SIXTY-NINTH SESSION

In re MITASTEIN

Judgment 1045

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Monique Mitastein de Karp against the Pan American Health Organization (PAHO) (World Health Organization) on 5 September 1989 and corrected on 18 October 1989, the PAHO's reply of 16 January 1990, the complainant's rejoinder of 14 February and the PAHO's surrejoinder of 20 March 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 1040 and 1050 and WHO Manual paragraph II.9.340;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Mexican citizen born in 1939 and a biologist by training, joined the PAHO in 1976 under a two-year appointment as a research assistant at grade G.7. She was employed in an affiliate of the PAHO's in Mexico City, the Pan American Center for Human Ecology and Health (ECO). She had her appointment extended, by two years at a time, as from 1 May of each even-numbered year. In 1979 she was promoted to grade P.3 as a scientist on post 5142. She was in charge of training and information. In 1984 she ceased to be in charge of ECO's information system and in November 1986 got a new post description with the title "university and higher education specialist".

ECO reports to the Environmental Health Unit (HPE) of the PAHO at headquarters in Washington D.C. and HPE is headed by a "program co-ordinator", who reports to the Health Programs Development Unit (HPD).

As part of an overhaul of the Center it was decided to abolish post 5142. The complainant would be kept on until the end of 1987, since her post was provided for in the 1986-87 budget, but for financial reasons the post would not be covered by the budget for 1988-89. Since her appointment was to expire on 30 April 1986, the Chief of Personnel told her by a letter of 9 April that it was extended to 31 December 1987.

The Director of ECO had already told her orally that she would stay until that date and on 12 March 1986 she had written to the Chief of Personnel at headquarters asking that the extension should be for the usual two years. In a letter of 15 April the Chief of Personnel answered that it was the Director who had recommended the shorter extension and that she should raise the matter with him.

In August 1986 the co-ordinator of HPE asked the Chief of Personnel to tell the World Health Organization and other WHO regional offices and United Nations agencies that the complainant would be available from 1988. The Chief of Personnel did so.

In a letter of 14 September 1987 he gave her notice of the abolition of her post at the end of the year and said that in accordance with Staff Rules 1040* (*Rule 1040 reads: "... a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract.") and 1050 her appointment would not be renewed and that if no suitable vacancy was found she would get the indemnity prescribed in 1050.4. In a letter of 6 October her counsel pointed out that she was entitled to the application of the procedure in 1050.2* (Rule 1050.2 reads: "When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director-General ...") for a "reduction in force", she could not be lawfully terminated until it had been followed, the notice of 14 September 1987 prejudged the outcome, it was too late to give her the three months' notice required by 1040 and her contract must be renewed for another term. In his reply of 7 October the Chief of Personnel said that the procedure did not apply. On 25 November she went to the Board of Appeal at headquarters. She left on 31 December 1987 but was reinstated on sick leave as from 1 January 1988 until November 1988, when she left again. The Board of Appeal suspended its proceedings while she was on leave. In

its report of 11 April 1989 it held that, her post having been one of "indefinite duration", the reduction-in-force procedure should have been followed, that the notice had been invalid and that her appointment should be extended by another twenty months as from 1 January 1988. But by a letter of 7 June 1989, the impugned decision, the Director of the PAHO told her that he rejected the Board's recommendations.

The PAHO having found no other employment for her, she was granted ten-and-a-half months' pay as indemnity.

B. The complainant submits that she ought to have had the benefit of the reduction-in-force procedure. The holder of an abolished post need not have his appointment terminated since according to 1050.2.1 a competition for retention is held between those performing similar duties at the same grade. The termination of the complainant's appointment was premature. Moreover, according to Rule 1050.2.5 a staff member may not be terminated before getting "a reasonable offer of reassignment if such offer is immediately possible". WHO Manual paragraph II.9.340 defines a "reasonable offer". The official may even be offered a post at a lower grade.

Since the complainant's last contract was for twenty months she was entitled to three months' notice under Rule 1040. The notice she did get was invalid because the reduction-in-force procedure had not been followed. When due notice is not given there is, according to the Tribunal's ruling in Judgment 469 (in re O'Connell), implied renewal for another term. The complainant's contract should therefore be renewed for another twenty months.

She asks the Tribunal to rule accordingly, or grant her damages, order her retroactive reinstatement and make her an award of costs.

C. In its reply the PAHO points out what it regards as mistaken or irrelevant in the complainant's version. It contends that the notice of termination in its letter of 14 September 1987, which she got on 28 September, was due notice under 1040. She is therefore entitled neither to any renewal of contract nor to damages for absence of notice nor to costs under that head.

But the Organization admits that her post was one of indefinite duration according to the criteria the Tribunal set in earlier cases and that the reduction-in-force procedure ought to have been followed. It invites the Tribunal to rule on that issue.

D. In her rejoinder the complainant addresses several issues of fact raised in the reply. She observes that she could not be given due notice until the reduction-in-force procedure had run its course since she would not necessarily have had to leave. On that count she is entitled to redress and to costs.

E. In its surrejoinder the Organization addresses several issues of fact and of law the complainant raises in her rejoinder, submitting that much of what she says is immaterial, tendentious or merely speculative. It again asks the Tribunal to reject her claims to reinstatement by virtue of implied renewal of her appointment and to costs.

CONSIDERATIONS:

1. The complainant joined the PAHO in 1976 and served under a series of fixed-term appointments. On 9 April 1986 the Chief of Personnel informed her that because her post was to be abolished her contract would not be extended beyond 31 December 1987. In a letter of 14 September 1987 he confirmed that the post she held would be abolished on 31 December 1987 and gave her notice of termination at that date in accordance with Staff Rules 1040 and 1050. His letter went on to state that the Organization hoped that she could be transferred to a post suited to her education and experience, but failing that she would be entitled to the indemnity provided for in Rule 1050.4.

The PAHO then made efforts to find a suitable post for her, including getting in touch with the headquarters of the World Health Organization (WHO) and other agencies in the United Nations system and a proposal to transfer her to a post for a translator, but it was unsuccessful.

On 6 October 1987 counsel for the Staff Association, who was representing her, wrote to the Chief of Personnel pointing out that she was entitled to application of the reduction-in-

force procedure in Rule 1050.2. The Chief of Personnel's reply of 7 October was that the PAHO was seeking "alternative employment" for her but that the procedure did not apply.

On 25 November 1987 the complainant lodged her internal appeal. She was reinstated on sick leave under

insurance cover with effect from 1 January 1988 and her termination was held in abeyance pending medical clearance from the WHO in Geneva. Clearance was received on 29 November 1988 and her separation was confirmed with effect from 30 November 1988. The Board of Appeal recommended allowing her appeal; reinstating her retroactively as from 1 January 1988 for another term of twenty months in line with the precedent set in Judgment 469 (in re O'Connell); and applying the reduction-in-force procedure. The Director rejected the Board's recommendations, however, on the grounds that even if her post had been considered to be of indefinite duration the procedure would have been inapplicable because of the uniqueness of her post. He also rejected the Board's view that the notice of termination had been invalid.

2. The complainant contends that because the reduction-in-force procedure had not been instituted the notice of 14 September 1987 was invalid and her contract was therefore extended by implication for twenty months. Her argument is based on two propositions: one is that the institution of the procedure is a condition precedent to giving notice of termination, and the other is that according to Rule 1050.2.5 a staff member's appointment may not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible.

3. Rule 1050.2 provides:

"When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director ..."

The procedures are set out in detail in the Manual of the WHO, and it is clear that the Rules preclude the termination of an appointment until the reduction-in-force procedure has been completed. The notice of 14 September 1987 was therefore invalid, and in keeping with the reasoning in Judgment 469 the complainant's contract is renewed by implication and remains in force. She is entitled to payment of the salary and allowances due under her contract less any indemnity or earnings she may have received in the meantime.

4. As a matter of fact the PAHO is no longer contesting her right to application of the reduction-in-force procedure. She claims reinstatement, but whether or not the PAHO will keep her in its service will depend on the outcome of that procedure.

DECISION:

For the above reasons,

1. The Director's decision of 7 June 1989 is quashed.

2. The Organization shall apply the reduction-in-force procedure to the complainant in accordance with Rule 1050.2.

3. It shall pay her the sums she is entitled to as set out in 3 above.

4. It shall pay her 3,000 United States dollars in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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