

FIFTY-FOURTH ORDINARY SESSION

In re BAMBINELLI

Judgment No. 636

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Vincent Babinelli on 15 March 1984, the PAHO's reply of 11 June, the complainant's rejoinder filed on 19 July, the PAHO's surrejoinder of 28 September, the additional item filed by the complainant and dated 16 October and the PAHO's comments thereon of 8 November 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulation 4.2, Staff Rules 410.4, 565.3 and 1050 and WHO Manual provisions II.9.280.4 and 340.4;

Having examined the written evidence, 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, a citizen of the United States, joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in Washington in 1974 as a clerk at grade G.6 in the Department of Budget and Finance. He was promoted in 1976 to G 7 and in 1978 to G.8. He is now an "accounting technician" at that grade. In February 1982 the PAHO invited applications for a grade P.2 post, No. 3478, for a finance officer to be in charge of the Payroll Unit. One requirement was a "working knowledge" of Spanish. The complainant applied. On 24 June an ad hoc Selection Committee recommended appointing him, although it found he did not fulfil the language requirement. On 6 August the Director informed the Chief of Administration that for this reason he was rejecting the recommendation. On 29 October it was decided to transfer another staff member to the post in accordance with Staff Rule 565.3, and by a letter of 14 December the Office of Personnel so informed the complainant. He appealed on 4 March 1983 against that decision to the Board of Inquiry and Appeal. In its report of 27 October the Board held that the complainant had been wrongfully denied the appointment by the irregular transfer of Mr. Humberto Bertran, a staff member made redundant by abolition of a P.3 post he had held in Guatemala. The Board recommended granting the complainant grade P.2 with effect from July 1982, giving him priority for any P.2 post he was qualified for, and paying his costs. But by a letter of 16 December 1983, which he received on 19 December and which is the final decision impugned, the Director informed him that he rejected those recommendations.

B. The complainant submits that the Director's reasons for refusing to appoint him to post 3478 -- that he lacked the minimum requirements -- were mistaken. In its report the Selection Committee had said: "Mr. Babinelli does not possess a working knowledge of Spanish as required but is pursuing courses in the language". He submits that the PAHO has no objective criteria for assessing language proficiency and that his knowledge of

Spanish had in any event already proved adequate. Mr. Bertran received unfairly preferential treatment. The Selection Committee actually rejected him and he already held a higher grade. In seeking an alternative post for him the PAHO ought, since he had become redundant, to have followed Staff Rule 1050 on reduction in force, which should overrule 565.3, on transfer. That would have meant appointing him to one of two P.3 vacancies at headquarters and not post 3478. The impugned decision was therefore arbitrary and overlooked essential facts. The complainant seeks the relief recommended by the Board of Appeal.

C. The PAHO submits that the claims are devoid of merit. The Director's decision not to appoint the complainant to a post he was unqualified for was discretionary and shows no defect. The rules empower the Director, not the Selection Committee, to appoint staff. There was no abuse of authority. The Selection Committee admitted that the complainant was not qualified and it had no authority to ignore the fact. Criteria for measuring language proficiency do exist. In any event Staff Rule 410.4 says that the requirement of a competition "shall not apply to any post which it is the interest of the Bureau to fill by the reassignment of a staff member without promotion". His allegations of unfair treatment are unfounded, as is clear from his record of promotion. The appointment of Mr. Bertran shows no defect, and besides, has no effect on the lawfulness of the decision not to appoint the complainant. Mr. Bertran is fully qualified for the post and has performed well in it. The reduction-in-force

procedures are irrelevant because the complainant did not hold post 3478 and has no locus standi to challenge Mr. Bertran's appointment. It does not matter that Mr. Bertran had no university degree since he was already in the Professional category. He did not receive preferential treatment.

D. In his rejoinder the complainant repeats his contention that when the PAHO wants to find a pretext for not appointing someone to a post it arbitrarily insists on the language requirements; otherwise it waives them. Selection committees commonly recommend for appointment candidates whose language skills fall short, and the candidates are appointed. In this case the Committee's recommendation was in line with that practice, and the grounds for rejecting it were arbitrary. Staff Rule 1050 and Manual provisions II.9.280.4 and II.9.340.4, which relate to reduction in force, were disregarded in order to appoint Mr. Bertran, who therefore did receive preferential treatment. His performance in the post has no bearing on the lawfulness of his appointment. The complainant's promotions were his due -- one followed reclassification of his post anyway -- and do not rebut the charge of prejudice. Rule 1050 should have been applied because Mr. Bertran's post had been abolished. The complainant is entitled to object to his appointment because he himself suffered injury because of it. He supplements his claims by inviting the Tribunal to order the PAHO to define clearly standards of competence in language and set objective tests to determine whether officials meet them.

E. In its surrejoinder the PAHO enlarges on its submission that the issue in this case is whether the complainant met the language requirements of the post: since he has shown neither that he did meet them, nor that they were unlawful, his complaint must fail. There is no evidence to bear out his allegations of prejudice. He is also mistaken in contending that Staff Rule 1050 displaces 565.3, which would be against the interests of both staff and Administration. The PAHO explains how the qualifications for a post are determined, in particular the language requirements, and maintains that the latter were correctly determined in respect of post 3478.

CONSIDERATIONS:

1. On 6 August 1982 the Director rejected a recommendation by an ad hoc Selection Committee that the complainant should be appointed to a P.2 post 3478. The post was that of a finance officer who would be chief of a payroll unit. One of the specified requirements of the post was a good working knowledge of Spanish, since one of the duties of the successful applicant would be to explain payroll computations to Spanish members of the staff. The Committee found that none of the candidates met all the requirements and decided that the merits of each candidate should be the prevailing criterion. The complainant, although he did not possess a working knowledge of Spanish, was "pursuing courses in the language".

2. Nevertheless, post 3478 remained vacant until 29 October 1982 when it was announced that it would be filled by the transfer of Mr. Bertran from a P.3 post which was being abolished. Since this was a reassignment, there was no competitive procedure. But Mr. Bertran had been one of the candidates considered by the ad hoc Committee. His appointment had not been recommended because, although he was bilingual in English and Spanish, he could not meet another requirement, namely, the possession of a university degree.

3. On 14 December 1982 the Administration, in response to an inquiry by the complainant, said that it had been decided to fill post 3478 and wrote again on 7 January 1983 to say that this represented a final decision. On 4 March 1983 the complainant filed his intent to appeal. The appeal was rejected by the Director on 16 December 1983 and this is the decision impugned.

4. The appeal is against a decision to fill a post for which the complainant had been rejected four months before. As such the appeal is unarguable unless it can be shown that the two events are linked. The complainant must show that the true reason for his rejection in August 1982 was not his lack of qualification but was an abuse of power, being wrongly motivated by the intention to secure the appointment of Mr. Bertran in the following months. The evidence tendered by the complainant falls far short of this. What is suggested in the argument is that "everyone at PAHO knows the main purpose of language requirements is to provide the Administration a way out of a selection it does not desire". It is a "tool for manipulating appointments". "Working knowledge", it is argued, is too wide a concept; the test ought to be whether the complainant knew enough of the language to do the job with the aid of bilingual secretaries and machine translation; this is the commonsense standard. This idea, or something like it, secured the unanimous approval of the headquarters Board of Inquiry and Appeal. But it is not the function of the Tribunal to ask itself whether or not the test prescribed by the rules is the most practical one. Even if it were, it is irrelevant to the decision impugned. There is no evidence to connect that decision with the decision in August which, even supposing it was incorrect, went unchallenged.

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 the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner