

NINETY-FOURTH SESSION

Judgment No. 2195

The Administrative Tribunal,

Considering the complaint filed by Mr H. F. G. against the World Health Organization (WHO) on 8 October 2001, the WHO's reply of 12 February 2002, the complainant's rejoinder of 17 April and the Organization's surrejoinder of 11 July 2002;

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 was born in 1946 and holds Turkish nationality. He joined the WHO at its Headquarters in Geneva on 11 September 1980 as an Internal Auditor at grade P.3, was promoted to grade P.4 in September 1989 and appointed to his current post as Senior Internal Auditor, grade P.5, on 1 April 1992.

The post of Director of Administration and Finance, at the WHO Regional Office for Europe (EURO), was advertised on 11 February 2000. The complainant applied for this post and was short-listed. He travelled to Copenhagen for a written test and interview. By a letter of 26 September he was informed that he had not been selected and that "another candidate" had been appointed.

Considering this appointment to be procedurally irregular, he filed an appeal against it on 23 October 2000 with the Headquarters Board of Appeal, seeking the annulment of the appointment and claiming an award of moral damages and costs. In its report of 2 April 2001, the Board of Appeal recommended that the request for annulment of the appointment be rejected, but that the complainant be awarded nominal damages of one United States dollar on the grounds that the selection process had been flawed. The Board also recommended an award of costs in favour of the complainant and an amendment of the Staff Rules with regard to the application of Rule 410.4.

By a letter of 13 July 2001 the Director-General informed the complainant that she endorsed the Board's recommendation concerning the appointment but rejected its recommendations concerning damages and costs, adding that the issue of an amendment of the Staff Rules had been submitted to the Human Resources Services Department for consideration. That is the impugned decision.

B. The complainant contends that the disputed appointment was invalid. By virtue of the WHO Manual paragraph II.3.60.2, and Staff Rule 410.4, the Organization was under no obligation to issue a vacancy notice and hold a competition to fill the disputed post. However, having chosen to do so, the Organization had to comply with the procedural requirements governing that method of recruitment and to select a candidate who satisfied the minimum qualifications stipulated in the vacancy notice.

The complainant asserts that the initial screening process was tainted by a gender bias in favour of female candidates. Moreover, the Organization failed to formally cancel the competition before appointing a staff member who had not even applied for it.

Lastly, he contends that the staff member chosen for the post was not properly qualified, so that even if her appointment was made outside the context of the competition, as a reassignment without promotion within the meaning of Staff Rule 410.4, such appointment, being contrary to the interests of the Organization and to Staff Regulation 4.2, remained invalid.

The complainant asks the Tribunal to set aside the Director-General's decision of 13 July 2001, to annul the disputed appointment and to award him moral damages and reimbursement of his legal fees and disbursements.

C. The WHO replies that the appointment was made outside the context of the competition, which had been concluded beforehand, no suitable candidate having been found amongst the competition applicants.

Meanwhile, as a result of a restructuring of EURO, the job description of the vacant post had been altered and additional duties stipulated. It had then become apparent that the redefined post could be filled by reassigning a staff member without promotion.

The decision to fill a post without holding a competition is a discretionary decision over which the Tribunal will exercise only a limited review. This reassignment without promotion was procedurally correct and fully complied with Staff Rule 410.4. Moreover, it was in the interest of the Organization, since the staff member appointed, unlike the complainant, was amply qualified for the redefined post and would indeed have been considered amply qualified for the post as initially advertised, had she applied for the competition. In addition, the post needed to be filled without delay.

At the request of the Tribunal, the staff member chosen for the post submitted her comments as an annex to the reply.

D. In his rejoinder the complainant maintains that the appointment should be annulled for breach of Staff Regulation 4.2. Whether or not its decision to abandon the competition in favour of a reassignment without promotion was legal, the Organization was not entitled to act in a manner contrary to its own interests by appointing a staff member who was not sufficiently qualified for the post.

E. In its surrejoinder the WHO presses its pleas.

CONSIDERATIONS

1. The complainant contests his non-selection for a post for which he applied in response to a vacancy notice and the appointment of another staff member by way of lateral transfer without formally cancelling the competition.
2. He argues that the selection process was procedurally flawed, that the appointment contravened Staff Regulation 4.2 as well as the Tribunal's case law, and that the appointment was contrary to the interests of the Organization.
3. The procedural flaws alleged by the complainant include gender bias in the short-listing, incomplete consideration of his qualifications, failure to formally cancel the competition before appointing a non-candidate and failure to provide proper reasons for not appointing him.
4. The Headquarters Board of Appeal identified a number of procedural flaws in the selection process. It concluded that there were, in principle, sufficient grounds to invalidate the selection procedure and to warrant an award of compensation.
5. However, the Board went on to establish that the complainant had not in fact suffered any real loss. The reasons provided by the Selection Committee for rejecting the complainant's application, which the Board considered to be sufficient and valid, showed that the complainant would not have been selected in any case. In addition, a lateral transfer was permitted under the Organization's Staff Rules and Staff Regulations and there was no evidence to suggest that the staff member thus appointed was insufficiently qualified.
6. Consequently, and taking into account the fact that no other candidate had appealed, the Board recommended that the selection process should not be recommenced.
7. The complainant contends that the Organization never formally cancelled the vacancy notice before making an appointment by lateral transfer. The Board of Appeal likewise found no evidence of formal cancellation, but since it was satisfied that the complainant would not have been selected in any case, it decided that this and the various other procedural flaws it had identified warranted no more than nominal damages. The Board recommended an amendment of the Staff Rules to clarify the issue of lateral transfers to posts which are the subject of a vacancy notice.

8. The evidence before the Tribunal shows that the competition for the advertised post had in fact been concluded before the contested appointment occurred, the Selection Committee having decided unanimously that no suitable candidate had applied. The Tribunal therefore rejects the complainant's arguments on this issue.

9. As a Director-level post the present appointment is squarely covered by Staff Rule 410.4, which provides as follows:

"Posts below the level of director, 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 Organization to fill by reassignment of a staff member without promotion."

10. The Organization was therefore entitled to make an appointment to the disputed post by reassignment without promotion and was under no obligation to advertise the vacancy or hold a competition.

11. However, the complainant argues that the appointed staff member was not sufficiently qualified for the post and that her appointment was therefore contrary to the interests of the Organization. He refers in particular to Staff Regulation 4.2, which provides, in part, that:

"The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity."

12. The Headquarters Board of Appeal found no evidence to support the complainant's allegation that the appointed staff member was unable to perform the tasks assigned to her.

13. The general rule established by case law is that the Tribunal will not substitute its opinion for that of a selection committee. It held in Judgment 1697, under 24, for example, that:

"[...] The Tribunal will review the comparison of candidates only when it appears that the Committee's choice rests on a mistake of fact or law or that there has probably been an abuse of authority [...]."

In the absence of any evidence of such mistakes or abuse, the Tribunal will defer to the Director-General in the exercise of her discretion as regards appointments and will not accede to the complainant's request to compare his qualifications with those of the appointed staff member.

14. What is "in the interest of the Organization" should be left to the organisation to decide. Time and again the Tribunal has held that it shall not interfere with a decision taken by the discretionary authority of the appointing power unless it finds that it was taken *ultra vires*, it shows some formal or procedural flaw, there was misuse of authority, there was a mistake of fact or of law, essential facts were overlooked, or a clearly mistaken conclusion was drawn from the evidence. That is not the case here.

15. Moreover, as the Tribunal observed in Judgment 1827, under 6:

"[...] The selection of candidates [...] is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate. [...]."

16. In the opinion of the Tribunal, the complainant has not demonstrated that the impugned decision was tainted by any flaw. There are therefore no grounds for quashing the Director-General's decision of 13 July 2001 upholding the disputed appointment.

17. The complainant has failed to establish that he suffered any moral injury and his claim for compensation therefore fails.

18. Nor is he entitled to reimbursement of his legal fees and disbursements, since all his pleas have failed.

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet