

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

FORTY-NINTH ORDINARY SESSION

In re DIAZ DE BORSODY

Judgment No. 511

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Celia Diaz de Borsody on 30 December 1980 and brought into conformity with the Rules of Court on 24 July 1981, the FAO's reply of 8 October, the complainant's rejoinder of 30 December 1981 and the FAO's surrejoinder of 2 February 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Manual provisions 330.13, 330.152 and 330.322 to 325;

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, who joined the staff of the FAO in 1963, holds a grade G.5 post as a research clerk. By a memorandum of 15 May 1979 the director of her division informed her that because of her conduct, which he described as "insubordination", he had recommended imposing on her a written censure in accordance with Manual provision 330.152(viii), and that under 330.325 she had five working days in which to reply. On the same day the Director of Personnel sent her a memorandum, signed also on behalf of the Assistant Director-General for Administration and Finance, informing her that, after reviewing the charges against her, he was in agreement with the measure recommended. In a memorandum of 21 May to the Director of Personnel the complainant asked for the withdrawal of the two memoranda of 15 May on the grounds that disciplinary action had been taken against her in breach of the procedural rules in the Manual. She was told on 30 May that she had misunderstood the rules but that she was still free to state her case. On 5 June she retorted that a formal disciplinary measure had already been taken against her, in breach of the correct procedure. On 19 June she appealed to the Director-General. The appeal was rejected by a letter of 14 August signed by the Assistant Director-General. On 6 September the Assistant Director-General signed a memorandum stating that the written censure was imposed. On 3 September she had appealed to the Appeals Committee. In its report of 1 July 1980 the Appeals Committee recommended rejecting her appeal but suggested suspending the censure and giving her a final opportunity to state her case. By a letter of 3 October 1980 the Deputy Director-General informed her of the Director-General's decision, which she now challenges, to reject both her appeal and the Committee's suggestion.

B. The complainant observes that according to Manual provision 330.323 the Director of Personnel ought to have investigated her case thoroughly. Yet it was on the very same day, 15 May 1979, that the director of her division and the Director of Personnel signed their memoranda. Thorough review was therefore out of the question. Disciplinary action was taken against her without giving her a hearing and in breach of the correct procedure. She asks the Tribunal to rescind the disciplinary measure, to remove from her personnel file all adverse comments and documents relating thereto, to make such other amends as the Tribunal sees fit, and to award costs.

C. In its reply the FAO maintains that the various stages of the procedure set out in Manual provisions 330.322, 323 and 324 were observed. In his memorandum of 15 May the Director of Personnel states, as required by 323 and 324, that he had reviewed the charges against her and was in agreement with the measure recommended. He did not actually impose it, however, and indeed he was transmitting a memorandum which expressly acknowledged her right to reply. Contrary to what she says, the Director's memorandum was not in itself the sanction; it was merely a stage in the disciplinary proceedings. She was given ample opportunity to reply to the charges. Before imposing the censure the FAO made a thorough investigation of the facts, which it describes at length and which it believes warranted the disciplinary action. The complainant does not deny the grounds on which the censure was

based. Her claim for "other amends" is too vague for comment. The FAO invites the Tribunal to dismiss the complaint as devoid of merit.

D. The complainant rejoins that the censure was imposed before she was given a hearing. She maintains that pressure was put on another official who had agreed to advise her on her case. The reason why she emphasised the procedural irregularities is that she believed that they made the sanction invalid and that discussion of the merits was pointless. She has never, as the FAO implies, agreed that she was insubordinate. She gives her own version of the incidents which led up to the sanction, which, she explains, arose from difficulty in getting on with her immediate supervisor, and which do not, in her view, warrant the measure. She presses her claims for relief.

E. In its surrejoinder the FAO observes that Manual provision 330.13 does not actually require giving a hearing to the official; yet she was given several opportunities to reply, which she ignored. Up to 6 September 1979, the date of the memorandum containing the censure, neither the Director of Personnel nor the Assistant Director-General had formally consented to it, and that is what the provisions require. There was no disciplinary sanction imposed before that date. No pressure was put on any other official. As to the merits, the FAO believes that the complainant has not answered any of the charges which led to the sanction and maintains that her unwillingness to accept her supervisor's direct supervision fully justified it.

CONSIDERATIONS:

Procedural issues

1. The rules on disciplinary measures in the FAO appear in Manual section 330.

Manual provision 330.13 states that the purpose of disciplinary measures is to protect the integrity and efficiency of the organization and that they are not to be imposed without a thorough investigation of the facts, and without affording the staff member concerned an opportunity to state his case to the responsible officer.

According to provision 330.322 the "initiating officer" addresses to the staff member in duplicate a confidential memorandum describing the unsatisfactory conduct and stating the measure to be imposed. He signs both copies and sends them to the Director of Personnel.

Provision 330.323 requires that the Director of Personnel shall review the offence alleged and the measure recommended in the light of the staff member's personnel record. If he feels that the matter should be investigated further he consults with the initiating officer and, if necessary, with the staff member.

According to provision 330.324, if the Director of Personnel concurs in the initiation of proceedings, he obtains the signature of the "authorising officer" where the initiating officer is not an authorising officer. He then has the memorandum delivered to the staff member, who signs and notes the date of receipt on one copy and returns it to the Personnel Division.

Lastly, under provision 330.325 the staff member has five working days in which to submit a reply to the initiating officer.

2. The proceedings in the complainant's case may be recapitulated as follows.

On 15 May 1979 the director of her division sent her a memorandum containing several charges against her, in particular that of unwillingness to accept the supervision of her immediate superior, and stating that he had no alternative but to recommend imposing a written censure on her for "insubordination". He gave her five working days in which to submit a written reply.

On the same day the Director of Personnel, citing provision 330.32, transmitted the memorandum to the complainant - channelling it through the Assistant Director-General for Administration and Finance in his capacity as the authorising officer - and informed her that he had reviewed the charges against her and was in agreement with the measure recommended. His memorandum was countersigned by someone on behalf of the Assistant Director-General.

The complainant lodged a protest and received a memorandum dated 30 May from a member of the Personnel Division explaining that the purpose of the memoranda of 15 May 1979 had been to inform her, as the rules

required, of the opening of disciplinary proceedings and that she might still state her case, if she so wished, without delay.

On 14 June the Director of Personnel, in answer to a further protest from the complainant, confirmed the terms of the memorandum of 30 May 1979 and pointed out that the signing of the memorandum of 15 May 1979 by an authorising officer did not mean that any decision had yet been taken.

On 6 September, with the appeal the complainant had lodged still pending, the Assistant Director-General for Administration and Finance imposed on her a written censure as a disciplinary measure on the grounds of insubordination.

3. It appears from the foregoing that, contrary to what the complainant maintains, the officers of the FAO rigorously complied with the procedural rules.

In particular, the complainant is mistaken in contending that a disciplinary measure was imposed on her on 15 May 1979. The director of her division merely started disciplinary proceedings on that date. He did recommend the measure, but he did not impose it, as is clear from his inviting her to state her case within a set time limit. On the same day the Director of Personnel merely stated his agreement with the measure recommended. All that may be read into the signature added on behalf of the Assistant Director-General is approval of the opening of disciplinary proceedings. Not until 6 September 1979 was the written censure actually imposed. Her case therefore differs from one where the disciplinary proceedings are initiated by an officer who is authorised to impose the measure he recommends and where he is deemed to have imposed it forthwith.

Nor is it established that the officers of the FAO were remiss in reviewing the case. First, the division director who initiated proceedings had long been aware of the charges against the complainant. Secondly, the Director of Personnel may have commented on the very day on which proceedings were initiated, but that does not mean he took the matter lightly. He needed only a short while to look at the complainant's records, and in any event had probably known since before 15 May 1979 of the discord between her and her supervisors. Besides, at that stage in the proceedings the Assistant Director-General was not required to go into her case thoroughly; all he needed to do was to take note of the views expressed on 15 May 1979 by the two heads of division.

Again, there is no substance to the complainant's plea that her right to a hearing was ignored. Her right to reply in writing was recognised by her division director on 15 May 1979 and confirmed twice thereafter. The time limit of five working days is what Manual provision 330.325 prescribes. Though short, it was adequate. She did not need a long time to answer the charges, which were nothing new. Besides, if she had so wished, she could have had the time limit extended. Although the time limit set on 15 May 1979 expired, she was invited again, on 30 May, to state her case without delay. It is immaterial that she was asked to reply in writing and not orally. Unless there is a provision to the contrary, the right to a hearing does not denote any right to reply orally.

Accordingly, the special procedural rules were complied with, as was the general rule in Manual provision 330.13.

The merits

4. The complainant seeks the quashing of the penalty, the removal of the relevant papers from her personnel records and the grant of such remedies as the Tribunal thinks fit. She does not, however, argue the merits. She simply denies all the charges against her, without troubling to discuss them. The Tribunal will not make an investigation which she herself has neither made nor sought. It will take the charges as proved and observe that they justify the impugned decision, which is in any case fully warranted in the light of Judgment No. 512.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

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