115th Session **Judgment No. 3236**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. V. against the World Health Organization (WHO) on 10 December 2010 and corrected on 18 January 2011, WHO's reply of 21 April, corrected on 25 May, the complainant's rejoinder of 2 August and the Organization's surrejoinder of 22 September 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Colombian and French national, is a former WHO official who joined the Organization in February 1990 and retired in April 2010 having reached grade D-1. At the material time he was serving as Director, Department of Public Health, Innovation and Intellectual Property (PHI), in the Office of the Director-General.

On 15 January 2010 Ms M., a member of the WHO Expert Working Group on Research and Development Financing (EWG) and a senator of the Colombian Congress, sent an open letter to the members of the WHO Executive Board, in which she complained

that the EWG's processes lacked transparency and were subject to external influence, particularly from the pharmaceutical industry. She asserted that WHO had failed to provide EWG members with relevant documentation and sufficient time for its analysis, and that it had "sidelined" the complainant as well as other members of the EWG from the elaboration of the group's final report. Following the dissemination of this letter a number of Member States raised concerns during meetings of the Executive Board about the work of the EWG and expressed dissatisfaction regarding the integrity of the process, including allegations that the said report and other confidential documents had been leaked to the pharmaceutical industry.

On 21 January 2010 the complainant received a memorandum from the Director ad interim of the Internal Oversight Services (IOS) informing him that IOS had "grounds to believe that a breach of WHO's rules, regulations or policies involving [him] may have taken place, and that access to [his] e-mail account and computer hard drive may reveal information relevant to an investigation of possible misconduct concerning a letter dated 15 January 2010 to members of the Executive Board". He was further informed that staff from the Information Technology and Telecommunications (ITT) Department would access his computer, and he was reminded that IOS had full, free and prompt access to all records, property and personnel, inter alia. On 22 January the complainant's computer and electronic files were removed from his office by a senior investigator of IOS.

By an e-mail of 3 February 2010 the complainant was officially notified that he was under investigation for misconduct and was invited by IOS to attend an interview. The e-mail referred to several paragraphs of the Fraud Prevention Policy of April 2005 including paragraph 25, which states that "staff members have the duty to cooperate with any investigation and assist investigators". He was informed that during such investigations, legal representatives of staff members could not be involved in interactions with IOS, and he was asked to suggest a suitable time for an interview. The complainant replied that, before responding to any questions concerning the

investigation, he wished to know the exact allegations against him, as the provisions referred to in the e-mail concerned financial fraud and he failed to understand their relevance for an investigation into the dissemination of the letter of 15 January. He stated that the investigation constituted harassment and that it was having a serious impact on his reputation, due to rumours circulating within WHO, and he insisted on his legal representative being present during the interview as a matter of due process.

In a memorandum of 8 February 2010 IOS suggested that the complainant answer its list of questions in writing, explaining that the purpose of the investigation was to establish the facts related to his possible involvement in the preparation and dissemination of the letter of 15 January 2010. By a memorandum of 9 February the complainant asked for clarification as to how paragraphs 23 to 25 of the Fraud Prevention Policy applied to him. He considered that the way in which the investigation was being conducted was "very hurtful, humiliating and embarrassing" and asserted that there were increasing rumours within WHO which were damaging his professional reputation only a few weeks before his retirement. He also questioned what the "real issue" behind the investigation was. In a second memorandum sent to IOS on 11 February the complainant answered most of the questions sent to him by IOS. He replied to the remaining questions in a memorandum of 22 February 2010.

In its report of 5 March 2010 IOS considered that the complainant's actions could be seen as violations of his obligations under the WHO Staff Regulations, "in particular his duty to exercise in all loyalty, discretion and conscience the functions entrusted to him and to regulate his conduct with only in view the interests of WHO". It recommended that his actions be reviewed to determine whether disciplinary proceedings should be initiated. By a memorandum of 12 March 2010 the Director of Human Resources Management (HRD) informed the complainant of the outcome of the investigation and provided him with a copy of the IOS report. The Director of HRD explained that, as a result of the report's findings, he might be found to have committed misconduct, which could lead to disciplinary

action, including summary dismissal. The complainant was asked to provide his written response to the allegations of misconduct and was advised that, following a review of his reply, he would be informed in writing of the Administration's finding regarding the charge of misconduct. The complainant responded in a memorandum of 23 March 2010. He denied being the author or the initiator of the letter and objected to the manner in which the investigation was conducted.

On 5 March 2010 the complainant filed a notice of his intention to appeal with the Headquarters Board of Appeal (HBA) challenging the decision to subject him to an investigation, the procedural actions taken in the course of the investigation, the managerial decisions taken by his supervisors while he was under investigation – particularly the last-minute cancellation of his duty travel and his isolation and marginalisation from normal technical and administrative activities – and WHO's failure to protect him from defamatory rumours generated by the investigation. On 11 March the Administration raised an objection to the receivability of his internal appeal on the basis that the notice of intention to appeal had been filed prior to any action being taken that might affect his appointment status, and prior to any final decision being taken as a result of the investigatory process. The complainant replied to the Administration's objection on 23 March. In April the HBA requested him to provide further information.

By a memorandum of 19 April 2010 the Director-General informed the complainant that she considered that his actions in relation to the dissemination of the letter of 15 January 2010 amounted to misconduct within the meaning of the Staff Regulations. Consequently, she had decided to issue him with a written reprimand. The Director-General emphasised that, in determining the most appropriate disciplinary measure, she had taken into account his more than 20 years of service to WHO and the fact that he was soon retiring.

The HBA sent its report to the Director-General on 14 September 2010. The Board found no evidence of a final action or decision that affected the complainant's status within the meaning of the Staff Regulations and it concluded that his appeal was irreceivable. It found

that the denial of the presence of a lawyer at the investigative stage appeared consistent with the applicable regulations and that, although the memorandum of 21 January and the e-mail of 3 February incorrectly referred to the provisions of the Fraud Prevention Policy, the procedure followed had been appropriate. Regarding the complainant's allegation of isolation and marginalisation by his superiors, the HBA found that there was no evidence that he had been deliberately marginalised and that there were programmatic reasons for the decision to place some of his Department's files in a locked cabinet. Lastly, although there was evidence of rumours to the effect that the complainant was the subject of an investigation for fraud, it was not possible to determine their origin and how they had been propagated, and the Board did not find evidence of defamation. It therefore recommended dismissing the appeal in its entirety.

By a letter dated 24 September 2010 the Director-General informed the complainant of her decision to accept the HBA's conclusions and recommendations and to dismiss his appeal in its entirety. That is the impugned decision.

B. The complainant contends that the decision to subject him to an investigation is tainted with misuse of power. He argues that the investigation was politically motivated and that WHO decided to target him as being responsible for exposing the Organization's improper behaviour in allowing the pharmaceutical industry to manipulate what was supposed to be an independent report. The decision to initiate the investigation was therefore tainted with improper motive. In his view, the investigation was launched to intimidate him and to stifle his views, in violation of his right to freedom of speech. The complainant also submits that the way in which IOS conducted the investigation breached his right to due process, particularly in that his right to legal representation was denied.

The complainant considers that the manner in which the investigation was handled by WHO amounts to defamation. Referring to the applicable procedures, he points out that an essential duty

of IOS is to treat the investigative process as confidential in order to avoid damaging the reputation of individuals. However, he provides evidence in the form of e-mails sent to him by colleagues both inside and outside the Organization who alerted the complainant to the serious rumours circulating about his involvement in a fraud investigation. He submits that by wrongfully implying that he had committed a criminal offence WHO wilfully and negligently generated defamatory and malicious statements about him.

The complainant also argues that WHO's failure to protect his personal and professional reputation constitutes a breach of its duty of care and, in particular, of its obligation to treat staff members with respect for their dignity. In this regard, the managerial decisions to cancel his duty travel at the last minute, to exclude him from staff meetings and from other meetings with UN agencies, even though he had always represented WHO on such occasions in the past, to prevent him from publishing a document which had been cleared by his Department, and the decision to remove all the Department files and to place them under lock, all of which were taken without providing any justification, injured his dignity and contributed to the damage done to his reputation.

The complainant requests oral hearings. He seeks the quashing of the impugned decision and claims material damages for the injury to his health, moral damages in the amount of 200,000 United States dollars, as well as costs. He also asks the Tribunal to order that the Organization pay punitive damages for wilfully and negligently generating defamatory allegations against him in order to protect its own reputation.

C. In its reply WHO submits that the complaint is irreceivable. It argues that the procedural steps taken in the course of the IOS investigation did not constitute final actions within the meaning of the Staff Rules. As the complainant filed his notice of intention to appeal prior to the initiation of any disciplinary proceedings, his internal appeal was premature. Further, his status was not affected by any of the actions challenged in his internal appeal or in the present

complaint. Referring to the Tribunal's case law, WHO argues that the initiation of an investigation does not constitute an administrative decision, and that his complaint is therefore also irreceivable on that ground. The Organization points out that the complainant refers in his complaint to certain programmatic decisions – such as the approval of publications, the cancellation of duty travel and his attendance at meetings – which were not the subject of his internal appeal. As a result, they are irreceivable for failure to exhaust internal means of redress and, in any case, time-barred. As regards the actions that were mentioned in his internal appeal, WHO notes that the HBA reviewed each incident and found that "there was no evidence that the […] series of actions or decisions had affected [his] appointment status". The Organization requests, therefore, that the Tribunal dismiss the complaint on grounds of receivability alone.

On the merits, WHO asserts that the complainant's claims are entirely unfounded. It argues that the investigation launched by IOS was fully justified and stemmed from a possible act of misconduct on the part of the complainant, who was suspected of having provided unauthorised assistance to a member of a national delegation in the preparation of a letter to members of the Executive Board. The investigation was conducted for a proper purpose and the complainant himself acknowledged that he was involved in the preparation and dissemination of the letter of 15 January 2010. In accepting an appointment with WHO, the complainant pledged himself to act in the Organization's interests and, where differences of professional opinion existed, to challenge these through hierarchical channels, and not in public forums where they could adversely impact on the Organization's reputation. Requiring the complainant to express his views in this way does not constitute an undue limitation on his right to freedom of expression.

In WHO's view, the investigation was conducted in accordance with the Organization's procedures and with full regard to the complainant's due process rights. It points out in particular that the complainant was not interviewed by IOS, but was instead exceptionally permitted to respond in writing to questions sent by

IOS. He was thus free to seek legal advice and assistance in preparing his answers. Moreover, he was fully informed of the allegations of misconduct, and the manner in which his computer and electronic files were removed complied fully with established procedures.

Lastly, WHO denies the complainant's allegations of defamation. It asserts that the investigation was conducted confidentially, in accordance with IOS guidelines, and that both the reputation of the complainant and the integrity of the process were protected. The Organization notes that the complainant does not identify any specific events or acts whereby WHO failed in its duty to keep the investigation confidential, nor has he produced evidence of any incident whereby the Organization instigated or acted to encourage the spread of rumours. As regards his challenge to a number of managerial actions, they were taken for objective and programmatic reasons, and were not retaliatory or otherwise linked to the IOS investigation.

D. In his rejoinder the complainant presses all his pleas.

E. In its surrejoinder WHO reiterates its position in full. It considers that the complainant's attempt to use the present proceeding as a vehicle for unsubstantiated accusations of wrongdoing against the Organization is an abuse of process.

CONSIDERATIONS

1. At the material time, the complainant was Director, Department of Public Health, Innovation and Intellectual Property (PHI) at WHO. He is now retired. This complaint arises from a controversy surrounding a report being prepared by an Expert Working Group on Research and Development Financing (the EWG report). The report was submitted to the WHO Executive Board in January 2010 and deferred to an open consultation before the WHO World Health Assembly scheduled in May 2010.

2. On 15 January 2010 a member of the EWG and senator of a member country sent an open letter to the Executive Board members which was very critical of the EWG report. She criticised the process and the influence of the pharmaceutical industry on the report. She also commented on the complainant being "sidelined" in the creation of the report. Similar concerns were expressed by a number of Member States at the Executive Board's 126th session on 18 and 19 January 2010.

3. On 21 January 2010 the Director ad interim of the Internal Oversight Services (IOS) notified the complainant that he was the subject of an investigation. The letter, in part, reads:

> "The Office of Internal Oversight Services (IOS) has grounds to believe that a breach of WHO's rules, regulations or policies involving you may have taken place, and that access to your e-mail account and computer hard drive may reveal information relevant to an investigation of possible misconduct concerning a letter dated 15 January 2010 to members of the Executive Board."

The memorandum also references several paragraphs of the WHO Fraud Prevention Policy.

4. The investigation process started on 22 January with the seizure of the complainant's computer. On 3 February 2010 an IOS Senior Investigator notified the complainant that he was under investigation for misconduct and invited him for an interview. Citing the Fraud Prevention Policy, the e-mail further stated that "there is no participation of legal representatives of staff members in interactions with IOS". Following an exchange of e-mails concerning the complainant's objection to being interviewed without his lawyer present, IOS sent the complainant 19 questions which he was required to answer in writing. The complainant wrote to the Director of IOS again objecting to the investigation procedure. In the same memorandum he raised the matter of rumours being circulated about him. Ultimately, the complainant provided written responses to the questions.

5. On 5 March 2010 the complainant filed a notice of intention to appeal with the HBA challenging the decision "to subject him to an investigation" for misconduct and the denial of his right to be legally represented during the investigation. He alleged that during the period of the investigation he was isolated through his exclusion from staff meetings, his duty travel plans were cancelled and his potential publications were blocked or delayed by the Organization. He also alleged that WHO defamed him and permitted rumours of the investigation to spread.

6. On 24 September 2012 the Director-General dismissed the appeal on the basis of the HBA's recommendation that the appeal was irreceivable as it had been filed prematurely. The Director-General agreed with the HBA's finding that "the work of IOS was not a final action or decision within the meaning of Staff Rule 1230.8.1". As to the duty travel, cancellation of meetings and the publications, the Director-General agreed with the HBA's conclusion that "none of these matters were administrative actions or decisions" and added: "these decisions were objective programmatic decisions made by your supervisors". That is the decision impugned before the Tribunal.

7. Returning to the IOS investigation, on 5 March 2010, the same day the complainant filed the notice of intention to appeal, IOS issued its report. In a memorandum of 12 March 2010 to which the report was appended, the complainant was informed of the outcome of the investigation. Following a detailed analysis of the complainant's role in the creation and distribution of the letter of 15 January 2010, the report concludes that the complainant misrepresented and concealed his level of involvement in the writing of the letter. The complainant provided his response to the report on 23 March.

8. On 19 April 2010 the Director-General concluded that the complainant's conduct constituted misconduct. She took into account the complainant's long service and impending retirement and imposed a written reprimand.

9. On the question of receivability, the complainant concisely frames the subject matter of the present complaint in the following terms:

> "The date of the final decision as a result of the investigation means nothing to me, as I am not challenging the results of the investigation. I am challenging the grounds under which the investigation was launched in the first place; its legality; its appropriateness; and the right of due process, including the refusal to have my legal representative present during the oral testimony."

10. With the exception of those allegations concerning the rumours and defamation that will be discussed below, the complaint is irreceivable.

11. The challenge to the basis on which the investigation was started is, in effect, an abuse of authority allegation. Abuse of authority in relation to the initiation of an investigation may, if proven, taint a final decision taken based on the results of that investigation; however, it must be challenged in the context of that decision. Similarly, an allegation of a breach of the right to due process in an adversarial proceeding must be brought in the context of the final decision arising from that proceeding.

12. Concerning the initiation of the investigation itself, the Tribunal's case law is clear that a decision to begin an investigation into misconduct at that stage is not a decision that affects the staff member's status (see Judgment 2364, under 3 and 4).

13. As WHO points out, the complainant's allegations of isolation in the unit, disruption of his duty travel and blocked publications are programmatic decisions and are not appealable decisions. The pattern of actions described could, in some circumstances, be the subject of a harassment grievance. However, they were not the subject of the internal appeal and therefore are not receivable for failure to exhaust the internal means of redress.

14. The allegations of rumour and defamation properly form part of this complaint. However, there is no evidence that WHO failed to follow the proper procedures to ensure the confidentiality of the investigation or, indeed, how the rumours were started. The allegations that starting the investigation itself and the reference to the fraud prevention documents in the notification of the investigation are defamatory are without merit and require no further consideration.

15. In light of the above consideration, the request for oral hearings is rejected.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet