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REPORT No. 82/18
PETITION 551-07
REPORT ON ADMISSIBILITY

ALCIDES ESPINOSA OSPINO *ET AL.*
COLOMBIA

Approved electronically by the Commission on July 10, 2018.

Cite as: IACHR, Report No. 82/18, Petition 551-07. Admissibility. Alcides Espinosa Ospino *et al.* Colombia. July 10, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	National Union of State Employees of Colombia (UNETE), National Federation of State Employees (FENALTRASE) and Jairo Villegas Arbeláez
Alleged victims:	Alcides Espinosa Ospina <i>et al.</i> ¹
Respondent State:	Colombia ²
Rights invoked:	Articles 8 (Fair Trial), 9 (Freedom from <i>Ex Post Facto</i> Laws), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention on Human Rights; ³ Articles 19 (Stability of Employment) and 24 (Public Employees) of the Inter-American Charter of Social Guarantees; Articles 3 (Obligation of Nondiscrimination), 6 (Work) and 7 (Just, Equitable, and Satisfactory Conditions of Work) of the Protocol of San Salvador

II. PROCEDURE BEFORE THE IACHR⁴

Filing of the petition:	May 4, 2007
Additional information received at the stage of initial review:	June 23, 2011
Notification of the petition to the State:	August 10, 2011
State's first response:	February 21, 2012
Additional observations from the petitioner:	September 28, 2011 and March 5, 2012
Additional observations from the State:	July 6, 2012
Notification of the possible archiving of the petition:	March 27, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	March 30, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes; American Convention (deposit of ratification instrument on July 31, 1973)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
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¹ Jaime Amado Gaona, Luis Antonio Mendoza Forero and Próspero Elías Triana Briceño.

² Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not participate in the discussion or the decision on this matter.

³ Hereinafter "Convention" or "American Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

Rights declared admissible	Articles 8 (Fair Trial), 25 (Judicial Protection) and 26 (Progressive Development) of the American Convention in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

V. ALLEGED FACTS

Common claims

1. The petitioners indicate that Alcides Espinosa Ospina, Jaime Amado Gaona, Luis Antonio Mendoza Forero and Próspero Elías Briceño (hereinafter “the alleged victims”) worked as provisional employees in administrative career positions in different state institutions. They submit that the authorities violated the alleged victims’ rights through discretionary actions, namely the alleged victims’ removal from office and the appointment of new provisional employees for the same positions. They allege that theirs were administrative career positions and not political or government appointments or subject to free appointment and dismissal. They also indicate that the State did not announce the corresponding merit-based selection processes. They indicate that the provisional nature of a career position does not render it subject to free appointment and dismissal.

2. They allege that discretionary dismissals apply to staff in positions of free appointments and dismissal but do not apply to provisional staff in career positions, under Article 26 of Decree Law 2400 of 1968. Thus, they claim that the dismissal of the alleged victims had to be well founded, and that since these were groundlessly dismissed, the government’s decision is null and void. They also allege that the decision to remove the alleged victims from office was not made in the framework of a disciplinary procedure nor was it the result of a selection process; that it was the mere decision to remove the provisional employees in order to appoint other provisional employees.

3. They add that the alleged victims resorted to the justice to obtain a restitution of their rights; that, however, the courts’ judgments were equally arbitrary and groundless. Moreover, they submit that the resolutions did not protect their right to equal protection because the State Council applied different criteria when it resolved a similar case on August 15, 2012.

4. For its part, the State claims that the petition is inadmissible because it seeks to establish a fourth instance of jurisdiction. It indicates that the petitioners seek to obtain a review of judgments adopted by domestic courts in accordance with the right of due process that were contrary to their interests. It submits that the events do not establish violations of the rights enshrined in the American Convention. In this regard, it asserts that career positions are subject to two types of appointment procedures, either a merit-based selection process to fill positions or a government’s discretionary appointment to fill provisional positions. It asserts that provisional employees can also be removed discretionally at any time and without a need to provide grounds for so doing.

5. Additionally, it affirms that the alleged victims had at their disposal a constitutional appeal to obtain the protection of their rights. However, it indicates that that remedy would have been inappropriate at that time because it would have ignored the remedy’s governing principle of immediacy. Furthermore, it submits that the IACHR is not entitled to deal with the instant petition in view of its subject matter, as it invokes the rights protected by Articles 3, 4, 6 and 7 of the Protocol of San Salvador, as well as purported violations of the Inter-American Charter of Social Guarantees.

Individual situation of the alleged victims*Alcides Espinosa Ospina*

6. The petitioners indicate that Mr. Espinosa Ospino worked at the District Institute of Tourism and Culture of the Municipality of Bogotá (hereinafter “the Institute”) from June 21, 1999. For four months he held the position of specialist professional employee on a provisional basis. They submit that by Resolution No. 428 of November 3, 1999, the Institute annulled the merit-based selection processes to fill positions of specialist professional staff and decided to postpone some provisional appointments, including the alleged victim’s appointment, until permanent staff was recruited for those positions. They assert that the Institute dismissed him by Resolution No. 195 of 2002. In view of this, he filed an action for annulment and restoration of rights before the Administrative Court of Cundinamarca, which on September 23, 2004 overturned the appeal on the grounds that Mr. Espinosa Ospino was a provisional employee in an administrative career position and, thus, his removal did not need to be well founded and could be decided at any time. The alleged victim challenged this decision before the State Council, which on December 6, 2006 upheld the judgment by declaring that the impugned matter was lawful because the contrary had not been proven.

7. The State affirms that the alleged victim held an administrative career position on a provisional basis and that, consequently, he did not have a relatively stable employment.

Jaime Amado Gaona

8. They claim that on December 16, 1996, without a prior merit-based selection process, Mr. Amado Gaona was appointed University Professor of the Federal Attorney General’s Office (hereinafter “the Attorney General’s Office”), an administrative career position. They indicate that he was dismissed by Resolution 0-1345 of August 31, 2001. Thus, the alleged victim lodged an action for annulment and restoration of rights before the Administrative Court of Cundinamarca, which dismissed his claims on June 25, 2004 by establishing that the Attorney General was entitled to remove provisional employees. Mr. Amado Gaona filed an appeal before the State Council, which on October 5, 2006 confirmed the impugned judgment by establishing that the norms invoked in the appeal had not been violated.

9. The State indicates that the Attorney General is entitled to remove provisional staff in a discretionary manner. It submits that groundlessness is not an invalidating factor for discretionary actions, and that the sole proof of the appellant’s good performance does not suffice to conclude that his removal will negatively affect public service.

Luis Antonio Mendoza Forero

10. They assert that Mr. Mendoza worked at the Transportation Department of Bogotá (hereinafter the “Department”) from November 20, 1990 as Head of the Planning and Statistics Division, a position subject to free appointment. They affirm that under Law 27 of 1992, positions like the one held by the alleged victim were administrative career positions. They claim that said provision was not applied and that, on the contrary, from July 26, 1995 his job became a provisional post. They indicate that on November 27, 1995 he was notified of his dismissal. As a result, he filed an action for annulment and restoration of rights before the Administrative Court of Cundinamarca, which rejected it on March 15, 2001 on considering that there was no proof that his removal was unlawful. Afterward, he lodged an appeal before the State Council, which revoked the impugned judgment on July 25, 2002 by applying the exception of groundlessness filed by the Attorney General’s Office that was initially dismissed by the Administrative Court of Cundinamarca. Thus, it considered that the alleged victim’s removal from office was not an administrative decision but the simple realization of a previous decision. Moreover, it refrained from ruling on the merits of the case. In view of this, Mr. Mendoza Forero lodged a petition to the Plenary of the State Council, which was dismissed on March 20, 2007 and notified by an edict on March 28, 2007.

Próspero Elías Triana Briceño

11. They claim that Mr. Triana Briceño developed his labor duties at the Federal Attorney General's Office from July 1, 1992 as Judicial Researcher in the Judicial Division of the District of Tunja. The alleged victim was dismissed through Resolution 0-0570 of March 19, 2002. In view of this, he lodged an action for annulment and restoration of rights before the Administrative Court of Cundinamarca, which was dismissed on October 20, 2006 on the grounds that the removal was not unlawful given that the dismissal of provisional staff is a discretionary decision. The alleged victim lodged an appeal dismissed by said court on January 25, 1997 on the grounds that it was a procedure of single instance of jurisdiction because the compensation sought does not reach the established quantum.

12. The State alleges that the Attorney General's Office is entitled to discretionally remove provisional staff. Moreover, it asserts that procedures of single instance of jurisdiction are governed by Law 954 of 2005, and that the alleged victim could eventually file a complaint against the dismissal of the appeal.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. The petitioners assert that the alleged victims questioned the procedures by which they were removed, through actions for annulment and the restoration of rights before the Administrative Court of Cundinamarca, and later through appeals before the State Council. They submit that by so doing they exhausted the domestic remedies. For its part, the State indicates that the alleged victims could have resorted to constitutional appeals but did not.

14. The Commission has established that the remedies normally available and appropriate in the domestic legal system should be activated first, that is, those whose functions, within the legal system, are appropriate to provide protection to remedy the situation denounced. In the present case, it is evident that the ordinary remedy available to the alleged victims, through an action for annulment and restoration of rights and a subsequent appeal to the State Council, had the possibility of remedying the situation complained of with regard to the allegedly unmotivated dismissals. Considering the foregoing, the Commission believes that the domestic remedies were definitely exhausted in regard to each of the alleged victims through the following decisions of the State Council: Alcides Espinosa Ospino, by the decision of December 6, 2006, notified on December 13, 2006; Jaime Amado Gaona, by the judgment of October 5, 2006, notified on February 2, 2007; and Luis Antonio Mendoza Forero, by the resolution of March 20, 2007, notified by an edict on March 28, 2007. Given that the petition was received on May 4, 2007, the IACHR concludes that the petition meets the admissibility requirements established in Article 46.1 paragraphs a and b of the Convention.

15. In regard to Mr. Próspero Elías Triana Briceño, the petitioners indicate that after the court rejected the action for annulment and restoration of rights, the alleged victim filed an appeal that the Administrative Court of Cundinamarca overturned on January 25, 2007 on the grounds that the compensation sought did not reach the established quantum. The State indicates that the petitioners could have challenged that decision by means of a complaint. The Commission observes that the State has not explained how a complaint could be an appropriate remedy when judgments of proceedings considered of minimum bills of damages are not reviewed. Therefore, the Commission resolves that the exception to the exhaustion of domestic remedies set forth in Article 46.2.a of the Convention is applicable in this case, and that the instant petition was filed in a timely manner and that the admissibility requirement of timeliness must be declared met.

VII. ANALYSIS OF COLORABLE CLAIM

16. In view of the elements of fact and law presented by the petitioners, and the nature of the matter brought to its attention, the Commission believes that the claims concerning the declaration of

redundancy not complying with legal requirements and not being justified⁵ could, *prima facie*, establish violations of Articles 8 (Fair Trial), 25 (Judicial Protection) and 26 (Progressive Development) of the Convention, in connection with its Article 1.1 (Obligation to Respect Rights), to the detriment of Alcides Espinosa Ospino, Jaime Amado Gaona, Luis Antonio Mendoza Forero and Próspero Elías Triana Briceño. In this regard, considering that Article 26 of the Convention broadly refers to economic, social and cultural rights, and that these must be determined in relation to the OAS Charter, the Commission believes that when a possible violation of said right is identified, the instruments to be applied in the merits stage are those applicable to the matter and the State concerned, such as the Protocol of San Salvador.

17. As for the claims of the establishment of the rights of Mr. Próspero Elías Triana Briceño in a proceeding of single instance of jurisdiction,⁶ they must be analyzed in the merits stage in the light of Articles 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in connection with Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the same treaty.

18. With respect to the complaint about the alleged violation of Article 9 (Freedom from *Ex Post Facto* Laws) and 24 (Equal Protection) of the American Convention, the Commission notes that the petitioners did not submit arguments or evidence sufficient for it to consider *prima facie* a possible violation of these.

19. Concerning the allegations of violations of Articles 3, 4, 6 and 7 of the Protocol of San Salvador, the IACHR observes that its competence to rule in the context of an individual case, foreseen in Article 19.6 of said treaty, is limited to Articles 8 and 13. As to the other articles, in accordance with Article 29 of the American Convention, the Commission may take them into account in order to interpret or apply the American Convention or other applicable instruments. Moreover, in regard to the Inter-American Charter of Social Guarantees, the IACHR is not entitled to establish violations of the norms of said instrument, without detriment to Article 29 of the Convention.

20. As to the State's allegations of the establishment of a fourth instance of jurisdiction, the Commission recognizes that it is not entitled to review judgments issued by domestic courts acting within their jurisdiction and in accordance with due process of law and the judicial safeguards. However, the Commission reiterates that, under its mandate, it is competent to declare a petition admissible and rule on the merits when it concerns domestic proceedings that may have violated any of the rights protected by the American Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 25 and 26 of the American Convention, in relation to Articles 1.1 and 2 of the same treaty;

2. To find the instant petition inadmissible in relation to Articles 9 and 24 of the American Convention; and

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 10th day of the month of July, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Francisco José Eguiguren Praeli (dissenting opinion), Joel Hernández García (dissenting opinion), Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁵ IACHR, Report No. 54/17, Petition 1327-07 Luz Angélica Porras Camacho *et al.*, Colombia, May 25, 2017, par. 10.

⁶ IACHR, Report No. 71/09, Petition 858-06, Massacre of Belén – Altavista, Colombia, August 5, 2009, par. 44; and IACHR, Report No. 69/09, Petition 1385-06, Rubén Darío Arroyave Gallego, August 5, 2009, par. 36.