

## NINETY-SEVENTH SESSION

Judgment No. 2363

The Administrative Tribunal,

Considering the complaint filed by Mrs C. S. R. against the Pan American Health Organization (PAHO) on 12 August 2003 and corrected on 19 August, PAHO's reply of 21 November, the complainant's rejoinder of 11 December 2003, and the Organization's surrejoinder of 15 March 2004;

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

Having examined the written submissions and decided not to allow the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is a citizen of the United States of America and was born in 1958, entered the service of PAHO in 1981 at grade G.4 on a temporary appointment. From January 1982 she held a fixed-term appointment, and thereafter was employed in various positions in the General Service category. She attained grade G.7, and in October 1999 was promoted to the Professional category. She thereafter held the post of Personnel Officer, at grade P.2.

On 7 December 2001 PAHO issued a vacancy announcement for the post of Chief of the Operations Unit (post .0252) in the Department of Personnel as the incumbent, the complainant's immediate supervisor, was to retire at the end of February 2002. The complainant applied for the post, which was at grade P.4, but her application was not successful. When the Chief of the Operations Unit retired, the complainant temporarily assumed the functions of post .0252, and in accordance with Staff Rule 320.5 she was granted extra pay for taking on the additional duties.

The candidate selected as a result of the competition declined the offer of appointment and on 15 October 2002 PAHO issued a second vacancy announcement for post .0252. An external candidate – Mr R. – was selected. On 27 May 2003 the complainant filed an appeal with the Board of Appeal, alleging inter alia that her performance had not been properly assessed, that her post should be reclassified to P.3, that she had been the victim of personal prejudice, and that the external candidate did not possess one of the essential minimum qualifications for the post, namely a "detailed knowledge" of PAHO's Staff Rules, Manual provisions, directives and practices. She put forward several claims, among which she sought the quashing of the decision to appoint the external candidate, the initiation of a new selection process and wanted steps taken to reclassify her post at P.3. She also claimed compensation for moral injury.

The newly appointed Director of PAHO subsequently set aside the decision to recruit the outside candidate, and reassigned another official, Mr F., to the post without promotion. The official concerned had spent some 30 years in the Department of Personnel. The complainant wrote to the Director on 5 June, asking her to reconsider the decision to assign Mr F. to the disputed post. She alleged harassment and said her "action to seek redress for the irregular procedure remains extant". In a letter of 23 June 2003 to the Director, she asked "[i]n the absence of a harassment policy" for authorisation to appeal directly to the Tribunal.

By a letter dated 7 August 2003 – which the complainant says she received on 25 August - the Director of PAHO responded to her letters of 5 and 23 June. The Director also told her that direct access to the Tribunal was not warranted, and that her appeal should follow the established procedures. The complainant lodged her complaint with the Tribunal on 12 August. The Board of Appeal reported on her case on 4 December 2003, and the Director issued a final decision on 2 February 2004.

B. The complainant submits that her complaint is receivable under Article VII(3) of the Tribunal's Statute, on the grounds that no decision was notified to her by the Administration within 60 days of either her appeal of 27

May 2003 or her letter to the Director of 5 June, and that within 90 days of either of those dates she had lodged her complaint with the Tribunal.

The complainant's main plea is that, in the circumstances in which it took place, the reassignment of Mr F. constituted an abuse of the Director's authority to reassign staff. The complainant refers to Staff Rules 410.4 and 565.2 which allow for reassignment without promotion when it is in the interest of the Organization, but cites Judgment 535, concerning a previous case against PAHO, in which the Tribunal gave three criteria for determining whether such reassignment was motivated by abuse of power or by the "interest" of the Organization as provided for in Staff Rule 565.2. With the criteria established by the Tribunal in mind, she alleges the following. Firstly, the action of reassigning Mr F. to post .0252 was no more than a pretext. The aim was to prevent her from having another chance to be selected for the post during a new selection process. As argued in her internal appeal, she believes she was the victim of prejudicial treatment and that Mr F. was placed as her supervisor in order to demean her. Secondly, she claims that she was better qualified for the job in the Operations Unit than Mr F., because she had more relevant experience. Thirdly, filling the post by reassignment instead of a competition was unfair, given that it deprived her of a fair chance of promotion.

Additionally, she submits that good faith required that the Director await the recommendations of the Board of Appeal before reassigning Mr F. to the vacant post.

The complainant wants the Tribunal to rule that the reassignment of Mr F. to post .0252 was irregular under PAHO's Staff Regulations, and amounted to abuse of power. She asks that his reassignment be quashed and that a new selection process be initiated. She wants the *status quo ante* to be restored and wants to be appointed again to act in the post. She seeks compensation for loss of income from the time she stopped receiving the special post allowance until her restoration to the position of acting unit chief. She also claims moral damages, and costs.

C. In its reply the Organization points out that on 7 August 2003 the Director of PAHO responded to the complainant's letters of 5 and 23 June, clearly addressing the points she had raised. While believing that the complainant has acted in bad faith and violated all procedural rules regarding the exhaustion of internal remedies, it nonetheless addresses the merits of her case.

PAHO considers that there is only one issue before the Tribunal – that is whether there was abuse of authority in the decision to reassign a staff member to a critical post that had been vacant for 15 months. It argues that, in accordance with Staff Rules 410.4 and 565.2, the reassignment in question was indeed in the interest of the Organization. Citing Judgment 2105, it considers that what actually constitutes the "interest" of the Organization should be left to the latter to decide. In this instance, the interest of the Organization required reassignment of a serving official from the same department rather than the undertaking of a third competition. That exercise of discretionary authority was not abusive. It did not violate any of PAHO's rules nor did it go against standards established in the case law of the Tribunal. Contrary to the complainant's argument, reassignment was not a pretext. Organization-wide restructuring was in progress and PAHO could not allow a post of such importance to remain vacant any longer. A person with solid experience was required, and the official chosen to fill the post was not less qualified than the complainant, having served at the Professional level for some 30 years. It was not unfair to the complainant to reassign him to the post. The complainant, who held grade P.2, had had two opportunities to compete for the post and her application had been considered by two different Selection Committees. The decision to appoint Mr F. was taken in good faith and was not arbitrary, and the complainant has failed to prove that there was any abuse of authority. Given that the Organization did not abuse its administrative authority, the complainant has suffered no injury and there are no grounds for an award of damages.

With respect to her claim that the reassignment in question constituted harassment, it points out that the Director responded to that allegation in her letter of 7 August 2003. The complainant was told that if she wished to pursue a case against any individual an independent review committee would be established, but she did not pursue her allegations.

D. In her rejoinder the complainant states on the matter of receivability that she only received the Director's letter of 7 August on 25 August 2003 when she returned from annual leave.

She expands on her pleas and maintains her claims. She notes that in its reply the Organization did not address her allegations of prejudicial treatment regarding the appraisal of her work, and she elaborates on them in her rejoinder. As upheld by the Tribunal in Judgment 535, she states that her plea of abuse of authority will succeed if she can

demonstrate that the reassignment of Mr F. came about as a result of “other considerations”, rather than the Organization’s interest. She wants the Tribunal to order PAHO to disclose the way in which the external candidate, Mr R., was initially recruited to post .0252. That, she asserts, will reveal that considerations other than the restructuring within PAHO prompted the reassignment decision.

E. In its surrejoinder the Organization points out that the complainant filed two parallel actions in two separate fora without exhausting internal remedies. In so doing, she chose not to follow the established procedures for appeals. It becomes clear that long before 12 August 2003 she had decided to file a complaint with the Tribunal, and it is disingenuous of her to claim that she did not receive the letter of 7 August until much later in the month.

PAHO states that it subsequently filed a motion to dismiss the case lodged by the complainant with the Board of Appeal, which was not acceded to. It points out that the Board ultimately issued its report to the Director of PAHO without having had the benefit of the Organization’s defence. The Director then took a decision on the appeal and PAHO gives details of that decision.

It explains the circumstances in which Mr R. was recruited, adding that the issue of his appointment is moot since he was not appointed to the post. As requested by the Tribunal, the Organization produces a statement supplied by Mr F. in which he expresses his views on the present complaint.

## CONSIDERATIONS

1. The complainant occupies a P.2 post at PAHO, as a Personnel Officer in what is now the Department of Human Resources Management. Upon her immediate supervisor’s retirement at the end of February 2002, his post as Chief of the Operations Unit, at grade P.4, was advertised and the complainant temporarily assumed the functions of that post. She applied unsuccessfully for the post. A first competition was held but the selected candidate declined the appointment. During a second competition, an external candidate was selected. The complainant objected to that appointment and filed an internal appeal, asking for a reholding of the selection process. Before the appeal could be heard, and because the published job description was thought to be in breach of certain staff rules, the recruitment of the external candidate was set aside and the Director of PAHO reassigned another official, who held P.4 and who had done the job in the past, to the vacant post. The complainant then asked the Director to reconsider that reassignment, but says that she did not receive a response within 60 days.

2. By this complaint, she is challenging the implied rejection of her request for the reholding of the selection process as well as the implied rejection of her claim against the filling of the post by reassignment. That reassignment, in her opinion, constituted abuse of authority and was illegal under the Staff Regulations. She also alleges prejudicial treatment and lack of good faith on the part of the Organization. She principally seeks the quashing of the decision not to rehold a new selection for the post in question; the quashing of the reassignment decision; the holding of a new selection process; damages; and costs.

3. Insofar as the complaint seeks the holding of a new selection process, that question was already the subject of her internal appeal which, at the time of the filing of the present complaint, was still pending before the Board of Appeal. While the Organization has improperly referred to the outcome of the internal appeal, neither the Board’s report nor the decision of the Director of PAHO thereon are properly before the Tribunal in these proceedings and since they may be the object of some future judgment, it would be wrong to consider or otherwise comment any further upon them here.

4. On the other hand, to the extent that the present complaint contests the decision to fill the vacancy by reassignment, the Organization does not contest that it is technically receivable under Article VII(3) of the Tribunal’s Statute, although there would appear to be some substance to PAHO’s suggestion that the complainant had made herself unavailable to receive the Director’s reply to her claims (which appears to have been delivered to her just after the expiry of the 60th day) and hastened immediately thereafter to have recourse to the Tribunal.

5. In the circumstances, both the complainant, by seizing the Tribunal of a part of her case at the earliest possible moment and avoiding recourse to the internal appeal process, and the Organization, by acting so as to foreclose any objection to receivability, have created and accepted a situation in which the proceedings before the Board and the Director’s response thereto must remain outside the scope of the present case. That is unfortunate for it means that the present judgment is restricted to dealing with only a part of what appears to be the dispute

between the parties.

6. Thus, the only issue before the Tribunal is the propriety of the Organization's filling of the supervisor's post by reassignment. That reassignment was carried out under the authority of Staff Rules 410.4 and 565.2 which read:

"410.4 Posts below the level of P.6, other than those of a short term nature, which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is in the interest of the Bureau to fill by reassignment of a staff member without promotion."

"565.2 A staff member may be reassigned whenever it is in the interest of the Bureau to do so. A staff member may at any time request consideration for a reassignment in his own interest."

7. These provisions give a clear discretionary power to the Administration, whose judgement as to the best interests of the Organization will not be lightly interfered with by the Tribunal (see Judgment 2105).

8. The complainant alleges that the appointment by reassignment to fill the vacancy was an abuse of power. She bears the burden of proving this allegation. In her view, it was a mere pretext used, it would seem, primarily for the purpose of preventing her from being appointed. This is far-fetched in the extreme and would require the Tribunal to accept a conspiracy theory which would include a finding that the highest levels of the Administration had been part of a plot to prevent a specific appointment to a mid-level managerial position. The evidence simply does not support it.

9. While the complainant is undoubtedly technically qualified for the coveted post, and was found to be so in the two competitions in which she was unsuccessful, she was also, in both cases, found by two separate Selection Committees not to be the most qualified. Although the complainant clearly has a high view of her own merits, the fact that that view is not universally shared by others, whose honesty and good faith the complainant has not been successful in impugning, does not mean that the complainant has been unfairly treated or that she has been denied a promotion which should rightfully have been hers. To put the matter simply, the complainant has failed to disprove the Organization's claim that the reassignment was made in the best interests of the Organization and in the context of major structural and administrative changes which were then in process. She has not shown that there exist any grounds upon which the Tribunal could intervene in the only impugned decision – that is to say the decision to fill the vacancy by reassignment – which is properly before the Tribunal. There is no evidence of prejudicial treatment.

10. One final point: the Tribunal has already commented on the impropriety of the Organization's attempt to inject the Board of Appeal's findings into the present proceedings. Equally improper and unfortunate, in the Tribunal's view, is the Organization's unfair attack, made in the surrejoinder and thus, without right of reply, upon the character and qualifications of the complainant's counsel. The Tribunal has disregarded it in the same way as it has disregarded the references to the findings of the Board.

11. The complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.