



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1314

Case No. 1412

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. Spyridon Flogaitis, President; Mr. Kevin Haugh; Mr. Goh Joon Seng;

Whereas, on 30 April and 29 November 2004, 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), filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 15 March 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

“Section II: PLEAS

a. ...

b. The [Applicant contests the decision of [the Director of UNRWA Affairs, Lebanon, (DUA/L) to demote him] from an Area Officer of [Beqa’a Area] to that of a teacher in the same area ...

c. [The Applicant requests reinstatement as Area] officer in Beqa’a as the post is vacant ...

d. [The Applicant requests the Tribunal to decide on the amount of compensation]

...”

Whereas, on 25 November 2005, the Applicant submitted a communication;

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 30 November 2005;

Whereas the Respondent filed his Answer on 30 November 2005;

Whereas, on 26 May 2006, the Respondent submitted a reply to the Applicant's communication of 25 November 2005 and, on 24 June, the Applicant commented thereon;

Whereas the Applicant filed Written Observations on 29 May 2006;

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

“II. SUMMARY OF FACTS

... Effective 18 September 1968, the [Applicant] was employed by the Agency on a monthly paid basis as a Class Teacher 'C'.

... Effective 1 September 1969, the [Applicant] was offered and accepted a Temporary Indefinite appointment as Teacher 'F', Grade 04, at Nazareth Elementary School, Burj Barajneh.

... From 12 February to 10 April 1993, the [Applicant] was acting Area Officer, Beqa'a, and effective 14 June 1993, he was appointed Area Officer, Beqa'a Area, and promoted to Grade 12 with a one year probationary period.

... On 24 June 1994, the Officer-in-Charge of UNRWA Affairs advised the [Applicant] that in his recent Periodic Report [(PER)], the Deputy Director did not recommend the [Applicant]'s confirmation in his post due to unsatisfactory performance, poor supervisory and professional skills. As a result, the [Applicant]'s probationary period was extended for three months.

... On 21 July 1995, the [Applicant] was served with a written censure by [the DUA/L] for his handling of money owed to the Agency by a borrower (Mr. J.) as he had not acted in the best interests of the Agency. On 27 September ..., the Field Finance Officer reported to [the] DUA/L that the loan from Mr. J. had been repaid in full through the [Applicant]'s efforts. As a result he recommended that the letter of censure be withdrawn, however, this recommendation was not followed.

... With effect from 1 August 1997, the [Applicant] was transferred to the post of Area Officer, Central Lebanon, with a promotion to the full grade of the post (Grade 14) a month later. The [Applicant] also retained the post of Area Officer, Beqa'a.

...

... On 3 September 1999, the [Applicant] requested that he be transferred to the post of Area Officer, Beqa'a, only. The [Applicant]'s request was approved with effect from 13 September ... and he retained his personal grade of Grade 14 (Area Officer, Beqa'a, is a Grade 12 post).

...

... On 9 February 2001, a contractor met with the Senior Auditor at the Lebanon Field Office. He provided the Senior Auditor with a copy of a letter that detailed serious complaints against an Agency staff member. The contractor alleged that he had previously given the original

version of the letter to the [Applicant] with a request to forward it to the Field Engineering & Construction Services Officer [(FE&CSO)]. The [Applicant] had not done so, and, when questioned by the Senior Auditor, he stated that the contractor had instructed him to retain the letter until he was asked to send it on.

... On 13 February 2001, the Deputy Director of UNRWA Affairs and Field Administration Officer, Lebanon[, D/DUA/L]) wrote to the Director of Audit & Inspection Department, HQ Amman, requesting an investigation into the contractor's complaint and the withholding of that letter by the [Applicant]. He attached the contractor's complaint letter ...

... On 9 March 2001, the Director of the Audit and Inspection Department delivered a Preliminary Assessment Report to [the] DUA/L in connection with the contractor's letter of complaint. In the Report, the Audit and Inspection Department relevantly concluded that:

(a) the contractor's letter had been passed to the [Applicant] 16 days prior to the contractor requesting a meeting with the Senior Auditor in the Lebanon Field Office.

(b) regardless of the instructions given to the [Applicant] by the contractor (about which there was dispute), the [Applicant] was aware of the nature of the ... contractor's complaint and the obligation to report such matters and admitted that he should have informed [the] DUA/L or [the] D/DUA/L of the receipt of the contractor's letter.

... By letter dated 8 June 2001, [the] DUA/L censured the [Applicant] and advised him that he would be transferred with demotion to a teacher's post at Grade 10, protected at Grade 12, with effect from 1 July ... [The] DUA/L advised that his decision to impose disciplinary measures was based on the [Applicant]'s failure to immediately inform him of the contents of the contractor's complaint to [the] FE&CSO ... which letter required immediate action. The [Applicant] had also failed to raise the matter with [the] DUA/L and [the] D/DUA/L in a meeting in the Lebanon Field Office on 1 February ... [The] DUA/L also noted that:

(a) The [Applicant] had been served with a written censure on 21 July 1995;

(b) On several occasions, during 1999 and 2000 the [Applicant] did not perform to the level expected from him as Area Officer, particularly in the management of the staff under his direct supervision;

(c) In September 1999, a conflict developed between the [Applicant] and [the School Supervisor/Area Education Officer] that had a detrimental effect on the education programme in Beqa'a; and,

(d) In July 1999, the [Applicant] had accused a Head Teacher of accepting a huge number of non-Palestinian students and it was later proven that some of these students and other students in other schools were admitted upon the [Applicant]'s instructions.

... On 14 June 2001, the [Applicant] requested [the] DUA/L to review and reverse the decision to discipline him. The [Applicant] asserted that the contractor asked him to hold on to his letter. Further, the contractor's letter referred to allegations that had been made 6 years before. He also addressed the other matters referred to by [the] DUA/L in his letter of 8 June ...

... On 26 June 2001, the [Applicant] advised the DUA/L he would be affected morally and financially by the disciplinary measures and sought approval to take early voluntary retirement effective 29 June ... The [Applicant]'s request for early voluntary retirement under paragraph 8 of staff rule 109.2 was approved on 28 June ... and he separated from the Agency at the close of business the following day.

... By letter dated 11 July 2001, [the] DUA/L advised the [Applicant] that there was no reason to change his decision to discipline [him].

... On 30 July 2001, the [Applicant] submitted his appeal to the Secretary of the Area staff Joint Appeals Board [in Amman, Jordan].”

The JAB adopted its report on 18 November 2003. Its evaluation, judgement and recommendation read as follows:

“III. EVALUATION AND JUDGEMENT

23. In its deliberations, the Board examined all documents cited before it, including the Appellant’s personnel file and came out with the following:

(a) The Board noted that the periodic reports of the Appellant for the years 1998 and 1999 were outstanding. One of the PERs states that the Appellant is ‘totally loyal to UNRWA and dedicated to his task which he performs at high levels standard’.

(b) The Board noted the sudden change in the evaluation of the Appellant’s performance without conclusive supportive evidence.

(c) The Board believes that the disciplinary measure taken against the Appellant is too severe and not proportionate to the accusations made against him.

RECOMMENDATION

24. ... [T]he Board unanimously makes its recommendation that the case be reviewed.”

On 4 December 2003, the Applicant, not having heard from the Respondent whether his appeal to the JAB had been accepted or rejected, wrote to the Respondent stating, inter alia, “[n]ow that my case has been discussed in the [JAB] and before receiving your reply [on the JAB’s recommendations] ...”. This clearly indicates that the Applicant knew of the submission of the JAB’s recommendation to the Respondent no later than 4 December.

On 15 March 2005, the Applicant, having not received any decision from the Commissioner-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 11 October 2005, the Commissioner-General informed the Applicant as follows:

“I do not agree with the Board’s recommendation. Given the serious allegations contained in the contractor’s letter, you should have immediately passed the letter on to your superiors. You should have done so even if, as you allege, the contractor requested that you delay its delivery. By not immediately informing your superiors of the letter’s existence and passing it on to them, you failed to act in accordance with both General Staff Circular 03/99 on Allegations and Complaints and the position of trust you occupied as the Area Officer and representative of the Director of UNRWA Affairs, Lebanon in Beqa’a.

Your failure to discharge the duties attaching to your position constituted conduct that is unsatisfactory and actionable under Area staff regulation 10.2. Given the seriousness of that failure within a context of significant importance to the Agency, coupled with prior incidents (including conduct contrary to the best interests of the Agency resulting in earlier censure), I do not agree with the opinion of the Board that the letter of censure with the demotion and transfer (which, were, in any event, not carried into effect in that you were permitted to retire prior to the effective date of the demotion and transfer) was disproportionate to your actions.

In light of the above, I have dismissed your appeal.”

Whereas the Applicant’s principal contention is:

The decision to censure, demote and transfer him was tainted by prejudice and improper motivation.

Whereas the Respondent’s principal contentions are:

1. The Application in its entirety is not receivable by the Tribunal. In the event that the Tribunal finds that the Application is receivable and further finds in favour of the Applicant on the merits of the case, any relief granted to the Applicant should address only the Respondent’s decision to censure the Applicant as the Applicant separated from the Agency two days prior to the intended effective date of his “demotion (and transfer)”.

2. The decision to “censure and demote (and transfer)”, the Applicant was a valid exercise of discretionary authority.

3. The facts on which the disciplinary measure was based were established by documentation on record.

4. The decision to “censure and demote (and transfer)” the Applicant was not disproportionate to the offence.

5. The decision was not vitiated by substantive irregularity, improper motive or abuse of discretion.

6. The remedy sought by the Applicant is inappropriate.

The Tribunal having deliberated from 23 October to 22 November 2006, now pronounces the following Judgement:

I. From 18 September 1968 to 11 February 1993, the Applicant was employed by the Agency as a Teacher. From 12 February to 10 April 1993, the Applicant was acting Area Officer, Beqa’a Area, and, effective 14 June, he was appointed Area Officer, Beqa’a, and promoted to Grade 12 with a one-year probationary period.

On 21 July 1995, the Applicant was served with a written censure by the DUA/L for his handling of money owed to the Agency by a borrower, as he had not acted in the best interest of the Agency. Although the loan was subsequently repaid, the DUA/L did not withdraw the censure.

As from 1 August 1997, the Applicant was transferred to the post of Area Officer, Central Lebanon, with a promotion to the full grade of the post (Grade 14). The Applicant also retained the post of Area Officer, Beqa'a. The Applicant failed to maintain good relations with the staff in the Beqa'a Area Office, which had a detrimental effect on the education programme in Beqa'a. On 13 September 1999, the Applicant was released from his functions as Area Officer, Central Lebanon, retaining only the post of Area Officer, Beqa'a (at personal Grade 14).

On 9 February 2001, a contractor provided the Senior Auditor with a copy of a letter that detailed serious complaints against an Agency staff member (not the Applicant), alleging that he had given the original version of the letter to the Applicant with a request to forward it. The Applicant had not done so, and, on 13 February, UNRWA, Lebanon, requested an investigation of the incident. On 8 June, the Applicant was again censured and advised that, because of his failure to immediately report the contractor's complaint to the appropriate authorities and a number of other reasons, he would be transferred with demotion to a teacher's post at Grade 10, protected at Grade 12, with effect from 1 July. On 14 June, the Applicant wrote to the DUA/L, refuting the allegations and requesting him to review and reverse the decision to discipline him. Subsequently, he requested permission to take early voluntary retirement, which request was approved on 28 June. He separated from the Agency on the following day, with full benefits calculated at Grade 14. His separation occurred before his demotion/transfer was due to take place.

On 30 July 2001, the Applicant submitted his appeal to the Area staff JAB. In its report dated 18 November 2003, the JAB believed that the disciplinary measure taken was too severe and not proportionate to the accusations made against the Applicant, and recommended that the case be reviewed. On 11 October 2005, the Commissioner-General advised the Applicant that she did not agree with the opinion of the Board and thus dismissed his appeal. The Applicant appeals this decision.

II. Two principal issues arise in this case, namely:

- (i) Is the Application receivable; and, if it is,
- (ii) Is the decision of censure and demotion meted out by the Respondent disproportionate to the "offence"?

III. With regard to issue of receivability, the Tribunal notes that the relevant provisions of article 7 of its Statute read as follows:

"1. An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.

2. In the event the joint body's [i.e. the JAB's] recommendations being favourable to the application submitted to it, and insofar as this is the case, an application to the Tribunal shall be receivable if the Commissioner-General has:

- (a) Rejected the recommendations;
- (b) Failed to take any action within thirty days following the communication of the opinion;
- (c) Failed to carry out the recommendations within thirty days following the communication of the opinion.

...

4. An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above ...”

IV. The JAB submitted its report containing a recommendation favourable to the Applicant on 20 November 2003.

V. The Applicant would have known of the submission of the favourable recommendation at the latest by 4 December 2003. In any case, he was informed by the JAB on 8 April 2004 that its recommendation had been submitted to the Respondent before the end of November 2003. The Applicant had ninety days calculated from either 20 November or 4 December 2003 or, at the latest, 8 April 2004 within which to file this Application. This Application dated 15 March 2005 was received by the Tribunal on 7 April, that is, at least nine months out of time.

The time limits set by article 7 are clear. That is, in respect of the JAB’s recommendations that are favourable to the applicant, the period of ninety days commences to run from the expiry of thirty days following the JAB’s communication of its recommendation(s) to the Respondent. This must be on the premise that an applicant knows of the date and of the contents of the JAB’s recommendation(s). Otherwise, he would not know of the commencement of the time limit of 90 days, within which the application has to be filed.

Even if the applicant knows of the date on which the JAB’s recommendation(s) were communicated to the Respondent, the applicant should still know of the contents of the same, otherwise he would not be able to take an informed decision as to whether he should file the application and what reliefs to apply for.

In the instant case, the decision of the Respondent came well after the time lines set by article 7 for the Applicant’s Application. As it turned out, it was a rejection of the favourable recommendation of the JAB.

It would be intolerable that an Administration which took almost two years before reaching a decision as to whether it should follow the JAB’s recommendation should successfully plead a time limit against an Applicant who waited for the results of the recommendation concerned. While the time limits

for applications to the Tribunal are set out in the Statute, it would seem unjust to enforce them strictly against an Applicant unaware of the results for almost two years when the Respondent himself has been guilty of such a grave and unexplained delay. If the Administration expects the Applicant to observe the time lines, the Administration, with the resources at its command, should be able to take a decision - be it acceptance or rejection of the JAB's recommendations - within a reasonable time in order that the Applicant may be better able to prosecute the Application.

Having regard to the conduct of the Respondent, the Tribunal exercises its powers under article 7, paragraph 5, and declares the Application receivable. Article 7, paragraph 5, provides that "[i]n any particular case, the Tribunal may decide to suspend the provisions regarding time limits".

VI. The Tribunal now turns to the merits of the Application. Area staff regulation 10.2 states that "[the] Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory". Paragraph 1 of Area staff rule 110.1 provides that "[d]isciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct".

It is well established jurisprudence of the Tribunal that although the choice of disciplinary measures to be imposed under Area staff regulation 10.2 falls within the powers of the Commissioner-General, this power is not absolute or unlimited. Its exercise is subject to, inter alia, proportionality in terms of the offence and the disciplinary measure imposed. (See Judgement No. 1090, *Berg* (2003).)

In this case, the Tribunal notes that the Applicant was censured on 8 June 2001, and advised that he would be demoted and transferred at a later date. As he was allowed, at his own request, to take early voluntary retirement effective 29 June, the demotion/transfer never took place and thus the request for compensation in this regard is moot. However, the Applicant does have the right to clear his name and, therefore, the Tribunal must determine whether the decision to sanction the Applicant for misconduct with censure, demotion and transfer was proportionate to the offence he committed. (See Judgements No. 897, *Jhuthi* (1998) and No. 941, *Kiwanuka* (1999).) Where the sanction is found to be disproportionate, the sanction can be vitiated. (See Judgements No. 1011, *Iddi* (2001); No. 1090, *Berg* (2002); No. 1244 (2005); and, 1274 (2006).)

VII. The offence giving rise to the censure and demotion/transfer stemmed from the Applicant's admitted failure to forward the contractor's letter. The letter contained serious allegations that the writer had been excluded from UNRWA's "Approved Contractor List" because he had, five years previously, refused to pay a bribe to an official of UNRWA. Such an allegation warranted immediate and thorough investigation as the Applicant knew or ought to have known.

In light of the seriousness of the Applicant's misconduct, the Tribunal is not persuaded that the disciplinary measures of censure and demotion/transfer herein are out of proportion to the offence committed by him.

VIII. The Application is, accordingly, rejected.

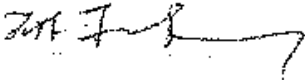
(Signatures)



Spyridon Flogaitis
President



Kevin Haugh
Member



Goh Joon Seng
Member

New York, 22 November 2006



Maritza Struyvenberg
Executive Secretary