

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

108th Session

Judgment No. 2897

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. M. against the Pan American Health Organization (PAHO) on 15 March 2008, PAHO's reply of 1 July, the complainant's rejoinder dated 31 August and the Organization's surrejoinder of 22 December 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. From July 2003 until he retired in March 2007, the complainant, an American national born in 1948, was employed by the Regional Office for the Western Pacific (WPRO) of the World Health Organization (WHO), which is based in Manila (the Philippines). He had previously been employed by PAHO for eight years, first as Chief of the Department of Finance and subsequently as Chief of the Department of Budget and Finance.

During the first half of 2005 he was advised that the post of Director of Administration, at level D.2, was to become vacant in

August that same year in the Pan American Sanitary Bureau, PAHO's secretariat in Washington D.C. Having expressed his interest in this post, the complainant, who was at the time Director of Administration and Finance, at grade D.1, in the WPRO was requested to provide an updated résumé to PAHO's Department of Human Resources Management. He was informed on 22 December 2005 that a consulting firm would evaluate and shortlist suitable candidates for interview with PAHO's executive management.

On 16 February 2006 the vacancy notice for the post of Director of Administration was issued and advertised in several newspapers by the consulting firm. The notice was based on a post description which listed among the required qualifications five years of international work experience and a very good knowledge of English or Spanish with a working knowledge of the other language. In April the firm submitted to PAHO a shortlist of 15 candidates, which included the complainant. His interview, which took place at WHO's Headquarters in Geneva on 18 May 2006, was conducted by a panel consisting of WHO's Assistant Director-General for Administration, PAHO's Director, its Assistant Director and the President of PAHO's Staff Association. The latter two panel members participated in the interview via videoconference from Washington D.C.

The complainant enquired about the outcome of the selection process and was told towards the end of July 2006 that the scheduling of interviews with other candidates had been delayed. Having been notified on 21 August 2006 that another candidate had been selected for the post of Director of Administration, he filed a statement of intent to appeal against the decision not to select him on 12 September 2006. His statement was forwarded to PAHO's Board of Appeal, which unanimously recommended in its report of 29 October 2007 that the appeal be dismissed as unfounded and that the Director of PAHO maintain her decision to appoint to the post of Director of Administration the candidate she had selected. In a letter of 12 December 2007 the Director informed the complainant that she had decided to accept the Board's recommendations and accordingly to reject his appeal. That is the impugned decision.

B. The complainant submits that the selection process for the post of Director of Administration was tainted by personal prejudice on the part of PAHO's Director and flawed on several counts. First, the Director of PAHO was not authorised to appoint the Director of Administration as the only two positions identified by Staff Regulation 4.5 for the Director's discretionary authority are those of Deputy Director and Assistant Director. In addition, the selection process contravened Staff Regulation 4.4 which provides *inter alia* that, in filling PAHO vacancies, preference shall be given to staff members already in the service of the Pan American Sanitary Bureau or WHO. The complainant contends in this respect that he fulfilled all the requirements for the post of Director of Administration since, at the time when he applied, he had been performing essentially the same duties for nearly three years in the WPRO. He asserts that the selection process was unfairly reopened by the Director approximately three months after it concluded in May or June 2006 with the selection of two qualified candidates, one of whom was the complainant, thus denying him the preference established in Staff Regulation 4.4. He complains of repeated delays in the process and considers that resorting to the consulting firm was "wasteful" and an "unnecessary service".

The complainant argues that the selected candidate did not satisfy the minimum requirements set out in the vacancy notice for the post of Director of Administration, emphasising that he did not have any experience with the United Nations, nor with any other international organisation, and had only two years before reaching retirement age.

He submits that he was not placed on an equal footing with other candidates. During his interview of 18 May 2006 he was asked questions in Spanish via an unclear videoconference whereas questions to the successful candidate were asked during a face-to-face conversation. Besides, some of the questions put to him were, in his view, prejudicial and inappropriate.

The complainant asks the Tribunal to quash the decision to appoint the selected candidate to the post of Director of Administration, and order that the selection process be reset from the time when there were

just two qualified candidates and that Staff Regulation 4.4 be applied in his favour. He requests to be appointed to the post of Director of Administration retroactively to the time when there were just two qualified candidates or, alternatively, to be compensated for his loss of earnings from that time until reaching the age of 62, that is the mandatory retirement age. He claims compensation for the moral injury he alleges to have suffered for nearly two years and costs. The complainant indicates in his complaint form that he applies for hearings but only “if [the] Tribunal [can] protect the identity of all witnesses from PAHO”.

C. In its reply the Organization notes that, when the complainant initiated his appeal against PAHO, he was a WHO staff member, and that his appeal was therefore irreceivable. It stresses that it however waived its receivability argument before the Board of Appeal and the Tribunal in order to show that the selection process for the post of Director of Administration was conducted in a fair, transparent and timely manner. It denies that there were repeated delays, stressing that only six months elapsed between the advertising of the vacancy notice and the selection of a candidate.

It considers the complainant’s reliance on Staff Regulation 4.5 to be incorrect and points out that Staff Rule 410.4 conversely provides that vacant posts below the P.6 level would normally be filled through a competitive process, thereby recognising that the PAHO Director has discretionary authority to appoint staff directly at the P.6 level and above. It adds that, throughout PAHO’s history, Directors have always exercised their discretionary authority to appoint Directors of Administration directly. In the present instance, the Director retained and duly exercised her discretion to select a candidate after seeking the advice of the consulting firm on the identification of qualified candidates. The Organization argues that the complainant could not be given preference pursuant to Staff Regulation 4.4 because the interview panel, which assessed the complainant’s qualifications without bias, found that he did not meet the requirements for the post of Director of Administration, particularly in regard to his knowledge

of Spanish, and that he had adopted a negative attitude during the interview of 18 May 2006. The selection process was not improperly reopened and no rule limits the number of candidates that may be interviewed for a vacant post. It was open to the Organization to request additional interviews given that none of the candidates previously interviewed fully met the requirements for the vacant post.

PAHO draws attention to the fact that the interview panel was unanimous in considering that the selected candidate was the best one. It contends that no rule restricts recruitment or appointment of a candidate at the age of 59, and that the complainant's allegation that the requirement of international work experience is defined as international organisation experience is inconsistent with the plain language of the vacancy notice and PAHO's practice.

Lastly, it argues that it took every step to ensure that all candidates, including the complainant, were treated equally. They were all advised in writing of the agenda of their interview and asked an identical set of questions, under the same conditions. During his interview, the complainant did not mention that he could not hear distinctly the only question put to him in Spanish, nor did he request that it be repeated. In the Organization's view, the questions asked were intended to reveal the interpersonal skills and communication styles of the candidates.

D. In his rejoinder the complainant presses his pleas. He contends that Staff Rule 410.4 does not deal with posts below the P.6 level and that PAHO's past practice does not justify direct appointments for filling the post of Director of Administration. He argues that the selection process began when the former Director of Administration announced in March 2005 that he was going to resign.

E. In its surrejoinder the Organization maintains its position. It emphasises that Article 21.B of the PAHO Constitution provides that the Director shall appoint all personnel of the Pan American Sanitary Bureau. It points out that for every interview some of the panel members participated by videoconference. Consequently, all candidates were in the same position when answering questions put to

them in languages other than their native language. Further, the complainant himself noted that he possessed a limited knowledge of Spanish when he applied for the post of Director of Administration.

CONSIDERATIONS

1. The complainant is a retired senior international civil servant. At the material time he had for some three years been the Director of Administration and Finance, at level D.1, in WHO's Regional Office for the Western Pacific (WPRO). For the previous eight years he had worked at PAHO, which serves as WHO's Regional Office for the Americas and which has its Headquarters in Washington.

2. As PAHO's Director of Administration had tendered his resignation, on 7 February 2006 the Organization engaged a consulting firm to assist it in finding and choosing a successor. The complainant applied for this D.2 position.

The post was advertised on 16 February 2006. The vacancy notice specified the required qualifications; these included a very good knowledge of English or Spanish and a working knowledge of the other language. It also indicated that knowledge of French and/or Portuguese would be an asset.

A shortlist of 15 candidates, including the complainant, was drawn up. These candidates were called for interviews held between 16 and 19 May 2006, either in Washington at PAHO Headquarters, or in Geneva at WHO Headquarters, with some of the panel's members participating by videoconference. PAHO selected an external candidate, a former official of the State Department of the United States, who could not be interviewed until 4 August owing to the professional commitments of several panel members. On 21 August 2006 the consulting firm notified the other candidates of the outcome of the selection process.

3. On 12 September 2006 the complainant filed a statement of intent to appeal against the rejection of his candidature and the appointment of the new Director of Administration.

By a decision of 12 December 2007 the Director of PAHO accepted the unanimous recommendations of the Board of Appeal and accordingly rejected the complainant's appeal. The complaint filed with the Tribunal is directed against this decision.

4. Although it draws attention to the fact that the Tribunal is competent to hear only disputes between the Organization and its own staff members, PAHO states that it accepts this jurisdiction without reservation. The complaint shall therefore be entertained.

5. The complaint concerns the appointment of a senior staff member. The authority responsible for taking such a decision has wide discretionary power which is subject to only limited review. The Tribunal will intervene only if the decision was taken without authority or in breach of a rule of form or of procedure, if it was based on a mistake of fact or of law, if some material fact was overlooked, if there was abuse of authority, or if the organisation has drawn a clearly wrong conclusion from the evidence. A mistake as to a candidate's qualifications or experience may constitute a mistake of fact or result in some material fact being overlooked (see Judgments 2163, under 1, and 2393, under 11 and 13).

An appointment decision may likewise be set aside if an applicant has been treated in a discriminatory manner (see Judgment 2393, under 12).

6. The complainant is wrong to think that he can infer from the wording of Staff Regulation 4.5 that the Director of PAHO is not authorised to appoint the Director of Administration. Indeed, this provision is mainly concerned with establishing the duration of appointments. It makes the specific duration of the appointment of the Deputy Director and Assistant Director subject to the Executive Committee's approval, whereas the duration of the appointments of other staff members is set by the Director herself.

Article 21.B of the PAHO Constitution leaves no doubt as to the scope of this provision, since it explains that the Director shall appoint all the personnel of the Pan American Sanitary Bureau, but that the appointment of the Deputy Director and Assistant Director must be approved by the Executive Committee.

7. The complainant submits that the selection process was not conducted in a timely and transparent manner. He alleges that his candidature was rejected because the Director of PAHO was prejudiced against him. In his opinion, Staff Regulation 4.4, which provides that internal candidates must be given preference over external candidates, has been breached.

(a) First, the Organization is right in holding that it cannot be criticised for engaging a consulting firm in order to obtain assistance with the selection process. This approach may even be unavoidable when, as in the instant case, it is necessary to fill a senior management position requiring outstanding personal qualities, a strong sense of responsibility, in-depth technical knowledge, extensive experience, the ability to fit into a major international organisation and good interpersonal relations.

(b) The Organization and the consulting firm were also right not to confine their search to internal candidates but to extend it outside the Organization in order to make an objective comparison of the qualities and merits of a large number of persons who were eligible for selection to the vacant post. In this respect the wording of the vacancy notice of 16 February 2006 may be regarded as judicious. The Organization cannot be criticised for having taken as much time as was necessary to ensure that the selection was as objective as possible.

The Tribunal notes that approximately six months elapsed between the date when the vacancy notice was advertised and the date on which the successful candidate was appointed, during which time the shortlisted candidates were thoroughly interviewed by the bodies responsible for the selection. Admittedly, the appointment was somewhat delayed because several members of the panel had other commitments, but this circumstance, which is by no means

exceptional, does not alter the fact that the selection process was conducted and completed within a reasonable period of time.

(c) Lastly, the arguments put forward by the complainant to show that the selection process was conducted in a manner that placed him at a disadvantage are unconvincing. Nothing in the submissions indicates that the bodies responsible for selecting the best candidate acted without due regard for his rights or for the vital interests of PAHO when appointing a senior official.

8. It has been established that the complainant's work experience was, on the whole, equivalent to or at least comparable with that of the candidate who was given preference over him. It may even be said that the complainant had the notable advantage over this candidate of having acquired lengthy experience in an international organisation, whether as Director of Administration and Finance in WPRO, or before that at PAHO's Headquarters.

Nevertheless, the Organization could, without displaying arbitrariness or discrimination, consider that the successful candidate's career in the State Department of the United States, in the course of which he had worked all over the American continent, constituted a guarantee that this candidate would be able to head its administrative services. Moreover, the vacancy notice did not restrict the required experience to that acquired within international organisations.

Ultimately, the two deciding factors were ability to fit into the Organization without difficulty and linguistic knowledge. Fluency in Spanish and a good knowledge of French were not unimportant from this point of view. Furthermore, in view of the complainant's behaviour during the selection process and what transpires from his submissions to the Tribunal to be his difficult relationship with the Director with whom he would have had to work closely, the Organization could legitimately conclude, without displaying any prejudice against the complainant, that he would not be able to perform his new duties calmly and efficiently in the best interests of the Organization. It was therefore entitled to depart from the rule that, in principle, preference must be given to internal candidates for, in light

of the foregoing, it has not been established that the complainant had the same qualities as the successful candidate. The Tribunal finds no evidence in the submissions of unequal treatment, or of a choice prompted by personal prejudice.

In these circumstances, the complainant's claims must be rejected in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Catherine Comtet