

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

## FORTY-NINTH ORDINARY SESSION

In re GATMAYTAN (No. 2)

Judgment No. 535

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Napoleon Garcia Gatmaytan on 22 March 1982, the PAHO's reply of 14 June, the complainant's rejoinder of 1 August and the PAHO's surrejoinder of 25 August 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal and PAHO Staff Rules 410.4, 565.2 and 1230.1.1;

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. As is stated in Judgment No. 424, under A, the complainant, a citizen of the Philippines, has served on the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, since 1971. On 10 November 1980 he applied for a P.4 post for a senior classification officer at headquarters. The successful candidate was a P.3 classification officer, whose post, No. 0253, thus became vacant. The Chairman of the Staff Committee, with whom the complainant had taken up the matter, asked the Office of Personnel when the vacancy would be advertised. On 7 May 1981 the Chief of Personnel answered that arrangements had been made to transfer a P.3 official to post 0253 on 1 June 1981 and that, being thus filled by a reassignment under Staff Rule 410.4<sup>(1)</sup>, the vacancy had not been advertised. The P.3 official was Mrs. Henson, the secretary of the Board of Inquiry and Appeal, whose post had been regraded from P.2 to P.3 on 9 March and who could therefore be reassigned without promotion. The acting Chairman of the Staff Committee wrote to the Chief of Personnel on 21 May objecting to such "arrangements". On 15 June the Chief of Personnel said that reassignment had been preferred, in the PAHO's "best interest", so as to fill the post promptly. On 3 August the complainant appealed to the Board challenging the reassignment. By a letter of 18 December, which he states he received on 18 January 1982 and which he now impugns, the Director endorsed the Board's recommendation of 6 November to deny his claims.

B. The complainant observes that according to Rule 410.4 the norm is competitive selection, reassignment being allowed only by way of exception in "the interest of the Bureau". The PAHO abused its authority in filling post 0253 by reassignment. It has never explained why it preferred this method. It overlooked essential facts in that it did not assess those qualified for the post by the normal procedure. There was no urgency since the PAHO anticipated the vacancy well in advance. Its interests required a competition to find the best candidate. The reassignment was in breach of Rule 1230.1.1, which forbids the taking of a decision from personal prejudice, including prejudice in favour of someone. As secretary to the Board of Inquiry and Appeal Mrs. Henson sometimes favoured the Administration, and the staff resented her being seemingly rewarded with promotion and an immediate transfer to a post in which she could look forward to early advancement to P.4. The post of secretary to the Board looks like a stepping stone to promotion. The complainant has been denied a fair chance to compete and a likely further promotion to P.4 on the retirement of the head of the classification unit. He is, he believes, better qualified: he holds two university degrees and has long been regarded by the Staff Association as expert in post classification, whereas Mrs. Henson has little or no experience of it and may not even hold a university degree. The Board glossed over this point, and indeed its report is in general tendentious. He invites the Tribunal to set aside the appointment and put post 0253 up for competition, any experience gained by Mrs. Henson since 1 June 1981 to be discounted; or to compensate him by ordering his upgrading to P.4 with effect from 1 June 1981; or to award him damages for loss of earnings equivalent to the difference in pay between grades P.2 and P.4; and to award him costs.

C. In its reply the PAHO observes that under Rule 565.2 a "staff member may be reassigned whenever it is in the interest of the Bureau". When it decides against competitive selection the PAHO exercises its discretion under Rule 410.4, and in this instance there was no flaw in its decision. The reason for its preferring reassignment was the urgent need to fill the post because of the backlog of work. Selection may take up to seven months, and the vacancy did not occur until February 1981. It is not for the PAHO to show that, had there been selection, the complainant would not have been chosen, although it is not certain that he would: it is for him to show an abuse of discretion. He and others were considered before Mrs. Henson was appointed. She had the right language qualifications whereas he lacked the required command of Spanish. She had a longer record of service. She had, like him, served on the Joint Advisory Group on Post Classification and she had done research on the subject. She holds a degree from a college in Washington. The reclassification of her post was not connected with her reassignment but the result of a desk audit made at the end of 1980. In any event the claims for relief should fail. To cancel the reassignment would, besides being unfair to someone with a good record whose integrity is not questioned, be neither possible nor advisable, as Article VIII of the Statute of the Tribunal requires. Moreover, the claim to compensation for loss of further promotion rests on pure speculation.

D. Enlarging on his arguments, the complainant maintains in his rejoinder that the PAHO's best interests lay in an objective screening of candidates. The PAHO should not appear to favour someone identified with it, especially when it chooses to break with the general rule. Mrs. Henson, too, should have avoided appearing to accept favours. The burden of proof is on the PAHO to justify an exception to the norm. Selection would not have taken too long, the average lapse of time from announcement of a vacancy to selection being only three months. Besides, someone as inexperienced as Mrs. Henson was unlikely to help much with the backlog of classification work. The complainant's own qualifications are vastly superior. The college from which she is said to hold a degree is defunct and was of far less repute anyway than the complainant's university. He presses all his claims, which are, in his view, in no way speculative. The only fair solution is to hold a competition, from which Mrs. Henson, if she is indeed the best candidate, has nothing to fear.

E. In its surrejoinder the PAHO further advocates rejecting the appeal. It would, in its view, be unfair to put someone at a disadvantage for having served as secretary to the Board, nor did her position as such oblige Mrs. Henson to decline the reassignment. True, selection need not last seven months, but delay was a risk the PAHO could not afford to take in this instance. The complainant's qualifications are not such that he would have defeated Mrs. Henson in a competition.

#### CONSIDERATIONS:

##### The issue

1. Staff Rule 410.4 lays down the procedure for filling vacancies below grade P.6 which are not of short duration. The first sentence of the Rule says that vacancies shall normally be announced to the staff if they represent a promotional opportunity for any staff and that selection shall normally be by competition. According to the second sentence these requirements shall not apply to any post which it is in the interest of the Bureau to fill by reassignment without promotion. Thus the general method of filling vacancies is to hold a competition, and reassignment without promotion in the interest of the Bureau is an exception.

The Tribunal observes that the second sentence refers to the "interest", not, as the parties have it, to the "best interest", of the Bureau.

2. On 1 February 1981 the incumbent of a P.3 post, No. 0253, was moved to a P.4 post, No. 4939. Instead of putting post 0253 up for competition the PAHO chose to fill it forthwith by reassigning a serving official. This was Mrs. Henson, who was on a P.3 post, No. 5118. Thus, to the general method prescribed in the first sentence of the Rule the PAHO preferred the exception allowed by the second.

The Tribunal will accordingly consider whether the Rule was correctly applied.

##### The Tribunal's power of review

3. Whether a post should, in the interest of the Bureau, be filled without holding a competition is a matter of discretion. The Tribunal will therefore set the decision aside only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on a mistake of fact or of law, or if essential facts were overlooked, or if

there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

The allegation of abuse of authority

4. The nub of the complainant's case is that in appointing Mrs. Henson to post 0253 the Organization was moved, not by the Bureau's interest, but by other considerations, and that it therefore committed an abuse of its authority.

5. The plea would succeed if the grounds alleged by the PAHO to justify its action were a pretext. That is not borne out on the evidence.

According to the PAHO it was urgently necessary to appoint someone to dispose of a backlog of work. The complainant retorts that there need never have been a backlog. This is pure supposition, however, of which there is no proof. In any event, it is not established that the Organization deliberately let a backlog build up so as to dispense with a competition.

The complainant challenges the PAHO's statement that it gained appreciable time by making an immediate appointment, both sides assessing differently the time saved. The Tribunal need not decide the matter and merely observes that an immediate appointment is of course quicker than an appointment following a competition and that, according to circumstances, several months may be gained.

6. Secondly, the plea of abuse of authority would succeed if the PAHO had appointed someone obviously less well qualified than the complainant. There is nothing to suggest that.

The complainant rates his own university qualifications more highly than Mrs. Henson's on the grounds that he attended a university of greater repute than she did. He also says that he has, and that Mrs. Henson lacks, experience in the matters of grading which the holder of post 0253 must deal with. The Tribunal need not settle these points, which are not decisive. In fact the complainant is overlooking several considerations which account for the preference for Mrs. Henson.

First, Mrs. Henson joined the PAHO five years earlier than he, in 1966. Secondly, she has the language qualifications for the post, and the complainant apparently has not. Thirdly, she obtained grade P.3 before her appointment to the post and therefore met one of the conditions in the second sentence of Rule 410.4, parity of grade between the former and the new posts. The complainant's post is graded only P.2 and so he could not benefit from the exception allowed under the Rule.

7. Lastly, the plea would succeed if the priority given to Mrs. Henson had been unfair to other candidates. The charge of favouritism is, however, unfounded.

Mrs. Henson was promoted to grade P.3 on 9 March 1981 with retroactive effect from 1 March. But that does not mean that the purpose of the promotion was to pave the way for putting her on post 0253. The promotion was the outcome of a regrading of her post which had been contemplated as early as the autumn of 1980, long before post 0253 fell vacant.

The complainant suspects the PAHO of wanting to reward Mrs. Henson for past services, especially as secretary to the Board of Inquiry and Appeal. This, again, is mere supposition, and indeed the charge of favouritism is refuted by the fact that before appointing Mrs. Henson the PAHO unsuccessfully tried to appoint two other officials to the post.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., 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

Jacques Ducoux

William Douglas

A.B. Gardner

1. "Posts ... which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is the interest of the Bureau to fill by reassignment of a staff member without promotion."

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