

EIGHTY-FOURTH SESSION

In re Malhotra

(Ramesh Kumar)(Nos. 3 and 4)

Judgment 1697

The Administrative Tribunal,

Considering the third complaint filed by Mr. Ramesh Kumar Malhotra against the World Health Organization (WHO) on 3 January 1997, the WHO's reply of 14 April, the complainant's rejoinder of 19 May and the Organization's surrejoinder of 27 August 1997;

Considering Mr. Malhotra's fourth complaint against the Organization which he filed on 16 January 1997, the WHO's reply of 23 April, the complainant's rejoinder of 28 May and the Organization's surrejoinder of 5 September 1997;

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 cases and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1935, is a former official of the WHO who retired at the end of November 1995. Details of his career in the Organization's Regional Office for South East Asia (SEARO), at New Delhi, appear under A in Judgment 1471 on his first complaint.

These complaints are about the rejection of his candidature for two vacancies in SEARO, both for posts of administrative assistant at grade ND.8. His third complaint concerns post No. 5.0028, which the Organization put up for competition by a notice of vacancy, No. 92/55, issued on 18 December 1992. The complainant applied and was among six internal candidates who were interviewed. The Regional Personnel Officer later put his name and two others on a short list which went to the ad hoc Selection Committee. By a letter of 18 March 1993 the Administration told him he had not been successful. On 17 May 1993 he filed an appeal with the regional Board of Appeal against non-selection. In its report of 18 April 1994 the regional Board said that it lacked the information it needed to make a "specific recommendation regarding the competitiveness of the candidates". Following the precedent in Judgment 1372 (*in re* Kashmiri Lal Malhotra) of 13 July 1994, the Organization sent the case back to the regional Board and made available to it the records of the Selection Committee's proceedings. In its second report, of 11 May 1995, the regional Board recommended rejection.

Mr. Malhotra's fourth complaint is about the rejection of his application for post No. 5.0895, which the WHO declared vacant by notice 94/03 of 21 February 1994. He was one of eight candidates who were interviewed. Again his name was put -- with two others -- on a short list that was submitted to the Selection Committee. On 22 July 1994 he learned that the Regional Director had picked someone else, and on 11 August 1994 he filed a further appeal with the regional Board. In its report of 15 May 1995 the Board recommended rejection.

By a decision of 25 May the Regional Director endorsed both of the Board's recommendations.

On 27 June 1995 the complainant went to the headquarters Board of Appeal. In a single report of 19 September 1996 it recommended rejecting his appeals. By a letter of 21 October 1996, which he impugns, the Director-General endorsed the recommendation.

B. The complainant submits that the impugned decision is tainted with procedural and substantive flaws. He says that the WHO failed in its duty under Staff Regulation 4.2 to secure the highest standards of efficiency, competence and integrity. He charges the Organization with overlooking his seniority and better qualifications and with personal prejudice against him. In his third complaint he contends that the absence

of a staff representative on the Selection Committee was a fatal procedural flaw. In his fourth complaint he observes that he was better qualified than the successful candidate, who was "unfit for promotion".

He asks the Tribunal to quash the appointment of each of the two successful candidates and declare him "selected" for post 5.0028 as at 14 August 1992 and for post 5.0895 as at 1 August 1994. He seeks awards of 50,000 United States dollars in moral damages in his third complaint, \$75,000 in his fourth and of such other compensation "as may be admissible". He claims costs.

C. In its replies the WHO contends that the complaints are devoid of merit. It says that it followed the right procedure and took full account of the complainant's application but found others more suitable. It committed no breach of the rules. Nor did it overlook his many years of service. The rules do not require that a staff representative take part, however regrettable the absence of one on the Selection Committee may have been. The Organization denies that any of its officials showed personal prejudice against the complainant.

D. In his rejoinders he presses his plea of personal prejudice and insists that he was the better candidate in both competitions on the score of seniority, performance and experience. Abiding by Regulation 4.2 would have meant choosing him. In any event it was the Programme Director of the receiving unit who should have held the interviews for post 5.0895, not the Regional Personnel Officer.

E. In its surrejoinders the WHO presses its earlier pleas and answers several issues raised in the rejoinders. Under the rules on recruitment and selection either the Programme Director or his "nominee" may conduct interviews.

CONSIDERATIONS

1. These cases concern appeals by the complainant against his non-selection for two posts, No. 5.0028 and No. 5.0895, advertised for administrative assistants in the World Health Organization (WHO) at its Regional Office for South East Asia (SEARO).

2. The ad hoc Selection Committee made recommendations for both posts. The complainant appealed both decisions to the regional Board of Appeal, which in May 1995 dismissed both appeals in two separate decisions. However, when the complainant appealed the Board's decisions to the headquarters Board of Appeal it dealt with both appeals in the same report, recommending their dismissal. Since both cases raise the same points it is convenient to deal with them together.

3. Regarding appointments and promotions, the fundamental regulation that both parties rely on is Article 4.2 of the Staff Regulations, which states:

"The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible."

4. The complainant's experience before applying for the two posts at issue is relevant. He was recruited in December 1967 as secretary and shorthand typist at grade ND.5 and moved his way up the ranks through various units in Health Services. After a number of awards and meritorious salary increments he ended up in the post of administrative assistant at grade ND.7 in SEARO's Personnel Unit, beginning in October 1986.

5. Post No. 5.0028, for an administrative assistant at grade ND.8 in the Personnel Unit of SEARO, was advertised in December 1992. The complainant was one of six internal applicants interviewed for the post, but he was not selected. One of the other applicants was successful. The third complaint is about the filling of post 5.0028.

6. Post No. 5.0895, also for an administrative assistant at grade ND.8 in the Personnel Unit of SEARO, was advertised in February 1994. The complainant was one of eight internal applicants interviewed for the post, but again another candidate was successful. The fourth complaint deals with the filling of post 5.0895.

7. In both cases the Regional Personnel Officer received and reviewed the application forms for the posts. He also sat on the Selection Committee as the personnel officer required by SEARO's "Recruitment and

Selection Procedures" established by its memorandum of 27 December 1990 as from 1 January 1991 (the "Selection Procedure").

8. In both cases the Regional Personnel Officer placed the complainant on a short list of three applicants for review by the Committee.

9. Contrary to the Selection Procedure, no staff representative sat on the Committee that recommended the selection for post 5.0028. Apparently the Staff Association (whose representative would normally sit on the Committee) was protesting against the Administration's guidelines for the composition of the Committee.

10. The Tribunal has identified the following issues:

(i) Personal prejudice: Is there any evidence of prejudice against the complainant?

(ii) Consideration of facts: Did the Selection Committee properly consider all the relevant facts?

(iii) Selection procedure: Was the selection process properly implemented in accordance with the then current Selection Procedure?

Personal prejudice

11. The thrust of the complainant's argument is that because he did not withdraw his appeal against his earlier non-selection for post 5.0013 the Personnel Officer was prejudiced against him. He also argues that the Personnel Officer exerted pressure on him to withdraw his appeal regarding post 5.0013 and later post 5.0028. There is no credible evidence to support these allegations, which are denied by the person concerned.

12. To support his plea of prejudice, the complainant has asked the Tribunal to review the performance appraisal reports of himself and the candidates selected for the two posts. He asserts that his appraisals are much better than those of the selected candidates and that only prejudice can explain his non-selection. Accordingly, the Tribunal has conducted a review of the appraisal reports of the complainant and the two successful candidates. This review leads the Tribunal to conclude that the complainant's allegation is unfounded.

13. There is no other evidence supporting his plea under this heading.

Consideration of facts

14. The complainant makes a number of arguments in support of his allegation that the Selection Committee failed to consider all the relevant facts.

15. First, he says that the candidate selected for post 5.0895 did not meet the requirements because he did not have experience in personnel matters.

16. The notice of vacancy specified that experience in personnel or related areas was preferred but not required. Furthermore, the candidate selected for the post had been an administrative assistant in the Regional Office and in that post had gained experience in a related area and been exposed to personnel matters.

17. Secondly, the complainant says he had an excellent service record that was not taken into account.

18. The Tribunal, after reviewing the file and in particular the reports of the two appeal boards, finds that the complainant's excellent service to the WHO was taken into account and given due weight.

19. Next, it is argued that the WHO was never able to prove in what way the complainant was inferior to the selected candidates.

20. In the Tribunal's view, there is no obligation for the WHO to prove that the complainant was inferior to the selected candidates. It is for the complainant to prove his allegations and he has failed to do so.

21. Finally, the complainant argues that, all other things being equal, the complainant's seniority should have caused him to be selected.

22. The Tribunal reiterates its oft-stated position that, while seniority is a consideration, it is not the paramount one: see Judgment 564 (*in re* Ali Khan) under 8.

23. Furthermore, it is clear that in the Selection Committee's view all other things were not equal. Even after giving due consideration to the complainant's seniority the Committee found the selected candidates to be superior. The complainant has not shown this conclusion to be wrong.

24. It is not the role of the Tribunal to substitute its opinion for that of the Committee. The Tribunal will review the comparison of candidates only when it appears that the Committee's choice rests on a mistake of fact or law or that there has probably been an abuse of authority: Judgment 1436 (*in re* Sala No. 2) under 6. There is no persuasive evidence to support such a finding in this case.

Selection procedure

25. There are two aspects to this question. The first deals with the role of the Regional Personnel Officer in both competitions. The complainant maintains that his participation was improper.

26. According to the Selection Procedure the "Programme Director of receiving unit or his nominee will review the applications, interview the candidates and prepare a short list". The Regional Personnel Officer was the Programme Director's nominee in this case. Also according to the Selection Procedure, the personnel officer must sit on the Selection Committee. The Regional Personnel Officer did so.

27. In the Tribunal's view his involvement in the process was in full compliance with the Selection Procedure. The Tribunal has already indicated that allegations of personal prejudice are not supported by the evidence.

28. The second aspect of this question is the absence of a Staff Association representative on the Committee in the process of selection for post 5.0028.

29. The Selection Procedure states that the Selection Committee "will be composed" of five members including "(d) Staff Association's President or his nominee".

30. The complainant argues that the absence of a staff representative rendered the selection procedure unlawful. It is clear that the President of the Staff Association was invited but for reasons with which the Tribunal is not concerned chose neither to attend nor to send a representative. As the Tribunal ruled in Judgment 1565 (*in re* Kashmiri Lal Malhotra No. 6) under 8, this fact "cannot have the effect of invalidating the recommendations" of the Committee.

31. In summary, the allegations regarding personal prejudice are not supported by any evidence. The complainant's argument that the Selection Committee did not consider all the relevant facts is unfounded; the evidence shows that the Committee reviewed the qualifications, experience and seniority of the short-listed applicants before deciding who had the highest merit. Finally, the Selection Procedure was properly implemented; the Staff Association's refusal to participate cannot prevent the selection of candidates.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

Mark fernando
James K. Hugessen

A.B. Gardner

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