

**113th Session**

**Judgment No. 3130**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S.K. M. against the World Health Organization (WHO) on 24 May 2010, the Organization's reply of 29 September, the complainant's rejoinder of 19 November and WHO's surrejoinder of 21 December 2010;

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 1952, joined WHO's Regional Office for South-East Asia (SEARO) in August 1982 as an Administrative Secretary at grade ND.04. He is currently employed as an Administrative Assistant in SEARO's Travel Unit at grade ND.07.

On 8 January 2008 a vacancy notice for the post of National Professional Officer (Planning & Monitoring) at WHO's Country Office

for India was issued. The complainant was one of three shortlisted candidates. He took a written test on 15 February and was called for an interview that same month with an Interview Panel comprised of four members. On 2 April the Regional Director approved the selection of another candidate for the post and on 22 April the complainant was so informed. He appealed this decision to the Regional Board of Appeal on 19 May, alleging personal prejudice on the part of the WHO Representative, India (chairperson of the Interview Panel), incomplete consideration of the facts and failure to observe or apply correctly the provisions of the Staff Regulations and Staff Rules or the terms of his contract. In its report of 19 January 2009 the Regional Board of Appeal concluded that the complainant had not substantiated his case and recommended that the appeal should be dismissed. By a letter of 12 February the Regional Director endorsed the Board's recommendation.

On 24 February 2009 the complainant filed his statement of intention to appeal with the Headquarters Board of Appeal (HBA), challenging the Regional Director's decision. He asked the Administration to set aside the selection of the successful candidate and he claimed damages and costs. In its report the HBA concluded that the selection process had been flawed because the composition of the four-member Interview Panel did not comply with the Selection Guidelines for Professional Staff in the WHO South-East Asia Region issued on 27 July 2005 (hereinafter "the Selection Guidelines"). However, with due consideration to the current incumbent and to the good functioning of the Office, it recommended inter alia that the selection should be maintained, but that the complainant should be awarded 8,000 United States dollars in compensation and 2,000 dollars in costs and that his remaining claims should be dismissed. By a letter of 7 April 2010 the Director-General informed the complainant that she had accepted the HBA's recommendations. That is the impugned decision.

B. The complainant challenges the validity of the decision to appoint another staff member to the post on several grounds. Firstly,

the written test was administered by the Country Office for India and not by a Personnel Officer of the Regional Office, in violation of the Selection Guidelines. At the material time, the successful candidate was a serving staff member of the Country Office and, in the complainant's view, the objectivity and results of the test are therefore questionable.

Secondly, the Interview Panel was illegally constituted, being comprised of four members instead of three, as stipulated by the Selection Guidelines. The complainant points to the findings of the HBA in this respect and notes that the Director-General accepted those findings in her final decision. He asserts that, according to the Tribunal's case law, when a competition procedure is tainted by a formal flaw, the selection in question must be set aside.

Thirdly, he submits that, unlike himself, the successful candidate did not possess the minimum educational qualifications listed in the vacancy notice, and as he was aware of this, he did not accept the appointment in good faith. Indeed, the Regional Director of SEARO abused his authority in making his selection. The complainant points out that the HBA failed to comment on this procedural flaw in its report.

He contends that the recommendation of the HBA to maintain the disputed selection and the Director-General's endorsement of that recommendation lack any nexus with the HBA's finding that the selection process was flawed. He argues that he has lost a valuable opportunity for career advancement as a result of the illegal selection made by the Administration, for which the Organization is liable. In addition, he asserts that there was an unreasonable delay in the internal appeal procedure, which caused him mental and physical injury.

The complainant asks the Tribunal to quash the selection of the successful candidate and to order WHO to conduct a new selection process which complies with the Selection Guidelines. He seeks material and moral damages in an amount of no less than 50,000 United States dollars and compensation of at least

10,000 dollars for the delay in the internal appeal procedure. He also claims costs.

C. In its reply WHO states that, according to the Tribunal's case law, decisions on selection and promotion are discretionary and thus are subject to only limited review by the Tribunal.

It submits that the selection process was fairly conducted and that it complied with the applicable guidelines. With respect to the complainant's allegations regarding the written test, the defendant refers to a memorandum of 1 September 2004 from the Regional Personnel Officer to all WHO Representatives which contains guidelines for the selection and appointment of National Professional Officers. The memorandum provides, in relevant part, that the WHO Representative has the authority to conduct written tests and evaluate papers. This memorandum is explicitly mentioned in the delegation of authority contained in the Selection Guidelines and, consequently, the written test was properly administered by the Country Office.

The Organization explains that the Selection Guidelines provide that a Professional Staff Selection Committee composed of six staff members must be constituted for the selection of professional positions at the Regional Office. However, for practical reasons, selections of National Professional Officers in Country Offices are conducted by Interview Panels composed of a minimum of two persons: the WHO Representative acting as chairperson and another staff member holding a grade not lower than that of the post to be filled. If a staff representative is available, a panel may consist of three members, as stipulated by the final paragraph of the Selection Guidelines. Therefore, if a Country Office constitutes an Interview Panel with at least two members and possibly three, it is acting in compliance with the Guidelines. It points out that these are the minimum requirements, but the practice followed in SEARO Country Offices is to have Interview Panels composed of between three and six persons, as decided by the responsible WHO Representative. Between January 2007 and December 2008, 16 selections in Country Offices were organised with Interview Panels composed of more than three

members. It also points out that in a previous case against the Organization the Tribunal agreed that an increase in the number of their membership enhanced the objectivity of the selection process. The Interview Panel for the contested post was composed of four persons, in line with regional practice, and, in WHO's view, this did not affect the validity of the selection and resulted in no prejudice to the complainant. Further, it stresses that, as the name suggests, the Selection Guidelines constitute guiding principles, and therefore should not be interpreted strictly.

The defendant asserts that the successful candidate's qualifications exceed the minimum requirements of the post. It denies the complainant's allegations of bias and partiality and, relying on the case law, submits that he bears the burden of proving those allegations.

It rejects his assertion that he has lost a valuable opportunity for career advancement and it argues that he has failed to prove that the selection was not made in the best interest of the Organization. In addition, it rejects his claim that there were inordinate delays in the internal appeal procedure and considers that it dealt with his appeal with due diligence.

D. In his rejoinder the complainant presses his pleas. He contends that, according to the Tribunal's case law, an organisation is bound by its own rules until it amends or repeals them, and WHO's practice of composing Interview Panels of more than three members is unlawful because it breaches the Selection Guidelines.

E. In its surrejoinder WHO maintains its position in full.

#### CONSIDERATIONS

1. The complainant applied for the post of National Professional Officer (Planning & Monitoring) at WHO's Country Office for India, and was notified of his non-selection on 22 April 2008. He appealed that decision before the Regional Board of Appeal

which recommended that his appeal should be dismissed, and the Regional Director endorsed that recommendation in a letter dated 12 February 2009. The complainant appealed that decision before the HBA, which recommended “with due consideration to the current incumbent and to the good functioning” of WHO’s Country Office for India that, although the selection should be maintained, the complainant should be awarded 8,000 United States dollars in compensation because the selection process had been flawed, and up to 2,000 dollars in costs upon presentation of bills. The Board further recommended that the complainant’s other claims should be dismissed and that the Selection Guidelines should be reviewed and updated, and applied in a consistent manner throughout the Organization. It stated that discrepancies between the Organization’s policy and the practice should be avoided to prevent appeals of a similar nature. In a letter dated 7 April 2010 the Director-General notified the complainant of her decision to accept those recommendations. That decision is impugned before the Tribunal.

2. The complainant asks the Tribunal to quash the selection of the successful candidate – which was approved on 2 April 2008 – to order fresh selections under the Selection Guidelines for Professional Staff in the WHO South-East Asia Region dated 27 July 2005, and to order payment of compensation of 50,000 United States dollars instead of the 8,000 dollars awarded by the Director-General – which he finds incommensurate with the injury he suffered. He also seeks 10,000 dollars in damages for delays in the internal appeal proceedings, and 2,000 dollars in costs.

3. The complainant alleges several violations of the Selection Guidelines. In particular, he contends that the Interview Panel was comprised of four members instead of three and that the written test was administered by the Country Office for India and not by a Personnel Officer of the Regional Office. He also asserts that the successful candidate did not fulfil the educational requirements of the post as listed in the vacancy notice.

4. The Tribunal agrees with the HBA's findings that the directives contained in the Selection Guidelines regarding the required number of panel members are specific and that these directives were not followed. The HBA noted that there is a provision for the absence of a panel member but not for the addition of an extra member. The Selection Guidelines, under the heading "Long-term National Professional Officers (NPOs) (fixed-term)", state in relevant part that "the [WHO Representative] forms an interview panel of 3 members: [WHO Representative] (Chairperson), a staff member and a staff representative, if any, whose grades are not lower than the post to be filled. If the staff representative is not available, 2 panel members will be sufficient. The Chairperson [...] prepares Selection proposal duly signed by panel members and forwards to [Personnel] for [the Regional Director's] approval." The Organization's assertion that the Selection Guidelines merely constitute recommended practices, rather than binding rules, is mistaken.

5. The defendant submits that as long as the interview panel consists of at least two members it has complied with the Selection Guidelines and that the Selection Guidelines should be read in conjunction with the Regional Director's memorandum of 25 March 2004 and the Regional Personnel Officer's memorandum of 1 September 2004. However, as mentioned above, while an interview panel can consist of only two members when necessary, there is no provision stipulating that members may be added to the three prescribed by the Selection Guidelines. Furthermore, the fact that the Selection Guidelines should be read together with the above-mentioned memoranda has to be interpreted in such a way that the rules set out in the memoranda are understood as having legal force unless their application has been excluded by a more recent official text of the same normative value.

6. The complainant's arguments relating to the administration of the written test, and to the successful candidate's failure to meet the

educational requirements of the vacancy notice are unconvincing, as are his allegations of bias. His claims in this respect shall therefore be dismissed. In the memorandum of 1 September 2004 entitled “Delegation of authority to [WHO Representatives]”, as regards the administration of the written test for Long-term National Professional Officers, it was stated in relevant part that the WHO Representative shall prepare a shortlist of three to five candidates who will be invited to take a written test. The candidates must meet the minimum requirements of the post and priority should be given to qualified WHO and United Nations staff members. The WHO Representative shall prepare the test questions and conduct the written test and evaluate papers. The WHO Representative was therefore competent to administer the written test.

7. Regarding the educational requirements of the post, the vacancy notice listed “University degree from a recognized university; Post-graduate degree/diploma in business/public administration or related field desirable” as the requirements under the heading of “Education & Special Training”. The successful candidate holds a Bachelor of Arts degree from the University of Delhi and a Masters degree in Economics from the University of Kota. As the requirement for a post-graduate degree in business/public administration or related field is listed as “desirable”, it is incorrect to assume that it was a mandatory requirement. Furthermore, a post-graduate degree in Economics can be considered as “a related field”. Therefore, the Organization’s assertion that the successful candidate exceeded the minimum and desirable educational requirements of the post is reasonable. The complainant submits that the violation of the Selection Guidelines was “proof enough of the bias of the selection panel in favour of the selected candidate, and of prejudice against the other candidates, including [...] the complainant”. He further argues that the bias of the interview panel in favour of the selected candidate “to the prejudice of other candidates, including the complainant is established when the panel disregarded the lack of desirable qualifications in the selected candidate and ignored to



evaluate these desirable educational qualifications of the complainant [...]”. The Tribunal does not find any evidence of bias on the part of the Administration as the procedural flaw does not automatically imply bias or prejudice.

8. The complainant also contends that as the successful candidate was aware of his inability to fulfil the minimum educational requirement, he could not be considered to have accepted the appointment in good faith. Given that the successful candidate did satisfy the educational requirements of the post and that, according to the case law, in the absence of evidence to the contrary, good faith must be presumed, the Tribunal finds that the successful candidate accepted his appointment to the post in good faith. (See for example Judgment 2293, under 11 and 12.)

9. The complainant requests an award of 10,000 United States dollars for unreasonable delays in the internal appeal proceedings. The appeal before the Regional Board of Appeal lasted only nine months from the date of appeal (19 May 2008) to the date of the decision by the Regional Director (12 February 2009) to endorse the Board’s recommendation dated 19 January 2009. The complainant’s appeal before the HBA lasted just over 13 months from the date of appeal (24 February 2009) to the decision by the Director-General dated 7 April 2010. Considering that the two appeals took less than two years to complete, the complainant cannot be considered to have suffered from inordinate delays meriting an award of damages. This is especially true considering that the two-tiered appeal process has provided him with greater protection of his rights as a staff member. His claim being unfounded, it must be dismissed.

10. The complainant contends that the recommendation of the HBA to maintain the selection and the Director-General’s endorsement of that recommendation lack any nexus with the Board’s findings that the selection process was flawed. He argues that there is no valid reason not to quash the flawed selection. According to

firm precedent, an organisation has wide discretion in appointing or promoting staff. As any such decision is subject only to limited review, the Tribunal will interfere only if it was taken *ultra vires* or reveals some formal or procedural flaw or mistake of fact or law or abuse of authority, or if it overlooks essential facts or draws clearly wrong conclusions from the evidence (see amongst others Judgment 2060, under 4, and the case law cited therein). Moreover, candidates who apply for a post to be filled by competition, whatever their hopes of success may be, are entitled to have their applications considered in good faith and in keeping with the basic rules of fair competition. An organisation must be careful to abide by the rules on selection and, when the process proves to be flawed, the Tribunal will quash any resulting appointment, albeit on the understanding that the organisation must “shield” the successful candidate from any injury (see for example Judgments 1990 and 2020 and the case law cited therein).

11. It therefore follows that the impugned decision of 7 April 2010 must be set aside, as well as the decision of 2 April 2008 to approve the appointment of the successful candidate to the post of National Professional Officer (Planning & Monitoring) at the WHO’s Country Office for India. This is on the understanding that the Organization must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith (see Judgment 2584, under 21).

12. In light of the above, the impugned decision and the decision of 2 April 2008 to approve the appointment of the successful candidate will be set aside. The complainant has already been awarded compensation in the amount of 8,000 dollars and, as the Tribunal finds that it is a fair compensation, no further award will be made. As the complainant succeeds in part, he is entitled to costs in the total amount of 1,000 dollars.

DECISION

For the above reasons,

1. The decision of 7 April 2010 as well as the decision of 2 April 2008 to approve the appointment of the successful candidate are set aside. The Organization must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith.
2. WHO shall pay the complainant 1,000 United States dollars in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet