

FORTY-NINTH ORDINARY SESSION

In re BURGOS

Judgment No. 527

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Fredy Omar Burgos on 25 August 1981, the PAHO's reply of 25 October, the complainant's rejoinder of 1 December 1981 and the PAHO's surrejoinder of 14 January 1982;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, PAHO Staff Regulations 4.1 and 4.4, PAHO Staff Rules 230, 320.4, 1230 and 1240, and Manual section II.1.115;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a citizen of Chile, joined the Washington staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1970 as a grade G.4 clerk. In 1971 he was promoted to a grade G.5 Post, No. 3772, in the Department of Budget and Finance. His post was regraded, and he was promoted to G.6 in 1973, G.7 in 1975 and G.8 in 1977. On 6 June 1980 a vacancy notice appeared for a grade P.2 post, 3404, for a finance officer, and the complainant applied for it on 17 July. Having chosen a candidate from outside the Organization, the Administration informed him on 6 October that he had not been successful, and he filed an appeal with the Board of Inquiry and Appeal on 2 December challenging the decision not to appoint him and claiming reclassification of his own post, 3772, to P.2. On 15 January 1981 the PAHO acknowledged a procedural flaw: he had been informed of the selection of another candidate before the final approval of that selection. The selection was annulled and the offer withdrawn from the successful candidate. In its report of 3 April the Board recommended refusing the remedies claimed and by a letter of 29 May 1981, which is the decision impugned, the Director of the Bureau informed the complainant that he endorsed that recommendation.

B. The complainant contends that to prefer an outside candidate was a breach of Staff Regulation 4.4: "... vacancies shall be filled by promotion of persons already in the service ... in preference to persons from outside". He was the only inside candidate, he met the educational requirements of the post, had ten years' experience of accounting in the Bureau and had excellent performance reports. The description of the post and that of his own post are strikingly similar. There was personal prejudice on the part of the Selection Committee Chairman - who was also to be supervisor of the incumbent of the post and therefore unlikely to be objective in favour of the successful candidate. An appeal therefore lies also under Staff Rule 1230.1.1, which authorises appeal against any decision resulting from "personal prejudice on the part of a supervisor or of any other responsible official". The PAHO's selection procedures are not objective and their outcome is predetermined, the requirements of Regulation 4.4 and the merits of individual candidates being overlooked. There was therefore also "incomplete consideration of the facts" authorising appeal under Rule 1230.1.2. The annulment was intended to cover up the flaws in the procedure. Had Regulation 4.4 been respected, the complainant would have been selected. The Board acknowledged the irregularity which led to the annulment but failed to recommend redress. There was no legal basis for the annulment. The PAHO has violated Staff Rule 320.4⁽¹⁾ by failing to compensate the complainant for performing duties recognised - at least since the date of the notice of vacancy - as pertaining to the P.2 grade, his own duties being similar to those of post 3404. He invites the Tribunal to order the PAHO to regrade his post P.2; to pay him compensation from the date when he would have held post 3404 had he been selected; to compensate him under Rule 320.4 from 1977 or from the date when "his duties were advertised at the P.2 level"; and to reform the selection procedures. He also seeks costs and any further relief the Tribunal deems fair.

C. The PAHO observes that Post 3404 has been abolished anyway for want of funds. In its view any procedural irregularity in the selection. Procedure, such as notification before approval of the decision, was corrected by the annulment. The annulment was lawful: under Regulation 4.1 the Director-General is empowered to appoint staff,

and so may also rescind an appointment. Besides, the complainant has no cause of action since the annulment has not injured him. Even if there was an impropriety, he has shown neither any definite damage nor any causal link between the impropriety and the damage. The reform of selection procedures is not a matter for the Tribunal. The Selection Committee complied with the prescribed procedures. Staff Regulation 4.4 does not give a serving staff member any absolute right to promotion: it sets several basic criteria for the grant of promotion. Comparison of the complainant with the selected candidate is irrelevant because the offer of appointment was withdrawn. The claim to regrading of his post is irreceivable the internal means of redress not being exhausted: he has never applied under Rule 230 for review of the classification of his post. His claim under Rule 320.4 is irreceivable because there is no final decision; besides, he has never been required to assume responsibilities of a post at a higher grade, and the proper course is to apply under Rule 230.

D. In his rejoinder the complainant presses his claims. The abolition of the post is immaterial: had he been appointed he would have acquired the P.2 grade and could then have claimed another P.2 post after abolition of post 3404. He was the only inside candidate and he was qualified; he should therefore have been appointed under Regulation 4.4. The Director-General's authority to rescind under Regulation 4.1 is not absolute. The appointment was annulled on procedural grounds so as to conceal the breach of Regulation 4.4 and that is his reason for challenging the annulment. Access to other P.2 posts is unlikely and his career prospects have suffered; that is why he wants his own post to be regraded. Application for review under Rule 230 would be pointless since the grading officer would not be objective. Besides, if his post were regraded a new one would be established for which he would have to compete under Manual section II.1.115, with all the risks that would entail. In support of his claim to payment of a differential under Rule 320.4 he contends that he has had to perform P.2 duties at least since 31 August 1980.

E. In its surrejoinder the PAHO develops its contention that there is no evidence of any breach of the Staff Regulations or other illegal act, abuse of authority, personal prejudice or any other improper motive; that annulment has removed any flaw there may have been; and that the complainant has disclosed no cause of action. No one has an absolute right to promotion. Besides, his candidature was given fair consideration, and he did not possess the qualifications and experience of the selected candidate. His claim to regrading is an attempt to circumvent the internal procedure and his objections to following it are spurious.

CONSIDERATIONS:

The nature of the claims

The complainant, the holder of a G.8 post in the PAHO, applied for the post of Finance Officer at P.2 level. He was not selected and appealed to the Headquarters Board of Inquiry and Appeal, which recommended that relief be refused. The Director of the Bureau accepted the Board's recommendation and the complainant now appeals to this Tribunal.

He seeks the following remedies:

- (1) that the Administration revise and reclassify his present post from G.8 to P.2;
- (2) that the Administration provide monetary compensation to the date when the complainant's post would have been, effective had he been selected for the post in question;
- (3) that the complainant be compensated under Staff Rule 320.4 for assuming higher graded duties since 1977, or since his duties were advertised at the P.2 level;
- (4) that the Administration pay the costs of this appeal;
- (5) as general relief, that the PAHO Administration be advised to revamp the selection procedures, so as to conform with Staff Regulation 4.4;
- (6) that the Tribunal award any and all further relief it deems just.

As to compensation for non-selection

PAHO Staff Regulation 4.4 provides as follows:

"Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Pan American Sanitary Bureau in preference to persons from outside. This preference shall also be applied on a reciprocal basis to the World Health Organization and the Organization of American States."

The rule seems perfectly capable of application without undue difficulty but, that notwithstanding, the Headquarters Board of Inquiry and Appeal found as a fact that the text and import of the rule were not properly heeded during the deliberations of the Selection Committee. From this the complainant asks that the inference be drawn that there was personal prejudice on the part of the Selection Committee Chairman - who was to be the supervisor of the incumbent of the post - and/or there was incomplete consideration of the facts. In any event there was irregularity in the selection process in that the complainant was informed that another candidate had been selected in advance of the selection of the other candidate being finally approved.

The PAHO's answer to these submissions is that the post sought by the complainant has been abolished and, that being so, there is no basis for compensation for non-selection for the reason that the abolition of the post has not injured him nor has he suffered damage as a result of any irregularity in the selection process.

As to reclassification

PAHO Staff Rule 230 provides as follows:

"A staff member may at any time request a re-examination of the classification of the post which he occupies and any staff member may at any time request a re-examination of the classification of any post under his supervision."

The complainant has made no request under this rule. His explanation is that such a request would be futile because the classification officer is also a personnel officer and would not be objective in his analysis of the post.

The merits

Under the provisions of Article VII, paragraph 1, of the Statute of the Tribunal a complaint is not receivable unless the decision impugned is a final decision and the person concerned has exhausted other means of resisting it as are available under the appropriate Staff Regulations. Applying this provision the complainant's request for reclassification of his post is not receivable.

The newly-created post for which the complainant applied was abolished. It cannot be suggested that the decision to abolish the post was ultra vires or otherwise improper. It would follow that the complainant is not entitled to compensation for non-selection.

The claim for compensation for assuming higher graded duties since 1977, or since the duties were advertised at the P.2 level is predicated on the complainant's having performed the duties of the higher office for a period exceeding three months. But the complainant has never sought a differential allowance under Staff Rule 320.4 and as in the matter of the reclassification of his post he has failed to exhaust the remedies open to him under the Staff Rules of the Organization.

The request that the PAHO be asked to review its selection procedures is irreceivable. Moreover, as is clear from the foregoing, the claims for costs and any further relief are devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Mr. Jacques Ducoux, Vice-President, and the Right Sir William Douglas, P.C., Deputy Judge, the afore have hereunto subscribed their signatures as well Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

1. The rule reads: "A staff member may be officially required to assume temporarily the responsibilities of an established post of a higher grade... As from the beginning of the fourth consecutive month of such service, the staff member shall be granted non-pensionable extra pay..."

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