



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1235

Case No. 1319

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President;
Ms. Jacqueline R. Scott;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 September 2003;

Whereas, on 11 September 2003, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“(a) [that] disciplinary proceedings be instituted against ... the two [Office of Internal Oversight Services (OIOS)] investigators, as well as against ... [the] ... Chief of [the Office of the High Commissioner for Human Rights (OHCHR)] Croatia from August 1998 to October 2000 ...;

(b) to impose disciplinary measures for their misconduct ...;

(c) to completely quash the Investigation Report No. 027 dated 26 April 2001 ... and expunge from personnel files all references thereto;

...

(e) [to order compensation] for the moral injury, besmirched reputation, sleepless nights suffered because of the dismissed appeal and the false and malicious OIOS report in the amount of [US\$ 50,000] in moral damages and costs.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 12 March 2004 and periodically thereafter until 31 August;

Whereas the Respondent filed his Answer on 27 August 2004;

Whereas the Applicant filed Written Observations on 5 November 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“[The Applicant’s] Professional Record

... The [Applicant] entered service at the United Nations on 19 November 1978, as a [Clerk/Typist] in the Office of General Services, United Nations Interim Forces in Lebanon (...), at the FSL-2 level, under a six-month fixed-term appointment. [The Applicant's appointment was subsequently extended and he received a series of promotions. At the time of the events that gave rise to this Application, he had a permanent appointment and held the P-3 position of Administrative Officer, OHCHR.]

...

Summary of Facts

...

... During the months of October and November 2000, two OIOS investigators ... conducted an investigation at the Zagreb OHCHR Field Office and at the OHCHR Headquarters in Geneva.

... Following this investigation, an OIOS report (Investigation Report N° 0270/00) was issued on 26 April 2001. One of the recommendations of this report was that ‘appropriate action should be taken against [the Applicant] for his patterns of abuse of authority, which served to the detriment of OHCHR’.

... On 22 May 2001, ... the [Applicant] ... was placed on suspension with pay effective immediately[, and] ... handed ... an envelope containing copies of the investigation report and two memoranda:

- a memorandum dated 18 May 2001, ... [requesting the Applicant's] comments on ... allegations of misconduct ... that he

- ‘fraudulently secured the continuous employment of a friend of [his] who reported to [him], Mr. [P.], by de facto bypassing [the] then Chief, Administrative Section, OHCHR, and by creating the false impression that [the latter] had approved Mr. [P's] assignment to the post of Associate Administrative Officer (P-2) at the OHCHR field office in Zagreb, when in fact, [he] knew that this was contrary to [the Chief's] position on the matter’.

- a memorandum dated 21 May 2001, ... [informing the Applicant] of the decision to place him on suspension with full pay, pending disciplinary proceedings ...

...

... [On] 29 May 2001, ... the [Applicant] replied to the allegations of misconduct brought against him.

... By memorandum dated 3 August 2001, the Assistant Secretary-General, [Office of Human Resources Management (OHRM)], informed the [Applicant] that 'following a careful review of [his] response, [she had] decided to close this case ...'. The [Applicant] was also advised that the charges had been dropped and that no further action would be taken.

... ... [On] 20 August 2001[, the Applicant's] ... suspension with pay was lifted ...

...

... By letter dated 12 October 2001, the [Applicant] requested the Secretary-General to pursue 'disciplinary proceedings ... against ... the two OIOS investigators ... who drafted the investigation report ...'."

On 2 January 2002, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 14 April 2003. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

46. ... [T]he Panel **concludes** that the appeal is **not admissible** for the reason that the Appellant's appeal has no legal basis since no staff member has a right to challenge the discretionary authority of the Secretary-General to pursue disciplinary proceedings and subsidiarily for the reason that a constitutive element for an appeal to be receivable is lacking, i.e. the request for administrative review.

47. ... [T]he Panel however **recommends** that the decision to close the disciplinary case against the Appellant be re-examined by the Secretary-General and substantiated in a spirit of transparency."

On 30 July 2003, the Officer-in-Charge of the Department of Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General accepts the Board's conclusion that your appeal is inadmissible, as the institution of disciplinary proceedings is not a right bestowed on a staff member but a matter falling within the discretionary authority of the Secretary-General. In this context, the Secretary-General, further concurring with the Board's conclusion that the determination of your appeal on the merits would have exceeded its mandate, notes that the Board's recommendation regarding the re-examination of the decision to close your disciplinary case equally exceeds its mandate. In light of the foregoing, he has decided to take no further action on your appeal."

On 11 September 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent erred in accepting the JAB's findings on receivability.
2. The Applicant did request administrative review of the impugned decisions. Even were such a request lacking, this is only a technicality which should not be held against him.
3. The JAB exceeded its authority in recommending that the decision to close the disciplinary case against the Applicant be re-examined.
4. The Applicant's rights of due process were systematically violated.

Whereas the Respondent's principal contentions are:

1. The Secretary-General enjoys broad discretion regarding disciplinary matters, and it is not within the power of a staff member to compel him to pursue disciplinary proceedings.
2. The OIOS investigation was conducted with due regard for the rights of the Applicant.

The Tribunal, having deliberated from 22 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant appeals against the decision of the Secretary-General, pursuant to a finding and recommendation of the JAB, that his case was non-receivable. If the JAB was correct, the Tribunal need not enter into consideration of the substance of the case; if it was incorrect, the Tribunal must determine the best course of action for the case.

II. The Applicant held the P-3 position of Administrative Officer, OHCHR, when, in October and November 2000, OIOS conducted an investigation at the Zagreb OHCHR Field Office and the OHCHR Headquarters in Geneva. In April 2001, OIOS issued Investigation Report N° 0270/00 in which it recommended that "appropriate action should be taken against [the Applicant] for his patterns of abuse of authority, which served to the detriment of OHCHR". On 22 May 2001, the Applicant was provided with a copy of the report and asked to comment on the allegations of misconduct that he

"fraudulently secured the continuous employment of a friend ..., by de facto bypassing [the] then Chief, Administrative Section, OHCHR, and by creating the false impression that [the latter] had approved [his friend's] assignment to the post of Associate Administrative Officer (P-2) at the OHCHR field office

in Zagreb, when in fact, [the Applicant] knew that this was contrary to [the Chief's] position on the matter'."

The Applicant was placed on suspension with pay with immediate effect, pending disciplinary proceedings, but, on 3 August, the Assistant Secretary-General, OHRM, informed him that "following a careful review of [his] response, [she had] decided to close [the] case".

Thereafter, on 12 October 2001, the Applicant wrote to the Secretary-General, asking him to pursue "disciplinary proceedings in accordance with staff rule 110 against ... the two OIOS investigators ... who drafted the investigation report". On 2 January 2002, the Applicant lodged an appeal with the JAB. In its report of 14 April 2003, the JAB held that, strictly speaking, the appeal was non-receivable as the Applicant was "contesting the non-response of the Secretary-General to his request to pursue disciplinary proceedings against two other staff members" and his letter of 12 October "was not to be taken as a request for administrative review but would constitute an initial request for administrative action". Notwithstanding this decision, the JAB considered whether the Applicant's appeal was substantively receivable and cited Judgment No. 1086, *Fayache* (2002) in support of its finding that "disciplinary procedures and decisions lie within the Secretary-General's discretionary authority and ... there is no provision that would give a staff member the right to request disciplinary action against another staff member". The JAB found that, in order to satisfy the Applicant's request that it review the nature of the OIOS investigation, "it would have to 'redo' the investigation" which "would go far beyond its fact-finding role [as] it was neither within its mandate nor within its material capacities to review allegations that [had] already been examined following a preliminary investigation". Accordingly, the JAB concluded that

"the appeal [was] not admissible for the reason that the Appellant's appeal [had] no legal basis since no staff member has a right to challenge the discretionary authority of the Secretary-General to pursue disciplinary proceedings and subsidiarily for the reason that a constitutive element for an appeal to be receivable [was] lacking, i.e. the request for administrative review".

The JAB noted, however, that it

"wishe[d] to express its perplexity regarding the decision taken by the Assistant Secretary-General, OHRM, to close the disciplinary case and drop all charges against the [Applicant]. ... Indeed, the Panel had difficulties in understanding the reasons that would lay behind the decision to drop all

charges against the [Applicant] and wondered on which basis the allegations of misconduct put forward by the OIOS were found to be unsubstantiated.”

Finally, the JAB recommended “that the decision to close the disciplinary case against the [Applicant] be re-examined by the Secretary-General and substantiated in a spirit of transparency”. On 30 July 2003, the Applicant was advised that the Secretary-General had accepted the Board’s conclusion that his appeal was inadmissible and concurred with the Board’s conclusion that the determination of his appeal on the merits would have exceeded its mandate. He was further advised that the Secretary-General also considered the Board’s recommendation to re-examine the decision to close disciplinary proceedings against the Applicant equally exceeded its mandate. It is this decision which the Applicant now appeals to the Tribunal.

III. The JAB considered that the appeal was not receivable for two reasons: a) a request for administrative review was lacking, since the letter of 12 October 2001 constituted an initial request for action and not a request for administrative review; and, b) the decision to initiate disciplinary proceedings lies solely within the Secretary-General’s discretionary authority and no staff member has the right to request disciplinary action against another. The Tribunal finds that whilst the first of these reasons is a valid cause for not receiving the appeal, the second appears to resolve the substance of the case.

IV. In Judgement No. 1106, *Iqbal* (2003), the Tribunal “reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization”. Staff rule 111.2(a) states:

“A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing”.

The Tribunal recalls Judgement No. 571, *Noble* (1992), wherein it held that “the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence”. Moreover, in Judgement No. 878, *Orfali* (1998), the Tribunal held that “the JAB does not have the power to waive non-compliance with the

requirement of requesting administrative review”. (See also Judgement No. 1196, *Maia-Sampaio* (2004).)

It was important for the Tribunal in this case, then, to review the letter in question, in order to determine whether or not it comprised a request for administrative review. Having done so, the Tribunal agrees with the JAB that it was not a request for administrative review but, rather, a request for administrative action to be taken. (As *obiter*, it notes that the document in question is 40 typewritten pages and wishes to state that, in any event, such an excessively lengthy document does not well serve a staff member’s case.) Whilst the Tribunal condemns the Administration’s practice of ignoring written requests from its staff members, its failure to act may be considered an implied rejection of the Applicant’s request for action, which then ought to have been followed by a request for administrative review of the Administration’s decision not to take such action. The Applicant failed to perform this final, and crucial, step.

In the instant case, as the JAB correctly concluded, the Applicant did not comply with the requirements of staff rule 111.2(a) and, therefore, his appeal was non-receivable, *ratione materiae*.

V. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Jacqueline R. Scott
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary