FORTY-EIGHTH ORDINARY SESSION

In re LEGER

Judgment No. 486

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Adrien Léger on 23 April 1981, the PAHO's reply of 11 June, the complainant's rejoinder of 21 July and the PAHO's surrejoinder of 17 August 1981;

Considering Article II, paragraphs 1 and 5, of the Statute of the Tribunal and PAHO Staff Rule 350, former Staff Rule 360, and Staff Rules 460 and 1230.

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. The complainant joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in Washington in 1963 as a G.4 finance clerk. He is a citizen of Haiti, but held a residence visa for the United States from 1963 until 1980. On 1 February 1978 his G.8 post was regraded P.2 and he was promoted to that grade. He then received an offer of appointment, which he signed on 27 January and in which he certified that his normal place of residence was Les Cayes, in Haiti. On 21 February he wrote to the Chief of Personnel applying for a change in his normal place of residence from Washington to Les Cayes, in accordance with Staff Rule 360, and also for help in obtaining a "G.IV" non-immigrant visa in lieu of his residence visa for the United States. On 20 April 1978 the Chief of Personnel replied, refusing both requests, returning the signed offer of appointment and asking him to sign instead a form declaring his normal place of residence to be Washington. He signed the form on 26 September. On 6 June 1979 he again wrote to the Chief of Personnel asking him to review the matter and pointing out that Staff Rule 360 had been mistakenly applied since a new Staff Rule, 460, came into force in January 1978, which reads:

"If [the staff member] was living in some other country at the time of appointment, the residence shall be a place in the country of his nationality determined in consultation with him on the basis of reasonable justification."

On 20 July the Chief of Personnel answered, refusing the complainant's application on the grounds that he had been in the United States since 1963. On 1 July 1980 he wrote again to the Chief of Personnel asking for a "final" decision within the meaning of Staff Rule 1230.8. On 10 September he supplied further information at the Organization's request. On 8 October a new Chief of Personnel replied, again refusing the application. The complainant appealed to the Board of Inquiry and Appeal. In its report of 4 March 1981 the Board unanimously recommended, among other things, changing the decision of 8 October 1980. By a letter dated 14 April 1981, which is the decision impugned, the Director informed the complainant that he did not accept the Board's recommendations and that the decision therefore stood.

B. The complainant observes that Staff Rule 460 is in mandatory terms which leave no room for discretion. For those, like himself, who on appointment are resident in the new country but have the nationality of another, the normal place of residence shall be in the country of nationality. The purpose of replacing former Staff Rule 360 with Staff Rule 460 was indeed to cater for cases like his own, which had not been adequately covered by the old rule. He was wrongly denied the opportunity to have his place of residence changed when he was promoted. Such promotion is generally treated by the PAHO as a new appointment, as is clear, in the complainant's case, from the fact that he received, and was asked to sign, an offer of appointment. Staff Rule 460 was therefore misapplied. The complainant accordingly asks the Tribunal to rescind the decision, to order the PAHO to change his normal place of residence to Les Cayes and grant him, with effect from 1 January 1978, full entitlements as an internationally recruited staff member, including home leave, repatriation and education grant, and to award him costs and any other remedies the Tribunal deems fit.

C. In its reply the PAHO contends that the complainant was not entitled to have his normal place of residence changed on account of his promotion. Staff Rule 460 is explicit on this point: the place of residence is to be determined "at the time of appointment" and recognised "throughout his service as his residence prior to appointment". The determination, once properly made, need not be altered under the rule. The administrative error in sending the complainant a form entitled "offer of appointment" did not after the facts of the case. It is mistaken, moreover, to assert that the PAHO normally grants change of residence on promotion to the Professional category. Nor was a change required as a matter of law under Staff Rule 460, since the rule allows the exercise of administrative discretion in each case and designation of a place in the country of nationality is not mandatory. This is clear from the last sentence, which reads: "Consideration may be given in individual cases to designating some other place if the facts so warrant". The decision to continue to recognise the United States as the place of residence was, moreover, borne out by the facts and was therefore not an abuse of discretion. The complainant left Haiti in 1962 of his own free will and had spent nine months in the United States before joining the PAHO. His claim to residence in Haiti is tenuous. Expatriate entitlements are in any case intended for staff who have left their own countries to serve the Organization, and that is not the complainant's position. The PAHO therefore invites the Tribunal to dismiss the complaint as unfounded.

D. In his rejoinder the complainant, after pointing out certain material and factual errors in the PAHO's reply, develops his arguments. He points out that a transfer to the Professional category brings into play so different a set of obligations for both parties that on promotion the staff member is asked to sign documents of appointment. Such a new contractual arrangement is tantamount to a new appointment allowing a change in residence under Staff Rule 460. The Board of Inquiry and Appeal rightly rejected any distinction between promotion and new appointment, and it is unconvincing to argue that there was an administrative error in sending the complainant an "offer of appointment". Contrary to what the Organization contends, the rule - which states: "the residence shall be ..." - leaves no discretion to choose a place not in the country of nationality for those living in another country at the time of appointment. The reference to "consultation" and "reasonable justification" in the rule is relevant only to determining some place within the country of nationality. Besides, even if there is discretion under the rule, it was abused in this case since there was failure to consider all the facts, and in particular the further information provided by the complainant at the Administration's request. He explains why in his view he cannot, on the facts, be treated as permanently resident in the United States, and he considers it irrelevant to contend that his claim for residence in Haiti is tenuous: under Staff Rule 460 physical presence is not required for establishing residence. The complainant accordingly presses in full his claims for relief.

E. In its surrejoinder the PAHO begins by commenting on the complainant's allegations of material and factual error in its reply, the great majority of which it rejects. It then argues that the meaning of Staff Rule 460 supports neither of the complainant's two main contentions, namely that a staff member should be deemed to reside in the country of his nationality regardless of the facts, and that he is entitled to a new determination of his place of residence on promotion to the Professional category. The PAHO also develops its argument that the facts of the case warranted its refusal to change the place of residence and that its decision was neither illegal nor an abuse of discretion. It therefore again invites the Tribunal to dismiss the case as unfounded.

CONSIDERATIONS:

1. Staff Rule 360 provided: "At the time of appointment of a staff member, the Bureau shall determine, in consultation with him, that place which is to be recognized throughout his service as his residence prior to appointment, for purposes of establishing entitlement under these Rules. Unless there are reasons to the contrary, the residence shall be determined to be the place in the country of the staff member's nationality where he was residing at the time of appointment".

2. The complainant joined the organization in August 1963 at the grade GS.4. He was (and still is) a national of Haiti who was living in Washington, having emigrated to the United States and been given a resident visa as an immigrant about nine months before. In accordance with the rule his residence prior to appointment was determined in consultation with him as Washington and he certified in writing that "my normal place of residence is ... Washington where I have established my home and wish to be repatriated". As an immigrant he was eligible for naturalisation after five years' residence but he did not apply for it. He maintained his ties with Haiti and he and his family spent a number of his leaves there, travelling at his expense.

3. In 1978 the complainant's post was graded at GS.8. On 21 January he was notified by Dr. Ortega, Chief of Personnel, that his post had been reclassified at grade P.2 and that he would be promoted accordingly:

documentation would follow. The document which followed was an offer of appointment to the post of Finance Officer at grade P.2; it was on a printed form designed for use in the case of new recruits. The complainant's acceptance of the offer was accompanied by a request that his normal place of residence be changed from Washington to Les Cayes, Haiti, on the basis of Staff Rule 360. The request was eventually refused and the refusal is the subject-matter of this complaint.

4. It is to be noted that the change in the complainant's situation affected the entitlements to which Staff Rule 360 refers. These are expatriate entitlements designed for recruits from abroad who will wish to maintain their contacts with the home country, the most important being grants for home leave and education. They are more freely available to officials in the P grades than to those in the GS. Moreover, an amendment in 1978 to Staff Rule 360 (the amended rule is now Staff Rule 460) removed any obscurity that might have been created by the fact that at the time of appointment the complainant did not reside in Haiti. Under Staff Rule 460 the residence to be recognised was definitely to be somewhere in the country of nationality "unless there are reasons to the contrary".

5. The great difficulty which the complainant has to face is that what has to be determined under Staff Rule 460, as under Staff Rule 360, the relevant words being left untouched by the amendment of 1978, is the place which is to be recognised "throughout his service as his residence prior to appointment". How can this be different in 1979 from what it was in 1963? The complainant advances two solutions.

6. The first is that the change in his situation in 1979 amounted to a new appointment; it was not a mere promotion in grade since there are fundamental differences between the P and the GS grades as for example that an officer in the General Service (GS) cannot be moved while one in the Professional category may be required to work wherever assigned. This argument is superficially assisted by the fact that the document given to the complainant was an offer of appointment. The Organization says that this was the wrong document to use and that it was sent in error. The Tribunal doubts whether the change was an appointment of any sort; the complainant remained in the same post which was reclassified into a higher grade. But anyway appointment is a word whose meaning depends upon the context. It can be used to mean an appointment to the staff of PAHO or an appointment to a post on the staff. In Staff Rule 460 it is clearly being used in the former sense as an appointment to the service. Indeed in the French text the word "engagement" could bear no other meaning. It is not and cannot be contended that in January 1979 the complainant concluded one period of service and without changing his post embarked upon another. This solution must be rejected.

7. The second is that it was the policy of the Organization to treat a promotion from the GS to the P grades as justifying a review under Staff Rule 460. There is ample evidence that this was the stated policy, though apart from one case there is no evidence in the dossier of the policy being put into practice. The one case is the present one in which Dr. Ortega applied the rule but rejected the request because of "reasons to the contrary". The question is therefore whether it is within the competence of the Tribunal to enforce a rule of policy or practice.

8. Under its Statute the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials and of such provisions of the Staff Regulations as are applicable to the case. The Tribunal has not given a narrow construction to "terms of appointment; it has treated the expression as sufficiently wide to cover obligations arising from the relationship created by the appointment. It has held that a statement by the Director of a practice which he intends to follow can under certain conditions create such an obligation. Such statements of practice often relate, as in this case, to the way in which the Director intends to administer a staff rule and thus clarify and amplify it. But just as a staff rule must not conflict with the staff regulation under which it is made, so a statement of practice must not conflict with the rule which it is elaborating. Staff Rule 460 mandates that the place determined at the time of appointment should be recognised throughout the service. This forbids the change of residence which the complainant is asking the Tribunal to order.

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 Lord Devlin, P.C., 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 3 June 1982.

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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