SEVENTY-EIGHTH SESSION

In re DE ANDA (No. 2)

Judgment 1382

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Arturo Ramírez de Anda against the Pan American Health Organization (PAHO) on 14 February 1994 and corrected on 2 April, the PAHO's reply of 20 June, the complainant's rejoinder of 4 August and the Organization's surrejoinder of 21 October 1994;

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

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. PAHO Staff Rule 1050.2.5 stipulates that "a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible".

Rule 510.1 reads:

"Staff members in the professional category are subject to assignment by the Director to any activity or office of the Bureau. Those in the general service category are not subject to assignment, except by mutual agreement, to an official station other than that for which they have been recruited. ..."

Rule 1310.2 reads:

"All posts in the general service category are subject to local recruitment and, therefore, shall be filled, as far as possible, by persons recruited in the local commuting area of each office. ..."

Details of the complainant's career and events relevant to this case are set out in Judgment 1193 of 15 July 1992 under A. At the date of termination of his appointment with the PAHO, 31 December 1988, he held a G.5 post at its United States-Mexico Border Office at El Paso, in Texas. By that judgment the Tribunal ordered the PAHO to reinstate him as from the date at which it had terminated his appointment; to apply the reduction-in-force procedure to him in accordance with Rule 1050.2; and to pay him damages for moral injury. The PAHO accordingly reinstated him and began a new reduction-in-force procedure. In a letter of 18 August 1992 the Chief of Personnel invited the President of the Staff Association in keeping with Manual paragraph II.9.320 of the World Health Organization, which applies to the PAHO, to name staff representatives on the reduction-in-force committee and to state a preference for chairman.

In a letter of 28 August the President gave the staff's preference for chairman; named its representatives and their alternates; and also pointed out that since there were two suitable vacancies at the complainant's grade, G.5, at headquarters in Washington, D.C. and since the complainant was willing to work there the Administration could complete the procedure by reassigning him to one of them.

In her reply of 15 September a new Chief of Personnel acknowledged the President's choice of staff representatives, endorsed his preference for chairman and said that, since the complainant and his post were subject to local recruitment, his reassignment to a post outside the commuting area of his duty station was "neither a matter of option nor of relevance".

In a memorandum of 17 November 1992 the Chief of Personnel told the complainant that the reduction-in-force committee, having failed to find any posts for which he could compete at his duty station, recommended terminating his appointment; she therefore gave him the three months' notice of separation under Rule 1050 and said his appointment would end on 1 March 1993 upon the expiry of his contract.

On 22 January 1993 the complainant appealed to the headquarters Board of Appeal objecting to the failure to

consider him for one of the vacant posts in Washington.

In a majority report of 16 September 1993 four members of the Board recommended rejecting the appeal but granting him a fixed-term appointment "of appropriate duration" at his duty station on "humanitarian" grounds owing to the circumstances of his dismissal and what they called "the general personnel situation in the El Paso Field Office under its former Chief". The fifth member of the Board recommended reassigning him to a vacant post in Washington.

By a letter of 15 November 1993, the impugned decision, the Director rejected his appeal on grounds that the PAHO had met all its obligations towards him.

B. The complainant submits that since the PAHO failed to complete the reduction-in-force procedure it neither gave him valid notice of termination nor complied with Judgment 1193.

Although the rules on competition for retention allow him to compete only for posts at his duty station, before setting up a competition the PAHO owed him an offer of transfer under Manual paragraph II.9.290* and such transfer might be to a post anywhere in the Organization; indeed, paragraph II.9.290.1 plainly states that reassignment may be "to a post outside the staff member's official station" when his post is subject to local recruitment. (*"Offers of reassignment are made first, where possible, to those incumbents whose services have been satisfactory. Staff members who refuse any reasonable offer will not be permitted to take part in the competition for retention provided for in Staff Rule 1050.2 and described below, unless the offer refused related either: 290.1 to a post outside the staff member's official station (for posts subject to local recruitment); or 290.2 to a post of lower grade than that of the staff member; or 290.3 to a post of limited duration. If none of these conditions apply, the appointment of a staff member who has refused an offer of reassignment on abolition of a post may be immediately terminated in accordance with Staff Rule 1050. ...").

When a candidate for retention is unsuccessful - as the complainant was - the Organization still owes him a "reasonable offer of reassignment if such offer is immediately possible" under Rule 1050.2.5. That offer too may be of a post anywhere in the Organization.

The Chief of Personnel committed a mistake of law when she said that assigning the complainant to a post outside the commuting area of his duty station was "neither a matter of option nor of relevance". By failing to offer him reassignment to Washington the PAHO was in breach of 1050.2.5 and II.9.290. So the notice of termination it gave him before completing the reduction-in-force procedure was premature and, as the case law provides, his contract was renewed by implication as of 1 March 1993.

He wants the Tribunal to declare that the PAHO failed to apply 1050.2.5 and II.9.290 and therefore failed to execute Judgment 1193. He claims reinstatement with full salary, allowances and other benefits less any sums he was granted on the purported termination; proper application of the reduction-in-force procedure; moral damages and costs.

C. In its reply the PAHO contends that it applied all the material rules on reassignment and reduction in force. The complainant's construction of the rules as a whole and of II.9.290 in particular is mistaken. They do not empower the Director to reassign locally recruited staff outside their duty station in the same way as Professional staff: their intent is to protect such staff against reassignment to stations where they would not qualify for home leave, expatriation allowances and other benefits reserved for staff in the Professional category.

Rule 1050.2.5 merely requires the Organization to make an offer of reassignment if one is "immediately possible". But no such offer was possible in this case because under Rule 510.1 the transfer of a General Service official to a duty station other than the one he was recruited for must be "by mutual agreement". The consent of both parties was lacking.

Besides, Rule 1310.2 bars the PAHO from looking outside the commuting area of Washington to fill posts for which suitable local candidates were available. The complainant's claims, if allowed, would set "a dangerous precedent" by allowing locally recruited General Service staff to claim benefits not intended for them.

D. In his rejoinder the complainant denies that the rules prevent the PAHO from transferring him to Washington. According to the case law long-standing employees are entitled to special consideration in keeping their employment and in any event 1310.2, which concerns the recruitment of new staff, does not apply to his case.

It is plain that 1050.2.5 applies equally to staff in the General Service and Professional categories: 1310.1 says that "The provisions of the Staff Rules shall apply to persons appointed to [General Service] posts except as specified within the Rules themselves" and 1050.2.5 does not distinguish between the two categories. Since the complainant is a locally recruited resident of the United States expatriate benefits are not due anyway.

E. In its surrejoinder the PAHO maintains that the general principles on the assignment of staff are set out in Rule 510.1, which draws a distinction between the Professional and General Service categories. Moreover, the requirement of "mutual agreement" between the parties was not met.

CONSIDERATIONS:

1. The complainant, who formerly held a G.5 post at the PAHO's office at El Paso, in Texas, alleges that the PAHO has failed to obey the Tribunal's order in Judgment 1193 that it reinstate him as from the date of termination of his appointment, 31 December 1988, and apply the reduction-in-force procedure to him in accordance with Rule 1050.2.

2. The PAHO did in fact reinstate the complainant, and it established a reduction-in-force committee to look into his case. But the committee found no posts at his duty station, El Paso, for which as a locally recruited official he could compete in accordance with Rule 1050.2.2, which reads in part:

"... if the post is subject to local recruitment, competition shall be limited to the locality in which the post is to be abolished."

The committee accordingly recommended that he should not be kept on the staff. In a letter of 17 November 1992 the Chief of Personnel informed him that the Director had accepted the recommendation and gave him three months' notice of his separation from service, which would take effect on 1 March 1993.

3. The complainant contends that the PAHO has failed to apply Staff Rule 1050.2.5 and Manual paragraph II.9.290. Rule 1050.2.5 provides:

"a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

The provisions of II.9.290 relevant to this case read:

"Offers of reassignment are made first, where possible, to those incumbents whose services have been satisfactory. Staff members who refuse any reasonable offer will not be permitted to take part in the competition for retention provided for in Staff Rule 1050.2 and described below, unless the offer refused related either:

290.1 to a post outside the staff member's official station (for posts subject to local recruitment); or ..."

4. On 28 August 1992 the President of the Staff Association wrote to the Chief of Personnel to say that the complainant was willing to work in Washington, D.C. and there were two G.5 vacancies there for which he qualified. A new Chief of Personnel replied on 15 September 1992 that the abolished post had been subject to local recruitment, that the complainant had been locally recruited to it; that his duty station was El Paso; and that reassigning him to a post outside the commuting area of El Paso was "neither a matter of option nor of relevance".

5. The complainant contends that the Chief of Personnel thereby ruled out the possibility of reassignment by limiting the geographical scope of the competition and thus committed an error of law. He believes that the PAHO might have offered him reassignment to Washington or anywhere else for that matter.

6. The plea fails. What II.9.290 means is that a staff member who was locally recruited cannot be required to accept an offer of reassignment to a post outside his duty station; it confers no right to reassignment. Rule 510.1 states:

"Staff members ... in the general service category are not subject to assignment, except by mutual agreement, to an official station other than that for which they have been recruited. ..."

That rule precluded the reassignment of a member of the General Service staff like the complainant outside his

duty station unless there was mutual agreement. In other words reassigning him from El Paso to Washington required not just his own consent but the PAHO's as well. The Chief of Personnel's letter of 15 September 1992 makes clear the Organization's refusal to reassign him to Washington. The absence of "mutual agreement" precluded the reassignment proposed by the President of the Staff Association. The Organization is in any event bound by Rule 1310.2, which provides:

"All posts in the general service category are subject to local recruitment and, therefore, shall be filled, as far as possible, by persons recruited in the local commuting area of each office. ..."

7. Apart from challenging the PAHO's interpretation of Rule 1050.2.5 and Manual paragraph II.9.290 the complainant has not sought to show any failure by the PAHO to execute Judgment 1193. Since his other claims depend on the success of the first and main one, they too must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, 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 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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