

NINETY-NINTH SESSION

Judgment No. 2472

The Administrative Tribunal,

Considering the complaint filed by Mr K.L.G. against the World Health Organization (WHO) on 8 July 2004, the WHO's reply of 6 October 2004, the complainant's rejoinder of 21 January 2005 and the Organization's surrejoinder of 18 February 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Indian national born in 1949, joined the WHO Regional Office for South-East Asia (SEARO) in October 1969. At the material time he held grade ND.07.

On 30 January 2002 vacancy notice SEAR 2002/10 for post No. 50050 of Special Assistant at grade ND.X, in the "Extended General Service Level" category, was issued; the incumbent of the post had retired on 30 September 2000. The complainant, along with 15 other staff members, applied for the post. All candidates were subjected to the same written examination. Based on the results of this examination the complainant was one of five candidates interviewed for the post by the interview panel, composed of three members of the General Service Staff Selection Committee; his interview took place on 28 June 2002. After deliberation the Selection Committee prepared a shortlist of three candidates, which included the complainant. By a letter of 11 July the Regional Personnel Officer informed him that his application had been unsuccessful.

On 30 August 2002 the complainant appealed to the Regional Board of Appeal against his non-selection for the post. In its report dated 19 May 2003 the Board concluded that "there was an inordinate and unexplained delay by the Administration in filling up the position of Special Assistant, ND.X" but that no factual evidence supported the complainant's claims of personal prejudice and incomplete consideration of the facts. It recommended dismissing the appeal. The Regional Director informed the complainant in a letter of 9 June that he accepted that recommendation. The complainant lodged an appeal with the Headquarters Board of Appeal on 9 July 2003. Following the recommendation made in that Board's report of 28 January 2004, the Director-General dismissed the complainant's appeal by a letter of 31 March 2004. That is the impugned decision.

B. The complainant puts forward several pleas. Firstly, he contends that the SEARO Administration abused its authority by delaying the advertising of the vacancy, thereby breaching the applicable rules which stipulate that "[a] vacant post should normally be advertised within two weeks of its falling vacant through a vacancy notice after review and, if necessary, revision of the Post Description". He argues that the post was deliberately kept vacant and was advertised only in January 2002, by which time the selected candidate, Mr K., who had been promoted to grade ND.07 in July 1999, had completed the statutory period of two years of service in that grade and was thus eligible to apply for the post.

Secondly, he submits that the selection was procedurally flawed. The Administration took the results of the written examination into account when ranking the candidates, thereby breaching the Guidelines stipulating that a test is only a qualifying test, not a competitive test for the "purpose of point ranking". The complainant considers that he was the most suitable candidate for the post by virtue of his education, length of service and excellent work appraisals but that the selected candidate had been "pre-designated".

Thirdly, according to the complainant, the Selection Committee and its interview panel were illegally constituted. Some of their members favoured the selected candidate who, as President of the Staff Association, was in a position to nominate the Staff Representative member of the Committee. The selection made by this Committee was, therefore, "based on abuse of authority and a mistake of law".

Fourthly, he submits that bias is shown by the fact that the Regional Director's decision to appoint the selected candidate was taken on the same day that he received the Report of the Selection Committee, which proves that he simply accepted the Committee's recommendation without taking time to look into the various aspects of the selection process. He concludes that the Regional Director was prejudiced against him and treated him in an unequal and unfair manner.

Lastly, he considers that there was a "well-planned conspiracy" leading to the appointment of the selected candidate.

The complainant wants the quashing of the selection of Mr K. to the post of Special Assistant and to be appointed to that post with retroactive effect. He claims an award of 170,000 United States dollars in moral and material damages, plus interest, and 8,000 dollars in costs.

C. In its reply the WHO cites the Tribunal's case law in support of its argument according to which promotions are discretionary decisions and thus subject to limited review.

It explains that the provisions concerning the advertising of vacancy notices referred to by the complainant only set out general guiding principles; these are not compulsory rules. A practice has been developed of reviewing the "Extended General Service Level" posts, in consultation with Headquarters, whenever they fall vacant in order to establish whether their level is still justified and whether the post description needs altering. Such a review always requires some time. General classification policy changes for the General Service category have been introduced over the last ten years and in SEARO the general revision of existing ND.X posts took much longer than initially expected. It submits that the delay in publishing the post for which the complainant applied was not "an abuse of authority intended to be [...] favorable to the selected candidate".

According to the Organization, the marks obtained in the written test were only intended to determine which candidate would be able to perform the duties of the post and thereby be included in the next step of the selection process; these were not used by the Selection Committee for any purpose other than determining which candidates would be invited for an interview. The Organization adds that every candidate who passed the written test was treated equally; there was no procedural flaw.

The WHO states that the Selection Committee was constituted according to the applicable statutory provisions; no mistake of law was committed during the selection procedure. It contends that the complainant's allegations of bias and conspiracy are unfounded and, in any event, unsubstantiated. The Organization concludes that, although the complainant must have sincerely believed that he was qualified for the post in question, this does not constitute evidence that he was the most suitable candidate, nor does it provide grounds for setting aside the selection of another candidate.

Invited by the Tribunal to comment on the complaint, the selected candidate submits that he was appointed to the post on the basis of merit, competition and suitability following "an informed established selection process".

D. In his rejoinder the complainant maintains that he has provided sufficient evidence to demonstrate that the selection was made by an illegally constituted Selection Committee, that it suffered from serious procedural flaws, that it was tainted by prejudice and that it was the result of a conspiracy to appoint a particular candidate.

The complainant reiterates that the Selection Committee breached the selection procedure by taking into account the written test marks in its recommendation to the Regional Director. He argues that, whether obligatory or just based on the Guidelines, the Organization's policy on the advertising of vacancies must be respected.

He observes that the Regional Board of Appeal found that "there was an inordinate delay by the Administration in filling up the position", from which the selected candidate benefited. It "follows" that his own chance of selection was negatively affected by the delay. There were serious procedural errors and violations of the selection procedure.

E. In its surrejoinder the Organization submits that, although it did not act within the recommended time frame, it acted in compliance with the applicable rules and there were objective reasons for the delay. It maintains that each candidate was treated equally and that the composition of the Selection Committee was made according to the applicable Guidelines. It rejects the complainant's allegations of bias and conspiracy on the part of the Administration as incorrect and unsubstantiated.

CONSIDERATIONS

1. The complainant has worked with the WHO for some 35 years in its Regional Office for South-East Asia (SEARO). He impugns a decision to reject his appeal against his non-selection to the post of Special Assistant, for which he had applied along with 15 other internal candidates and to which Mr K. was appointed.
2. Having been informed on 11 July 2002 that his application had not been successful, the complainant appealed to the Regional Board of Appeal; after a thorough review of his appeal the Board recommended rejecting it. The Regional Director did so on 9 June 2003. The complainant appealed that decision to the Headquarters Board of Appeal; after a review of his case that Board also recommended rejecting the appeal. The Director-General accepted this recommendation and so informed the complainant in a letter dated 31 March 2004, received by the latter on 14 April. He filed his complaint with the Tribunal on 8 July 2004.
3. The complainant seeks the following relief: the quashing of the selection of Mr K. to the post of Special Assistant, his own appointment to the said post with retroactive effect, compensation for moral and material injury, and legal costs.
4. The complaint is based on the following grounds: (a) abuse of authority through unauthorised delay in advertising the vacancy; (b) procedural flaw by taking into account test marks in the ranking of candidates; (c) mistake of law in the illegal constitution of the Selection Committee and (d) bias on the part of the Regional Director in favour of the selected candidate and concomitant perpetual bias against him in furtherance of a “conspiracy” to achieve a pre-planned promotion, extraneous to the interests of the Organization.
5. The Organization, in response to the complainant’s pleas, explains that there was no abuse of authority in the delay of the publication of the vacancy notice for the post of Special Assistant since the relevant Information Circular precisely contemplated the possibility of revising post descriptions when it provided: “[a] vacant post should normally be advertised within two weeks of its falling vacant through a vacancy notice after review and, if necessary, revision of the Post Description” (emphasis added). The post for which the complainant applied was at grade ND.X and belonged to the “Extended General Service Level” category. The grading of such posts extends beyond the usual classification system and often takes into account the seniority, experience or specific skills of the incumbent. It is, therefore, a practice that such posts are reviewed in consultation with Headquarters whenever they fall vacant in order to establish whether the ND.X level is still justified and whether the post description needs altering.
6. The regional administrations concerned reviewed all ND.X and M.X posts as they fell vacant in order to reduce the number of such posts. In SEARO, the decision-making process took much longer than initially expected so that between April 2000 and January 2002, that is for 21 months, no vacant ND.X post was advertised and two ND.X posts were left vacant for several months. It is, therefore, not correct for the complainant to contend that the delay in issuing the vacancy notice for the posts for which he applied was an abuse of authority intended to be detrimental to him and favourable to the selected candidate. The Tribunal finds the explanation by the Organization of the perceived delay in advertising the position concerned satisfactory and fully justified in the context of a general classification policy change and not intended to favour the candidate eventually chosen.
7. As regards the complainant’s plea of a procedural flaw in the use of test marks in the selection process, the Organization asserts that under the applicable Guidelines, marks were used only to “check [his] ability [...] to perform the duties of [the] post”. Moreover, it says that it never stated that “a written test is just a qualifying test and not a competitive test” as the complainant insists. After qualifying for further consideration for the post, a candidate is treated equally with other candidates who have passed the test. All relevant factors, including marks obtained in written tests and interviews, were taken into consideration by the Selection Committee before it made the appropriate recommendation to the Regional Director. At no time did the Administration use the test marks to favour the selected candidate. The Tribunal finds that the Organization did not violate its internal rules in constituting the Selection Committee and in applying the selection procedures so as to treat all applicants equally based on their qualifications, experience and performance appraisals.
8. In support of his plea that the Organization committed a mistake of law in the illegal constitution of the Selection Committee, the complainant contends that the selected candidate, who was President of the Staff

Association at the material time, exerted influence on the membership of the Committee. The Organization points out that in accordance with the applicable Guidelines, another staff representative had to be nominated to take the place of the President who was a candidate for the advertised post. It says: “[i]f this were not possible, it would mean that no recruitment could occur when the [President] was not available and, furthermore, that all career prospects would be denied to the [latter] during his or her mandate”.

9. With respect to the allegations of bias and conspiracy, the burden of proving this is on the complainant, who has merely indulged in speculation and has not proffered evidence of sufficient weight to persuade the Tribunal. “Mere suspicion and unsupported allegations are clearly not enough, the less so where [...] the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification.” (See Judgment 1775, under 7.) The Tribunal finds that the complainant’s allegations of bias and conspiracy are unfounded and unsubstantiated.

10. While the Tribunal is empowered to review the decisions of international organisations on matters of promotions and appointments, it will proceed in discharging its duty with special caution, taking utmost care not to substitute its judgement for that of the Organization if the latter has amply proved that it has exercised its discretion judiciously. Embedded in case law is the doctrine worth reiterating that the Tribunal will set aside such a decision only if it was taken without authority, or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. In this case, there being no convincing ground to reverse the Organization’s decision, the Tribunal will allow it to assume full responsibility for its choice.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Flerida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet