

## FORTIETH ORDINARY SESSION

### *In re* PRICE (No. 2)

#### Judgment No. 342

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan-American Health Organization (PAHO) (World Health Organization) by Mr. Hoyt Glenn Price on 15 June 1977, the PAHO's reply of 12 August, the complainant's rejoinder of 9 September and the PAHO's surrejoinder of 20 September 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 54 of the Constitution of the World Health Organization, the PAHO Staff Regulations, particularly Regulation 2.2.1, the PAHO Staff Rules, particularly Rules 120, 130, 1030.1.b, 1030.1.c, 1030.1.d and 1030.9 and the WHO Manual, particularly paragraphs II.1.20, II.1.40.1, II.1.40.2, II.1.40.5 and II.3;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the Pan-American Sanitary Bureau, the secretariat of the PAHO, on 18 January 1954 and was assigned to the Supply Office. He has since held a series of more and more responsible posts in that office and reached grade P.3 (on post 0239). From 25 July 1975 to 27 April 1976 he was acting Chief of the Supply Section. His annual reports attested to his satisfactory performance. In 1958 he was given a "career service appointment".

B. In 1975 the post of the Chief of the Supply Section fell vacant. The complainant applied, but the post went to another candidate. In April 1976 he appealed against that decision to the Board of Inquiry and Appeal and then to the Tribunal (see Judgment No. 326). The Board of Inquiry and Appeal recommended that the selection committee's choice for the post should be accepted but that the Administration should consider promoting the complainant to an appropriate step in the P.4 grade, as his supervisors had already recommended. The Director of the Bureau rejected the latter recommendation on the grounds that it touched on a matter subject to the regrading procedures. Those procedures were set in motion in September 1976 and a revised post description was approved. The personnel office nevertheless took the view that the complainant's post was correctly graded P.3. The complainant appealed against the personnel office's decision to the Board of Inquiry and Appeal, which recommended upgrading his post to P.4. The Director's final decision of 25 March 1977 to reject the Board's recommendation is the decision impugned.

C. The complainant asks the Tribunal:

(a) to declare that the classification standards of the PAHO were improperly applied;

(b) to declare that the principle of equal pay for equal work has been violated since the duties pertaining to several P.4 posts which he mentions and to his own P.3 post are similar;

(c) to order that his post be regarded P.4;

(d) to order that the reclassification take effect on 22 September 1976, the date on which the revised post description was approved; and

(e) to award him reasonable costs.

D. The nub of the PAHO's case is that duties in a regional office and duties at headquarters, which are naturally broader in scope and performed at a higher level cannot be put on a par, even if they are similar. The complainant's post was correctly and lawfully graded P.3. The PAHO therefore asks the Tribunal to dismiss the complaint.

## CONSIDERATIONS:

1. It is unnecessary in this case to offer a complete description of the anomalous relationship between the WHO, the PAHO and the PASB. It is sufficient to say that the office in Washington where the complainant serves is both the headquarters of the PAHO as an autonomous organisation and a regional office of the WHO. The complainant is in the service of the PAHO (or the PASB) as an autonomous organisation which is nevertheless closely connected with the WHO. In particular the PAHO's relationship with its staff is, subject to certain modifications, governed by the WHO Staff Manual. These modifications are inserted into the Manual on pink pages.
2. The origin of this dispute lies in a decision of the PAHO/WHO Board of Inquiry and Appeal given on 29 April 1976 rejecting an earlier complaint by the complainant; the complainant's subsequent appeal to this Tribunal was dismissed in Judgment No. 326. This earlier complaint concerned the procedure of a selection committee which had rejected the complainant's application for the vacant post of Chief of the Supply Section and recommended instead a candidate from outside the Organization. The complainant, who was then occupying Post 0239 at the level of P.3, had a long and excellent record of service in the Supply Section and had for the preceding nine months been acting as its chief. The Board added to its decision a recommendation that consideration should be given to promoting the complainant to P.4 as previously recommended by his supervisors. This, however, could be done only by a reclassification of his post, since it is clearly established in SM II.1.40.5 that "the grading of a post will be dependent upon the duties and responsibilities required and not on the qualities of the incumbent". Under SM II.150 the Chief of Personnel has authority to classify individual posts "in accordance with the Post Classification Plan". The Chief, Dr. Ortega, caused a desk audit to be made of the complainant's duties and responsibilities and a revised post description was approved on 22 September 1976. But at the same time Dr. Ortega decided that the post was properly classified at P.3. Against this decision the complainant appealed successfully to the Board of Inquiry and Appeal on 24 January 1977, but on 25 March 1977 the Director of the PAHO decided to affirm Dr. Ortega's decision. Against this affirmation the complainant has appealed to the Tribunal.
3. The decision impugned is one taken within the discretionary authority of the Director, over which the Tribunal has only a limited power of review. The grounds for review include error of law, excess of authority, misapprehensions of the facts and a material irregularity in the procedure. An analysis of the facts and arguments in the dossier has led the Tribunal to the conclusion that the Director's decision is vitiated by errors within these categories. Fundamentally, the anomaly created by the fact that the PAHO is both the headquarters of an autonomous organisation and a regional office gives rise to problems which cannot be legally solved in the manner proposed in the Organization's argument. The complainant relies also on irregularities in procedure peculiar to the circumstances of this case. These irregularities are lightly dealt within the Organization's argument which moves on a different plane. Since however they are not admitted, the Tribunal must deal with them. The simplest way of showing how both the irregularities and the errors occurred is to set out the events in narrative form and to deal with the points in issue as they arise.
4. One must begin with a study of the WHO Post Classification Plan. There was not in the part to be referred to any modification of it in its application to the PAHO. After an introductory section containing general principles, from which the Tribunal has already quoted in paragraph 2 above, the Plan consists of numerous sections, each one devoted to a category of officer. The relevant category in the present case is Supply Officer. In each category the Plan describes under some such heading as Distinguishing Features of Work and in the manner of a post description the functions (the word is used here to embrace also duties and responsibilities) of the officer at the different levels from P.1 to P.5. In the case of the Supply Officer a division is made into the sub-categories of Medical (within which the complainant fell), Administration and Shipping. In some cases also a distinction is made between headquarters and regional offices. In the case of Supply Officers (Medical) the Plan described separately the functions at the P.3 and P.4 levels at headquarters and regional offices respectively.
5. It is in this case conceded that (subject to a general discretion which the Organization contends is vested in the Director) the complainant's post at Washington is to be treated for the purposes of the Plan as a headquarters post. The complainant prepared for the Board of Inquiry and Appeal a detailed comparison between the functions of his post as set out in his post description or as discharged by him and the functions set out in the Plan at headquarters P.4 level, and claimed that they were substantially the same. He also prepared a detailed comparison between the post description for his post and that for the WHO Post 1.2983, which is a P.4 post for a Supply Officer at WHO headquarters in Geneva; this shows a remarkable similarity on paper. While this latter exercise is useful as a practical demonstration of the application of the Classification Plan, it was put forward by the complainant

primarily in support of his contention that Dr. Ortega's decision was in breach of the basic principle expressed at II.1.40.2 that "posts of approximately equal difficulty and responsibility and requiring approximately the same qualifications should be placed in the same class". At the hearing before the Board the Organization's representative objected to this comparison on the ground that the WHO and the PAHO were separate organisations. In the end the Board stated that it had reached its conclusion without regard to this comparison. The Tribunal likewise, while accepting the comparison as an illustration, does not find it necessary to consider the application of the basic principle.

6. Dr. Ortega and the Board both applied the same test, i.e. a comparison of the complainant's post description with the descriptions in the Post Classification Plan. The former held that the complainant's post description fitted P.3 in the Plan and the latter that it fitted P.4. The five members of the Board included some who were experienced in classification work; they were unanimous and clear in their disagreement with Dr. Ortega. Thus, in having to decide whether to accept or reject the recommendation of the Board, the Director of the PAHO was faced with a difficult task. It is at this point that the complainant makes his first charge of irregularity. He alleges that the Director permitted Dr. Ortega to "become intimately involved in the appeal case in an advisory capacity". The Organization does not dispute this, but replies that it is normal WHO practice for submissions on recommendations made by the Board to be prepared by the Chief of Personnel. The complainant retorts that, whether or not it is the practice, it is wrong for the officer "who took the adverse action" to be involved in the decision upon its merits.

7. The one would dispute that there are many cases in which the Director could properly ask the officer concerned for elucidation of the Board's recommendation. But in the peculiar circumstances of this case in which the views of the Chief of Personnel and the Board were irreconcilably opposed, there is prima facie evidence of irregularity. Dr. Ortega was not in a position to give the Director the neutral and impartial advice of the sort which he might be expected to seek from someone higher in the hierarchy. Since Dr. Ortega could not be neutral, to confer with him might be giving one side in the dispute an opportunity which was denied to the other. But much must depend on the exact part assigned to Dr. Ortega. While some degree of involvement is not denied, it is not at all clear what form it took. What is clear is that the Director decided to refer the point to the WHO Chief of Personnel for "an evaluation" or "advisory opinion".

8. In so doing the Director was not referring the matter to an authority within the hierarchy. When he gave the decision impugned the Director of the PAHO was acting as the head of an autonomous organisation from whom there was not, except to the Tribunal, any appeal. The WHO was for this purpose, as the PAHO itself contended before the Board of Inquiry and Appeal, a separate organisation. But the WHO Chief, Mr. Taylor, treated as a member of an outside organisation, was nevertheless an independent expert on the matter; it is not suggested that there is anything wrong in the Director seeking his help in making up his own mind. What the Director could not do was to delegate his responsibility to Mr. Taylor. The exact terms in which the application to Mr. Taylor was made do not appear in the dossier. But Mr. Taylor appears to have treated the application simply as a reference to him for decision. In a memorandum to Dr. Ortega dated 14 March 1977 he gave his evaluation in a sentence without any discussion of detail: "We wish to confirm that the post in question is properly classified at P.3".

9. The Tribunal will not, for reasons which will hereinafter appear, decide whether it would have been proper for the Director to have accepted this "confirmation" of Dr. Ortega's view as settling the matter without going further into it himself. Before that point is reached there intervenes a second charge of irregularity. The Director did not personally approach Mr. Taylor for help and advice; he entrusted the approach to Dr. Ortega. Dr. Ortega sent to Mr. Taylor "the entire appeal file", but sent with it an accompanying letter of 7 February (not in the dossier) which appears to have contained substantial additional argument. Whether or not Mr. Taylor's evaluation was to be decisive, it would certainly be extremely influential. What the Director was doing in effect was to set up a further process of appeal in which access was allowed to one side and not to the other. This is gravely irregular.

10. At this point the argument gets diverted into another channel. Mr. Taylor answered the wrong question. What was submitted to him in the letter of 7 February was Dr. Ortega's comparison of the complainant's post description with the description of the headquarters P.4 post in the Plan and what he was presumably asked to confirm was that the two descriptions did not match. But he replied that a description which related to WHO headquarters in Geneva was "not to be considered as applicable" to PAHO headquarters in Washington. It was only those parts of the Plan, he wrote, which concerned regional offices that applied to PAHO. It was on this assumption, as he wrote, that he confirmed that the complainant was properly classified at P.3 (presumably regional) and added that his post description did not include the specifications for P.4 regional.

11. Mr. Taylor's memorandum was received in Washington on or about 17 March and considered by the Chief of Administration, Mr. Muldoon. He read it, he wrote, "as an indication that Mr. Price could not meet the requirements of the P.4 grade either at headquarters or regional levels". In fact the memorandum never said anything at all about headquarters levels. This is perhaps rather a curious omission, since Mr. Taylor might have been expected to say that, even if his assumptions were wrong and Dr. Ortega's right, nevertheless the claim must still fail. Mr. Taylor did not say this and Mr. Muldoon appears to reach his conclusion by treating regional standards as "the lesser standards" and from this arguing that, if in Mr. Taylor's opinion the complainant could not satisfy the lesser standard, it must follow that he could not satisfy the greater. Whether or not regional standards are lesser, they are certainly quite different. They could not be applied to a headquarters post without a great deal of paraphrasing. The regional officer is, for example, required to initiate communications to bring significant changes to attention at headquarters. He is required to work with a minimum of supervision and to submit his recommendations to the Chief of Administration at headquarters. Mr. Price on the other hand, like his counterpart in Geneva, was a second-in-command and required to work under the supervision of the Chief of Supply Services or his equivalent. Broadly it seems true to say that the P.4 regional officer has greater independence within his own office than his equivalent at headquarters, but exercises it within a much smaller area of responsibility. Undoubtedly Mr. Taylor was literally correct in saying that the complainant's post description did not include the specifications of a P.4 regional officer. Did he mean more than that? Why was he not asked?

12. On 25 March the Director wrote the letter containing the decision impugned. He said that he had noted that the Board of Inquiry and Appeal "did not seek specific information regarding classification matters". It is not clear from the dossier what information the Board is thought to have lacked nor why what it lacked was not supplied by the representative of the Organization who attended the hearing. The letter continues: "In order for me to make an objective and intelligent assessment of the issue, I requested from the Classification Unit of WHO/Geneva an evaluation as to the adequacy of the grading level of Post 0239. I took their evaluation into consideration along with the data provided by the Board in reaching my decision". The Director then states that he cannot agree with the Board that "the PAHO/WHO classification standards were not properly applied in your case".

13. It is clear from this letter that the Director had found himself unable to resolve the controversy between Dr. Ortega and the Board without the further evaluation which he says he took into consideration. In the opinion of the Tribunal Mr. Taylor's evaluation was irrelevant, being made on the wrong basis. If the Director read it as Mr. Muldoon did, then for the reasons already given he misconstrued it. Moreover, even if Mr. Taylor had expressly confirmed Dr. Ortega's opinion, the confirmation would be tainted by the irregularity of allowing Dr. Ortega to reopen the case before Mr. Taylor without giving a similar opportunity to the complainant. It is true that the Director's letter says merely that he took it into consideration, not that he relied entirely on it. But on what else could he have relied? The letter makes it clear that the evaluation was needed "in order for me to make an objective and intelligent assessment of the issue". If Mr. Taylor's evaluation was irrelevant or tainted, there is nothing to show that the Director got what was necessary from any other source. For these reasons and applying the principles that limit the Tribunal's power of review, the Tribunal concludes that the decision is defective in that it lacks a proper basis of fact or is based on irrelevant matters or is tainted by irregularity: consequently it must be quashed. The question that remains is whether the matter should be remitted to the Director for a fresh decision or whether, as the complainant asks, the Tribunal should itself order a reclassification.

14. It is at this stage that it becomes convenient to consider the argument advanced by the Organization in its reply and additional comments. Though it makes no admissions on the points with which the Tribunal has just been dealing, it hardly touches them. Its case is that, even if the comparison of functions shows the complainant's post description to fit the headquarters P.4 post, there remains a discretion in the Director to modify the Plan in its application to headquarters at Washington. This argument does not dispute that the PAHO at Washington is a headquarters office and not a regional one, nor does it dispute that there is only one PAHO/WHO Classification Plan and that the only division in it is between headquarters and regions and not between Geneva and Washington. But, so the argument runs, there cannot be "a complete identity of functions" between the Geneva staff and the Washington staff. The PAHO's functions "are related to the geographical area of the Americas and not to the rest of the world". So, in many categories, including the Supply Services, "PAHO has graded the posts for comparable activities at least one grade lower than in Geneva". Mr. Muldoon put the position more bluntly when he wrote: "The Organization's position that PAHO is a separate entity and uses its own standards has not and will not change. In Mr. Price's case he was measured against a P.4 headquarters level post as contained in the PAHO classification standards and he did not meet the requirements. To me, it is as simple as that".

15. This argument does not sustain the decision impugned. On the contrary, it virtually admits that it was wrong.

What that decision purported to decide was that the PAHO/WHO classification standards were properly applied to the complainant. It did not say that they were applied at one grade lower. Nor did it say that what was properly applied was PAHO's own standards as a separate organisation and as used by Mr. Muldoon. If the Director had a discretion as claimed in the argument, there is no sign that he sought to exercise it or to apply his mind to the considerations which it would involve.

16. So the argument really relates not just to the question of whether the decision impugned should be quashed but to the question of whether, once it is quashed, the matter should be remitted to the Director for a new decision. An order to remit might be right if it is still open to the Director either to find - this time without irregularities - that the complainant's post description did not fit the WHO/PAHO headquarters P.4 level or to find that he could within his discretion apply some other standard.

17. As to the first, the Tribunal finds that on the facts in the dossier the complainant's post should, if the PAHO/WHO Classification Plan is applied, be classified as P.4. It reaches this conclusion from the detailed comparison made in the request which the Organization has not attempted to controvert; on the contrary, it has, as pointed out in the rejoinder, conceded a number of similarities. The Tribunal realises that classification demands more than a comparison on paper and that normally it would depend on a reading by experts. But the Tribunal has, apart from its own reading, the decision of the Board of Inquiry and Appeal, fortified by the significant gaps in Mr. Taylor's evaluation and in the Organization's arguments which taken together seem tantamount to an admission.

18. As to the second, the Tribunal holds that the Director has not got the discretion claimed. Admittedly the WHO and PAHO are separate organisations. But in the exercise of its own autonomous authority PAHO has adopted the WHO Classification Plan save where it has made insertions "to reflect PAHO policies and procedures different from those of WHO". If it is PAHO policy to make its headquarters officers a grade below those of the WHO, effect can be given to it only by the insertion of a "pink page". While the policy remains as stated, the Director has no power to depart from it by a discretionary decision in a particular case; and it seems clear from the terms of the decision impugned that he never supposed that he had.

19. Since upon a remission the only decision which the Director could properly give as a matter of law and within the limits of his authority and in accordance with the facts in the dossier would be to act upon the Board's recommendation, there is no point in a remission.

#### DECISION:

For the above reasons,

The Tribunal quashes the decision of the Director given on 25 March 1977, and orders:

(a) that the complainant's Post 0239 be reclassified at the P.4 level, such reclassification to take effect on 22 September 1976, and

(b) that the Organization pay the complainant the sum of 4,000 United States dollars in respect of his costs.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 May 1978.

M. Letourneur  
André Grisel  
Devlin

Roland Morellet