

SEVENTIETH SESSION

In re BARAHONA (Janice)

Judgment 1077

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Janice Ann Barahona against the Pan American Health Organization (PAHO) (World Health Organization) on 17 May 1990 and corrected before 28 May, the PAHO's reply of 30 July, the complainant's rejoinder of 1 September and the Organization's surrejoinder of 30 October 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 4.1 and 4.4, Staff Rule 1230.1 and PAHO/WHO Manual provisions II.3.344, II.3.346 and II.3.380;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, an Australian citizen, joined the staff of the Pan-American Sanitary Bureau (PASB), the secretariat of the PAHO, at its headquarters in Washington D.C. in 1965 as a clerk at grade G.3. After a break in employment she took up duty in mid-1969 as a clerk at grade G.5 in the Conference Section. Her post was regraded, and she was promoted, to G.6 in 1971, to G.7 in 1972, to G.8 in 1974 and, as conference officer, to grade 2 of the Professional category in 1978. She still holds that post and she has a career appointment. Reports on her performance have been very good.

In October 1985 she applied for a vacant post for an English editor, No. 4.0133, that had been put up for competition in the Scientific and Technical Health Information Program (HBI/ES) of the Publications and Language Services Department. The post was graded P.3. She and many others of the 39 candidates took an examination in March 1986. A Selection Committee met in June 1986. Four of its five members chose the complainant "in view of the length and quality of her experience with PAHO, her performance in the examination and the editing skills she has acquired in her role as a Conference Officer". In a report dated 12 June the four members recommended appointing her. But instead of making an appointment the Director announced by a bulletin dated 9 September the suspension of recruitment to headquarters posts. By a memorandum of 20 November the Chief of Personnel (APL) informed the complainant that post 4.0133 was unlikely to be filled soon. A temporary editor, Miss Cecilia Parker, was nevertheless recruited to do the work in the meantime.

On 23 March 1988 the Director authorised recruitment to the post. The notice of vacancy was reissued on 16 June 1988 and on 5 July the complainant again applied. On 12 August she lodged under Staff Rule 1230.1 an internal appeal objecting to the reissue of the notice. On 16 September a new Selection Committee recommended, again by four to one, appointing Miss Parker to the post. On 22 September the Director approved the recommendation and by a letter of 10 October, which the complainant got on 14 October, the Chief of the Manpower Planning and Staffing Unit told her of the appointment of Miss Parker. On 19 October she withdrew her appeal. On 12 December she filed a new appeal under 1230.1 against the decision notified in the letter of 10 October.

In its report of 9 January 1990 the Board of Appeal held that there had been no need for a new recommendation in September 1988 since a valid one had been made in June 1986; that not all the essential facts had been taken into account; and that several provisions of the WHO Manual had not been complied with. The Board recommended declaring the appointment invalid, endorsing the earlier recommendation of June 1986, appointing the complainant to the post and granting her retroactive payment of P.3 emoluments as from October 1986, and awarding her costs.

But by a letter of 2 March 1990, the decision impugned, the Director informed her that he rejected the Board's recommendations and her appeal.

B. The complainant submits that by refusing to appoint her to post 4.0133 the Director abused his discretion under Staff Regulation 4.1 to "appoint staff members as required".

(1) She alleges fatal procedural defects. According to PAHO/WHO Manual provision paragraph II.3.380, "Recommendations of ad hoc Selection Committees are submitted through the Chief of Personnel to the approving officer. The Director will serve as approving officer for professional posts ...". Although on 12 June 1986 the secretary of the Selection Committee drew up a memorandum intended for the Director and reporting on its recommendation in her favour, the Personnel Department failed to pass it on to the Director.

(2) Since the recommendation was made three months before the post was "frozen" she should have been appointed in 1986.

(3) It was improper to recruit a temporary employee to perform the duties of the post during the freeze. To take someone on for that purpose was in any event in breach of the freeze, and the PAHO has never explained why it so acted.

(4) As the Board of Appeal held, the post Miss Parker was appointed to was the same as the one the complainant had been recommended for. The freezing of it interrupted the original process of selection, which ought to have been resumed when the freeze ended.

(5) The second committee's recommendation and so the appointment were invalid for breach of Regulation 4.4: "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 Bureau] in preference to persons from outside". Having a fine record and being fully qualified, the complainant ought to have been preferred to an outside candidate like Miss Parker.

(6) In the second procedure for selection the complainant and others took a test of editing skills, but the PAHO failed to "quantify" the results. Since the Selection Committee was therefore unable to tell whether the candidates were up to standard it overlooked an essential fact and acted in breach of Manual provision II.3.344, which requires of candidates "the minimum qualifications".

The complainant asks the Tribunal to quash the appointment to post 4.0133 and order the PAHO to accept the first Selection Committee's recommendation, appoint her to the post and pay her at grade P.3 as from June 1986, and meet her costs.

C. The PAHO replies that the freezing of the post broke off the first process of selection, the complainant never appealed against the interruption and she may not do so now. So the material issue is whether the second process caused her any actionable wrong.

As she accepted at the time, the first process was lawfully interrupted by the freezing of the post for financial reasons. So there was no call to pass on the recommendation of her to the Director in 1986 and there was no breach of the Manual in failing to do so. Besides, she was merely recommended, and the Director did not actually appoint her. She may derive no rights from the first process. In particular the memorandum drafted by the secretary of the Selection Committee on 12 June 1986 was never sent to the Director and conferred no entitlement on her.

As for her argument that the Director committed an abuse of discretion by failing to act on the Board of Appeal's recommendation, he had no duty to do so.

Time enough had gone by since the first selection process to warrant starting a second one and getting a new recommendation. Since the complainant applied again and withdrew her appeal against the reissue of the notice she presumably regarded the second process as valid. Yet its purpose was not just to appoint her but to hold a fair competition.

Regulation 4.4 does not grant inside candidates absolute priority over outside ones. The complainant does not contend that Miss Parker was unqualified, and since Miss Parker was the better candidate the Director had no reason not to appoint her.

As for the failure to "quantify" the results of the test, editorial skills cannot be so measured: what matters is that the candidates were all given the same test and assessed by the same criteria.

D. In her rejoinder the complainant enlarges on her pleas and seeks to refute the defendant's. She reaffirms that, as the Board of Appeal held, the end of the freeze was no sound reason to drop the first process or the recommendation made in her favour in 1986, which had simply been put "in cold storage" until the post became

available again. Besides, having had three months in which to act on the recommendation before the freeze the PAHO was remiss in not appointing her then. The Chief of Personnel had a duty to pass the recommendation on to the Director, and the PAHO is liable to her for his failure to do so. How could it bring in a new temporary recruit to do the work after the post was frozen, yet not approve the first selection committee's choice of someone already on the staff? The Board of Appeal's findings were correct. Selection must be by duly established and objective criteria, and the second process of selection did not follow such criteria.

E. In its surrejoinder the Organization develops the pleas in its reply, contending that the complainant has failed to show that the only decision under challenge, the Director's letter to her of 2 March 1990, was in any way improper or unlawful. She fails to distinguish between the wrongful appointment of someone else to post 4.0133 and the illegality of the selection process. It is at the Administration's discretion to determine what sort of testing the choice of the right candidate calls for. As the complainant cannot disprove, the successful candidate had the qualifications and experience that the post required. The PAHO invites the Tribunal to reject the complainant's claims in their entirety.

CONSIDERATIONS:

1. At the material time the complainant, who had been in the service of the PAHO for some 20 years, held an editor's post at grade P.2 with the title of conference officer. The evaluations of her performance up to 1985 had been consistently very good.

2. On 15 October 1985 she applied for a vacant P.3 post for an English editor, No. 4.0133, in the Scientific and Technical Health Information Program (HBI/ES) of the Publications and Language Services Department and in March 1986 she and many of the other applicants took an examination. Four out of the five members of the Selection Committee chose the complainant on the grounds of her experience, her performance in the examination and her proven editing skills and in a report dated 12 June 1986 they made a recommendation in her favour.

Since there was urgent editing work to be done, the Director authorised the temporary employment of English editors in August 1986.

The Committee's recommendation appears not to have reached the Director. At all events, without making any appointment he announced by a bulletin of 9 September 1986 the suspension of recruitment to all Professional and General Service category posts, whether temporary or permanent, at headquarters in Washington, the reasons being "financial constraints" and a need to review the Organization's budgets for 1987 and for 1988-89.

Miss Cecilia Parker was appointed as a temporary editor in October 1986 and kept on under temporary appointments until August 1988.

3. The Director was asked on 2 March 1988 to lift the suspension for post 4.0133 and he authorised recruitment to the post. For that purpose, instead of taking up the recommendation the Selection Committee had made in 1986 in the complainant's favour, he had the notice of vacancy reissued on 16 June 1988. Although on 5 July the complainant again applied, she lodged an internal appeal on 12 August 1988 objecting to "the failure to honour her selection ... by reissuing a vacancy notice to the post". An editorial test different from the one she had taken earlier was set, but the results were never "quantified".

On 16 September 1988 a new Selection Committee recommended, again by four to one, appointing Miss Parker, who this time was among the candidates. On 22 September the Director accordingly appointed Miss Parker and the complainant was so informed on 14 October. Having on 19 October 1988 withdrawn her first appeal, she filed on 12 December a second one against the "wrongful appointment" of someone else to the post.

Reporting on 9 January 1990, the Board of Appeal held that the decision to appoint Miss Parker was flawed on several grounds. It observed that the first Selection Committee had duly recommended appointing the complainant; that since its recommendation had been valid and had never been rescinded there had been no need to order a new selection process in 1988; that essential facts had been overlooked, in particular related to the provision of test scores; and that there had been breach of Manual provisions II.3.344, II.3.346 and II.3.380. The Board recommended appointing the complainant and granting her payment of P.3 emoluments as from October 1986.

But by a letter of 2 March 1990, the decision impugned, the Director informed her that he rejected the Board's recommendation and her appeal. She is asking the Tribunal to quash Miss Parker's appointment and order the

PAHO to appoint her instead and pay her at grade P.3 as from June 1986. She also seeks an award of costs.

4. As the Tribunal has often declared, a decision by an international organisation to make an appointment is a discretionary one and is therefore subject only to limited review. It may be quashed 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 essential fact has been overlooked, or if there was abuse of authority, or if a clearly mistaken conclusion has been drawn from the evidence. Moreover, the Tribunal will in cases like the present exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the Selection Committee and the executive head full responsibility for their choice.

5. The complainant puts forward six pleas, and they are summed up in B above. The flaws she alleges are such as would, if proven, be fatal to the decision she impugns.

The complainant's first four pleas

6. The complainant having withdrawn her first appeal, this case is concerned only with the issues she raised in her second one.

The suspension of recruitment justified Personnel's decision not to forward to the Director the recommendation made by the Selection Committee in 1986. Besides, even if that recommendation had been passed on to him there was no certainty that he would have appointed the complainant: a Selection Committee makes mere recommendations and the Director has discretion to accept or to reject them. Since the first process of selection never reached the stage where the Director had to decide whether or not to appoint the complainant there can be no question of abuse of his discretion. It is true that, even when the Director had ended the suspension of recruitment to the post, the Personnel Department failed to bring forward the recommendation made in 1986 and to put it to the Director for decision. But the Tribunal is satisfied that, nearly two years having elapsed, it was only reasonable in the circumstances to treat the 1986 process as abortive and to start a new one by advertising the vacancy and interviewing and testing the candidates.

7. In sum the complainant's first four pleas fail.

(1) There was no breach of Manual provision II.3.380: recruitment having been lawfully suspended, there was no call to forward the 1986 recommendation to the Director.

(2) The complainant is mistaken in contending that since the recommendations were made three months before the post was frozen she should have been appointed in 1986: there is no legal requirement that action on recommendations be completed within three months or, for that matter, within any particular period.

(3) There was nothing improper, since urgent work had to be done, about recruiting a temporary employee to perform the duties of the vacant post.

(4) The freezing of the post aborted the first process of selection, and when the freeze ended in 1988 the lapse of nearly two years warranted starting the second one.

The complainant's fifth and sixth pleas

8. The lawfulness of the suspension of recruitment to post 4.1033, of the temporary appointment of Miss Parker, of the ending of the suspension and of the initiation of the second process of selection cannot be challenged. Yet the Tribunal is not precluded from taking into account what occurred between the two processes of selection, the one in 1986 and the other in 1988. It is clear on the evidence that in 1986 the Selection Committee was considering applications for two P.3 posts for editors - Nos. 4.5194 and 4.0133 - and agreed to recommend appointing the complainant to No. 4.0133. But it delayed recommending that the Director appoint anyone to post 4.5194, because it was waiting for the results of a test that applicants for that post had taken. That is why the Chief of Personnel decided not to forward the one recommendation to the Director until the other one had been made as well. And it was before the other one could be made, on 9 September 1986, that the Director suspended recruitment to the two posts and to others.

Because of urgent work towards the end of 1986 two temporary editors were later recruited, and indeed one of them came to be chosen by a different Selection Committee for the editor's post for which the results of the test

held in 1986 had not come through.

In the 1988 process of selection for P.3 post 4.0133 - the one for which the complainant had been recommended in 1986 - the other temporary editor, Miss Parker, was preferred to the complainant, a permanent staff member with, by then, over 20 years' standing and a consistently excellent record.

In the 1986 process the complainant and other short-

listed candidates took an examination and the results were "quantified", and four of the five members of the Committee recommended the complainant, one reason for their choice being "her performance in the examination". In the 1988 process, however, there was no quantification of the results of the test.

9. PAHO/WHO Manual provision II.3.344 provides:

"Selection Committee members are responsible for using and applying a relevant, consistent and fair process for evaluating and making meaningful distinction among candidates, with the objective that the selected candidate best meets the needs of the Organization."

One of the minimum requirements stated in the original description of post 4.0133 was the "achievement of a passing score on the PAHO competitive test for editors". Though the vacancy notice issued in 1988 did not specifically state that requirement, the failure to quantify the results of the 1988 test still deprived the Selection Committee of the means of "evaluating and making meaningful distinctions among candidates" for the post and accordingly recommending the one who "best meets the needs of the Organization". In the circumstances that failure was a fatal flaw in the selection process.

10. There was a further potential flaw in the process. Since the candidates had to write their names on the test papers, the person in charge of quantifying the results would, had she marked the papers, have been aware of their identity, and there would have been a risk that the examiner might, even involuntarily, be influenced by knowing the candidates. The process of evaluation must not only be fair, as provision 344 requires, but also be seen to be fair.

11. Regulation 4.4, the text of which is reproduced in B(5) above, gives preference to inside candidates for promotion, all other things being equal. Shortly after the suspension of recruitment to the two posts the 1986 Selection Committee was asked to consider applicants for, two temporary editors were recruited. Their appointments were financed from funds earmarked for the two posts and were constantly renewed until the 1988 process. That sort of approach is bound, whether rightly or wrongly, to give inside candidates the impression of subterfuge, particularly in this case, where in the end the two temporary editors were actually appointed to the two posts after the suspension was lifted. It is in the Organization's interests to avoid arousing suspicion that outside people are recruited under temporary appointments and, after some months' or even a few years' service, may get the opportunity of overtaking those who have served the PAHO well for much longer.

12. Though the serious flaw in the 1988 process was to the complainant's detriment, the Tribunal does not think it fitting in the circumstances to quash Miss Parker's appointment to post 4.0133, as the complainant asks. Instead it will order the Organization to pay her 12,000 United States dollars in damages for the injury she has sustained and 1,000 dollars in costs.

DECISION:

For the above reasons,

1. The PAHO shall pay the complainant the sum of 12,000 United States dollars in damages.
2. It shall pay her 1,000 dollars in costs.
3. Her other claims are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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