

NINETY-NINTH SESSION

Judgment No. 2436

The Administrative Tribunal,

Considering the complaint filed by Mr H.C.S. against the World Health Organization (WHO) on 5 March 2004, the WHO's reply of 16 June, the complainant's rejoinder of 6 August, and the Organization's surrejoinder of 3 November 2004;

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, an Indian national born in 1946, joined the WHO in its Regional Office for South-East Asia (SEARO) in 1969. He received regular within-grade increases throughout his career and on 1 May 1997 he received a two-step merit increase for exceptional service. At the material time he held a post at the ND.07 level as "Assistant Insurance-Finance".

The post of Special Assistant (Finance) fell vacant on 1 September 2000 and the post of Special Assistant (Budget), (whose responsibilities had been temporarily assumed at various times by the complainant between July 1994 and February 1997), became vacant on 1 January 2002. Vacancy notices for each post, at the ND.X level, were issued on 22 January 2002. The complainant applied for both posts. He was shortlisted for the post of Special Assistant (Budget), but he was informed in identical letters of 6 May 2002 from the Regional Personnel Officer that his applications were unsuccessful.

He appealed to the Regional Board of Appeal on 14 June 2002 against his non-selection for both posts. After considering the information before it, the Board came to the conclusion in its report of 30 April 2003 that there was no factual evidence to support the complainant's contentions and it recommended dismissing the appeal. The Regional Director did so in a letter of 12 May 2003. The complainant appealed against this decision to the Headquarters Board of Appeal on 10 June. The Headquarters Board reviewed the case and, in its report of 10 November, it came to the same conclusion. The Director-General informed the complainant in a letter of 24 November 2003 that he agreed with the Board and therefore was dismissing the appeal. That is the impugned decision.

B. The complainant argues that there has been incomplete consideration of the facts by the Administration and that this constitutes an abuse of discretion. He contends that the Headquarters Board of Appeal looked into confidential files relating to the selection process and although he was not made aware of the contents of these files, and is therefore unable to comment on them, he presumes that sufficient material is available to challenge the Board's erroneous conclusion that the Administration had followed the prescribed selection process. He submits that there are demonstrable differences in the qualifications, experience, seniority, and performance of the candidates and that the Organization is not entitled to choose a less qualified and less experienced candidate in the "exercise of its discretionary powers". He compares his qualifications with those of other candidates to show that he was the best candidate and says that the rejection of his candidature has "no logical, reasonable or objective basis". He alleges that he was the highest-rated candidate for the post of Special Assistant (Budget) when it was vacant in 1996; however, another official was promoted on the grounds of seniority.

He submits that there has been a failure to observe and correctly apply the provisions of the Staff Rules and Staff Regulations. There was a substantial delay in advertising one of the two posts. He says that according to the terms of the selection and recruitment procedures for General Services staff published on 14 October 1998 (under the reference Information Circular IC-98-23), "a vacant post should be advertised within two weeks of its falling vacant" and that under the terms of Cluster Note 99/3 of 8 January 1999 actions to fill vacancies due to retirement "should be initiated six months before a Staff Member's retirement". But the WHO has taken the position that these provisions are only "directory" in nature and are not mandatory. In addition, Information Circular IC-98-23

was “inexplicably amended” by a memorandum of 21 June 1999 in such a way that his earlier achievements could no longer be taken into account during the selection process. He argues that pursuant to the Staff Regulations this amendment is *ultra vires* and therefore the selection has been tainted by the same flaw.

He alleges that there has been a “conspiracy” against him and personal prejudice on the part of the Budget and Finance Officer (BFO) and other responsible officials which has affected his chances, since 1999, of being awarded a post at the ND.X level.

He asks the Tribunal to quash the Director-General’s decision dismissing his appeal and to order his promotion to the ND.X level post of Special Assistant (Budget or Finance) with effect from the date of the vacancy. He requests that three circulars on selection and recruitment procedures published between 14 October 1998 and 21 June 1999 be declared *ultra vires* under the Staff Regulations. He also claims moral damages and costs.

C. In its reply the WHO states that, according to the Tribunal’s case law, decisions on selection and promotion are discretionary and thus are subject to limited review. It explains at length the selection procedure for the posts in question and states that it did not provide the complainant with the selection records for the two posts as these are privileged in nature; however, it did make these records available to both Boards of Appeal and is willing to make them available to the Tribunal if so requested. It submits that all the relevant facts were properly considered and that the complainant put forth many irrelevant facts in his complaint. In his analysis of all the candidates’ qualifications he has alleged in particular that his seniority should have played a more important role in the selection process; however, if the Organization had the intention to rely only on seniority for selection, then there would be no selection procedure at all, as the most senior staff member would automatically be assigned to any vacant post.

There has been no breach of Information Circular IC-98-23 or of Cluster Note 99/3; these do not afford any particular rights to staff members and merely clarify conditions and provide guidance to help managers plan for staffing needs in respect of retiring staff. It is clear from the wording of the texts that the policy recommendations made in them are not obligatory. The complainant is therefore mistaken in considering that the applicable rules have been violated. The delay in advertising the post of Special Assistant (Finance) was due to the fact that a review of the post description was felt necessary when the post became vacant. The Organization points out that the amendment to Information Circular IC-98-23 followed a proposal from the Staff Association and that this was explained to all staff members concerned. The amendment was not in contradiction with provisions of the Staff Regulations.

There has been no “conspiracy” to bar him from selection to an ND.X post nor has he submitted any proof that there has been personal prejudice against him.

D. In his rejoinder the complainant accuses the WHO of concealing facts. He reiterates that he had been considered the most suitable candidate for promotion to the post of Special Assistant (Budget) in 1996 and that this is clear from a covering letter written by his then supervisor concerning the selection process; he says he was passed over for the post “because of internal politics”. The Organization has failed to produce this document for the Tribunal and it has not replied to his allegation. He points out that he is not making any claim to promotion with effect from 1996; however, he does not find it reasonable or logical that he could be found the most suitable candidate in 1996 and that in 2002 persons with less professional experience got promoted in his place. He claims that he is not seeking promotion solely on the ground of his seniority but that he is basing his argument on all the criteria listed in Information Circular IC-98-23. He contends that the amendment to this circular provided an easy way for the “interested party” on the Selection Committee (i.e. the person coming from the same service as the vacant post) “to advance his illegal objective of rejecting the candidature of the [c]omplainant in exercise of his personal prejudice”.

He points out that category ND.X no longer exists at SEARO and has been replaced by category NO-A. Consequently, he amends one of his claims accordingly and asks to be promoted to this new category.

E. In its surrejoinder the Organization submits that it did not address the issue of his non-selection for the post of Special Assistant (Budget) in 1996 because it is clearly outside the scope of the present dispute; he did not challenge the decision at the time it was taken and he is time-barred from doing so now. Furthermore, the document he produced on this issue details some of his qualities but does not give any indication that he was the candidate proposed for selection; this is a typical example of the complainant’s “erroneous inferences”. The

Organization considers Information Circular IC-98-23 as well as its implementing guidelines to be in compliance with the Staff Regulations and it contends that determining the relative weight to be given to each criterion for selection is within the WHO's prerogative. There is no proof that the "interested party" was able to use any of the criteria against the complainant in the selection. Contrary to the arguments put forward by the latter, he was not the best candidate for either of the posts.

CONSIDERATIONS

1. The complainant, who has occupied various positions in the WHO's Regional Office for South-East Asia for a period of about 35 years and who, at the material time, held the post of "Assistant Insurance-Finance" at the ND.07 level, applied for the positions of Special Assistant (Finance) and that of Special Assistant (Budget) in response to vacancy notices issued for both posts on 22 January 2002.
2. After going through the selection process as prescribed by the relevant staff rules, the complainant's applications for both vacancies were turned down on 6 May 2002. He appealed his non-selection successively to the Regional Board of Appeal and the Headquarters Board of Appeal; both recommended dismissing the appeal. The Director-General accepted the recommendation of the Headquarter's Board and dismissed the appeal and all requests for redress.
3. Having received the decision on 16 December 2003, the complainant filed his complaint with the Tribunal on 5 March 2004. His claims are set out under B, above.
4. Throughout the different stages of his internal appeal and his complaint, the complainant has principally relied on the following arguments: (a) personal prejudice on the part of his supervisor and other responsible officials at SEARO; (b) incomplete consideration of facts; and (c) failure of the Administration to observe and apply the provisions of Staff Rules and Staff Regulations.
5. As regards the allegation of prejudice, the complainant perceives as part of a conspiracy to bar him from an ND.X post his non-selection to the two Special Assistant positions as well as his reassignments, the first in 1999 to the Staff Health Insurance (SHI) "out of the mainstream" Budget and Finance Unit (BFU) when any of the junior staff members could have been appointed thereto and the second in 2003 to the Office of the WHO Representative to India where the assignment involved substantially lower job responsibilities compared to his former post.
6. The Tribunal finds, however, that level transfers are common practice in the WHO, in line with Staff Rule 565.2, when it is in the interest of the Organization to do so, as in fact the complainant has been reassigned several times in the course of his career. Moreover, the complainant had not been moved outside BFU since the post of Assistant Insurance belongs to the Finance sub-unit of the BFU. Both the post in SHI and the post in the Office of the WHO Representative to India were classified at the ND.07 level with the same responsibilities as his previous post. In any event, there is no basis for the allegation of prejudice in his non-selection for the subject posts as his applications were processed by the Selection Committee in accordance with the relevant rules.
7. The complainant has alleged that the facts of the case suggest that the Administration has reached a conclusion not warranted by the disclosed facts. While it may have a wide discretion in the matter of selection of a staff member for promotion, this discretion should be exercised in a reasonable manner. In the present case, he insists, there are demonstrable differences in the qualifications, experience, seniority and performance of the candidates; therefore the Administration may not choose a less qualified and less experienced candidate in the exercise of its discretionary powers in selecting candidates for promotion.
8. He cites specific facts which were supposedly ignored by the Administration: that he was senior in practically every grade to either of the two successful candidates; that he is the only one who has exclusive experience of nearly three years in a temporary capacity in the ND.X post of Special Assistant (Budget), which he held as supervisor; that he was considered the most suitable candidate for promotion to the post in 1996; that he is the only candidate holding a career service appointment in the WHO; that when he held the ND.X level post he was given a "double meritorious award"; and that he received regular within-grade increases throughout his career.
9. The Tribunal, however, finds no substantial basis to depart from its consistently-held view that in cases of

promotion or appointment in international organisations, the Director-General has a considerable level of discretion and, as such, his decision is subject to only limited review. It will set aside such decision only if it was taken without, or in abuse of, 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 material fact was overlooked, or if a clearly wrong conclusion was drawn from the evidence. In cases like this, the Tribunal will “exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice”. (See Judgment 2163, under 1.)

10. The Tribunal is satisfied that the Selection Committee has properly recognised and evaluated the factors of education, experience, performance and personality traits of the three candidates in the shortlist, including the complainant, in determining the efficiency, competence and integrity of each candidate. It has rightly applied the amendments made to the selection procedure, introduced in June 1999, which were not in violation of the Staff Regulations, such as giving more weight to the criterion of “personality traits” as rated following the interview over the criterion of “performance”, as well as increasing the Panel membership to three persons instead of one, thus enhancing the objectivity of the selection process. The complainant cannot insist on his own self-evaluation over that of the Organization.

11. The Tribunal takes note of an observation made by the Personnel Officer, after the Office of the Representative to India requested a replacement of the complainant at the earliest opportunity due to its perception of his “low level of performance” that “[r]ealistically, therefore, [the complainant] would have to come to terms with the fact that no promotion would materialize for him during his remaining 3 years with WHO”.

12. The allegation of the complainant that the Organization has failed to observe and apply the provisions of the Staff Rules and Staff Regulations has mainly been addressed by the Tribunal under 10, above. It concludes that the WHO has applied its “Guidelines for implementing the selection and recruitment procedures for [General Services] Staff effective 1 November 1998”, its Staff Rules and Staff Regulations, as well as its Information Circulars, in selecting the most qualified candidate for each of the posts in question. No adequate evidence has been adduced to show otherwise.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Flerida Ruth P. Romero

Agustín Gordillo

Catherine Comtet