Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

MANSOUR

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 Markushevski
Introduction

1. This is an application by Abdul Karim Mansour (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 censure him and to transfer him.

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 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. At the time of the events, the Applicant who has been at the employ of the Agency since 1992, was working as Head Storekeeper at the main warehouse in Irbid, Jordan.

5. Following a complaint about theft of UNRWA supplies by staff members in the general stores, a Fact Finding Committee (the “FFC”) was established on 3 December 2007. Upon the Applicant’s return from Special Leave Without Pay, the FFC interviewed him and presented the allegations against him.

6. In a report dated 19 May 2008, the FFC set out its findings with respect to the Applicant, and noted that although he denied all of the allegations regarding his involvement in the theft of UNRWA supplies, he nonetheless admitted that “he saw many staff members (did not remember their names) used to take parts of
the surveyed computer and other items which are located next to his office, he mentioned that this is illegal but he did not report such incidents because he did not want to get into conflict with other staff members” [sic].

7. By letter dated 29 May 2008, the Applicant was informed of the FFC’s conclusion that he had observed but failed to report wrongdoings regarding the handling of UNRWA material. He was invited to respond by 9 June 2008.

8. By letter dated 2 June 2008, the Applicant confirmed that staff members and laborers had taken scrap material from the yard.

9. By letter dated 4 August 2008, the Field Administration Officer found that the Applicant’s irresponsible attitude could not be accepted from a Head Storekeeper working with the Agency and consequently decided to serve him with a letter of censure and to transfer him to another duty station.

10. By letter dated 27 August 2008, the Applicant requested a review of the decision to censure and transfer him.

11. By letter dated 31 August 2008, as agreed upon between the Applicant and the Agency, the Applicant was transferred to the post of clerk “A”, grade 7, in the Department of Administration, effective 1 September 2008, and was assured that the transfer would not affect his then present grade, step, or salary and that “the transfer is a temporary one and until a permanent solution is found”.

12. By letter dated 25 September 2008, the Deputy Director of UNRWA Operations, Jordan informed the Applicant of the outcome of his request for review. The decision was maintained.

13. On 20 October 2008, the Applicant filed an application with the JAB.

14. By letter dated 20 January 2009, the Applicant requested to be transferred to the post of Area Administration Clerk, Zarqa.

15. By letter dated 5 February 2009, the Applicant was informed that his request was denied.
16. By letter dated 29 March 2009, the Applicant was transferred to the post of Senior Clerk at the Central Pharmacy effective 1 April 2009, with no change to his grade, step or salary.

17. Without leave, by memorandum dated 13 April 2009, the Applicant submitted supplementary material to the JAB.

Applicant’s contentions

18. The Applicant contends that:

(i) he was not responsible for scrap material outside the store;
(ii) scrap material outside the store is the administration’s responsibility;
(iii) the administration should have secured the scrap material.

19. The Applicant requests the Tribunal to order the Respondent to rescind the decision to censure and transfer him.

20. Furthermore, in his supplementary filing of 13 April 2009 to the JAB, the Applicant claims that:

(i) the refusal of the Agency to accede to his request to be transferred to the post of Area Administration Clerk, Zarqa is evidence of a conspiracy against him;
(ii) decisions were taken against him for personal reasons;
(iii) he was not notified when the post of Area Administration Clerk, Zarqa became vacant;
(iv) he was more qualified for that post than the person who was transferred to it.

21. The Applicant also requests the Tribunal to:

(i) investigate the allegations made in his supplementary filing;
(ii) obtain the results of written tests for posts the Applicant has applied to and compare his results with those of successful candidates;
(iii) conduct an investigation into the selection of the candidate who was transferred to the post of Administration Clerk, Zarqa in 2009.
Respondent’s contentions

22. The Respondent contends that:

(i) the decision to censure and transfer the Applicant was properly made;
(ii) the issues raised in the supplementary material are not receivable;
(iii) the appeal against the decision not to transfer the Applicant to the post of Administration Clerk, Zarqa is time-barred;
(iv) the appeal against the decision to transfer the Applicant to the post of Senior Clerk, Central Pharmacy, is not receivable;
(v) the remedies sought by the Applicant have no legal basis.

23. The Respondent requests the Tribunal to dismiss the application, including the supplemental filing, rejecting each and all of the Applicant's pleas and denying the application in its entirely.

Considerations

Was the Respondent's decision to censure and transfer the Applicant properly made?

24. It is important to look at the legal and administrative framework applicable in the case at bar. Area Staff Regulation 10.2 in force at the time of the facts provides that:

The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

25. Pursuant to Area Staff Personnel Directive No. A/10/Rev.1, the Commissioner-General has delegated to the Field Office Directors the authority to impose disciplinary measures, who may delegate it in turn to Field Administration Officers.

26. With regard to what is “unsatisfactory” for the purpose of Area Staff Regulation 10.2, Area Staff Personnel Directive No. A/10/Rev.1 provides:

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

* * *

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

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

B. wilful or irresponsible failure to comply with contractual obligations …

27. 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 …

28. With regard to written censure, Area Staff Personnel Directive No. A/10/Rev.1 provides:

7.1 A written censure is a letter addressed to a staff member in which he/she is advised of serious shortcomings in behavior. The necessity for a written censure may arise from a single incident or from repeated verbal or written reprimands to a staff member. A written censure may or may not be combined with suspension without pay or demotion, as circumstances warrant.

7.2 A written censure contains a warning that, if no improvement is forthcoming (if necessary within a stated period of time), other disciplinary measures or administrative action (e.g. transfer to another post) may be taken.

7.3 ... Two or more written censures should lead to further disciplinary measures up to and including separation from service.

29. By memorandum dated 27 January 2003 to all area and international staff, the Commissioner-General promulgated the International Civil Service
Commission’s 2001 “Standards of Conduct for International Civil Service”, which provides the following with regard to the duty to report violations:

19. It must be the duty of international civil servants to report any breach of the organization’s rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions.

30. Following the United Nations Appeals Tribunal in Haniya 2010-UNAT-024 and Maslamani 2010-UNAT-028 when reviewing a disciplinary measure, 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 the United Nations Appeals Tribunal 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 was based been reasonably established?

31. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based have been reasonably established. Indeed, the FFC was established on 3 December 2007. Upon the Applicant’s return from Special Leave Without Pay, the FFC interviewed him and presented the allegations and evidence against him. On 19 May 2008, the FFC issued a report setting out its findings with respect to the Applicant, who was accorded the opportunity to rebut the allegations against him.

32. Rather, the Applicant voluntarily confessed to the FFC that he had seen staff members take Agency assets located next to his office and admitted that while he knew this to be illegal, he did not report the incidents because he did not want to get into conflict with other staff members.

33. The Tribunal notes that the Applicant’s statement that he knew the above activities were illegal, contradicts his justifications for not reporting such acts i.e.,
he was not responsible for scrap material outside the store and the administration should have secured the scrap material. It is clear that by the Applicant’s own admission, the facts on which the censure and transfer were based have been reasonably established.

Do the facts amount to misconduct?

34. The establishment of the facts regarding the Applicant’s full knowledge that illegal activities were taking place on the one hand and his failure to report such wrongdoings on the other hand legally support the characterization of misconduct. Even if the Agency had been responsible for the scrap items stored outside of the General Store or in charge of their security, it is still the Applicant’s duty to report the suspected misappropriation of Agency assets in conformity with the “Standards of Conduct for International Civil Service” referred to earlier. The Applicant has failed in his duty and is reminded that “it 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.

35. Noting that the “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, that the facts reasonably established the Applicant’s failure to abide by the standards of conduct required and expected of him as a staff member of the Agency and that these facts legally support the determination of misconduct.

36. The Tribunal finds that in censuring the Applicant, the Agency complied with the requirements of Area Staff Regulation 10.2, Area Staff Rule 110.1 and Area Staff Personnel Directive No. A/10/Rev.1. Furthermore, the Tribunal finds that in line with the Agency’s broad discretionary authority to manage and administer its staff, the transfer of the Applicant was a proper exercise of this authority, in line with Area Staff Regulation 1.2 which provides that:
Staff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency in or outside the area of its operations …

and with Area Staff Regulation 4.3 which states that:

Due regard shall be paid in the appointment, transfer and promotion of staff to the necessity for securing the highest standards of efficiency, competence and integrity.

Was the Respondent’s decision exercised arbitrarily, motivated by prejudice or flawed by procedural irregularity or error of law?

37. The question to ask now is whether the Respondent’s decision to censure the Applicant was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law, as held in Assad 2010-UNAT-021. The record in the file indicates that the Applicant’s admission of his failure to report observed wrongdoings was unsolicited as the FFC had convened to confront the Applicant with allegations regarding his involvement in a series of thefts, allegations which proved ultimately to be unfounded. The Applicant was accorded the opportunity to respond to the FFC’s conclusion that he had noticed but failed to report activities which he well knew to be illegal. The Agency took note of the Applicant’s admission and explanations and properly decided to censure, and transfer him.

38. The Tribunal fails to see any improper motivation or procedural error in this sequence of events, and is reminded of the jurisprudence of the former 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 by improper motivation or other extraneous factors. The Applicant has failed to produce such evidence about the investigation, the disciplinary decision to censure him or the discretionary administrative decision to transfer him.

Was the Respondent’s decision to censure and transfer the Applicant so disproportionate as to amount to an injustice?
39. As the facts on which the sanction was based have been established, as the Applicant has been properly found to have engaged in misconduct and as the decision to censure him was not flawed by arbitrariness or error of law, the Tribunal is of the opinion that the disciplinary measure to censure him - the lightest disciplinary sanction - was not so disproportionate or unwarranted as to amount to an injustice. As for the discretionary administrative decision to transfer the Applicant, the Tribunal fails to see any disproportion or injustice about this measure as his grade, step and salary remained unchanged.

40. When considering proportionality, the Tribunal takes special note of the nature of an Applicant’s post, as held by the United Nations Appeals Tribunal in Haniya 2010-UNAT-024. As Head Storekeeper, the Applicant was entrusted with a heightened duty of care to safeguard the Agency’s assets and he is reminded that his loyalty should go to the Agency, not to colleagues committing illegal acts.

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

41. Considering that:

(i) the facts on which the disciplinary measure was based have been reasonably established;
(ii) the facts legally amount to misconduct;
(iii) the Respondent’s decision to sanction the Applicant was properly made;
(iv) the disciplinary measure is not disproportionate to the offence;
(v) the discretionary authority of the Respondent was not exercised arbitrarily, neither tainted by evidence of improper motivation nor flawed by procedural irregularities or error of law.

the Tribunal finds that the relief sought by the Applicant has no basis in fact or in law.

Issues raised in the Applicant’s supplementary material

42. As a general rule, the Tribunal will not review additional claims which are not relevant to the contested decision.

43. However, for the Applicant’s information, the Tribunal reminds him that he filed his application on 20 October 2008 before the former JAB to challenge
the 4 August 2008 decision to censure and transfer him. And this is what this Judgment is about.

44. The Tribunal notes that in his additional submission dated 13 April 2009, as summarized in paragraph 20, the Applicant attempts to challenge administrative decisions distinct from those initially contested in his application and contained in the letter dated 4 August 2008. His application in this regard is non receivable since it is either time-barred or because a request for administrative review is missing.

45. This Tribunal thus summarily dismisses claims not raised by applicants in their initial application.

**Conclusion**

46. Given all the above, the Tribunal finds no merit to this application. The application is dismissed in its entirety.

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(Signed)

Judge Bana Barazi

Dated this 16th day of February 2012

Entered in the Register on this 16th day of February 2012

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(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman