

EIGHTY-FIRST SESSION

In re MERCHAN

Judgment 1550

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nelson Merchan Cely against the Pan American Health Organization (PAHO) on 14 February 1995 and corrected on 13 April, the PAHO's reply of 7 August, the complainant's rejoinder of 28 September and the Organization's surrejoinder of 21 December 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 Colombian born in 1939, joined the staff of the PAHO in 1962 under a career appointment. At the material time he held a post of administrative assistant II at grade G.7 in the office of the World Health Organization (WHO) and the PAHO in Colombia. His duties included issuing cheques to the office's General Service staff and short-term consultants.

Alongside his official duties the complainant had for several years been exchanging currencies for people who were connected with the PAHO in various capacities. Among such customers was the head of the office, the WHO/PAHO Representative in Colombia. Though he did not charge for the service, he made a profit by letting his customers have only the official rate of exchange but taking advantage of the more favourable one some banks offer to international civil servants like himself. Two such banks lent him by revolving credits the funds he required for the purpose of his currency dealings.

In June 1992 the PAHO/WHO Representative told him to stop those dealings and in a fax of 17 February 1993 informed the Chief of Administration that, as he had "learned" from consultants, the complainant was "using his status as a staff member" to negotiate cheques and, despite a promise to put an end to the business, was still carrying it on.

By a letter of 19 March 1993 the Chief of Personnel informed the complainant that because he was treating the office as an "exchange agency" he was suspended from duty for thirty days under PAHO Staff Rule 1120 pending investigation.

In his reply of 25 March the complainant refuted the charges and explained what he had been doing.

By a letter of 15 April 1993 the Chief of Personnel charged him with serious misconduct under Staff Rules 1075.2 and 1130 on grounds of insubordination, conflict of interest and abuse of the diplomatic pouch. He answered the charges in a letter of 21 April to the Chief of Personnel.

By a letter of 5 May 1993 the Chief of Personnel gave him notice of dismissal for serious misconduct under Staff Rule 1075.2 at 10 May.

The complainant appealed on 2 July 1993. In a report dated 30 September 1994 the headquarters Board of Appeal in Washington, D.C. recommended a more lenient penalty than summary dismissal, which it considered disproportionate in view of the Administration's failure to act when his activities had been disclosed to it in an audit report of December 1991. It proposed reinstating him at a lower grade.

By a letter of 16 November 1994, which he impugns, the Director upheld the earlier decision.

B. The complainant submits that his dismissal is unlawful. He has two main pleas.

Taking up the charges seriatim, he alleges, first, that the PAHO has not discharged the burden of proof it bears in

disciplinary cases. His supervisor's order being ultra vires, there was no question of insubordination, and he chose to pursue his lawful business discreetly. As to the allegation of a conflict of interests, he neither made the office an exchange agency nor impaired the PAHO's integrity; he committed a single "mistake" in thirty years of cashing cheques, and it did not amount to an attempt to defraud. Since the PAHO lets officials use the pouch for business with the Credit Union in Washington, he did not abuse the pouch service.

His second plea is breach of the principle of proportionality. Even if his conduct was improper it did not warrant summary dismissal, which is a fitting penalty only for conduct incompatible with the performance of duty. His own performance was satisfactory.

He claims reinstatement, moral damages and costs. He also wants the Organization to produce the audit report of December 1991, which the Board of Appeal cites.

C.In its reply the PAHO contends that dismissal was lawful and warranted. Not only has it discharged the burden of proof but the complainant admits to carrying on business after his supervisor had ordered him to stop. If he regarded the order as ultra vires he should have lodged an appeal, not disobeyed it. By continuing to use for his own advantage information gained through his official position he infringed Regulation 1.6 and such conflict of interest amounts to misconduct under Rule 110.8.3. Since his insubordination, deceit and failure to anticipate the conflict of interests were incompatible with his duties dismissal was the only "responsible" decision open to the Director.

The PAHO produces the audit report.

D.In his rejoinder the complainant challenges the PAHO's account of the facts and accuses it of muddling "emotional" and legal arguments. He observes that it is relying on provisions of the Staff Regulations and Rules which it failed to cite in its decisions to suspend and dismiss him, and of which he committed no breach anyway. He therefore presses his claims.

E.In its surrejoinder the PAHO seeks to refute the complainant's arguments in his rejoinder and presses its earlier pleas.

CONSIDERATIONS:

1.The PAHO employed the complainant from 1962 until 10 May 1993, when it dismissed him, as an "administrative assistant II" in the office of the Representative of that Organization and of the World Health Organization at Bogota, in Colombia. Subject to supervision by the Representative he was in charge of the disbursement and control of funds allocated to the office and his functions included the signing and issuing of cheques on the PAHO's behalf.

2.Some time in mid-1992 consultants told the Representative that the complainant was turning the office into a currency exchange agency. The Representative thereupon summoned him and ordered him to stop such business. The complainant promised that he would. He nevertheless carried on as before in the belief that it was "simpler to be discreet" until the Representative himself had gone and then "return to business as usual".

3.On 17 February 1993 the Representative reported to the Chief of Administration at PAHO headquarters in Washington, D.C. that the complainant was in breach of his promise to stop his currency exchange business. By a letter of 19 March 1993 the Chief of Personnel informed him that he was suspended from duty under Staff Rule 1120 on the grounds of "unethical activities". They consisted in "cashing and converting cheques issued by the Organization" which he "later negotiated and endorsed" as "holder". In a reply of 25 March to the Chief of Personnel he protested that the transactions were lawful. He attached texts of Colombian legislation; a statement of his account with the Credit Union of the PAHO and the WHO, of which he was a member, for the period from 1 October to 31 December 1992; a list of PAHO staff who had made deposits in that account for the purpose of his making payments to their relatives in Colombia; and statements from two banks in Colombia giving details of his transactions with them.

4.In a letter of 15 April 1993 the Chief of Personnel charged him with "serious misconduct" under three heads: "insubordination in the face of express instructions" from his supervisor;

"conflict of interests"; and

"abuse of the Organization's pouch privilege"

and invited him to answer the charges within eight days. In his reply of 21 April to the Chief of Personnel he stated that:

1. He had been guilty of no act of insubordination.

2. There was no conflict of interest. Once a cheque was issued it became the property of the beneficiary, who could deal with it as he pleased. There was no legal prohibition to prevent the complainant from buying foreign currency.

3. Staff were entitled to use the diplomatic pouch to send correspondence to the Credit Union.

By a letter of 5 May the Chief of Personnel informed him that the Organization rejected his explanations and he was dismissed at 10 May in accordance with Staff Rule 1075.2.

5. He thereupon applied to the headquarters Board of Appeal. In its report of 30 September 1994 the Board held that the charges against him were proven but recommended, among other things, that instead of dismissal he should be reinstated at a lower grade and paid costs. By a letter of 16 November 1994, however, the Director of the PAHO informed him that since the Board's recommendations could not be "reconciled with their substantive conclusions" as to his guilt his appeal was dismissed. That is the decision he is impugning.

Insubordination

6. The complainant contends that the Representative had no right to forbid him to carry on his currency exchange activities. He argues that provided that he was not neglecting his duties the Staff Rules did not prohibit such activities and that the Representative's order was therefore ultra vires.

7. It is clear from the Staff Regulations that the Representative was accountable to the Director of the Organization for the work of the Bogota office and had authority to direct and supervise the complainant's performance of his duties. The Representative's authority necessarily covered the giving of instructions to stop any activity which in his view was in breach of the Staff Regulations and Staff Rules or contrary to the Organization's interests. In Judgment 1277 (in re Avralioglu) the Tribunal upheld the contention that where a staff member wished to challenge an administrative decision the means whereby he did so must be lawful, for example recourse to the appeals procedure: he was not free to take the law into his own hands. Likewise, if the complainant felt that the Representative's order was ultra vires the proper course was for him, not just to carry on regardless, but to raise the issue with the Representative and, if necessary, refer it through the Representative to headquarters for a ruling. By failing to obey an explicit and unambiguous order from his supervisor he was in breach of his duty under the Staff Regulations, which declare staff to be subject to the authority of the Director. In this instance that authority had been delegated to the Representative.

Conflict of interest

8. It is not in dispute that he was carrying on the business of exchanging money for people associated with the PAHO. He made no secret of it; indeed he said he had been doing it for 25 years. It appears on the evidence that he was able to get revolving credits from two banks in Bogota which made available to him loans amounting to 10,000 United States dollars a month. With such credit he would buy Colombian currency at the special rates which he obtained only because he was an international civil servant. He would then cash at the rates prevailing on the exchange market the cheques of people associated with the PAHO who were paid in dollars and so repay the loans secured by means of the revolving credits together with the sums due in interest. His profits, which he estimated at 2.5 per cent on each transaction, consisted of the difference between the special rate and the market rate less the interest he had to pay to finance the purchase of Colombian currency. The cheques which he cashed and endorsed were deposited in his account with the Credit Union in Washington. Another side of the business was that he would receive payments into that account from people in Washington and make payments in Colombia to their nominees.

9. His Credit Union account for the period from 1 October to 31 December 1992 shows 19 deposits made at fourteen dates and totalling \$50,684.96. The bank accounts in Bogota show a regular pattern of debits and credits

and the purchase of Colombian currency, at various rates of exchange, for \$52,949.06. All those transactions reveal extensive and complex business dealings.

10.The Organization cites Article I of the Staff Regulations: staff members must regulate their conduct with the interests of the Organization solely in view (Regulation 1.1); place their whole time at the disposal of the Organization (1.2); and refrain from engaging in any occupation incompatible with the proper discharge of their duties (1.4). In the defendant's submission the complainant's business dealings were in breach of those obligations because they conflicted with his fiduciary responsibilities and constituted abuse of his position for private gain.

11.His answer is that those provisions of the Staff Regulations are about the loyalty of staff members and unrelated to any outside economic activity which they may pursue, which is forbidden only when incompatible with the proper discharge of their duties.

12.As to the propriety of outside economic activity, the defendant's surrejoinder cites the 1982 edition of a Report on Standards of Conduct in the International Civil Service by the International Civil Service Advisory Board. That report contains the following passages:

"50.... the primary obligation of an international civil servant is to devote his energies and capacity fully to the work of the organization he serves. ... There can be no participation in activities which cause an excessive drain on the staff member's time and energy ...

51.... The conditions of employment of international organizations are designed to make it possible for the staff member to devote himself to his career, and outside activities the principal aim of which is to procure financial gain would be inadmissible."

13.The Tribunal accepts the statement of those principles as being in accordance with the purposes that the Staff Regulations seek to attain. The many sides of the complainant's business required of him so much time and effort that in pursuing it he was in breach of his obligation to devote his energies fully to the Organization's service.

The use of the diplomatic pouch

14.According to Section 12 of Article IV of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, the Organization has the right to despatch and receive material by diplomatic pouch. The use of the pouch is restricted by WHO Manual paragraph V.1.855 to official correspondence, authorised documents and publications, supplies and equipment intended for official use when despatch by pouch is considered necessary.

15.The Organization states that it allowed its staff to use the pouch, among other purposes, to forward necessary and normal correspondence to its Credit Union. Though it does not disclose the exact terms of such permission, the concession it grants presumably covers only correspondence of the kind that would ordinarily be required for the making of personal deposits and withdrawals of funds; it does not extend to transactions carried out in the conduct of a business.

Proportionality

16.The complainant was dismissed for serious misconduct under Staff Rule 1075.2. Rule 110.8 defines misconduct to include:

"110.8.2any conduct by a staff member, unconnected with his official duties, tending to bring the Bureau into public discredit;

110.8.3any improper use or attempt to make use of his position as a staff member for his personal advantage;

..."

17.The charges against the complainant of insubordination, conduct incompatible with his status as an international civil servant and misuse of the pouch service are fully proven.

The only remaining issue is whether the sanction of dismissal is out of proportion to the objective and subjective

circumstances of his case.

18. There is no evidence to bear out the conclusion of the headquarters Board of Appeal that there were mitigating circumstances. On learning that the complainant was conducting a currency exchange business at the office, the Representative ordered him to stop immediately. In the circumstances it is immaterial that there was neither mention of the matter in the reports on his performance nor a written reprimand. Nor does the audit report of December 1991, to which the Board of Appeal referred in its report, support the finding that the Administration had already been warned of his activities. The Tribunal concludes that in the circumstances of the case the sanction of dismissal was warranted.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 11 July 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner