

## EIGHTIETH SESSION

### ***In re* PERKINS**

#### **Judgment 1492**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Francisca Perkins against the Pan American Health Organization (PAHO) on 25 January 1995 and corrected on 16 March, PAHO's reply of 29 May, the complainant's rejoinder of 7 July and the Organization's surrejoinder of 24 August 1995;

Considering Article II, paragraph 5, 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 Paraguayan who was born in 1943, began work at the PAHO in May 1992 as an employee of a temporary agency. She was assigned to the office and project equipment unit of the Procurement Department, headed by Mrs. Irene Pino.

On the recommendation of Mrs. Pino and Mrs. Marga Krupp, the complainant's first-level supervisor, the Chief of the Procurement Department, who was Mr. Anthony Asrilen, sent a memorandum to the Personnel Department on 16 November 1992 proposing the complainant for a vacant post of procurement clerk at grade G.4. She was chosen for the job and got a short-term appointment to it in December 1992, then a two-year appointment from 1 June 1993. In accordance with PAHO Staff Rule 420.4 the first year of her appointment was probationary.

In a memorandum of 26 August 1993 she asked Mr. Asrilen for a transfer to another unit in the Department on the grounds that she found Mrs. Krupp hard to get on with. In April 1994 she was transferred to the unit in charge of buying vaccines and drugs, which came under Mrs. Patricia Ramos.

On 12 May 1994 Mrs. Pino wrote a first probation report on the complainant's performance from 1 June 1993 to 1 June 1994. She gave her the rating "needs improvement" for all 13 "evaluation factors" and recommended extending the probation period by four months so that her work could be properly evaluated. On 13 May the complainant added her comments, objecting that the evaluation was "totally unfair". In his comments of the same date Mr. Asrilen said that the appraisal reflected the fact that "the staff member needs to be re-evaluated under a new immediate supervisor". By a memorandum of 25 May 1994 the Chief of Personnel told Mr. Asrilen that the complainant's within-grade salary increment was to be withheld for four months.

On 12 September 1994 Mrs. Ramos wrote a second probation report, covering the complainant's performance from 1 June to 30 September. She said that her "capabilities", being "limited", would be "an obstacle to her future development" in the Department, and rated her "unsatisfactory" for two evaluation factors, "satisfactory" for five, and "needs improvement" for the remaining six. She therefore recommended terminating her appointment on the grounds of unsatisfactory performance. On 15 September the complainant asked for a written explanation of the allegation that her "capabilities" were "limited". On 22 September, under the heading "review by second level supervisor", Mr. Asrilen stated that Mrs. Ramos' assessment bore out the earlier evaluation and observations, including his own. On 30 September the complainant signed the report, though she said she disagreed with the evaluation and was "still awaiting substantiation in writing" of Mrs. Ramos' comments.

By a letter of the same date the Chief of Personnel informed her that in view of the two probation reports her appointment would not be confirmed and that separation would take effect at 31 October 1994 to allow for the one month's notice required by Staff Rule 1060. In a letter of 14 October she appealed to the Director of PAHO against that decision and sought either confirmation of her appointment or a further extension of probation. By a letter of 27 October the Director upheld the decision to dismiss her and extended the period of notice to 30 November 1994.

That is the decision she is challenging.

B. The complainant contends that the two probation reports were unsubstantiated and inconsistent. She alleges breach of Staff Rule 530.4, which says: "The evaluation of performance as reflected in these reports shall be the basis for assisting the staff member to make his most effective contribution ...and for decisions concerning the staff member's status and retention" in the PAHO, and of Rule 540.2, according to which "the staff member shall be notified of the reasons" for the decision not to confirm his appointment at the end of the probationary period.

She cites Judgment 194 (in re Vrancheva), whereby the Tribunal quashed a decision to dismiss a staff member at the end of probation on the grounds that the organisation had produced no real evidence to substantiate the allegation that her work was unsatisfactory. She asserts that the criticisms of her work were not backed up by any specific challengeable allegations.

Mrs. Pino recommended extending probation so that her work could be assessed fairly, and that shows that the first evaluation was not a fair one. What is more, the recommendation was inconsistent with Mrs. Pino's endorsement of her application for the vacant post of clerk in November 1992. The second probation report made unsupported allegations about her performance.

She seeks reinstatement on a probationary appointment "of adequate length" and with "sufficient supervision" to permit fairer evaluation of her fitness for her duties. She seeks awards of moral damages and costs.

C. In its reply PAHO contends that the complainant's attitude was "defensive" or even "aggressive" and her work was "slow" and "inferior".

It points out that according to precedent the Tribunal exercises only limited review over a supervisor's assessment of a staff member. It submits that all the complainant's supervisors made "specific allegations" about her performance: they spoke of her constant mistakes, carelessness, inability to learn and unwillingness to take constructive criticism.

As Staff Rule 1070.1 required, the decision not to confirm her appointment was based on her unsatisfactory performance as evidenced by the two probation reports. And the Tribunal has consistently acknowledged an organisation's wide discretion in deciding whether to confirm a probationary appointment.

There was no breach of Rules 530.4 and 540.2. At every stage the complainant was told how to correct mistakes and was allowed ample time in which to do so. She knew that probation was being extended to give her a chance to show her mettle in another unit.

D. In her rejoinder the complainant pleads that since much of the work in the Procurement Department turns on points of detail the risk of error is high.

She contends that the first report offered only general criticism of her performance. As to the second one, it was the chief of the unit, Mrs. Ramos, who was supposed to tell her what to do; but she herself had joined the Department only four months earlier and was unable to give proper guidance.

The reason for the change in her supervisors' opinions of her work was that she got on badly with Mrs. Krupp, whom she calls "an abusive supervisor". Had her work been below par the PAHO would not have given her a short-term, let alone a fixed-term, appointment.

E. The Organization presses its pleas in its surrejoinder. It submits that work in the Procurement Department requires an eye for detail and that is just what the complainant lacked, as her frequent mistakes made plain. She offers not a jot of evidence to bear out her allegations about Mrs. Krupp.

#### CONSIDERATIONS:

1. The complainant, a citizen of Paraguay, joined the staff of the PAHO in 1992 under a short-term appointment. She was in the Procurement Department. From 1 June 1993 she was granted a fixed-term appointment as a clerk at grade G.4. In April 1994 she was transferred from the office and project equipment unit to the unit in charge of buying vaccines and drugs.

2. In accordance with PAHO Staff Rule 420.4 she was on probation in the first year of her appointment. During that period her immediate supervisors wrote two reports appraising her performance. The first, which covered the period from 1 June 1993 to 1 June 1994, called on her to do better in several respects and recommended extending the period of probation by four months. The probation was so extended, and at the end of the four months her supervisors wrote another report advising against confirmation of her appointment on the grounds of unsatisfactory performance. By a letter of 30 September 1994 the Chief of Personnel informed her that her appointment would end at 31 October 1994. She then appealed to the Director of the Organization. In a letter which he wrote to her on 27 October the Director rejected her appeal but said he was extending the period of notice by one month to 30 November 1994. That is the decision she is impugning.

3. Since both parties rely on precedent the Tribunal will restate the rules that emerge from the case law about probationary appointments. In Judgment 1052 (in re James) it held under 4:

"... a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority.

Although such criteria hold good for the review of all discretionary decisions, the Tribunal will exercise especial caution in reviewing a decision not to confirm the appointment of someone who is still on probation ..."

Judgment 1052 added that when the reason for non-renewal was unsatisfactory performance the Tribunal would not replace the organisation's assessment of the complainant's fitness for his duties with its own.

4. A long line of precedent bears out that approach. For example, Judgment 687 (in re Delangue) quashed a decision on the grounds that plainly mistaken conclusions had been drawn from the evidence, and Judgment 1017 (in re Hall) set aside the impugned decision because of a procedural flaw.

5. In this case the complainant is contending that the conclusions that the PAHO drew from the evidence were obviously wrong. In her submission the sole basis for the impugned decision is the two appraisal reports by her supervisors; that, being vague and inconsistent, they afford no grounds in law for dismissing her; and that the Director overlooked points in her favour such as Mrs. Pino's support for the application she made in 1992 for a vacant post of clerk.

6. The plea fails. For one thing, it was quite proper for the Director to rely on her supervisors' reports since they were best qualified to assess her; for another, it is plain from all the evidence, not just the reports, that her performance was below par. Several items that the PAHO appends to its reply show that while on probation she was inaccurate and careless and affidavits by her supervisors concur in finding her performance unsatisfactory.

7. Citing Judgment 194 (in re Vrancheva), the complainant further pleads that the PAHO did not state adequate reasons for its decision to dismiss her. That judgment set aside the impugned decision on the grounds that the defendant had failed to give the complainant in that case "clarification of the specific facts motivating the unfavourable appraisal by the chief of her branch of the manner in which she carried out her duties". What the present complainant is saying is that the appraisals of her were in too general terms and contained no charges circumstantial enough for her to refute.

8. Again her argument is unsound. The 13 "evaluation factors" in the reports were specific enough for her to be able to grasp what was amiss. Besides, the grant of the further four months' probation on Mrs. Pino's recommendation left her ample time in which to make good. Yet by the end of that further period of probation she was rated satisfactory on only 5 of the 13 factors.

9. The Tribunal is satisfied on the strength of those reports and the other evidence that the termination of her appointment was a proper exercise of the Director's discretion and shows no fatal flaw.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.