

NINETY-FOURTH SESSION

Judgment No. 2202

The Administrative Tribunal,

Considering the complaint filed by Ms M. D. against the World Health Organization (WHO) on 1 March 2002, the WHO's reply of 6 June, the complainant's rejoinder of 24 July and the Organization's surrejoinder of 11 October 2002;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant is of American nationality and was born in 1948. After joining the WHO in 1992 she had a series of short-term contracts. From October 1996 she held a fixed-term appointment as a secretary at grade G.4, in the Global Programme for Vaccines and Immunology. In addition to the duties of that post she served as staff representative on the Staff Association, and at the material time was Vice-President.

On 16 October 2000 the Organization issued vacancy notice LR/00/NMH/66 for an administration assistant at grade G.7 in the Management Support Unit of the Noncommunicable Diseases and Mental Health Cluster. The closing date for applications was 1 December. The complainant, who was at the material time at grade G.5, applied and learned on 5 December 2000 that she was on the short list. She attended an interview two days later but was informed by a letter dated 9 January 2001 that her application had not been successful. She subsequently learned that a candidate from the International Labour Office (ILO) was to be appointed.

By a memorandum of 2 February the complainant requested details of the competition as she wanted to "assess the fairness of the proceedings". Her request was denied, on the grounds that the selection documents were confidential. On 26 February the complainant notified her intention to appeal to the Headquarters Board of Appeal. The complainant received a letter of even date from a personnel officer informing her that the vacancy notice had been cancelled "due to changes in the overall work requirements" in the Unit. The complainant wrote to the Coordinator of Human Resources Services on 6 March contesting the cancellation of the vacancy notice.

By a letter of 9 March to the Headquarters Board of Appeal the complainant withdrew her notice of intention to appeal filed on 26 February, and the same day submitted a notification of intention to appeal, against the "decision of the Administration to cancel the vacancy notice". She filed her full statement of appeal on 2 April.

The Board reported on her case on 22 October 2001. In comments on the receivability of her appeal it noted that she was appealing "against both the selection and the decision to cancel the [...] vacancy notice". It accepted that the new notification of intention to appeal annulled and superseded her first one. It found no evidence of violation of any of the rules governing selection procedures; nor did it find evidence of bias either in favour of the successful candidate or against the complainant or in the decision to cancel the vacancy notice. It recommended that "the selection procedure be allowed to stand", that the "decision to cancel the selection be annulled" and "the selection process be resumed". It found that the complainant had suffered no real loss as a result of the decision to cancel the vacancy notice and recommended that payment of compensation was not warranted.

The complainant is challenging a final decision taken by the Director-General on 13 December 2001. In her letter the Director-General held the view that the complainant had withdrawn her previous appeal against the selection made for the G.7 post and had appealed solely "against the decision of the Administration to cancel the vacancy notice". She accepted the Board's recommendation that there were no grounds for awarding compensation to the complainant and dismissed her claims. The complainant wrote back on 2 January 2002 querying aspects of the

decision. By a letter of 9 January 2002 the Director-General reiterated her decision.

B. The complainant has the following five pleas. First, the Administration's decision to select a candidate from outside the Organization must be rendered null and void because it infringed the WHO's rules, regulations and policy of giving preference to internal candidates. That policy, she argues, is clear from Information Circular IC/89/97, dating from 1989, which has not been superseded or revoked. Despite the fact that Staff Regulation 4.4 allows for recruitment of staff from the United Nations and specialised agencies it nonetheless shows that there is a "hierarchical preference system" in place within the WHO in favour of internal candidates. The complainant contends that she was as well qualified as the ILO candidate, if not more so, and should have had priority over her.

Secondly, she submits that the decision to cancel the vacancy notice was arbitrary. It was procedurally irregular and could not be attributed to restructuring in the cluster. The way it was cancelled caused her injury for which she is entitled to redress. She claims that after cancelling the notice the Organization appointed a junior professional at P.2 level on a short-term appointment to carry out the same tasks as those that were to be part of the G.7 position.

Thirdly, she contends that the Organization failed to abide by established procedures when it interviewed her for the post, since the selection panel was not properly constituted.

Fourthly, she had been short-listed for the post and had a good chance of being selected; she therefore had "a legitimate expectation that the vacancy would result in the occupation of the post". The cancellation of the vacancy thwarted that expectation, thereby causing her injury.

Fifthly, she argues that the Administration showed prejudice against her throughout the selection process, and she presumes that the cause was her involvement in the Staff Association. Instead of offering the position to another candidate on the short list the Organization cancelled the vacancy notice, and she sees that as further evidence of prejudice against her.

Among her claims for redress she wants the Tribunal to order the WHO to: conduct an investigation into the disputed selection and subsequent cancellation of the vacancy notice and forward the results to her; supply her with a copy of the selection report; give her in writing the reasons why she was not chosen; and give her a copy of the "terms of reference" for the P.2 post which was created to replace the G.7 one. She also asks that the "impugned selection decision and its cancellation be quashed", and wants another selection procedure to be conducted for the G.7 post in compliance with the applicable rules. She seeks moral damages in the amount of one United States dollar; confirmation that circular IC/89/97 is still in force; such other relief as is deemed appropriate by the Tribunal; and costs.

In addition, she asks the Tribunal to order the Organization to produce any documents that would help the complainant present her case.

C. The Organization states that the part of the complaint that challenges aspects of the selection procedure is irreceivable as it has not arisen from an internal appeal and the complainant has not exhausted the internal means of redress. While recognising that the Headquarters Board of Appeal looked into whether there had been any irregularities in the abandoned selection procedure, it says that the Board erred in doing that because the selection procedure was not the subject of her internal appeal. She had withdrawn her first appeal and her second notification of intention to appeal lay exclusively against the decision to cancel the vacancy notice. It contends that the complaint as a whole is devoid of merit.

With regard to the cancellation of the vacancy notice, it states that the complainant is wrong in assuming that the competition must necessarily result in an appointment being made to the post. The timing of the cancellation of the vacancy notice has to be seen in context. The Organization's interest was finally best served by abandoning the competition. In taking that decision it properly exercised its discretionary authority; it acted in good faith and for objective programmatic reasons. While the competition was under way it became clear that the Unit needed to be reorganised, and it was necessary to create a P.2 post. The Organization issued a vacancy notice for the P.2 post in March 2002 and the complainant was one of the candidates.

While considering them to be irreceivable, the Organization responds to the complainant's arguments relating to the selection made to the G.7 post, but deems them to be immaterial because it abandoned the competition before

anyone was officially appointed to the G.7 post. Her status as an internal candidate did not entitle her to be selected in preference to non-WHO candidates. Moreover, her interpretation of Staff Regulation 4.4 is at odds with the case law, as the Tribunal has consistently ruled that preference shall be given to internal candidates "all other things being equal". It points out that although she relies on circular IC/89/97, it has long since been superseded by other policies and procedures. It categorically denies the complainant's allegation of personal prejudice, and argues that while it has the duty to substantiate a decision that does not mean it has to reveal the selection records to her. The complainant has not suffered any injury and payment of damages is not warranted.

D. In her rejoinder the complainant maintains that her case is receivable because when she sent her full statement of appeal to the Board on 2 April 2001 she said in the covering letter that she was resubmitting all the arguments on non-selection put forward in the appeal that she had withdrawn.

The wording of circular IC/89/97 in her view still holds because staff have never been informed of any amendment, and the circular states that the final result of a post advertisement must be the appointment of the "best qualified internal candidate". Contrary to the Organization's assertions, she is not saying that she should have been appointed to the G.7 post, she is saying that an internal candidate should have been given preference over an external one. Nor is she saying that the mere announcement of a competition must result in a vacancy being filled. Her argument is rather that the Organization should have followed its decision through, because it had gone as far as to offer the position to the ILO candidate. She is challenging the improper motivation of the decision to cancel the selection process and not the right of the Organization to cancel it under "proper circumstances". By virtue of the moral injury she has suffered she insists that she is entitled to costs. She also asks the Tribunal to hear the ILO candidate as a witness.

E. In its surrejoinder the Organization again contests the receivability of the complainant's arguments relating to non-selection. It points out that she was informed of her non-selection on 9 January 2001, and so her covering letter of 2 April resubmitting her arguments arrived after the 60-day statutory time limit for the filing of an appeal. Her first statement of intention to appeal satisfied that time limit, but had been withdrawn.

It stresses that the competition was abandoned before an appointment was made and the ILO candidate was never appointed to the post.

CONSIDERATIONS

1. The complainant, who is employed at the WHO as a secretary at grade G.5, applied for the G.7 post of administration assistant in the Management Support Unit (MSU) of the Noncommunicable Diseases and Mental Health Cluster (NMH) in response to a vacancy notice of 16 October 2000.
2. Five candidates were included on the short list, namely the complainant, three other internal candidates and one from the ILO.
3. After a written examination and an interview by a selection panel, the ILO candidate was chosen unanimously and was so informed on 20 December 2000. Likewise, she was told that until her employment contract with the WHO was signed, there could be no firm commitment regarding her proposed appointment.
4. By a letter of 9 January 2001, the complainant was informed that her application had been carefully reviewed by the Selection Committee but had not been successful.
5. She then asked to be provided with "details of the competition", but her request was denied. On 26 February 2001 she filed a notice of intention to appeal with the Headquarters Board of Appeal.
6. The same day she was informed that the vacancy notice for the G.7 post had been cancelled "due to changes in the overall work requirements in the NMH/MSU". The other non-selected candidates, as well as the ILO candidate, were similarly informed of the cancellation of the vacancy notice.
7. In the meantime, a reorganisation of the MSU was taking place in order to separate administration and personnel functions. As an offshoot of this restructuring, it was decided to abolish the G.7 post and create a P.2 post instead.

8. Reacting to the cancellation of the vacancy notice, the complainant sent two memoranda. In one dated 27 February 2001 she acknowledged that an appointment by an international organisation may be a discretionary decision, but held the view that the procedure in question was flawed and had "breached the rules of fair competition and due process". In another of 6 March she contested the cancellation of the vacancy notice on the grounds that the decision taken was arbitrary and was not in keeping with established procedures for cancelling vacancy notices.

9. On 9 March the complainant formally withdrew her notice of intention to appeal, but submitted another on the same day against the Administration's decision to cancel the vacancy notice. On 2 April she filed her full statement of appeal with the Headquarters Board of Appeal.

10. On 22 October 2001 the Board submitted its report to the Director-General, concluding as follows. There was no evidence of violation of the rules governing selection procedures and the selection should be allowed to stand. Likewise, it had not found evidence of bias either in favour of the selected candidate or against the complainant, or in the decision to cancel the vacancy notice. It recommended that the decision to cancel the selection be annulled and the selection process be resumed.

11. In a letter of 13 December to the complainant, the Director-General agreed with the Board's finding that the decision to cancel the vacancy notice was not a biased one; she considered that the decision was a "valid one of discretionary authority". The Director-General accepted the Board's recommendation that the complainant should not be paid compensation and that all her other claims should be dismissed.

12. The complainant wrote back on 2 January 2002 seeking clarification of the Director-General's letter. On 9 January the Director-General reiterated her decision, stating that she did not agree with the Board's recommendations that "the selection procedure be allowed to stand, the decision to cancel the selection be annulled, and the selection process be resumed".

13. In her complaint to the Tribunal the complainant is contesting the decisions on both her non-selection and the cancellation of the vacancy notice. She alleges that the Administration failed to follow its own rules and procedures set out in the Staff Rules and Regulations by hiring an external candidate instead of her; it failed to consider her background and seniority; and it exhibited prejudice both by cancelling the vacancy notice and by subsequently refusing to accede to her inquiries regarding the selection process.

14. The complainant's main claims for redress are as follows:

(i) That the WHO "be ordered to conduct an investigation forthwith into the impugned selection and subsequent cancellation of the applicable vacancy notice, and that the results of such investigation be promptly communicated to [her]".

(ii) That the impugned selection decision and its cancellation be quashed, and that the WHO be ordered to conduct another selection for the G.7 post "in compliance with all applicable WHO rules, procedures, and instructions, as well as the law of the international civil service".

(iii) That the WHO be ordered to supply her with a copy of the selection report and of the terms of reference for the P.2 post which was subsequently created.

(iv) That she be compensated in the amount of one United States dollar for moral damages and reimbursed her actual legal fees and costs.

15. The Organization, replying to the complainant's protest against her non-selection, asserts that on the basis of the vacancy notice, all short-listed candidates, including the complainant and the ILO candidate, underwent the competitive process in the same way. The selection panel and the Executive Director of NMH unanimously concluded that the ILO candidate was better suited for the post than the other candidates.

Under Staff Regulation 4.2, the paramount considerations in the appointment, transfer or promotion of staff are the "highest standards of efficiency, competence and integrity". It is not said therein that this standard can only be reached by promoting staff already in the WHO's employ.

16. The complainant relies on Regulation 4.4 which states that:

"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 Organization in preference to persons from outside. This preference shall also be applied, on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations."

She interprets this to mean that "WHO personnel will be promoted in lieu of external candidates", and that read in conjunction with other provisions it establishes a "hierarchical preference system" by which the WHO should "hire from within [...], then look to other organisations, then look to external candidates to fill positions".

17. The Tribunal's case law holds that this regulation means giving preference to internal candidates "all other things being equal".

18. The selection panel considered the ILO candidate as best qualified among all the candidates for the post in question even though it expressed regret at not being in a position to recommend an internal WHO candidate.

19. As noted by the Organization, the candidate chosen was a staff member of the ILO, which, with reference to Regulation 4.4, is a specialised agency "brought into relationship with the United Nations". Such a candidate, according to this regulation, can be placed on an equal footing with internal WHO candidates in selections.

20. The complainant alleges that she was the victim of personal prejudice stemming from her participation in the Staff Association which, in turn, motivated the decision to cancel the vacancy notice instead of offering the post to another candidate on the short list. The Tribunal, however, finds there is absolutely no evidence to support this allegation.

21. The Organization's arguments and justification for its decisions first to select another candidate instead of the complainant, then to cancel the vacancy notice, and finally not to appoint that candidate, are grounded on relevant Tribunal case law. The complainant's first appeal in respect of the selection of the external candidate was abandoned and even though she resubmitted her claims regarding the decision of 9 January 2001 in her full statement of appeal of 2 April 2001, they were by then out of time. They are therefore irreceivable and must be dismissed.

22. In Judgment 2105, on a case which also involved the WHO, the Tribunal stressed that the Director-General was within her rights in abandoning a competition which had been announced if, in her discretion, it was necessary to effect desired reforms.

23. The Organization is free to withdraw a notice of vacancy at any time, even when, as in this case, the process of selection had gone quite far (see Judgment 1357, under 11).

24. The Tribunal finds no violation by the Organization of its Staff Rules and Regulations or the laws of the international civil service when it exercised its managerial prerogative and discretion to cancel the vacancy notice in question. Nor was there substantive evidence of bias or prejudice.

25. There being no moral injury suffered by the complainant, no damages or redress are warranted. All other claims are dismissed.

DECISION

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

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.