 per cent of the tuition charges.

13. She has produced only one such statement of charges for scrutiny by the Tribunal. It shows a credit of \$1,044 on 8 July 1989, which was merely described as "Community Studies" without any indication as to whether it came from the University or had been paid by herself. But the detailed summary later provided by the University revealed that it consisted of a remission of \$894 in charges for tuition and of a payment of \$150 made by the complainant on 18 July 1989. That statement was thus incomplete and inaccurate. The conclusion is that she did not take sufficient care to make full disclosure to the Organization of the assistance given by the University.

14. Having obtained financial benefits to which she was not entitled, the complainant was under an obligation to refund the over-payments and the PAHO was entitled to recover them. Manual paragraph II.2.1130 states that a staff member who is unable to repay an amount owed to the Organization in a lump sum may apply for permission to repay it within a reasonable time not exceeding twelve months.

15. As to claim (c) the complainant pleads that no disciplinary action should have been taken because she had no intent to defraud and that the recovery from her of the over-payments in just twelve monthly instalments and the removal of her responsibilities for petty cash constituted improper disciplinary action.

16. The enforcement, within the maximum period allowed by Manual paragraph II.2.1130, of her obligation to refund the over-payments did not amount to disciplinary action. Furthermore, the whole transaction revealed laxity on her part in regard to financial procedures and the PAHO was entitled to take administrative action to prevent lapses in the future. Changing her duties for those reasons may not be regarded as a disciplinary measure either.

17. Since the complainant has suffered no actionable injury, all her claims must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 13 July 1994.

William Douglas
P. Pescatore
Mark Fernando
A.B. Gardner