

The Administrative Tribunal,

Considering the complaint filed by Mrs S. B. B. against the Pan American Health Organization (PAHO) on 21 November 2001 and corrected on 17 January 2002, PAHO's reply of 7 May, the complainant's rejoinder of 24 June and the Organization's surrejoinder of 22 October 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, who is of Honduran nationality and was born in 1950, entered the service of PAHO on 1 February 1977. At the material time she held a career-service appointment as Administrative Assistant II, at grade G.7, and was responsible for personnel matters and procurement in the PAHO Representation Office in Honduras.

In early 1996, in order to meet its staffing needs, the Office of the PAHO/WHO Representative started to deal with an employment agency called PRADEH. In September 1998 the Representative told the complainant that he had been to the Honduran Social Security Institute (IHSS) to verify information about the agency, and had noticed from its records that her husband's name appeared as manager of the company. The form in question was dated 27 June 1996, and had been filled out internally by IHSS staff when the company was registered. Another form, dated 7 May 1996, which had been filled out by PRADEH and signed by the complainant's husband as representative, identified someone else as the general manager. The PAHO/WHO Representative obtained copies of the two documents and showed them to the complainant, who said her husband had done work for PRADEH as an unpaid temporary adviser, and that the IHSS was wrong in stating that he was the manager.

PAHO's Chief of Personnel wrote to the complainant on 5 October 1998 specifying various charges against her as a result of her husband's supposed involvement with PRADEH. She also indicated that a similar situation had arisen in 1993 when it came to light that the complainant's husband had connections with a company called CATSA that was recruiting staff for the Office in Honduras, and went on to say that PAHO had, on that occasion, allowed the "irregular situation" to exist for a limited time only, until a company offering the same services could be found. The complainant replied to the charges on 29 October 1998. In her comments she stated that the idea of dealing with PRADEH had originated from a colleague, Ms C.

In a letter of 24 February 1999 the Chief of Personnel defined another five charges against the complainant and told her that until the investigation had been completed she was suspended from her functions - with pay. The complainant replied on 8 April. By a letter of 16 April the Organization said that her explanations did not "exonerate [her] from the charges" and she would be dismissed on 31 May 1999, under Articles 1075.1 and 1110.1.4 of the Staff Rules.

She filed an intent to appeal on 2 June 1999, contesting her termination. At her request, the Headquarters Board of Appeal granted extensions for submitting the brief of her internal appeal. The need for these was explained by the complainant's counsel in a memorandum to the Board dated 1 May 2000. He said the complainant had started legal proceedings against the IHSS and until that lawsuit had reached a conclusion she did not have the necessary evidence to support her argument that PAHO had acted on the basis of incorrect information supplied by the IHSS. The Board decided to grant "one last extension" to 31 December 2000. It then took up her case.

The Board reported on 2 July 2001. A minority of its members thought matters should be held in abeyance until

"the case [had] been fully adjudicated in Honduras". The majority found against the complainant, recommending the dismissal of her claims. In a decision of 23 August 2001, that the complainant impugns, the Director of PAHO endorsed the majority recommendation of the Board. He said that the fact that she did not disclose her husband's association with PRADEH "created a conflict of interest", warranting her dismissal for misconduct.

B. The complainant submits that in misconduct cases the burden of proof lies with the organisation, and the evidence put forward by PAHO is not sufficient. She notes that of all the charges originally held against her only the one of conflict of interest has been retained. PAHO is principally relying on just two forms faxed from the IHSS and statements by Ms C. and another colleague who testified against her. She contests the credibility of the evidence obtained from the IHSS. The two documents in question are contradictory in that one contains an entry that her husband was manager of PRADEH, and the other shows the manager to be somebody else. Even though statements were taken from her colleagues they failed to prove that her husband had a stake in PRADEH, and the Organization's conclusion that conflict of interest existed is not justified.

Her intention is to obtain a retraction from the IHSS with regard to the two documents, and in order to successfully rebut the evidence put forward by the Organization she must first pursue her legal action in the Honduran courts. The Board of Appeal acted unlawfully in forcing her to present her case prematurely before she had finished the process of refuting the evidence on which the Organization was basing its case.

In further argument she adds that PAHO was wanting to upgrade its Administrator posts from the General Service category to National Officer level, for which she would not be qualified; because she had remonstrated about that upgrading, the Organization was clearly seeking a way to end her appointment and had seized on the issue of conflict of interest to bring that about.

She seeks reinstatement, moral damages, and costs.

C. In its reply the Organization states that it has sustained the burden of proving that there was conflict of interest. The complainant withheld information that she knew to be crucial in the contracting of PRADEH and "wilfully breached her oath of office and the ethical standards incumbent on international civil servants". She "repeatedly took advantage of her position to advance the interests of her family". In ending the complainant's appointment it acted properly, and on the basis of legitimate evidence.

It submits that even if the two documents obtained from the IHSS are at variance regarding the name of the manager, both show that the complainant's husband was associated with PRADEH. It conducted a full administrative review and obtained both documentary and testimonial evidence. The complainant was afforded the opportunity to comment on it and fully exercised her right to defend herself, but she has adduced no evidence to disprove the facts.

Furthermore, although she had had adverse decisions from the Honduran Social Security Administration she did not inform the Board of Appeal of any of those proceedings; she just regularly requested extensions for filing her appeal on the basis of her need to be able to pursue her action before the Honduran courts. Regarding the time allowed for the filing of the complainant's internal appeal, the Organization says it acted fairly. The Board granted her eight extensions over a period of 18 months. That gave her ample time to prepare her case. The complainant showed bad faith in not keeping the Organization informed of the status of her parallel claims against other entities.

The Organization expresses the opinion that because it had agreed to deal with CATSA for a limited time only, PRADEH was created in its stead specifically to take over the task of supplying staff to the Office in Honduras.

It claims costs against the complainant.

D. In her rejoinder the complainant asks the Tribunal to order the Organization to provide her with the original of a statement made by Ms C. on 4 February 1999.

She contends that the meaning of "conflict of interest" is crucial to her case. Her argument is that her husband was not employed by PRADEH and had no "legal share to any part of the contract with PRADEH"; since he had no "interest" in the company no conflict of interest existed and the Organization terminated her employment without cause.

It appears to her that in the past when PAHO was wanting to take on staff to whom she is related, she has complied

with her obligation to the Organization by disclosing the family connection; but even when PAHO had that knowledge, the recruitment in question or signing of a contract still went ahead.

It is the complainant's belief that the legal process in Honduras must be allowed to run its course in order to establish the accuracy of the information in the IHSS forms.

E. In its surrejoinder the Organization states that in trying to define what her husband's "interest" was in PRADEH the complainant is attempting to shift the focus away from her misconduct. She knowingly withheld material information and allowed a "tainted procurement action to go forward". The complainant alone bore the responsibility of the procurement action. Whether or not it was Ms C.'s idea to use that company's services is of no relevance to the central issue, which is the complainant's failure to divulge critical information. It states that it does not have the original of the statement of 4 February 1999 that the complainant is requesting, and in any case considers the dispute about that document to be a purely private affair between the complainant and her former colleague.

What ultimately constitutes conflict of interest is, PAHO points out, a matter for the Organization to decide, in accordance with its rules and policies. The documents from the IHSS are only relevant to this case in so far as they support what the complainant has already admitted - namely, that her husband was associated with PRADEH. The Organization goes on to point out that the Honduran Administrative Tribunal that heard her lawsuit issued three judgments against her, the last one being final.

The Organization does not agree that the complainant always disclosed family ties before PAHO entered into a contract with people she was related to.

CONSIDERATIONS

1. The complainant began working for PAHO on 1 February 1977 as an Administrative Assistant at grade G.4. Her post was successively reclassified and at the time of her termination she held grade G.7, as Administrative Assistant II, with a career-service appointment. Her duties included recruiting personnel which was done by way of contracting through an outside agency.

2. By way of background to the complaint, the complainant's husband was one of the incorporators of a company called CATSA, which provided, inter alia, employment agency services. When the Office of the PAHO/WHO Representative in Honduras was looking for a new employment agency in 1993, CATSA was contacted. The complainant states that the family link and conflict of interest were revealed from the outset and despite that, the Representative decided to use CATSA for a short contract. PAHO claims that the complainant did not immediately reveal the possible conflict of interest. No disciplinary action was taken against her at that time. The Chief of Personnel made it clear in a letter to the Representative, however, that the contract was to be temporary and that future contracts must be with firms not connected in any way to PAHO employees. The evidence indicates, and the Board of Appeal decided as a matter of established fact, that PAHO was aware of the conflict of interest when it signed the three-month contract with CATSA. It is also clear that after the CATSA contract was terminated the complainant knew of PAHO's policy regarding conflict of interest.

3. In October 1993 the Representative contracted with an employment agency called CADERH; however, because of problems with that agency, he began looking for another company to replace CADERH in early 1996. Eventually, PAHO signed a contract with PRADEH, a company incorporated in December 1994. The incorporators designated a Mr B.H. as the general manager.

4. There is a dispute between the complainant and PAHO as to whether the complainant initiated contact with PRADEH or whether it was another PAHO employee, Ms C. This has become the focus of much controversy and has indeed led to a lawsuit in the civil courts. Much of the material produced relates to this question which is, however, in the Tribunal's view, irrelevant to any issues before it.

5. The actions that led to the present complaint before the Tribunal began when it came to the attention of the PAHO/WHO Representative that the complainant's husband's signature and name appear on two documents relating to PRADEH, held by the Honduran Social Security Institute. The first document is a form headed "Request for registration of employers". On this form, filled out on 7 May 1996, Mr B.H. is identified as the general

manager of PRADEH and the complainant's husband signed on the line provided for the signature of the "Employer or [his] Representative". The second document is an internal IHSS form dated 27 June 1996. It states in part that PRADEH has nine employees, one of which is the complainant's husband, identified as the manager and earning a salary of 600 lempiras per month.

6. On 5 October 1998 PAHO's Chief of Personnel charged the complainant with misconduct because she did not inform PAHO that her husband was linked to PRADEH. That same day, Mr. B.H. made a sworn statement before a notary public to the effect that the complainant's husband was in no way connected with PRADEH.

7. In answering PAHO's charges against her, the complainant maintains that her husband had spent time over a two-month period training one of PRADEH's accountants. He did it as a favour and without pay, and during that time registered its IHSS form. Other than that, he has had no connection with and no financial interest in PRADEH. The reason his signature appears on the first IHSS document is because he filed it on behalf of PRADEH, acting as their representative, which he was for the purposes of filing the form. The complainant cannot explain why her husband's name is listed as a PRADEH manager on the second document but states that it is an error and the form in question was filled out exclusively by the IHSS.

8. The complainant offered as evidence the sworn statement, referred to above, in which the notary himself affirmed that he had searched through the incorporation records, personnel lists, documents relating to social security contributions, and other legal documentation and attested to the fact that the complainant's husband "never has appeared nor currently appears as associate, manager, administrator, employee and/or contractor" nor has he maintained any other relationship - be it "corporate [...] commercial [...] or of any other nature" - with the company called PRADEH.

9. In addition to this evidence, the complainant submitted correspondence from Mr B.H. to the IHSS in the former's attempt to have the IHSS clarify the mistake it had made because the complainant's husband was not and had never in fact been an employee (or manager) of PRADEH. Mr B.H.'s attempt did not meet with success and the complainant's further efforts to force the IHSS to change its records have in fact been dismissed by the appropriate civil and judicial authorities at all levels.

10. On 16 April 1999 the Chief of Personnel informed the complainant that her appointment would be terminated as of 31 May 1999, based on six charges, five of which involve her husband's alleged involvement with PRADEH and one of which involves a conflict of interest with respect to her niece, which PAHO does not rely on in these proceedings. The gravamen of the remaining charges is that the complainant knowingly failed to reveal to PAHO that her husband had an interest in PRADEH at the time the contract with the latter was entered into.

11. On 2 June 1999 the complainant filed an appeal with the Headquarters Board of Appeal. Because of her pending litigation with the IHSS, by which she was seeking to get the latter to change its records, the complainant asked for several extensions so that she could rely on the outcome of the civil action. After eight extensions, the Board of Appeal refused to grant any more and her case was heard.

12. On 2 July 2001 the Board issued its report. Three members found that there was no reason to doubt the IHSS documents, thus accepting that the complainant was indeed guilty of the charges against her. Two members found that there was not enough evidence to substantiate the charges against the complainant and so she should be given the benefit of the doubt.

13. On 4 September 2001 the complainant received the Director's final decision, dated 23 August 2001 which is the impugned decision. He accepted the Board's majority opinion and upheld his decision to terminate the complainant's employment.

14. The complainant insists that her husband has never had an interest in PRADEH and thus there is no conflict of interest and she has not in any way behaved inappropriately.

15. The complainant relies principally on the following evidence in support of her position:

(i) Mr B.H.'s notarised statement before the notary public and the latter's own statement that her husband's name does not appear in PRADEH's books.

(ii) Correspondence between Mr B.H. and the IHSS, where the former requests an explanation for the mistakes in

the IHSS documents, which it never addressed.

(iii) Her own correspondence with the IHSS.

16. The complainant argues that PAHO had the burden of proving whether her husband had an interest in PRADEH and that, in relying primarily on the IHSS documents, it has not discharged that burden.

17. She also submits that it was wrong for the Board of Appeal to refuse further extensions. It should have allowed them until her civil action against the IHSS had wound its way through the courts, since the result of that action might have given her the irrefutable evidence she was seeking.

18. While there can be no doubt that the PAHO has and had the burden of proving the complainant's misconduct, it is in the Tribunal's view equally clear that the IHSS documents, being official government records whose source can only have been PRADEH itself and whose authenticity has been confirmed by the appropriate Honduran authorities, create a 'case to answer' which had the effect of shifting to the complainant the burden of showing that her husband did not have any interest in PRADEH. That burden is rendered more difficult by the complainant's admission that her husband actually did work for PRADEH over a period of at least two months although without, it is said, receiving any compensation for his efforts. That is, to say the least, a very unusual circumstance which requires explanation. One does not offer one's services gratuitously to a commercial enterprise in which one does not have an interest. Notwithstanding that the complainant had ample opportunity to produce any evidence she wished, and has in fact produced numerous witness statements on numerous irrelevant peripheral matters, there is one glaring omission in her case. The one person best able to inform the Tribunal on the nature and extent of the complainant's husband's involvement in PRADEH and to explain his activities is her husband himself. His failure to give evidence on the subject, and possibly to expose himself to cross-examination on the question, is fatal to her case. The majority of the Board of Appeal did not err in finding as it did.

19. The complainant's claim of procedural unfairness is equally unfounded. The Board of Appeal gave extensions of time of some 18 months and she has not shown that even if she had been given more time she would have been able to marshal more evidence in her favour.

20. The complainant has failed to show any error in the impugned decision which was based on the majority finding of the Board of Appeal.

21. The Tribunal sees no reason to allow PAHO's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. PAHO's counterclaim 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

