

SEVENTY-SEVENTH SESSION

In re MALHOTRA

Judgment 1372

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 8 October 1993, the WHO's reply of 22 December 1993, the complainant's rejoinder of 11 March 1994 and the Organization's surrejoinder of 31 March 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Regulation 4.2, Staff Rules 410.4, 555 and 1230.1 and Manual paragraphs II.3.310 and II.3.340;

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, an Indian citizen born on 14 January 1936, joined the staff of the WHO in 1964 as a secretarial assistant at grade ND.5 - formerly ND.4 - in the Organization's Regional Office for South East Asia (SEARO). His post was upgraded to ND.6 and he was promoted to that grade as from 1 May 1979. The WHO granted him a career-service appointment on 1 March 1989 as from 1 July 1988. Since 15 May 1989 he has been in the Health and Behaviour Unit, where he still holds grade ND.6. In May 1973 he got a within-grade increase for meritorious service under Staff Rule 555 and two further steps in January 1984 and again in January 1989 upon completing 20 and 25 years' service respectively.

In August 1990 the Administration put up for competition a post, No. 5.0343, as assistant II at grade ND.7. The complainant was one of 14 applicants. An ad hoc selection committee drew up a short list and submitted it to the Regional Director for final decision. On 15 October 1990 the complainant learned that the Regional Director had decided in favour of another candidate on 12 October 1990.

On 13 December 1990 the complainant announced his intention to appeal on the grounds of personal prejudice, incomplete consideration of the facts and failure to comply with the applicable Staff Regulations and Rules.

The regional Board of Appeal asked the Administration to produce all the papers it had submitted to the selection committee, to state whether its recommendation had been unanimous and, if not, to supply a copy of the dissenting opinion. The Administration refused on grounds of privilege.

In its report of 9 January 1992 the regional Board confined itself to the matter of compliance with the material procedure and rules since it could not compare the candidates' qualifications. It concluded that there was not enough factual evidence to bear out the complainant's case and it was therefore unable to make any recommendation. By a letter dated 27 January 1992 the Regional Director informed the complainant that he rejected the appeal.

On 26 May 1992 the complainant put his case to the headquarters Board of Appeal, which in a report dated 25 May 1993 followed conclusions of the regional Board. It said that the dispute turned on how the selection committee had ranked the candidates and that the Administration's withholding material documents prevented it from settling the issue.

In a detailed letter of 6 August 1993, the impugned decision, the Director-General rejected the appeal and confirmed that the papers and record of the selection committee's proceedings were and would remain privileged.

B. The complainant alleges discriminatory treatment and relies on several earlier cases, in 1983, 1985 and 1990, in which the Administration made the reports of selection committees available to the regional Board.

He traces the obvious prejudice against him to his work as staff representative on several joint bodies, including the regional Classification Committee and the regional Board of Appeal. He cites procedural flaws that tainted his

performance appraisal report in 1987 and the review of his applications for other vacancies in 1988 and 1990.

He also alleges non-observance of the Staff Regulations and Rules in his case. The "factor rating system", the outcome of an agreement between the Staff Association and management at SEARO, is intended to stop favouritism. He was first on the short list whereas the successful applicant was seventh and should not have been on the list anyway since, according to the rules and practice, there should not be more than five names on such a list. The Administration was in breach of good faith by submitting the list of all fourteen candidates to the ad hoc selection committee so as to allow the representative of the Regional Director to impose his preference.

Manual paragraph II.3.340 says:

"Before a meeting of a selection committee, all applications are reviewed by the unit concerned and a short list of those candidates who seem to be the most suitable for the post is drawn up. ... Brief curricula vitae of the candidates and the comments of the reviewing unit(s) are included with the short list ..."

The Administration did not comply with that paragraph: the members of the committee did not see the candidates' confidential files until the meeting had begun and so had no time to study them. What is more, the officer representing the relevant department at the meeting did no more than make known his own preference. That was in disregard of the whole purpose of the selection process: Judgment 1049 (in re Dang, Kapoor and Seshadri). That officer is at the Organization's beck and call anyway since it agreed to extend his appointment beyond retirement. The WHO's real reason for refusing to disclose the committee's records was to cover up procedural mistakes.

The complainant alleges breach of Staff Rule 410.4 which reads:

"Posts below the level of director ... 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 in the interest of the Organization to fill by reassignment of a staff member without promotion."

In this case the successful candidate was promoted, not reassigned.

The regional Board failed to establish that the selection process squared with Staff Regulation 4.2, which says:

"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. ..."

In the complainant's submission only the personal views of members of a selection committee are privileged.

He asks the Tribunal to quash the appointment made to post 5.0343 and declare him the successful candidate; award him 30,000 United States dollars in compensation for "grave injury, moral prejudice, mental torture, and loss of reputation"; and grant him 5,000 dollars in costs.

C. In its reply the WHO rejects his allegations of breach of the Staff Regulations and Rules and of personal prejudice.

Manual paragraph II.3.310 empowers regional offices to set up selection committees, and they are to include the head of the service in which the vacancy lies. It was in that capacity that the administrative officer who represented the Regional Director took part in the selection process and expressed his views to the committee.

Besides the factor-rating system, which affords the basis for the short list, the selection committee considers the nature of the vacancy and the opinion of the unit in which it is. Judgment 251 (in re De Sanctis) said that the "most important" criterion is "fitness for the vacant post" and Judgment 564 (in re Ali Khan) that "seniority does not always mean greater merit".

The WHO takes up the complainant's arguments and seeks to refute them. In keeping with the rules the Administration makes candidates' personal files available to selection committee members upon demand and did so in this case. The committee drew up a short list; there is no rule that limits the number of candidates that may be on it. The complainant was not first on the list nor was the successful candidate seventh. Contrary to the complainant's allegations, the selection committee made a unanimous recommendation. The WHO will produce the minutes of its

meeting if the Tribunal wishes.

The Organization denies the charge of bias against the complainant on account of his activities as staff representative. Staff associations are an integral part of the structure of all United Nations agencies. So it is wrong to presume that the opinions staff representatives freely express in joint bodies may provoke discriminatory treatment. The complainant offers not a jot of evidence to back up his accusations. The Administration has time and again shown how it values his services: did it not award him a merit increment in 1973 and exceptional two-step increases, also for merit, in 1984 and 1989, when he was particularly active as staff representative?

The complainant avoids personal attack on those responsible for the disputed decisions, namely the Regional Director and the Director-General; his prime target is the administrative officer in the Regional Director's office for his part in the work of the selection committee. Inasmuch as the committee's proceedings are privileged the complainant's allegations rest on hearsay and speculation and must therefore be discounted.

The Organization's policy is to safeguard the confidentiality of documents put to or coming from selection committees in order to preserve their members' freedom of choice and shelter them from outside pressure. Candidates also have a stake in seeing that their weaknesses are not disclosed. But the Organization is willing to produce whatever documents the Tribunal may wish to see. It could thus establish that (1) the complainant did not get the highest rating and the successful candidate was not in seventh place; (2) the successful candidate was not the most junior in service or grade on the short list and his work was not inferior to the complainant's.

The selection process is not tainted with formal or procedural flaws, or mistakes of fact or of law, and the Organization therefore invites the Tribunal to dismiss the complaint.

D. In his rejoinder the complainant enlarges on his pleas and presses his claims. He cites guidelines adopted by the International Civil Service Commission which make seniority decisive in distinguishing candidates *ceteris paribus*. He maintains that the members of the selection committee could hardly do justice to fourteen personal files in thirty-five minutes, the less so since debate between the president of the Staff Association and the administrative officer from the office of the Regional Director took up most of the time while the other members kept silent. No selection committee would choose a candidate ranked seventh without special reasons or unless it simply overlooked the six other applications. A selection process based solely on subjective considerations is in breach of the material rules; that in itself is enough to show injury.

E. In its surrejoinder the WHO points out that if seniority had been the overriding criterion the complainant would not have won the competition anyway, since other candidates were senior to him. It sets out the stages of the selection process at SEARO and headquarters in Geneva. It presses its pleas.

CONSIDERATIONS:

1. In 1964 the complainant joined the WHO at grade ND.5 in its Regional Office for South East Asia (SEARO) in New Delhi. His post was upgraded to ND.6 and he was promoted to that grade in 1979. Since 1989 he has been working in the Health and Behaviour Unit, still at ND.6. His complaint is that the Organization did not choose him for a post as assistant II at grade ND.7 in 1990.

2. In August 1990 a notice of vacancy was issued for that post, which was in the Regional Director's own office. Selection for the post was subject to a prescribed procedure of which the main features are the following:

(a) An ad hoc selection committee is set up as required in the Regional Office's Policy and Procedure Handbook.

(b) Upon receipt of applications in answer to a notice of vacancy standard information on each candidate is prepared by the Personnel Department, which applies the "factor rating system". The committee takes into consideration length of service (35 points), performance (35 points), education (20 points) and experience (10 points), up to a maximum of 100 points. The Personnel Department submits to the committee, usually one week beforehand, a scoring sheet and work sheets about all candidates.

(c) Before meeting, the members of the committee may if they ask see the applicants' personnel files.

(d) The committee sets its own "cut-off" point in drawing up a short list, but takes into account the "clustering" of applicants whenever their scores come close together. A "cluster" is described as a nucleus of scores similar in

value and distinctive as a group as against all others.

(e) The minutes of the committee's meeting include its recommendation, and the Regional Director makes the final selection.

3. The following are arguments which the complainant put to the regional Board of Appeal but which the Organization contested.

(a) The ad hoc selection committee stretched the short list beyond the point of clustering so as to include the selected candidate.

(b) Due consideration was not given to the factor rating sheets and to the relative positions of the complainant and the selected candidate. He had 27 years' service as a secretary and was ranked first on the short list, whereas the selected candidate had only the minimum of five years' service as a secretary and came only seventh on the short list.

(c) There was strong dissent.

4. The regional Board held that it could not go into the applicants' merits and ranking and decided to consider only the question of compliance with the rules and procedures for selection. It took the view that it required further information and asked the Administration, among other things,

(a) to provide the background papers submitted to the committee including the factor-rating sheets relating to all candidates, the short list prepared for the said selection, if any, and other related documents; and

(b) to say whether or not the recommendation had been unanimous and, if not, to supply the text of the "dissenting note".

5. The Organization refused to comply on the grounds of privilege. The Board did not press the matter. In its report dated 9 January 1992 it did express the view that the selection committee should have given due consideration to the complainant's seniority, performance, education, experience and so forth; but it felt unable to "make any recommendation" for want of "factual evidence".

6. In a letter of 27 January 1992 to the complainant the Regional Director observed that the Board had found "no factual evidence to support [his] contentions", accepted the Board's conclusions and notified rejection of his appeal.

7. The complainant then went to the headquarters Board of Appeal. In its report of 25 May 1993 it too said that it felt "constrained by the lack of factual evidence to the extent that it could not make any recommendation". It observed that "the one central issue concerned the factor rating and listing procedures applied by the [selection committee] in reaching their decision" and that, having "had no access to these elements, it had no basis upon which to resolve that issue". It suggested "a change in the availability rules for selection matters in regard to Appeal Board hearings which are strictly confidential, or the creation of a different process for appeals on selection matters wherein the essential information could be made available".

8. By a letter of 6 August 1993 the Director-General informed the complainant of the rejection of his further appeal and confirmed the impugned selection. The complainant is asking the Tribunal to quash that selection, declare him appointed to the post and award him damages for moral injury and costs.

The issue of privilege

9. To justify withholding the documents sought by the regional Board the Organization relies mainly on a memorandum dated 28 March 1983 which the Director-General addressed to the chairman of the headquarters Board of Appeal in the context of another case and which said:

"In future, in order to protect the indispensable confidentiality of selection documentation, the content of Ad Hoc or Senior Staff Selection Committee papers shall be disclosed neither to staff members who have applied for a vacancy notice, nor to the Ombudsman, nor to Appeal Boards.

Such selection documents constitute part of internal working files and cannot therefore be made available for

consultation by staff members ... Confidential status was conferred on such files, and will be consistently maintained in the future, for the following obvious reasons:

It is essential and in the best interests of the Organization that, when assessing candidates and submitting recommendations for selection, supervisors and members of Selection Committees should be free - within the selection committees' scope and terms of reference - to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must also be guaranteed in order to protect the interests of third parties, i.e. other candidates for the vacancy."

10. Only from examining the documents sought by the regional Board in this case would it have been possible to determine whether, as the complainant was contending, the short list had been improperly stretched to favour the successful candidate and due weight had not been given to comparison of seniority, performance and experience as between him and the successful candidate. For example, if a member of the ad hoc selection committee had dissented, the reasons for the dissent might well have had some bearing upon those contentions. The factor-rating sheets, too, and the minutes and recommendation of the selection committee, including any dissenting note, were all part of the proceedings. When the Organization declined on the grounds of privilege to disclose the information and documents called for by the regional Board it withheld items that formed part of the proceedings leading up to the impugned decision and prevented determination of what the headquarters Board rightly called the one central issue, namely "the factor rating and listing procedures applied by the [ad hoc selection committee] in reaching their decision".

11. As the Tribunal held in Judgments 1177 (in re Der Hovsépian) under 5 and 1323 (in re Morris No. 2) under 9, an item that forms part of the proceedings that led to the impugned decision may not be withheld from scrutiny by the Tribunal. That holds good for any appellate body. So the Administration ought to have disclosed to the regional Board the documents it required to enable it to take up the complainant's appeal properly.

12. That rule applies equally to the views expressed by members of the ad hoc selection committee. Since there was a right of appeal against the selection based upon the committee's recommendation, both the regional and the headquarters Boards were entitled to review the reasons for the selection and for the recommendation so as to ascertain whether there had been some fatal flaw such as an error of fact or of law, personal prejudice or arbitrariness. The failure to disclose the views expressed by those who had made the recommendation frustrated the appeal proceedings.

13. From the circumstances recounted above the Tribunal concludes that there was no proper examination of the complainant's appeal by the regional Board or by the headquarters Board and that the decision of 6 August 1993 by the Director-General based upon the latter's recommendation cannot stand. The regional Board and then, if need be, the headquarters Board must take up the complainant's appeal anew in the light of full records of the ad hoc selection committee's proceedings.

14. The complainant has been denied due process in his internal appeals and the Tribunal therefore awards him 3,000 United States dollars in damages for the moral injury thereby caused to him. It also awards him costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 6 August 1993 is quashed.
2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board of Appeal may take up the complainant's appeal anew.
3. The Organization shall make available to the Boards of Appeal the full records of the ad hoc selection committee's proceedings for the purpose of appeal.
4. It shall pay the complainant the sum of \$3,000 in damages for moral injury.
5. It shall pay him \$500 in costs.

6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-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 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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