



Administrative Tribunal

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LIMITED

AT/DEC/961
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 961

Case No. 1059: SALMA

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix
Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Mahmoud Ahmad Salma, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 7 January 1999, the Applicant filed an application containing pleas which read as follows:

“SECTION II PLEAS

Applicant prays the esteemed Tribunal to.....

Prior to the session ...

[Order production] of the Governmental final examinations of the third Prep class sections of Khalisah School for the school years [1994 to 1997].

In session

- a. [Rescind the] decision of the Commissioner-General, and order [the Applicant's] reinstatement to duty.
- b. [Consider the] period of cessation [as] special leave with full pay.
- c. [Order] compensation for injury sustained, including libel and slander the Administration exercised by Respondent.
- d. [Order] should Respondent refrain from reinstating Applicant, [he is to pay] salaries plus interest until the date of enforcement of judgement.
- e. [Order] payment of secretarial and counseling fees.”

Whereas the Respondent filed his answer on 30 July 1999;

Whereas, on 24 September 1999, the Applicant filed written observations, and on 26 June 2000, the Respondent provided his comments thereon;

Whereas, on 6 July 2000, the Applicant filed an additional document, and on 15 July 2000 filed written comments on the Respondent's submission of 26 June 2000;

Whereas on 24 July 2000, the Respondent commented on the Applicant's submission of 15 July 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 23 September 1995, as an Area staff member on a three-year fixed-term appointment, in the capacity of Teacher (English), Khalsa School, Damascus Area, Syrian Arab Republic (SAR). His appointment was subject to an initial probationary period of 12 months duration. The Applicant's appointment was terminated on 10 April 1997.

On 2 November 1995, a School Supervisor from the Department of Education, UNRWA, SAR, after a class visit, rated the Applicant as “unsatisfactory”, awarding him “2” on a scale of 1 to 7 where 7 is highest. On 27 February and 15 April 1996, a different School Supervisor after a further class visit, gave the Applicant the same rating.

On 27 May 1996, the Area Education Officer (AEDO) sent the Applicant a letter of reprimand for unsatisfactory performance.

On 15 September 1996, the Applicant's periodic report was completed. The Applicant received an overall rating of a "Staff member who maintains only a minimum standard of efficiency". The AEDO's comment in the report was "Unsatisfactory teacher". On 17 September 1996, the Field Personnel Officer, SAR, notified the Applicant that in view of his periodic report, it had been decided to defer his annual salary increment for a period of six months. He further informed the Applicant that a further periodic report would be prepared on 1 April 1997.

On 25 February 1997, the School Supervisor again rated the Applicant as unsatisfactory. On 27 February 1997, the AEDO wrote a memorandum to the Chief, Field Education Programme, SAR, and advised him that the Applicant showed no desire for improvement.

On 13 March 1997, a second periodic report assessed the performance of the Applicant. The report reflected unsatisfactory performance in the same areas as the one prepared in September 1996 and had the same overall rating. Once again the AEDO's comment in the report was "Unsatisfactory teacher". On 17 March 1997, the Field Personnel Officer advised the Applicant that his annual salary increment and confirmation of appointment were being deferred for a further six months in view of his continuing unsatisfactory performance. He was further advised that failure to secure a satisfactory report "in every respect" within twelve months of deferment of an annual increment could result in him being downgraded or terminated under Area staff rule 109.1.

On 3 April 1997, the AEDO advised the Chief, Field Education Programme, that, in light of the School Supervisor's reports, he recommended termination of the Applicant's probationary appointment. On 9 April 1997, the Director of UNRWA Affairs, SAR, informed the Applicant of the decision to terminate his appointment effective 10 April 1997, under paragraph 10 of his Category "X" letter of appointment which specified that a probationary appointment may be terminated by the Agency at its sole discretion and without notice at any time during the probationary period.

On 21 April 1997, the Applicant requested the Director of UNRWA Affairs to review the administrative decision to terminate his appointment. On 11 May 1997, the Officer-in-Charge, UNRWA Affairs, SAR, advised the Applicant that he had reviewed the decision and saw

no reason to change it.

On 24 July 1997 the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 25 March 1998. Its evaluation, judgement and recommendation read in part as follows:

“III. EVALUATION & JUDGEMENT

19. ...

(a) The Board dwelt on the preliminary issue of receivability and decided to declare the appeal receivable due to the seriousness of the disciplinary measure applied.

(b) The Board noted that the Appellant signed a number of School Supervisors’ reports in which he was rated unsatisfactory and never objected to one of them.

(c) The Board noted that the periodic reports of the Appellant were unsatisfactory.

(d) The Board noted the Appellant had no objections for the letters of reprimand that were issued against him.

(e) In this context, the Board is of the opinion that the Administration has acted within the framework of standing Rules and Regulations, and that there was no bias or prejudice against the Appellant.

IV. RECOMMENDATION

20. In view of the foregoing, and without prejudice to any further oral or written submissions to any party, the Board by majority vote makes its recommendation to dismiss the appeal.”

One member of the JAB filed a dissenting opinion which read, *inter alia*, as follows:

“DISSENTING OPINION OF BOARD MEMBER ...

I disagree with the Board on several points:

- The Appellant should be treated as a confirmed staff member as the

probation period should not in any circumstances exceed eighteen months (...) while he spent 19 months (23 September 1995-8 April 1997).

- The English School Supervisor rated the Appellant 50 out of 100, but the Head EDC [Education Development Centre] who is a neutral party granted him 60 out of 100.
- The Appellant[’s] class results in the final governmental exam was 94.3% success. The government is a neutral party and its result should be considered.

...

- The Appellant’s termination affected negatively the grades of his student because his services were actually terminated 50 days before the end of the scholastic year and not 20 days as mentioned i.e. the Appellant was not present with his students during their final exams preparations.
- As for the periodic reports I am of the opinion that these reports were not filled in dating order.
- **In view of the foregoing, I recommend that the Administration’s decision be reviewed.”**

On 22 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

“...

While I endorse the Board’s recommendation on the substance of the appeal. I do not accept the Board’s determination concerning the preliminary issue of receivability.

The Board’s determination to declare the appeal admissible in spite of the time-limits set out in Area staff rule 111.3 does not appear to be based on any reasons or explanation from you as to why you failed to meet the time limits, but rather simply on what the Board has termed ‘the seriousness of the disciplinary measure applied’.

I do not consider that the ‘seriousness’ of a measure, in itself and without

more, constitutes exceptional circumstances upon which a decision to waive time limits can be properly based. Exceptional circumstances cannot be assumed or declared to exist without full consideration of the reasons, if any, adduced by the staff member as to why he or she did not meet the time limits. There is no evidence of any such consideration in this case.

Accordingly, I have determined to dismiss the appeal, both on the basis of the preliminary issue of receivability and on the substance of the appeal.

...”

On 7 January 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to terminate the Applicant's appointment was based on a mistake of fact as the examination results for the pupils taught by the Applicant prove that the Applicant's performance was “outstanding”. Furthermore the decision was vitiated by error of law as his appointment should have been confirmed “under the terms of personnel directive A/4”.

2. The JAB properly decided that the case was receivable. Under Area staff rule 111.3 the authority to waive the time limit for filing an appeal is “... within the entire jurisdiction of the Board ...”

Whereas the Respondent's principal contentions are:

1. The appeal was not receivable before the JAB because the Applicant failed to file it within the 30-day period as required by Area staff rule 111.3 and there were no “exceptional

circumstances” to justify the JAB’s deviation from that rule. Consequently, the application is not receivable by the Tribunal.

2. The Applicant’s claims of credit for student examination successes are erroneous because these successes reflect the accumulated efforts of all the teachers during four previous years of English learning. There has been full compliance with the Applicant’s terms of appointment and the Applicant has not produced any evidence of improper motivation, prejudice or other extraneous factors.

The Tribunal, having deliberated from 12 July to 2 August 2000, now pronounces the following judgement:

I. First, the Tribunal must determine whether the appeal was time-barred. According to the facts, on 9 April 1997, the Director of UNRWA Affairs, SAR, wrote a letter to the Applicant, informing him that the Agency had decided to terminate his employment because of his continued unsatisfactory performance, under paragraph 10 of his “X” Category letter of appointment. His termination would be effective at the close of business on 10 April 1997. The Applicant requested review of the decision to terminate his services in a letter dated 21 April 1997. In his reply of 11 May 1997, the Respondent confirmed his decision to terminate the Applicant’s employment. On 24 July 1997, the Applicant submitted his appeal to the JAB.

II. Thus, more than two months had elapsed, between the date the Applicant received confirmation of his separation from service (11 May 1997) and the date he lodged his appeal (24 July 1997).

III. Area staff rule 111.3 establishes that:

"A staff member who wishes to appeal under the terms of staff regulation 11.1, after having sent a letter to the Agency’s Administration in accordance with the

foregoing provisions of this rule, shall submit a written appeal, specifying his/her allegations, to the Secretary of the Joint Appeals Board within the following time limits:

...

- (B) In the case of staff members of Field Offices, within thirty days from the date of the receipt of a reply from the UNRWA Field Office Director, or, if no reply has been received from the latter within thirty days of the date of the staff member's letter, then within the next thirty days."

IV. In its decisions, the Tribunal has consistently emphasized the importance of complying with the mandatory time limits set out in the Staff Rules. (Cf. Judgements No. 527, *Han* (1991); No. 549, *Renninger* (1992); No. 596, *Douville* (1993) and No. 913, *Midaya* (1999)).

V. The JAB did, indeed, consider the issue but decided "to declare the appeal receivable due to the seriousness of the disciplinary measure applied".

VI. The Tribunal notes that the separation of the Applicant from service was not a disciplinary measure but an administrative one. However, the Tribunal is satisfied that the JAB would have applied the same reasoning to any measure which had grave consequences for the Applicant, whether or not of a disciplinary nature.

VII. In the Tribunal's opinion, the fact that the measure was serious is of no consequence. Area staff rule 111.3, paragraph 4, provides that "[a]n appeal shall not be receivable by the Joint Appeals Board unless the ... time limits have been met, provided that the Board may waive these time limits in exceptional circumstances". Since the Applicant had failed to submit his appeal within the specified time limits, the JAB could only waive the time limits by finding that "exceptional circumstances" existed. (Cf. Judgements No. 372, *Kayigamba* (1996); No. 713, *Piquilloud* (1995) and No. 796, *Xu et al.* (1996)). However, the JAB waived the time limits because it considered that the measure applied to Applicant was a serious one.

VIII. The Tribunal does not agree with the JAB that the mere seriousness of the measure

constituted “exceptional circumstances”. If time limits were not intended to apply in cases that have serious consequences, the rule would have made this clear. “Exceptional circumstances” are deemed to exist in situations beyond the staff member's control, for instance, *force majeure*. There cannot be different standards for waiving time limits varying with the degree of seriousness of the measure applied.

IX. Thus, the Tribunal finds that the JAB erred in declaring the appeal receivable and holds that the appeal was time-barred.

X. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 2 August 2000

Maritza STRUYVENBERG
Executive Secretary