Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

NAJJAR

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 Markusewski
Introduction

1. This is an application by Issam Mohammed Najjar (the "Applicant") against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the "Respondent") to terminate his appointment for misconduct.

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 Regulation 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 judgments 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 1 August 2000, the Applicant was engaged by the Agency as a driver in Saida, Lebanon on a fixed-term full-time monthly paid appointment. On 1 August 2004, the Applicant’s contract was converted from category “Z” to “X”.

5. On 30 May 2008, a preliminary internal investigation was conducted, following reports of discrepancies in food ration distributions on 23 May 2008. It concluded that the Applicant was involved in the 23 May losses and recommended the establishment of a Board of Inquiry.

6. On that same day, 30 May 2008, the Applicant was informed by the Field Administration Officer/Lebanon ("FAO/L") that, in accordance with the provisions of
Staff Rule 110.2, he was suspended from duty without pay effective immediately, pending the investigation into these losses.

7. By letter dated 2 June 2008 to the FAO/L, the Applicant objected to the decision to suspend him from duty without pay, adding that he looked forward to “an investigation related to the issue” as “he has the right to defend himself and his reputation”.

8. By letter dated 17 July 2008, the FAO/L replied to the Applicant’s letter dated 2 June 2008 taking note of his objection, however reminding him that suspension from duty without pay is without prejudice to his rights and is customary whenever an investigation is conducted.

9. In August 2008, the Internal Investigation Team (the “IIT”) conducted an official investigation into the 23 May 2008 ration discrepancies found in the distribution process. The IIT consisted of four members, and had been established based on the recommendation of the preliminary internal investigation of 30 May 2008. The IIT interviewed thirteen area staff members and examined the available documentary evidence.

10. On 4 October 2008, in a joint memorandum with the two other area staff members who had similarly been suspended from duty in connection with the investigation of these losses, the Applicant complained to the FAO/L that the suspension was not based on concrete evidence.

11. On 6 - 7 October 2008, the report of the Internal Investigation Team (the “IIT”) was submitted to the Director of Human Resources and Department of Legal Affairs.

12. By letter dated 14 October 2008, the Director of UNRWA Affairs, Lebanon (“DUAL/L”) informed the Applicant of the IIT’s findings, concluding that:
The Board is sure, based on substantial evidence, as the 50 parcels were purposefully loaded and not accounted for after the distribution, that you were involved in embezzlement of Agency food parcels which were meant for the refugees.

The DUA/L invited the Applicant to comment on the IIT’s conclusion no later than 10 days, from the date of receipt of his letter.

13. By memorandum from the Applicant to the DUA/L dated 16 October 2008, the Applicant insisted on his innocence.

14. By letter dated 13 November 2008 from the Officer-in-Charge/UNRWA Affairs, Lebanon, the Applicant was informed that, because of his involvement in the embezzlement of Agency food parcels, his appointment was terminated for misconduct under Area Staff Regulation 10.2 and Area Staff Rule 110.1, effective from the date of his suspension on 1 June 2008.

15. By letter dated 17 November 2008 to the DUA/L, the Applicant requested a review of the administrative decision to terminate his appointment for misconduct.

16. By letter dated 27 November 2008, the DUA/L responded to the Applicant that the administrative decision of 13 November 2008 to terminate his appointment for misconduct was confirmed, noting that the decision was taken after a full investigation and in accordance with due process.

17. By letter dated 23 December 2008, the Applicant submitted his appeal to the JAB.

Applicant’s contentions

18. The Applicant contends that:

(i) he has had good performance and has been granted annual increments;
(ii) the investigation which resulted in his termination for misconduct took only 15 minutes; and
(iii) there is a conspiracy against him by staff members in charge of food distribution.

The Applicant requests the Tribunal to order the rescission of the Respondent's decision to terminate his appointment and reinstatement to his post.

Respondent's contentions

19. The Respondent essentially contends that:

(i) the decision to terminate the Applicant's appointment was properly made;
(ii) the decision to terminate the Applicant's appointment was not so disproportionate or unwarranted as to amount to an injustice; and
(iii) the remedy sought by the Applicant has no legal basis.

The Respondent requests the Tribunal to dismiss the application.

Considerations

Main issues

Was the Respondent's decision to terminate the Applicant's appointment properly made?

20. It is important to look at the legal and administrative framework applicable in the case at bar. Former Area Staff Regulation 10.2, in effect during the material time, provides that:

The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.
21. The Commissioner-General has delegated to the Field Director the authority to terminate area staff serving in the field, pursuant to Area Staff Personnel Directive No. A/10 ("PD A/10"), paragraph 3.2.

22. In relation to what is "unsatisfactory" for the purposes of Area Staff Regulation 10.2, PD A/10, Part 1, paragraph 4, provides:

4. Policy

4.1 Disciplinary measures will normally be imposed for willful misconduct, irresponsible conduct, or willful failure to perform assigned duties or to carry out specific instructions.

* * *

4.3 ... the following are examples of instances where disciplinary measures would be normally imposed:

A. Refusal to carry out and discharge the basic duties and obligations specified in the Staff Regulations, Rules, and Directives of the Agency, and in particular, departures from the standards of conduct specified in Chapter I of the Staff Regulations;

B. willful or irresponsible failure to comply with contractual obligations;

C. willful or irresponsible failure to comply with written or oral instructions of supervisors;

D. repeated minor infractions.

23. The disciplinary measures which may be taken against staff members whose conduct is unsatisfactory are provided in Area Staff Rule 110.1, paragraph 1:

Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct,
provided that suspension pending investigation under staff rule 10.4 or under rule 110.2 shall not be considered a disciplinary measure.

24. On 30 May 2008, the Respondent informed the Applicant that he would be suspended without pay pending investigation, noting that such procedure is without prejudice to his rights.

25. Upon the outcome of the ITT investigation, on 13 November 2008, the Applicant’s appointment was terminated for misconduct under Area Staff Regulation 10.2 and Area Staff Rule 110.1 with effect from the date of his suspension on 1 June 2008.

26. Following the United Nations Appeals Tribunal ("UNAT") in Hanlya 2010-UNAT-024 and Maslamani 2010-UNAT-028, when reviewing a disciplinary measure to terminate a staff members appointment for misconduct the Tribunal will consider: (i) whether the facts on which the sanction is based have been established; (ii) whether the established facts qualify as misconduct; and (iii) whether the sanction imposed is proportionate to the offence. Noting however, as held by UNAT in Abu Hamda 2010-UNAT-022:

As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.

*Have the facts on which the sanction is based been established?*

27. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based were reasonably established. Indeed, a preliminary investigation was held on 30 May 2008, testimonies were taken, and recommendations were made to, among other things, set up an internal investigation team. The Applicant contends that “the investigation took only 15 minutes”. However, the record in the file shows that in August 2008 the IIT, composed of a panel of four, interviewed 13 staff members including the three accused of embezzlement and examined the documentary evidence. The Applicant has not presented any evidence - convincing or otherwise - to
substantiate his claim other than hearsay which in any event fails to explain the 50 parcels which were loaded but unaccounted for. The record also indicates that in the course of the investigation of the IIT, the Applicant was made fully aware of the allegations and evidence against him, and he was accorded the opportunity to rebut them and failed to produce evidence in his defence.

28. The Agency - suspecting previous fraud in the distribution of food rations and having been provided with credible evidence that the Applicant was about to misappropriate Agency assets - had set in motion on 25 May 2008 a “sting” operation, unsealing the truck loaded and recounting the contents, finding 50 additional ration parcels unrecorded, resealing the truck and awaiting the distribution reports, which failed to account for the extra parcels.

29. The IIT’s conclusion is supported by corroborating testimony from another Distribution Team Leader who had witnessed the Applicant “violat[ing] the rules many times by involving himself in the distribution of the parcels, when his job was only limited to transporting the distribution staff members”. The Applicant submits, “that there is a conspiracy plotted between responsible is [sic] distribution part and the distribution team (emphasis in original). However, the Applicant has not provided any evidence to support this allegation Applicants are reminded that in the absence of tangible evidence, unsubstantiated allegations will not be examined.

30. For the above reasons, the Tribunal finds that the facts on which the sanction was based have been reasonably established.

*Do the established facts amount to misconduct?*

31. The former United Nations Administrative Tribunal provides that, to reasonably establish the facts on which disciplinary measures are based, “[t]he Administration is not required to prove its case beyond reasonable doubt”, as affirmed by the former United Nations Administrative Tribunal in Judgment No. 1022, *Araim* (2001), paragraph V, the
Tribunal finds that the Respondent duly exercised his broad discretionary authority with regard to disciplinary matters according to Area Staff Regulation 10.2, Area Staff Rule 110.1 and Area Staff Personnel Directive No. A/10 when the Agency terminated the Applicant’s appointment for his involvement in the embezzlement scheme.

32. The Applicant is reminded that “[i]t is the duty of every staff member to safeguard the property of his or her organization”, as held by the United Nations Appeals Tribunal in Abu Hamda, 2010-UNAT-022.

Was the Respondent’s decision to terminate the Applicant’s appointment for misconduct so disproportionate or unwarranted as to amount to an injustice?

33. As the facts on which the sanction has been based have been reasonably established and the Applicant has been properly found to have engaged in misconduct, the Tribunal must now examine if the Respondent’s decision to terminate the Applicant’s appointment was not so disproportionate as to amount to an injustice. In the case at bar, the misconduct which the Applicant was found to have engaged in was the embezzlement of food rations. While the Applicant submits that, “I’m not responsible for the work in distribution part in all its duties. My work is only to transfer the team to place of distribution …” [sic] the record of the file indicates witness testimony that the Applicant repeatedly violated the rules by involving himself in the distribution process. The Tribunal is of the belief that the disciplinary measure to terminate the Applicant’s appointment for embezzling food rations intended for the Agency’s refugee beneficiaries, was not so disproportionate as to amount to an injustice.

34. The Tribunal takes due note of the Applicant’s statement that he had a good performance and had received annual increments proving that his performance was good. However, these elements in his favour are prior to the discovery of his misconduct, and they do not make up for or outweigh the fact that these 50 food rations were destined for utterly destitute refugees.
Was the Respondent's decision exercised arbitrarily or capriciously, motivated by prejudice or other extraneous factors?

35. The question to ask now is whether the Respondent's decision to terminate the Applicant's appointment for misconduct was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, was flawed by procedural irregularity or error of law, as held in Assad 2010-UNAT-021. The Tribunal notes that a preliminary internal investigation was conducted, followed by a properly constituted IIT, which duly submitted an investigation report after interviewing 13 staff members and examining the relevant documentation. The Tribunal fails to see any improper motivation or procedural error in this sequence of events, and is reminded of the jurisprudence of the United Nations Administrative Tribunal Judgment No. 834, Kumar (1997) clearly stating that the Applicant bears the burden of proof and must produce convincing evidence that the contested decision was tainted and that his allegations of conspiracies or plots against him are unsubstantiated. The Applicant has failed to produce such evidence.

36. Moreover, the Applicant has failed to provide any convincing evidence that the exercise of the Respondent's discretionary authority to terminate his appointment for misconduct was arbitrary, motivated by prejudice or other extraneous factors, or flawed by procedural irregularity or error of law.

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

37. Considering that:

(i) the facts on which the disciplinary measure was based have been legally established;
(ii) these facts legally amounted to misconduct;
(iii) the disciplinary measure imposed was not disproportionate to the offence.
(iv) the discretionary authority of the Respondent was not tainted by evidence of procedural irregularity or prejudice,

the Applicant's request for relief, i.e. the rescission of the Respondent's decision and the Applicant's reinstatement in his post, has no basis in fact or in law.

Conclusion

38. The Tribunal finds no merit to this application. The application is dismissed in its entirety.

Judge Bana Barazi

Dated this 2nd day of February 2012

 Entered in the Register on this 2nd day of February 2012

Laurie McNabb, Registrar, Amman