

SEVENTY-FIFTH SESSION

In re GLENN (No. 2)

Judgment 1268

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Clark Lee Glenn against the Pan American Health Organization (PAHO) (World Health Organization) on 15 October 1992 and corrected on 23 November 1992, the PAHO's reply of 19 January 1993, the complainant's rejoinder of 22 February and the Organization's surrejoinder of 17 March 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 4.1, 4.2 and 4.4, PAHO Staff Rules 320.4 and 410.4 and PAHO/WHO Manual provision II.3.320;

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 United States citizen, was born in 1934. His career in the PAHO is summed up in Judgment 1067 of 29 January 1991, under A.

By information bulletin HQ/FO-91-35 of 29 May 1991 the Director of the Organization announced that an outside candidate would take over as chief of the Procurement Department on his predecessor's retirement at the end of July 1991.

By a memorandum of 3 July 1991 the complainant appealed to the Board of Appeal against that decision, saying it was in breach of PAHO Staff Regulation 4.4 and PAHO Staff Rule 410.4. Having heard his appeal in May 1992, the Board submitted to the Director an undated report which unanimously recommended dismissing it. In a letter of 10 July 1992 the Director informed the complainant of his endorsement of the recommendation, and that is the decision impugned.

B. The complainant pleads flaws both in the procedure for filling the post of chief of the Procurement Department and in the appeal proceedings. He contends that he fell foul of personal and racial prejudice and suffered abuse of authority, the Director having extended the chief of the Procurement Department's contract beyond the age of retirement so as to prevent him from getting promotion to the post.

Having failed to issue a vacancy notice for the P.5 post of chief of the Procurement Department the Organization was in breach of Staff Rule 410.4, which says:

"Posts below the level of P.6 ... 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. ..."

The complainant submits, first, that the PAHO's failure to tell him that he was on the list of candidates deprived him of a "promotional opportunity"; secondly, that although the Senior Staff Selection Committee interviewed other applicants it did not interview him and was not fully informed of his qualifications; and thirdly, that the PAHO infringed Regulation 4.4:

"Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Pan American Sanitary Bureau in preference to persons from outside. ..."

He challenges the Board of Appeal's view that the rules followed by the Senior Staff Selection Committee are different from those followed by other selection committees in the PAHO. He alleges procedural flaws, breach of the principles of fairness and equal treatment and personal and racial prejudice against him as the only "Afro-American" in the Professional category of the PAHO's staff.

He wants the Tribunal to award him salary and allowances at grade P.5 until his retirement at age 60 - for two

years and four months - and costs.

C. In its reply the PAHO rebuts the charge that it abused its authority by extending the appointment of the former chief of the Procurement Department. Such decisions are discretionary and officials may not ordinarily challenge them.

In keeping with paragraph II.3.320 of the PAHO/WHO Manual the Senior Staff Selection Committee examines applications for posts as chief of department. Though the Organization's consistent practice is not to announce vacancies in management it did put the complainant's name on the list of candidates. That shows that his supervisors were familiar with his qualifications and thought highly of them and explains why the Committee saw no need to interview him.

In the exercise of his discretion under Regulation 4.1 the Director will pick the candidate he thinks best fitted to further the Organization's interests. The PAHO has not denied the complainant promotion: he has no right to it, only an expectation, which the Organization took due account of by putting him on the list of candidates.

The Organization denies discriminating against him, a charge for which he produces not a jot of evidence. It is the PAHO's policy to beware of any discrimination on grounds of origin or race, and his allegation of bias is groundless.

D. In his rejoinder the complainant enlarges on his pleas and submits that the PAHO may not plead the Director's discretion as a pretext for breach of staff rights and due process. Why, since the WHO announces vacancies, does the PAHO not follow suit?

He describes the senior posts he held before joining the PAHO and points to his consistently fine record. It was discriminatory to deny him promotion to the post when he had been performing the duties of a P.4 official for a year and a half - in breach, for that matter, of Rule 320.4, which says that such arrangements may not last more than 12 months. He objects to the PAHO's higger-mugger criteria for selection.

The Committee made out that the successful applicant was fluent in Spanish. So why did the PAHO have him take private coaching in Spanish for a year in office hours and at its own expense?

E. In its surrejoinder the PAHO develops its earlier pleas and observes that the Board of Appeal found no breach of equal treatment or bias. The Administration never impeached his professional reputation or character; it merely regarded another candidate as the one who best met its requirements.

The PAHO and the WHO are two separate organisations, each with its own rules and selection procedures. The PAHO complied with the material rules, the Director properly exercised his discretion in taking the decision, and there was nothing arbitrary about it.

CONSIDERATIONS:

1. The complainant, a United States citizen joined the PAHO as a supply officer in the Procurement Office of the Organization on 1 January 1977 at grade P.2. That Office became the Procurement Department in 1987. He was promoted to P.3 on 1 October 1980 and still holds that position and grade. He was acting chief for 17 months from July 1977 and for short periods on many later occasions.

2. By a general information bulletin of 29 May 1991 the Director of the Organization informed the staff that, the chief of the Procurement Department - a grade P.5 post - being about to retire at the end of July, an external candidate, whom he named, would be taking over as from 1 June 1991.

3. The complainant appealed against that appointment, the Board of Appeal recommended rejecting his appeal, the Director endorsed that recommendation, and so informed the complainant by a letter of 10 July 1992. That is the decision he is impugning, and he relies mainly on flaws in the procedure followed in making the appointment.

4. His first plea is that the vacancy afforded the staff an opportunity for promotion and that under Rule 410.4 such a vacancy should "normally" have been announced but no such announcement had been made.

The Organization contends in reply that that rule does not apply to posts for which a Senior Staff Selection

Committee is convened under PAHO/WHO Manual provision II.3.320 and that its long-standing practice is to refrain from announcing the vacancy of such posts. It argues that the main criteria that the Selection Committee applied were those set out in Regulation 4.2:

"The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence, and integrity. ..."

As the Board of Appeal observed, Rule 410.4 refers to the announcement of vacancies whereas the provision of the Manual deals only with the composition of the Selection Committee that is to make recommendations for filling certain specified posts. Nothing in that provision overrides 410.4, which applies to selection for all "posts below the level of P.6". The Organization was bound to announce the vacancy for chief of the Procurement Department. It failed to do so and has also failed to offer any evidence to justify or explain its departure from the "normal" procedure that 410.4 lays down.

5. Secondly, the complainant observes that Rule 410.4 further requires that selection should "normally be on a competitive basis" and that although the Organization treated him as a potential candidate it did not so inform him and gave him no opportunity of putting to the Selection Committee material which might have helped his case. He further submits that other applicants had the advantage of an interview, which he himself was denied.

The Organization retorts that the reason why no interview was arranged with him was that the Selection Committee and the Director had full knowledge of his qualifications, experience and record, that he suffered no injury because he was duly considered for the post anyway and that interviews ordinarily take place only when the applicant is not well known to the Selection Committee. The Organization implies that that was why the outside applicant was interviewed.

As the Tribunal said in Judgment 107 (in re Passacantando), under 1, of the right of staff members "to take part in any competitions that may be open to them" -

"If this right is to be effective, it must necessarily include the right to demand that the arrangements for the competition ensure the appointment of the candidate who is really the best qualified. In other words, at every stage of the competition including the arrangements made, the conduct of the tests and the evaluation of their results, every candidate must be treated on an equal footing and with full impartiality."

That passage was indeed quoted, under 3, in Judgment 1071 (in re Castillo), which was about a similar case against the PAHO. As in that case the Selection Committee failed in the present one to put the complainant on an equal footing with the outside applicant, who thus had an unfair advantage over him.

6. The complainant's third plea rests on Regulation 4.4, which provides that "Without prejudice to the inflow of fresh talent ... vacancies shall be filled by promotion" of serving officials "in preference to persons from outside".

The Board of Appeal found that the outside applicant met the basic requirements of the post save that it could not assess his proficiency in Spanish, of which a thorough knowledge was demanded. As to Regulation 4.4 the Board observed that it was "not in a position to pass judgment on the decision of the Senior Selection Committee to recommend an external candidate".

But the Selection Committee seems to have disregarded the fact that in his 14 years' service in the Procurement Department he had acted several times for the chief and was assessed as outstanding in his four yearly performance appraisal reports, from 1987 to 1991. It thereby failed to compare the merits of the complainant and the outside applicant properly and so to apply Regulation 4.4 correctly.

7. The conclusion is that the process of selection was seriously flawed in that it was in breach of Rule 410.4 and Regulation 4.4 and in general did not come up to the required standards of fairness. It is accordingly unnecessary to consider the complainant's other pleas.

8. The complainant does not ask the Tribunal to set aside the appointment of the external candidate but merely seeks compensation for loss of advancement to grade P.5. The Tribunal allows his claim and awards him damages in an amount that it sets *ex aequo et bono* at 10,000 United States dollars. He is also entitled to an award of costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant \$10,000 in damages.
2. It shall pay him \$500 in costs.

In witness of this judgment Mr. José Maria Ruda, 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 14 July 1993.

José Maria Ruda
Mella Carroll
Mark Fernando
A.B. Gardner

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