



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/JFO/2009/17

Judgment No.: UNRWA/DT/2011/014

Date: 2 November 2011

Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

AL FAYOUMI

v.

COMMISSIONER GENERAL
OF THE UNITED NATIONS RELIEF AND
WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
W. Thomas Markushewski

Introduction

1. This is an application by Raed Yahya Al Fayoumi (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his appointment during his probationary period.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulations 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the Joint Appeals Board (JAB) has been submitted to the Commissioner-General.

Facts

4. Effective 27 February 2008, the Applicant was employed by the Agency as a Teacher, at Jofeh Preparatory School, in Jordan, on a fixed-term appointment which was subject to a probationary period of 12 months.

5. Concerns raised by the Head Teacher (“HT”) about the Applicant’s performance and behaviour, including his inability to manage his classes, improper teaching, recurring absences from classroom periods and the use of corporal punishment led to negative conclusions by a fact-finding committee which were communicated to the Applicant by letter dated 22 May 2008. More complaints followed in the month of June 2008, with the Applicant admitting to inflicting corporal punishment on a student, an allegation supported by witness statements.

6. By Inter Office Memorandum the Applicant was transferred to another preparatory school, effective 16 August 2008.

7. On 17 August 2008, the Applicant was given a Letter of Censure (a disciplinary measure) and suspended without pay for three days for not improving his behavior and performance, and for inflicting corporal punishment on a 7th grade student.

8. By letter dated 19 August 2008, the Applicant was reprimanded for disregard of his duties and negligence leading to the loss of and damage to computer lab equipment under his supervision.

9. In his Periodic Evaluation Report (“PER”) for the period ending 28 February 2009, the Applicant was rated overall with an unsatisfactory performance despite “intensive efforts employed by all concerned in Education to help the staff member carry out his duties satisfactorily during the last year, regrettably all were in vain”.

10. By letter dated 8 April 2009, the Applicant was informed that, having “failed to provide satisfactory performance during [his] probationary period”, his appointment would be terminated effective 1 May 2009.

11. By letter dated 7 May 2009, the Applicant requested administrative review of the decision to terminate his appointment. By letter dated 21 May 2009, the Director of UNRWA Operations, Jordan, informed the Applicant that the decision would not be changed.

12. On 18 June 2009, the Applicant filed an application.

Applicant's contentions

13. The Applicant contends that:

- i. he was a new teacher without any experience and did not receive instruction or guidance about how to deal with difficult students;
- ii. the first school (Jofeh school) to which he was assigned, had aggressive students who lacked discipline;
- iii. his performance and conduct improved after he was transferred to another school.

The Applicant requests reinstatement and an unspecified amount of compensation.

Respondent's contentions

14. The Respondent essentially contends that the decision to terminate the Applicant's appointment was properly made, and that the remedy sought has no legal basis. The Respondent requests that the Tribunal dismiss the application in its entirety.

Considerations

Main issues

Was the decision to terminate the Applicant's fixed-term appointment properly made?

15. Looking at the legal and administrative framework in this case, the Tribunal notes that Area Staff Regulation 4.2 provides:

Appointments shall be subject to the satisfactory completion of not less than one month's probationary service.

16. The purpose of probation is made clear in Area Staff Personnel Directive A4/Part VII:

3. The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance.

17. As for termination, Area Staff Rule 109.1, paragraph 1, defines it as follows:

Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member's probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

18. The Applicant was well aware of the fact that he was under probation. Indeed, his Letter of Appointment specifies in paragraph 4 that:

This appointment shall be subject to probationary service of **twelve months** effective **27.2.2008** and may be terminated by the Agency at its sole discretion and without notice at any time during this probationary period. Subject to your satisfactory work performance during this probationary period, this appointment shall be confirmed by the Agency in writing. [Emphasis in the original]

19. Although the United Nations Appeal Tribunal gives the Agency and the Commissioner-General broad discretionary authority in the application of the Agency's Staff Regulations, Rules and other issuances, it provides that this authority will not be disturbed unless the decision was arbitrary or capricious, was motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law. More specifically, with respect to the authority to terminate an appointment during the probationary period, the United Nations Appeal Tribunal in *Asaad* 2010-UNAT-021 paragraphs 10 and 11, provides that:

The Staff Rules applicable to staff members on probation provide that the Administration has broad discretionary authority to terminate the appointments of such staff during the probationary period. They provide that a probationary appointment may be terminated without advance notice at any time.

Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration. We would add that its decisions must not be based on erroneous, fallacious, or improper motivation.

20. The Applicant is reminded that the burden of proof rests on him when he alleges that the exercise of the Respondent's discretionary authority was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law, and that he must adduce convincing evidence to substantiate his allegations.

21. The Tribunal takes note of the fact that no evidence - convincing or otherwise - has been brought forward by the Applicant in support of his allegations in this matter.

22. Rather, the record in the file shows that the decision to terminate the Applicant's probationary appointment was based on the Applicant's shortcomings, properly documented through correspondence, between May 2008 and April 2009. His failings are related as much to his teaching skills and behaviour in the classroom as to his supervisory skills in the computer laboratory. The record also shows that the Agency made efforts to help him improve, yet he continued to perform at a less than satisfactory level, and failed to meet the requirements of the post during the probationary period.

23. The Applicant also alleges that the HT believed his performance had improved and had, in his PER, rated him "2/5 which means that [his] performance is satisfactory, but under the pressure and insistence of the Chief Field Education Programme and Area Educational Officer who returned the periodic report to the H.T and ordered him to change his evaluation from 2/5 to 1/5". The Applicant is reminded that even if his rating

of 2/5 had not been changed, it would still be reflective of a staff member who maintains only a minimum standard of efficiency.

24. Finally, the Applicant is reminded that although he did not sign his PER, the HT noted that it had been discussed with him, and refusal to sign a PER does not vitiate its contents. Furthermore, the Applicant has failed to produce any evidence that the HT considered his performance to have improved or to be satisfactory.

25. The Tribunal finds that the Applicant's record of performance - properly evaluated and reported - establishes that the broad discretionary authority accorded to the Agency in respect of termination of appointments during probationary periods was properly exercised. The Tribunal notes that the Applicant's 12-month probation ended on or around 27 February 2009 pursuant to his Letter of Appointment; however, his probationary appointment was not terminated until 8 April 2009. Under similar circumstances, the former UN Administrative Tribunal in Judgment No. 952, *Hamad* (2000) held that a probationary post cannot be confirmed automatically, but instead requires an affirmative act of confirmation by the Administration. Therefore, although the 12-month probationary period in the Applicant's Letter of Appointment had passed, his post remained probationary until the date of his separation as the Agency had taken no action indicating its intent to confirm.

26. The Tribunal also finds that the Applicant has failed to provide any evidence of arbitrariness, prejudice, extraneous factors, procedural irregularity or error of law on the part of the Respondent.

Is there any legal basis for the remedy sought by the Applicant?

27. With respect to the Applicant's request to be reinstated and paid compensation, the Tribunal finds that there is no basis for his claim as the decision to terminate the Applicant was properly made during his probationary appointment, and it complied with

the applicable Area Staff Regulations, Rules and other issuances. The contested decision was based on the properly formed conclusion that the Applicant failed to demonstrate his overall performance as a Teacher.

Conclusion

28. There is no merit to this application and it is dismissed in its entirety.

(Signed)
Judge Bana Barazi

Dated this 2nd day of November 2011

Entered in the Register on this 2nd day of November 2011

(Signed)
Laurie McNabb, Registrar, UNRWA DT, Amman