



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1354

Case No. 1431

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 29 March 2005, a former staff member of the United Nations, filed an Application, requesting the Tribunal, inter alia, to request production of a number of documents and to grant him two years' compensation for the delay in resolution of a number of issues related to recommendations made by the Joint Appeals Board (JAB) "not based in policy, documentation, jurisprudence or interpretation". Whereas on 27 July 2007, the Tribunal rendered Judgement No. 1329, having determined that there were three sets of grievances presented by the Applicant. It rejected the Application in its entirety, finding that the vague terms in which the first claim was couched made it impossible to determine exactly what administrative decisions were being contested; that the second one, demanding re-opening of his requested investigation into the United Nations Safety and Security Service (UNSSS) in Vienna should fail, in view of the Tribunal's long-standing jurisprudence that to hold an investigation is at the discretion of the Administration; and, with regard to the third claim, that the Applicant had failed to discharge the burden of proof that the JAB's proceedings were vitiated by irregularities and errors of fact.

Whereas, at the request of the Applicant, the President of the Tribunal extended to 31 July 2005 the time limit for the filing of a second application with the Tribunal;

Whereas, on 24 July 2005, the Applicant filed an Application requesting the Tribunal, inter alia, to:

" ...

2. find that the JAB Report having addressed only one of [eight] pleas in the absence of any rationale gives the impression of having trivialised the appeals process itself. ...

3. find that the ... JAB failed or refused to secure:
 - a. Access to Departmental Recommendations with respect to applications for posts (about 14 at that time) which the JAB had been requested to secure; [and,]
 - b. Access to the camera recordings of the events that took place at Checkpoint One in the evening of 8 December 2001; so as to be able to gauge the full extent to which the Applicant has been the subject of discrimination, prejudice, harassment and favouritism such as had been alleged in the Report of the Panel on Discrimination.
- ...
5. find that all of these [actions on the part of the JAB] taken together did not comprise an accident.
...
6. find that these things occurred because the Respondent wanted them to occur.
7. find that taken together these events comprise a consistent and persistent pattern of discrimination, prejudice, harassment and favouritism.
...
10. decide that because of those breaches, accountability, either collective or individual, is appropriate and that the Applicant should receive one-year net pay for the anguish, torment, discrimination, anxiety and for each level at which the Administration had been requested and failed to take appropriate action.
11. decide that the highest priority be given to the Applicant's future applications for Sergeant posts.
12. decide that the Applicant should have full security against reprisals and retaliation.”

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 15 February 2006;

Whereas the Respondent filed his Answer on 1 February 2006;

Whereas the Applicant filed Written Observations on 12 April 2006;

Whereas the facts additional to those contained in Judgement No. 1329, as contained in the report of the JAB, are as follows:

“On the facts

[On 8 December 2001, while the Applicant, a Security Officer with UNSSS, United Nations Office in Vienna (UNOV), was on duty at Gate 1 of the Vienna International Centre (VIC), an ‘incident’ occurred between the Applicant and a staff member of the International Atomic Energy Agency (IAEA) leaving the building.]

... In the absence of any direct witnesses to the incident, the [JAB] based its review of the facts of the incident on the appeal, the statements of [the Applicant] to the Chief, UNSSS, the statement of the IAEA staff member, and certain pictures taken by the security cameras and provided by the Respondent. The JAB therefore had some difficulties to establish some of the crucial elements of the incident. However it was able to establish the following:

- a. The IAEA staff member had left the building without complying with the signing-out procedure in place during evenings and week-ends (the incident occurred on a Saturday evening around 22:00 hrs), although he was aware of this procedure;
- b. The IAEA staff member twice ignored [the Applicant]'s request to show his grounds-pass, the first time answering [the Applicant] with a reference to the fact that he had signed out already with the IAEA electronic time registration, and the second time, continuing to walk, opening the exit doors and walking down the stairs outside the building;
- c. [The Applicant] left his post to follow the IAEA staff member, and threatened to use force against him if he did not stop;
- d. The IAEA staff member stopped and returned towards [the Applicant]. An argument followed, and [the Applicant] was given the grounds-pass of the staff member;
- e. The staff member then went back inside the VIC to report the incident to [the Applicant's] supervisor;
- f. [The Applicant] reported the staff member on the walkie-talkie to Security Officers in the main building and requested them to intercept him;
- g. The staff member returned in the company of [a Security Sergeant] as well as two other Security Officers;
- h. The incident was discussed, the staff member was informed of the rules and regulations and he admitted that he had made a mistake and apologized;
- i. [The Security Sergeant] discussed the incident several times with [the Applicant] when [the Applicant] maintained that he had followed the applicable rules;
- j. [The Security Sergeant] reported the incident by telephone to the Chief, UNSSS, on the next day;
- k. On the Monday following the incident, [the Applicant] reported an injury to his finger to the Medical Service. A report from the Medical Service was sent to UNSSS noting that [the Applicant] had 'swelling, redness, tenderness of the second knuckle of [the middle] finger of [his] left hand' and that he was referred out for x-rays.
- l. The Chief, UNSSS, removed [the Applicant]'s authorization to carry a weapon on 9 December 2001 until further notice; ... he was placed back on the list of officers authorized to carry a weapon on 26 September 2003;
- m. [The Security Sergeant] issued a written report to the Chief, [UNSSS,] dated [8 December 2001];
- n. On the request of [the Security Sergeant] and [also on 8 December 2001, the Applicant] issued a description of the incident to the Chief;
- o. On 10 December 2001, [the Applicant] wrote an Interoffice Memorandum in which he replied to the report of [the Security Sergeant] and suggested that the latter was purposely trying to harm him, misconstrue the situation and set him up."

On 12 December 2001, the Applicant submitted another written statement on the incident to the Chief, UNSSS.

This incident led to a letter of reprimand being issued to the Applicant on 17 January 2002 by the Director, Division of Administration and Common Services (DACs), in his capacity as Officer-in-Charge, UNOV. The letter of reprimand read:

“It was reported to me that you, while on duty and armed, had told a person ([an] IAEA staff member) who was attempting to leave the VIC without complying with the exit procedures, that you could use force or shoot.

After a careful review of the facts reported to me, including your written statements of 8 and 12 December, I have reached the conclusion that you acted in violation of the work instructions issued to the staff of the UNSSS. In particular, you did not comply with Section 5.06 of the Manual for the UNSSS, which establishes that ‘*Mentioning a firearm or motioning with it for the purpose of intimidating a person is a serious offence*’. As you are aware, the instruction is also contained in the statement issued to all UNSSS personnel permitted to carry firearms.

Taking into account the need to ensure full compliance with such instructions, in particular those concerning the use of force and firearms, I have decided to apply the administrative measure of reprimand.

A copy of this letter will be placed in your Official Status file.”

On 15 May 2002, the Applicant lodged an appeal with the JAB in Vienna. The JAB adopted its report on 6 September 2004. Its findings, conclusion and recommendations read, in part, as follows:

“The review of the incident

18. Section 8.03 of the Manual reads:

‘Section 8.03 - Unsatisfactory Conduct

A member of the Service charged with an infraction has the right to answer such a charge during a review conducted by the Chief to determine whether a formal recommendation for disciplinary action should be made. If an infraction is of a minor nature, a reprimand by the immediate supervisor or by the Chief or the Chief of Section may be sufficient. [...] If the results of the review indicate an infraction of a more serious nature, the Chief will make a written recommendation for [appropriate action] ...’

...

21. According to the Respondent ... ‘the review of the incident by an UNSSS investigator has been carried out at the request and for the Chief of UNSSS and as such should be perceived to be in accordance with the letter and the spirit of Section 8.03 of the Manual’.

22. The JAB considered that the fact that the Appellant had written two Interoffice Memoranda did not mean that he had been given the right to answer the charge against him under Section 8.03. There was no evidence that the Chief had informed the Appellant of the investigation or review being carried out or of the charges against him. Also, in light of the fact that other persons directly or indirectly involved had been interviewed, the Appellant could also have been either interviewed or informed of the charges against him by the Chief.

23. According to Section 8.03, the decision to reprimand the Appellant should have been taken by the Chief, UNSSS, or by the Chief of Section. The JAB found that if the facts were as clear as stated in the [Interoffice Memorandum] from the Chief, UNSSS to the Chief, [Human Resources Management Service (HRMS),] the Chief himself should have decided to issue the letter of reprimand, if necessary in

consultation with others involved. If the incident was not considered minor, as stated by the Chief, then the incident should have been referred to the Joint Disciplinary Committee [(JDC)]. The fact that the Director of DACS signed the letter of reprimand in his capacity as Officer-in-Charge, UNOV, gave an increased weight to the letter of reprimand without giving the staff member access to the procedural safeguards of the JDC.

CONCLUSION

24. The JAB therefore concludes that, even if the Appellant should have handled the incident more sensitively, there was not a clear breach of the rules by the Appellant. The JAB further found that the handling of the incident and its review by the Service did not fully respect the principles of due process.

25. The letter of reprimand was therefore issued after a review that did not respect the letter and the spirit of Section 8.03 of the Manual of UNSSS.

RECOMMENDATIONS

26. The JAB recognizes that an incident of some kind did occur on 8 December 2001 to which the Appellant contributed.

27. Taking into account all aspects of the case, the JAB recommends that:

- (a) The reprimand be withdrawn from the [Official Status file] of the Appellant;
- (b) The JAB report and any subsequent decision by the [Secretary-General] be added to the [Official Status file] of the Appellant;
- (c) No compensation be given to the Appellant, as completion of recommendation (a) and (b) restores the Appellant's record;
- (d) To avoid in future some of the issues raised by this case, the Security Service should consider reviewing and revising its Manual, in particular its procedures with regards to use of firearms as well as interpretation of those procedures, and the administrative handling of offences by staff."

On 17 February 2005, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 24 July 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB report only addressed one of the eight pleas advanced by him without explanation.
2. UNOV and the JAB deliberately refused to secure certain documents and additional materials requested by the Applicant.
3. These events are part of a consistent and persistent pattern of discrimination, prejudice, harassment and favouritism.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is moot because the Secretary-General adopted the recommendations of the JAB, which were favourable to the Applicant.

2. The Applicant's claims relating to discrimination, prejudice, harassment and favouritism are not receivable, as they fall outside the scope of the Application.

The Tribunal, having deliberated from 2 to 21 November 2007, now pronounces the following Judgement:

I. Between 14 September 2001 and 16 July 2002, the Applicant and two other staff members, Mr. E. and Mr. M., lodged 11 appeals with the JAB, Vienna. On 29 July 2003, the JAB adopted its report, joining all appeals, and recommended, inter alia, that the Applicant's appeal submitted on 15 May 2002 was receivable. It decided that this appeal should be examined as to its merits by a separate JAB Panel, which was subsequently established.

II. On Saturday 8 December 2001, while the Applicant was on duty at Gate 1 of the VIC, an incident occurred between him and an IAEA staff member leaving the building. Apparently, the IAEA staff member had left the building without complying with the appropriate signing-out procedure and then twice ignored the Applicant's request to show his grounds pass. The second time, he simply walked away. The Applicant left his post to follow him and threatened to use force against him or to shoot if he did not stop. An argument followed, and the Applicant confiscated the staff member's grounds pass. The IAEA staff member reported the incident to the Applicant's supervisor, however, later, in the presence of other Security personnel, he admitted that he had made a mistake and apologized. The Applicant claims that, in the course of the incident, he injured his finger because the staff member had pushed him with full body force causing the door to close on his left hand: the IAEA staff member stated that he had definitely not touched or pushed the Security Officer, nor used force.

This incident led to a letter of reprimand being issued to the Applicant on 17 January 2002. According to the letter, the Applicant acted in violation of the work instructions issued to the staff of UNSSS, in particular, Section 5.06 of the UNSSS Manual, which establishes that "*Mentioning a firearm or motioning with it for the purpose of intimidating a person is a serious offence*".

In his appeal to the JAB, the Applicant contended (a) that the decision to reprimand him was disciplinary in nature; (b) that it was flawed in that his actions were justified and in compliance with the existing standing instructions and that it constituted discrimination and retaliation against him; and, (c) that he was denied due process in that the decision was taken in violation of Section 8.03 of the UNSSS Manual. He requested, inter alia, removal of any and all references to any "reprimand" from his Official Status file.

III. In its report dated 6 September 2004, the JAB considered that the Applicant had not been given the right to answer the charge against him under Section 8.03 of the Manual and that there was no evidence that he had been informed of the investigation, the review being carried out, or of the charges against him. Furthermore, the fact that the letter of reprimand was not signed by the Chief, UNSSS, or by the Chief of Section as it would normally have been, but by the Officer-in-Charge, UNOV, gave increased weight to the letter. If this was not just a "minor

incident” as stated by the Chief, UNSSS, it should have been referred to the JDC, giving the Applicant access to the procedural safeguards of the disciplinary process. The JAB concluded that, even if the Applicant should have handled the incident more sensitively, there was no clear breach of the rules. Moreover, the handling of the incident and its review by the Service did not fully respect the principles of due process. The JAB recommended, inter alia: (a) that the reprimand be withdrawn from the Applicant’s Official Status file and (b) that the JAB report and any subsequent decision by the Secretary-General be added to his file. The Secretary-General accepted the JAB’s recommendations on 17 February 2005.

IV. The Tribunal takes note of staff rule 110.3 (b) (i) and Sections 5.06 and 8.03 of the UNSSS Manual which provide that a reprimand may be written or oral; that it needs to be taken by a supervisory official; and, that it is not a disciplinary measure. Clearly, when issuing reprimands, the Administration has a duty to maintain the procedural standards expected from the United Nations. This is emphasized in Judgement No. 1176, *Parra* (2004), paragraph IV:

“[T]his does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member’s file. The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or natural justice, which implies, inter alia, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (*audi alteram partem*). The Tribunal notes that the letter of reprimand was issued on the same day that the Security Officer had submitted his report. The Tribunal thus finds that such an opportunity was not extended to the Applicant prior to issuing this reprimand, thus violating this fundamental principle.

...”

V. In the instant case, the Administration complied with the recommendations made by the JAB: the reprimand was indeed taken out of the Applicant’s file and the JAB’s report was placed therein. These issues are thus moot. However, at the same time, the Tribunal is of the view that for the failure of the Administration to follow the relevant rules in the handling of the incident, which violated the Applicant’s due process rights - as the Respondent himself admits - he should be paid compensation. It recalls in this regard Judgement No. 1122, *Lopes Braga* (2003):

“VI. The Tribunal has previously held that formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant’s right to due process, for which the Applicant should be compensated. (See Judgement No. 1047, *Helke* (2002).)”

VI. With regard to the Applicant’s claims of discrimination, prejudice, harassment and favouritism, the Tribunal concurs with the Respondent’s position that these issues are moot in view of the Secretary-General’s decision to remove the reprimand from the Applicant’s file and to insert therein the JAB report. It also wishes to

point out that these issues were previously raised in the context of Judgement No. 1329 (2007) and recalls that it held in paragraph X of that Judgement that

“when an applicant presents, at his own risk, a disorganized application, then he should be aware that errors of fact may occur. It would be an abuse of procedure for anyone addressing him or herself to an authority in a confused manner to claim later that the authority thus addressed did not understand the facts with clarity.”

VII. Concerning the Applicant’s request that a confidential investigation be conducted into the UNSSS, the Tribunal recalls that it has already dealt with this issue in Judgement No. 1329 (*ibid.*) and that this issue is thus *res judicata*.

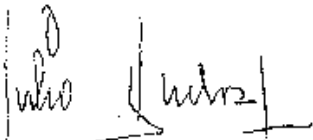
VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of one month’s net base salary at the rate in effect at the time of his separation from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

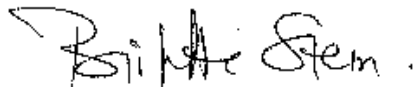
(Signatures)



Spyridon **Flogaitis**
President

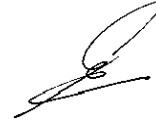


Julio **Barboza**
Member



Brigitte Stern
Member

New York, 21 November 2007



Maritza Struyvenberg
Executive Secretary