

EIGHTY-FIRST SESSION

In re LEE

Judgment 1548

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tommy Lee against the Food and Agriculture Organization of the United Nations (FAO) on 14 October 1995, the FAO's reply of 25 January 1996, the complainant's rejoinder of 2 March and the Organization's surrejoinder of 26 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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 Conference of the FAO and the General Assembly of the United Nations established the World Food Programme (WFP) under resolutions they adopted in 1961.

The complainant, a citizen of the United States, joined the staff of the Programme in July 1985 under a fixed-term appointment as assistant project officer at grade P.2 at Bangui, in the Central African Republic. In 1988 the WFP transferred him to Chad, where he got promotion to P.3 in January 1990. In March of that year he became the WFP's project officer in Uganda. In September 1991 he took up a post as its project officer at Khartoum.

In a memorandum of 25 November 1992 the officer in charge of the Operations Department informed him that he would recommend withholding his within-grade step increment (WIGSI) for 1 January 1993 owing to the "unacceptable" quality of his work and working relations. In a letter of 21 December 1992 the Deputy Executive Director of the Programme told him the increment was being withheld, asked him to improve his performance and warned him that he might not get another extension of appointment after its normal expiry date, 30 June 1993, if his performance and conduct did not come up to standard "within the next few months".

In discussions with senior officials at the WFP's headquarters at Rome in January 1993 he agreed to work towards specific goals in the months ahead and have his performance evaluated in a special appraisal report.

He then returned to duty in the Sudan, where he learned in June 1993 that the Administration had failed to complete his special appraisal report before transferring his supervisor to another duty station. To give his new supervisor time to draft the appraisal it extended his contract by six months.

A special report written by that supervisor and dated 29 December 1993 said that his performance since August of that year did not warrant renewal, and in a letter to him of 11 February 1994 the Director of Personnel of the Programme confirmed the decision not to extend his appointment. The complainant left the FAO on 28 February 1994.

On 26 April 1994 he lodged an appeal with the Director-General of the FAO. By a letter of 22 June 1994 the Executive Director of the WFP rejected it on the Director-General's behalf. On 14 August 1994 he put his case to the Appeals Committee. In its report of 12 May 1995 the Committee recommended rejection.

By a letter of 6 July 1995 the Director-General endorsed the recommendation of the Committee. That is the decision he is impugning.

B. The complainant submits that the Director-General had ample grounds for renewing his contract. He charges the Organization with misuse of authority, procedural mistakes, failure to abide by the rules on performance appraisals, personal prejudice, overlooking essential facts, drawing mistaken conclusions from the evidence, breach of due process, tampering with evidence, taking covert "disciplinary" action and infringing his right to a hearing.

He seeks the quashing of the impugned decision, reinstatement "without detriment" to his career prospects or,

failing that, awards of gross salary and benefits from 1 March 1994 up to the date of the Tribunal's judgment and of three years' gross salary in professional and moral damages plus interest at ten per cent a year, also from 1 March 1994. He requests payment of the within-grade step increment "due" from 1 January 1993 to 28 February 1994 plus interest at the same rate, removal of adverse comments from his personal file, and material and moral damages in the amount of his full salary and other benefits at his last duty station "at a step and WIGSI determined according to the date of his original recruitment", plus interest again at ten per cent a year, from the date of separation. He claims 10,000 United States dollars in costs "plus interest" from the same date.

C. In its reply the FAO contends that the complaint is in part irreceivable and in any event devoid of merit. Since the complainant failed to appeal against the withholding of his within-grade step increment within the prescribed time limit, his claim to back payment of the increment is irreceivable.

Under FAO Manual section 305.5123 fixed-term appointments do not confer any right to extension and expire at the specified date without notice or indemnity. The Organization gave him every opportunity to improve after the "marked degeneration" in his conduct and performance in 1990. In the absence of improvement, non-renewal was the only proper solution, the situation being "totally unacceptable".

D. In his rejoinder the complainant enlarges on his pleas and also claims a continuing appointment at grade P.4 or six years' salary and benefits. He asks the Tribunal to order the FAO to send him documents necessary to enable him to bring his car out of the Sudan.

E. In its surrejoinder the FAO observes that the rejoinder contains no new material facts and maintains its pleas in the reply.

CONSIDERATIONS:

1. The complainant joined the FAO on 20 July 1985 on a fixed-term appointment for three years. He was employed as an assistant project officer at grade P.2 under the World Food Programme (WFP) which the FAO and the United Nations had jointly established. The FAO granted him another two fixed-term appointments. The second of them expired at 30 June 1993 but was extended to 31 December 1993 and for the last time to 28 February 1994. The complainant is challenging the Organization's refusal to renew it thereafter.

2. The system for the appraisal of the performance of FAO staff provides for five overall ratings: exceptional, where performance is consistently outstanding; excellent, where it exceeds expected standards; good, if it meets expected standards; improvement desired, if it fails to meet expected standards in all respects; and unsatisfactory.

3. The complainant's performance from December 1985 to September 1990 was duly assessed and the assessment formed the subject of four staff performance appraisal reports. One of them rated his performance as excellent, i.e. exceeding expected standards, and the other three described it as meeting expected standards. He was promoted to grade P.3 at 1 January 1990.

4. There was no appraisal of his performance in the period from October 1990 to September 1991, when he was stationed in Uganda. On 30 November 1990 the Director of Operations in Uganda saw him and questioned him orally about "reports" that he had made "some very negative and indeed destructive comments" on 9 August 1990 to the Representative of the United Nations Children's Emergency Fund (UNICEF) and on 20 November 1990 to an official of the Government of Uganda about the Director's management of WFP operations in that country. The complainant denied the Director's allegations. On 4 December 1990 the Director sent him a memorandum calling for his written comments on the "reports". He did not reply, and the Director took no action. Much later however, in letters dated 20 May 1991, the two informants stated their allegations for the first time in writing, and on 22 May the Director made a written record of his meeting of 30 November 1990 with the complainant. The complainant was not given copies of the informants' letters.

5. On 24 July 1991 the Director of Personnel informed the complainant that senior headquarters staff were dissatisfied with his conduct, especially his "inter-personal relationships" with his supervisors; that if he did not improve "in this area" his appointment would not be renewed after 30 June 1993; and that his performance and conduct would be "closely monitored" in performance reports. As from September he was transferred to the Sudan.

6. On 25 June 1992 the complainant's reporting officer signed a report assessing his performance since 20 September 1991. In one section it said he "meets expected standards" as to six out of eight "specific performance

assessment work goals" and was "below expected standards" as to the other two. The report form gave instructions for reporting officers which said that that part of the assessment should be done "in the course of a work review discussion with the staff member"; no performance rating was valid without comment to support it; and the overall assessment must be consistent with "specific performance assessment". In the complainant's case, although there was a supporting comment about delays in projects it was relevant to only one of the ratings; and the overall assessment was that he did "not meet expected standards in all respects". The next section of the report, headed "general performance factors", assessed his "job knowledge and competence" as "good", and against "personal effectiveness", "inter-personal effectiveness" and "performance as a supervisor" put "improvement desired". The form failed to say how many staff he supervised.

7.The complainant having refused to comment, the acting WFP Representative forwarded the report to the Regional Manager of the Mediterranean and Middle East Bureau of the WFP in Rome. In an accompanying letter dated 22 July 1992 the Representative cited an allegation by another official that the complainant had disclosed confidential information to the local authorities in August 1991. The Representative recommended transferring him immediately from the Sudan. The Regional Manager sent the report on to the Director of Personnel with a memorandum dated 7 August 1992 saying that he found the complainant's performance to be still "below expected standards", had objected in the first place to assigning him to the Sudan, and wanted him to leave the country.

8.At the invitation of the Deputy Director and Chief of the Personnel Service the complainant submitted detailed comments on the report on 9 September 1992. He observed that his reporting officer had "supervised" him for only four months of the period covered by the report and had refused to discuss any section of it with him.

9.By a memorandum of 30 September the reporting officer told the Director of Operations that he had spent "over one hour" discussing the report with the complainant but saw no need to answer his comments. The reporting officer maintained his assessment. In a letter of 8 October 1992 to the Deputy Director and Chief of the Personnel Service the Director expressed agreement with the reporting officer and forwarded the report together with several memoranda accusing the complainant of being absent without leave and of lacking professional competence.

10.The Director of Operations gave the complainant the report for signature but the complainant refused to sign on the grounds that the text was not the original one but contained several major amendments. On 1 December 1992 the Director entered his own comments in the report. Those comments were inconsistent with his previously unqualified endorsement of the reporting officer's assessment. Moreover, they supported some of the complainant's own objections by saying that since the reporting officer had been his supervisor for only four months his previous supervisor should comment on his attainment of four specified work goals and that it was difficult both to decide whether he or the reporting officer was to blame for the project delays and to rate him as a supervisor. The Director recommended giving him, after discussion, precise goals for his work from February to June 1993 and only then making a final assessment of his performance.

11.By a letter of 21 December 1992 the Deputy Executive Director of the WFP told him that his "within-grade salary increase" for 1993 would be withheld under Manual paragraph 315.323 on the strength of documents that included those sent by the Director of Operations on 8 October 1992. The complainant protested in a letter of 5 January 1993 to the officer in charge of the Development Division saying that he had "never seen nor been made aware of most" of the documents in question.

12.A letter dated 15 February 1993 went from the acting Director of the Development Division at headquarters to the Director of Operations in the Sudan and a copy of it was sent to the complainant. It referred to discussion with the complainant and headquarters in January 1993 on his performance and conduct. It said that a "special assessment of his performance" should be made by 15 May on the standard report form. It explained:

"In order to weigh considerations regarding the extension of his contract ... a consistently superior level of performance will be expected ... In at least some key result areas, specified and agreed to in advance, [he] will have to exceed expected standards. He should at least meet expected standards with respect to the other objectives.

His general performance factor assessment must at least be good on all accounts.

Attention is drawn to the requirement that each individual rating must be justified in writing."

13.On 9 February 1993 the Director of Operations had urgently asked the complainant to write "project completion

reports" on three projects. Yet on 22 November 1992 the Director had himself acknowledged in a memorandum to the chief of the Evaluation Service in Rome that it would not be possible to provide such reports: "all historical memory", he said, had been "lost" because of "huge emergency operations" in the Sudan, where the country office was unable "to undertake such cumbersome research work". On 22 February 1993, it seems, a deadline for completion of those reports was agreed, and by August 1993 the complainant had submitted all three. There is no suggestion that his performance of the assignment was found wanting in any way.

14. Despite the decision to make a special assessment, the Regional Manager at headquarters commented on 10 March 1993 in a standard form appraising the complainant's performance in 1991-92 that he agreed with the reporting officer's assessment and the detailed comments by the Director of Operations. He observed that the complainant had "not been able to perform at the level expected, and his inter-personal relationships were particularly questionable". That report was not, as the procedure required, sent for signature to the complainant thereafter.

15. In a letter of 25 March 1993 to the acting Director of the Development Division the complainant pointed out that the special assessment had not even begun. He was told in a reply of 23 April 1993 that, though there was "no stepping back from the framework for assessment" agreed on in January, there could be "the necessary accommodation without jeopardising fairness or objectivity" if the departure of the Director of Operations from the Sudan required "adjustments within this framework". In June the complainant inquired about the extension of his contract. By a letter of 24 June 1993 the acting Director of the Development Division said that because of the unforeseen transfer of the Director of Operations "it has not been possible to complete the performance appraisal exercise; that in order to "continue the framework of assessment" his appointment was extended by six months; and that the new Director of Operations would be supervising him directly and would assess his performance in November 1993, as the Director of the Development Division had informed him in his letter of 15 February 1993, mentioned in 12 above.

16. Although that extension made it quite feasible to assess the complainant's performance from 1 July 1992 to 30 June 1993 in a normal report, no such assessment was made.

17. By a memorandum of 28 August 1993 the new Director of Operations assigned the complainant the duties he was to perform up to November 1993, but he did not indicate "at least some key result areas" which the letter of 15 February 1993 from the Director of the Development Division had said should be identified. Nor was anything said to the complainant about any aspect of his performance while he was carrying out those duties, which he completed on schedule. Only under cover of a letter of 29 December 1993 to the Regional Manager did the new Director of Operations make the special assessment, and his "overall rating" was: "Performance does not meet expected standards in all respects". The Director did not use the standard form and did not make his assessment in the course of any "work review discussion" with the complainant. The assessment was sent on 30 December to the complainant, who was told to comment and return it by the end of the day. He signed the Director's assessment and returned it, neither commenting nor objecting to lack of time in which to do so.

18. In a telex of 6 January 1994 the Director of Personnel Services informed the complainant that his appointment was extended to 28 February 1994 and that "informal communication to date indicates that the assessment will not indicate above-average performance". In his reply of 20 January the complainant expressed disagreement with the special assessment. On 11 February 1994 the Director of Personnel Services informed him that his appointment would not be further extended: the view expressed by the Director of Operations in the letter of 15 February 1993 that his performance was not up to standard had been confirmed by the Regional Manager and the Director of the Operations Department - whose comments, however, were never made available to the complainant.

19. The complainant made detailed comments in memoranda of 23 and 25 February 1994 that he sent by fax to the Director of Operations about the special assessment and asked for review of the decision of 11 February. The decision was confirmed on 1 March by the Director of Personnel Services and an appeal by him dated 26 April to the Director-General was rejected as unfounded on 22 June 1994. He appealed to the Appeals Committee on 14 August. In its report of 12 May 1995 the Committee recommended rejection. It found ample justification for the non-renewal, and indeed even for having let the complainant go much earlier "given the incidents in Uganda and his continued unsatisfactory behaviour once transferred to the Sudan" despite the FAO's efforts to give him further opportunities, including the extension of the period of assessment, of changing his behaviour and working better. On 6 July 1995 the Director-General accepted that recommendation and rejected his appeal. That is the decision he is impugning.

20. The FAO submits that although the complainant's work was, with some reservations, found generally satisfactory at first, there was "marked degeneration" from 1990 in both his work and his conduct; "countless efforts were made by [his] superiors to redress the situation"; "he was fully informed in a timely manner of the reasons [for] dissatisfaction and countless warnings were given"; he was given every reasonable opportunity to show his mettle and "improve his performance and his relations with his supervisors as well as with government officials"; and it was because all those efforts proved futile that his appointment was not renewed.

21. Those being the grounds for non-renewal, the burden is on the Organization to show that its decision rested upon proper appraisal of the complainant's performance. Although it warned him that it would be assessing his performance in the Sudan by means of the usual formal reports, it failed to complete a single process of reporting for the whole period, from October 1990 to November 1993, in which it alleges unsatisfactory performance. There was no such report at all for 1990-91. The one for 1991-92 was begun but not completed; it showed omissions, errors and irregularities; and during the process of appraisal the complainant's supervisors made, not on the report form, adverse comments about him which he never saw. And the fact that on reading his objections the Director of Operations had second thoughts and recommended further assessment suggests that that report was at best inconclusive, if not defective. Lastly, the report for 1992-93 was not made out even when it became quite clear that that was feasible. All the reports up to September 1990 having been satisfactory, the Organization's failure to have proper appraisal reports made since then is a flaw in the decision.

22. The special assessment did not remedy that flaw. True, the letter of 15 February 1993 prescribed safeguards of fairness and objectivity, and the complainant was twice reassured on that score. One safeguard was that "key result areas" should be agreed beforehand; another that the standard report form would be used so as to let him have the benefit of the normal process of appraisal, including discussion with supervisors and disclosure of any adverse comments. But since those safeguards were not observed, the special assessment too was flawed.

23. The consequence of the delay in the special assessment was to deny the complainant the benefit of any appraisal of the work which he did from February to August 1993, and about which there had been no adverse comment. The decision not to renew his appointment was made in disregard of that period of seven months and based upon an assessment of his performance only in the following three months.

24. The FAO's reply and the conclusions of the Appeals Committee show that one point that influenced the decision was the charge against the complainant of unsatisfactory behaviour, especially poor relations with supervisors in Uganda and the Sudan. But he denied some of those allegations; others he was not even told of; and none was pursued. By acting on such allegations the FAO denied him due process.

25. The conclusion is that the impugned decision, being tainted with procedural errors and irregularities, denial of due process and disregard of material facts, cannot stand. In lieu of reinstatement the complainant will be awarded damages in a sum equivalent to two years' salary and allowances at the rates prevailing in February 1994. He claims retroactive payment of the within-grade salary increase that by virtue of its decision of 21 December 1992 the FAO withheld as from 1 January 1993. But since he failed to file an internal appeal against that decision the claim is irreceivable under Article VII(1) of the Tribunal's Statute for failure to exhaust the internal means of redress.

DECISION:

For the above reasons,

1. The Director-General's decision of 6 July 1995 is quashed.
2. The FAO shall pay the complainant damages in a sum equivalent to two years' salary and allowances at the rates prevailing in February 1994.
3. It shall pay him 1,000 United States dollars in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, 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 11 July 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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