

SEVENTY-SEVENTH SESSION

In re ORTIZ

Judgment 1371

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jorge Ortiz against the Pan American Health Organization (PAHO) on 21 July 1993 and corrected on 1 September, the PAHO's reply of 29 December 1993, the complainant's rejoinder of 28 February 1994 and the Organization's surrejoinder of 27 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and PAHO Staff Rules 530.3, 1040, 1050 and Manual paragraphs II.5.50 and II.9.250 to 375;

Having examined the written submissions and decided not to order hearings, 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 Costa Rican born in 1935, joined the staff of the PAHO in 1968. He is a chemical and industrial engineer by training and was employed as a scientist at grade P.4 in the Department of Research Coordination (DRC). His last fixed-term appointment expired on 31 December 1991.

In the report appraising his performance in 1976-77 - and in several later ones - his supervisor stated that the description of his post "needs revision". In the reports for 1987-88, 1988-89 and 1989-90 the rating of his "overall performance" was "unsatisfactory". On 2 January 1991 his supervisor said in the report for 1988-89 that the area of his specialisation and his post description did not match the "current structure and functions" of the DRC. The supervisor made similar comments, also on 2 January 1991, in the report for 1989-90.

On 1 May 1991 the complainant filed an appeal against the report for 1988-89; on 14 June he lodged a further appeal against the one for 1989-90.

In a letter of 26 August 1991 the Chief of Personnel told him that his post would be abolished under Staff Rule 1050 on 31 December 1991, said that there would be a reduction-in-force procedure and gave him notice of termination under 1040 on 31 December. Rule 1040 reads as follows:

"... 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 Rule 1050.2:

"When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director ..."

The complainant appealed against termination on 10 September 1991.

A reduction-in-force committee met from 18 September to 2 October and reported to the Director on 8 October: it had not found another post for him in the same occupational group at the same grade or even at one grade lower than the one he held.

By a letter of 28 October the Chief of Personnel sent him the committee's report and confirmed his separation from service on 31 December 1991.

In a memorandum of 26 November 1991 the complainant told the Chief of Personnel that he wanted to compete in six specific "occupational groups" under Manual paragraph II.9.360.1, which reads:

"If the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to

qualifications and experience, the candidate is obviously well- suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years ..."

In a memorandum of 24 December 1991 he gave the Chief of Personnel a list of the "occupational groups" for which he wanted the committee to consider him.

By a letter of 26 December the Chief of Personnel acknowledged the memorandum of 24 December and promised to tell the complainant of "any change pertaining to your status" if there was one.

The committee reported to the Chief of Personnel on 13 January 1992 that in only one of the categories - that of statisticians - was there a post available but the complainant was not "well-suited" for it within the meaning of Manual paragraph II.9.360.1 since he had not in the last 15 years held a post in that group at the same grade as the one being abolished or at one grade lower.

By a letter of 19 February 1992 to the complainant's counsel the Chief of Personnel said that the completion of the committee's work had not brought about any change in the complainant's "status".

On 24 February 1993 the Headquarters Board of Appeal reported on his appeals against the reports and termination; it recommended rejecting all his claims.

In a letter of 21 April 1993, the decision he impugns, the Director endorsed the Board's recommendation.

B. The complainant submits that the reports appraising his work in 1988-89 and 1989-90 and the notice of termination are unlawful.

Staff Rule 530.3 requires the supervisor to appraise performance "in relation to the actual duties and responsibilities of the post". Manual paragraph II.5.50 says that "The appraisal is made by reference to the duties and responsibilities in the post description ... which should therefore be kept up to date at all times ... In addition, for professional staff, the appraisal is also made on the basis of achievement of 'planned activities' ..."

At the material time the complainant's post description, which was drawn up in 1968, was badly out of date. That had been plain for many years: his supervisor began calling for revision in the report for 1976-77. The reports for 1988-89 and 1989-90 both deplore the mismatch between what his department was doing and what his post description said. The out- of-date description could not serve as the basis for the appraisals, which were therefore in breach of Rule 530.3. The "planned activities" to which Manual paragraph II.5.50 refers are additional criteria and do not prevail over the reference to the post description in the Rule.

In Judgment 665 (in re Dutta) the Tribunal held that failure to give a staff member enough time between appraisal reports to come up to scratch was a fatal flaw. On that score it is plain that the complainant's report for 1989-90, which his supervisor drew up at the same time as the one for 1988-89, should be removed from his file. Inasmuch as his second-level supervisor completed the appraisal for 1987-88 only five months before the complainant filled up his part of the report for 1988-89, that report showed the same flaw.

As to the notice of termination he points out that until the reduction-in-force procedure has been carried out there is no telling whether the incumbent of an abolished post is to have his appointment terminated. Since the PAHO had not completed - or even begun - the reduction-in-force procedure before it gave him notice, the notice was premature.

In any event the procedure itself was flawed. In its report of 13 January 1992 the reduction-in-force committee declared that the complainant was not "well-suited" for work as a statistician under Manual paragraph II.9.360.1. That provision describes under what conditions a candidate may be "presumed" to be well-suited: but the committee failed to go beyond the realm of presumption to establish, as it must, whether he really was well-suited. So it was again too early to send out a valid notice of termination.

He wants the Tribunal to order his reinstatement as from the date of "dismissal"; the resumption of the reduction-in- force procedure; the removal from his file of the appraisal reports for 1988-89 and 1989-90; the inclusion in his file of a note explaining the reason for the removal of the two appraisals and "indicating that the same would have

been done to the 1987-88 appraisal had it been appealed"; and awards of moral damages and costs.

C. In its reply the PAHO submits that it treated the complainant fairly. He is wrong to blame it for failing to update his post description: that would have put paid to his career since neither his department nor the Organization needed an engineer. Though it tried to get him to improve his skills, lack of initiative and imagination kept him from moving with the times and turning his old job into one that met his department's needs. Revising his post description was, after all, something he could be expected to cooperate in.

Under the circumstances it was reasonable, and in keeping with the Personnel Department's guidelines on drafting appraisal reports, to base the appraisals of him on "planned activities".

As to the delay in preparing his report for 1988-89 the complainant himself held it up by submitting his self-appraisal more than a year after it was due, and it took him nearly three months to answer his supervisor's comments on the report for 1989-90.

After giving him timely notice of termination the Organization was willing to reverse that decision as a result of the reduction-in-force procedure. Insofar as it had promised to tell him of any change in his favour the delay was not to his detriment anyway. The committee did not misconstrue Manual paragraph II.9.360.1: the material procedure is an exceptional one reserved for candidates who held a post in a different occupational group. Having determined that the complainant had not worked as a statistician, the committee quite properly deemed him unsuitable for a post in that group.

D. In his rejoinder the complainant seeks to rebut the arguments in the reply. It was for the Administration, not him, to change his post description. Instead of expecting him to adapt it had only to train him for another job. Planned activities may be covered by appraisal only insofar as they relate to an official's post description: else they might endanger the whole system of grading.

According to the case law notice of termination must come after the reduction-in-force procedure, not during or before it.

As for the difference between a "presumption of well- suitedness" and "well-suitedness" he points out that an official may be qualified to work in a field without ever having done so. That is why under II.9.360.1 the committee has a duty to establish whether he was qualified to compete as a statistician.

E. In its surrejoinder the PAHO maintains that in view of the complainant's career and performance its treatment of him was warranted and fair. It never denied being responsible for changing his post description: but for want of some effort on his part the abolition of his post was "inevitable". The notice it gave him of termination complied with both 1040, on expiry of contract on "completion of temporary appointments", and 1050, on abolition of post. In any event the reduction-in- force committee's assessment of his qualifications was sound.

CONSIDERATIONS:

1. The complainant is by training a chemical and industrial engineer. He joined the PAHO at headquarters in Washington D.C. in 1968 as a scientist at grade P.4. He was in charge of the "operations research" unit in the Department of Research Coordination (DRC). His main duties, as set out in the description of his post, were to "plan, develop, organize and direct the work of operations research" and advise the chief of DRC and the Director of the PAHO in that technical field.

The complainant's appraisal reports

2. In a report, signed on 2 January 1991, appraising his performance from 1 December 1988 to 1 December 1989 his first- level supervisor, the chief of DRC, gave him the general rating "unsatisfactory". In detailed comments dated 22 February 1991 the complainant said that he needed a new post description and that the duties assigned to him in the work programme had been adequately completed. In comments dated 22 March 1991 his second-level supervisor, the Deputy Director agreed with the first-level supervisor's evaluation and accused him of "a certain lack of initiative" in coping with "the changing requirements of the Organization".

3. In a report on his performance from 1 December 1989 to 1 December 1990 his first-level supervisor again rated it "unsatisfactory" and his second-level supervisor concurred. Again he commented that a new post description was

required and that he had performed his duties adequately.

4. On 1 May and 14 June 1991 he gave notice of appeal within the prescribed time limits against the two appraisals. In its report of 24 February 1993 the Headquarters Board of Appeal held as to those two appeals that there were "no substantial irregularities" in the process of appraisal and recommended rejection. In a letter of 21 April 1993, the decision impugned, the Director of the Organization told the complainant, among other things, that he accepted that recommendation.

5. The complainant contends that the description of his post was out of date and that he was no longer being assigned work that corresponded to it. The PAHO replies that if the description had been revised he would have had to be replaced.

6. It must have been apparent to the complainant that over the years the Organization's needs for scientific research would change and he would be called upon to deal with new problems in his work. The appraisal reports contain adverse comment by his supervisors, especially on his lack of initiative, and there is no evidence before the Tribunal to suggest that their views were not honestly held or were prejudiced. He was given a proper opportunity to comment on those views and his comments form part of the reports. In the circumstances the Tribunal disallows his application for the removal of them from his personal file.

The reduction-in-force procedure

7. By a letter of 26 August 1991 the Chief of Personnel informed the complainant that his post would be abolished at 31 December 1991 under Staff Rule 1050, that his contract would come to an end in accordance with Rule 1040 and that the reduction-in-force procedures would be going ahead shortly.

8. The principles upon which those procedures are based are set out in detail under Rule 1050.2 and the procedures as established by the Director are set out in Manual provisions II.9.250 to 375. Rule 1050.3 further provides that termination under 1050 requires the giving of notice.

9. The ad hoc reduction-in-force committee set up to examine the complainant's case first reported to the Director of the Organization in a letter dated 8 October 1991. It said that it was "unable to find another post" for him in the same occupational group either at his grade or at one grade lower. Having been so informed, he asked the Chief of Personnel in a memorandum of 26 November 1991 that he be considered for several other occupational groups he listed. In a second report in the form of a letter of 13 January 1992 to the Chief of Personnel the committee reported that it could not find a post for the complainant. By a letter of 19 February 1992 the Chief of Personnel informed the complainant's counsel that the committee had "completed its assignment" but that the outcome had not resulted in altering the complainant's status.

10. In its second report the committee had explained that after examining "the Common Classification of Occupational Groups and the PAHO Staff Information Roster" it "could not find any post within the Organization" in four categories it named. Those categories corresponded to all but one of the occupational groups the complainant had listed. As to the one remaining group - "the Statisticians category" - it said:

"... after analyzing the qualifications and experience of Mr. Ortiz, the Committee found that he is not well-suited for work corresponding to this group since Manual II.9, paragraph 360.1 provides that to be considered 'well-suited', he/she must have 'held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years.' Mr. Ortiz has not occupied such a post during the last 15 years."

11. On that score the committee fell into error. What Manual paragraph II.9.360.1 says is that a request for leave to compete for posts in a different occupational group -

"is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group".

And the paragraph goes on:

"He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the

preceding fifteen years."

But the presumption does not deprive the committee of its discretion to consider a candidate well-suited for work in that group on the strength of his actual qualifications and experience. In this case the committee failed to exercise such discretion and so the reduction-in-force procedure has not been duly completed. It must therefore be restarted.

12. On 10 September 1991 the complainant's counsel filed an appeal on his behalf against the notice of termination of 26 August 1991 on the grounds that "reduction-in-force did not precede notice of termination". In the report of 24 February 1993 mentioned in 4 above the Headquarters Board of Appeal further held as to that appeal that, having regard to "the due execution of the [reduction-in-force] procedures by the Administration", it saw "no basis for reinstating the Appellant". In the impugned decision of 21 April 1993 the Director further informed the complainant of his acceptance of the Board's recommendation for rejection of the appeal.

13. The complainant contends that the notice dated 26 August 1991 is invalid, and the PAHO pleads that it was expressly given "subject to reduction-in-force procedure".

14. The Organization's plea fails. A notice given under Rule 1040, which relates to the completion of temporary appointments, is inapplicable when it is Rule 1050 that is being relied upon. Furthermore, Manual paragraph II.9.360 makes it plain that if a "candidate for retention" receives no offer of another post, final action is taken to terminate his appointment in accordance with Rule 1050. As was said in Judgment 1045 (in re Mitastein) under 3:

"The procedures are set out in detail in the Manual ..., and it is clear that the Rules preclude the termination of an appointment until the reduction-in-force procedure has been completed."

and again in Judgment 1193 (in re de Anda) under 12:

"Where a post is abolished compliance with the reduction- in-force procedure is a condition precedent to termination of the holder's appointment."

15. The complainant not having received any valid notice under Rule 1050.3, his contract was renewed by implication and remains in force. He is entitled to payment of the salary and allowances due under that contract less any indemnity or earnings he may have received in the meantime.

16. The reduction-in-force committee simply erred in interpreting the rules and there is no entitlement to damages for moral injury in such circumstances. The grant of arrears of pay to the complainant will afford him sufficient redress. But he is entitled to costs.

DECISION:

For the above reasons,

1. The Director's decision of 21 April 1993 is quashed.
2. The complainant is reinstated as from the date of his separation from service.
3. The Organization shall pay him in full the salary, allowances and any other benefits due to him under his contract, less any indemnity or earnings he may have received in the meantime.
4. It shall apply the reduction-in-force procedure to him in accordance with Staff Rule 1050 and the Manual.
5. It shall pay him 3,000 United States dollars in costs.
6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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