

Registry's translation, the French text alone being authoritative.

FIFTY-THIRD ORDINARY SESSION

In re GIARDINO

Judgment No. 619

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giorgio Giardino against the Food and Agriculture Organization of the United Nations (FAO) and Mrs. Patricia Byrne-Moreschi on 7 April 1983 and corrected on 1 July, Mrs. Byrne-Moreschi's letter to the Registrar received on 15 August, the FAO's reply of 4 October to the complainant, the complainant's rejoinder of 30 December 1983, the FAO's surrejoinder of 17 February 1984 and Mrs. Byrne-Moreschi's letter of 16 March 1984 to the Registrar;

Considering Articles II, paragraph 5, and V of the Statute of the Tribunal, FAO Staff Regulation 301.042 and FAO Manual provisions 305.232, .313, .322(ii), .444 and .445(ii);

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. In 1956 the complainant, an Italian, joined the FAO in Rome at grade G.1. By 1968 he had risen to G.4 as a supervisor in the Mail and Pouch Group in the Administrative Services Division (AFS), and by 1978 to G.5 on the same post. In May 1980 the FAO issued an announcement, No. GS/2125-AFS of a vacant post, No. 5110-4122, for a G.6 supervisor in the group. The qualifications included five years' experience of mail work, knowledge of English and Italian at "level 6" and familiarity with postal regulations. There were applications from the complainant, Mrs. Byrne-Moreschi, who is the second defendant in this case, and another, but no one was chosen. A new announcement, No. GS/2276-AFS, was issued in March 1981, and this time the qualifications included five years' clerical and supervisory experience and knowledge of English and Italian at "level C". Mrs. Byrne-Moreschi and the complainant applied again, and so did others. Mrs. Byrne-Moreschi was appointed. On 7 October 1981 the complainant challenged the decision. A Deputy Director-General rejected his appeal in a letter to him of 17 December. He submitted his case to the Appeals Committee. In its report of 24 November 1982 the Committee recommended rejecting his appeal, and another Deputy Director-General informed him by a letter of 26 January 1983 -- the challenged decision -- that his appeal was rejected.

B. The complainant submits that the decision to appoint no one after the first announcement was in breach of Manual provisions. There was breach of 305.322(ii), which says that the competent Division "recommends the candidate it considers best qualified": no such recommendation was made. Again, although his knowledge of English was only at "level 4se, not 6 as the announcement required, 305.445(ii) says that "when the most suitable candidate fails to meet the language requirements of the post, he may be recruited on condition that he undergo obligatory language training until the required level is reached". The FAO mistakenly assumed that for want of the essential qualifications nobody could be appointed the first time, and it was therefore wrong to cancel the first announcement and issue the second. AFS having said it was urgent to fill the vacancy, the postponement was not in the FAO's interests, and therefore unlawful. The drastic lowering of the qualifications in the second announcement was at odds with Staff Regulation 301.042: "The paramount consideration in the appointment, transfer, or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity." Mrs. Byrne-Moreschi was picked even though the first time she had not been found qualified. The complainant wishes to call witnesses to establish that she was not and that he himself was. He seeks the quashing of her appointment to post 5110-4122 or his own promotion to G.6.

C. In its reply the FAO submits that the complaint is devoid of merit. Manual provision 305.322(ii) does not oblige the Division to recommend an unqualified candidate: it recommends the best of the qualified candidates and, as 305.313 requires, the candidate recommended must have the "minimum essential qualifications". Since the complainant's English was not good enough, there was no breach of the rules in not recommending him. All that

305.445(ii) says is that a candidate who falls below the language requirements "may" be recruited. In fact that is the exception since 305.444 says that "candidates are not normally appointed unless they meet the level of language ability required by the post". There was nothing unlawful about the second announcement: it did not reduce the essential qualifications but merely shifted the emphasis. In any event the change was not prejudicial to the complainant since he could not meet the language requirements. Nor is there evidence of prejudice or other extraneous factors or of misappraisal of the facts. Oral proceedings would be pointless since the material facts are hot in dispute. The FAO has its own procedure for assessing the merits of staff, and the evidence of the complainant's witnesses, who are all mail clerks, is irrelevant.

D. In his rejoinder the complainant enlarges on his original pleas and his application for oral proceedings. He alleges breach of Manual provision 305.313, which makes the Personnel Division solely responsible for declaring whether candidates are qualified: the AFS Division therefore acted without authority in determining whether he had the required qualifications. He contends that the FAO misinterprets 305.322(ii); that the minimum essential qualifications were altered by the dropping of knowledge of postal regulations and five years' experience of mail work; that this was contrary to the Staff Regulations and the FAO's own interests; and that the right course would have been to cast the net wider by placing commercial advertisements of the kind provided for in Manual provision 305.232. He discloses evidence to suggest that resort to 305.445(ii) is not exceptional.

E. The FAO's surrejoinder answers points raised in the rejoinder. In particular, it maintains that all decisions leading up to Mrs. Byrne-Moreschi's appointment were in accord with the letter and spirit of its rules. It submits that AFS made only an initial determination that the complainant did not qualify, and that that determination was subject to approval by the Personnel Division, as is clear from a memorandum the AFS Director wrote on 6 October 1980. The evidence the complainant has disclosed about the application of 305.445(ii) is confidential and he has no right to be in possession of it. Besides, it does not establish any practice so common as to oblige the FAO to waive essential language requirements. His application for oral proceedings is unfounded.

CONSIDERATIONS:

The application for oral proceedings

1. The complainant applies to the Tribunal for oral proceedings, and the FAO objects to the application.

By virtue of Article V of its Statute the Tribunal decides in each case whether oral proceedings shall be public or in camera. But its practice is to order such proceedings only in exceptional circumstances where evidence from the parties or witnesses may help in resolving the issues. In this case the purpose of taking evidence from the complainant's witnesses would be to enlighten the Tribunal as to the qualifications of two applicants for a post. That is a question the Tribunal will not consider, as is indicated in 8 below, and the application therefore fails.

The first competition

2. On 20 May 1980 the FAO advertised for competition a post for a grade G.6 supervisor in the Mail and Pouch Group. The announcement of the vacancy, No. GS/2125-AFS, required, among other things, five years' experience of mail and communications work, working knowledge of English and Italian at level 6 and full knowledge of international and Italian postal regulations.

There were three candidates, the complainant, Mrs. Byrne-Moreschi and another. Since none of them met the requirements in full the FAO cancelled the competition and delayed making an appointment.

3. The complainant contends that under FAO Manual provision 305.313 the Personnel Division alone is responsible for determining whether candidates qualify and that in taking a stand on the matter the Administrative Services Division -- known as AFS -- acted ultra vires.

The provision does make the Personnel Division responsible for a first assessment of the candidates' qualifications, and the AFS Director's memorandum of 6 October 1980 may suggest that it was AFS that decided to cancel the announcement and transfer Mrs. Byrne-Moreschi to a new temporary post. But the last sentence of the letter shows that the decisions were subject to approval by the Personnel Division. In fact they were really just proposals submitted to the Personnel Division, and it was the latter that had to take the final decisions. Further evidence of this is that the Personnel Division objected to creating a temporary post for Mrs. Byrne-Moreschi and the idea was dropped. The Tribunal therefore rejects the complainant's allegation that AFS encroached on the Personnel

Division's competence.

4. The complainant further maintains that to cancel the announcement was in breach of Manual provision 305.322(ii), which says that the competent Division recommends the candidate "it considers best qualified, having paid due regard to geographic representation". The FAO replies that only the best of the qualified candidates may be recommended.

The construction the FAO puts on the rule is the right one. Obviously the rule is not supposed to require the FAO to choose someone, even if he has the best qualifications, who is still not qualified for the job. In this case none of the candidates qualified for the vacant post and it was no breach of 305.322(ii) not to appoint any of them.

5. The complainant relies on 305.445(ii), which provides that the most suitable candidate may be appointed even if he fails to meet the language requirements, on condition that he undergoes language training. In support of the plea the complainant cites several instances in which the FAO had recourse to the rule.

What 305.444 says is that candidates are not normally appointed unless they meet the "level of language ability required". Thus 305.445(ii) is the exception. Furthermore, whether to have recourse to it is a matter of discretion. The evidence does not suggest any abuse of authority in the refusal to let the complainant benefit under the provision. Indeed he has the less cause for grievance in that he seemingly made no attempt between the competitions to improve his English. He tried to do so only after the second notice of vacancy came out, i.e. at a date subsequent to that at which his qualifications were to be assessed.

The second competition

6. A second competition was announced on 2 March 1981. The new announcement, No. GS/2276-AFS, altered the qualifications in several respects. It required five years' clerical and supervisory experience, though not in any particular area, and knowledge of English and Italian at level C. Full knowledge of postal regulations was now stated to be only desirable, not essential.

The complainant, Mrs. Byrne-Moreschi and others applied, and this time Mrs. Byrne-Moreschi won.

7. According to Staff Regulation 301.042 the paramount consideration in appointment, transfer or promotion shall be the necessity of meeting the highest standards of efficiency, competence and integrity. The complainant's case is that it was a breach of that regulation to lower the qualifications for the post. In his view it would have been better policy to keep to the qualifications required in the original announcement and admit outsiders.

The FAO's approach would be open to criticism only if the requirements in the second announcement fell short of what might ordinarily be expected of the holder of the post. In fact they did not. To work as a supervisor in a mailing service it is not essential to have long experience or be familiar with postal regulations. Any intelligent and energetic person with the will to take charge and a sense of orderliness will no doubt quickly make up for any shortcomings in his qualifications.

8. The Tribunal is not competent to compare the candidates' merits; it will merely determine whether there was any prejudice in the impugned decision. There is no reason to suppose that in preferring Mrs. Byrne-Moreschi the FAO was actuated by any considerations other than merit. Indeed its impartiality is borne out by the fact that on the recommendation of AFS the majority of the selection board were in favour of the successful candidate.

The Tribunal's decision

9. Since the complainant's pleas fail, so does his application for the quashing of Mrs. Byrne-Moreschi's appointment. There is no plea in support of his claim to promotion, and this too must be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President,

and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A. B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.