ABU GHOSH

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 Sana Abu Ghosh (the “Applicant”) against the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “Respondent”), to reprimand, censure, transfer and suspend her without pay.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (the “JAB”) 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 JAB 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 in respect of which no report of the JAB has been submitted to the Commissioner-General.

Facts

4. Effective 5 September 1990, the Applicant was employed by the Agency as Science Teacher at Aida Preparatory Girls School, Hebron Area, the West Bank.

5. Effective 1 September 1996, the Applicant was transferred on promotion to the post of Head Teacher at Battir Elementary and Preparatory Girls School, Hebron Area. Subsequently, she was transferred as Head Teacher to Halhoul Basic Girls School.

6. By e-mail dated 18 September 2008 to the Director of UNRWA Operations, West Bank (“DUO/WB”), the Applicant requested Leave with Pay or temporary transfer to Jordan while keeping her post as Head Teacher, in order to pursue a PhD in Education in Amman, Jordan. She indicated that in reply to a previous request for a temporary transfer to Jordan, the Chief, Field Education
Programme, West Bank (“CFEP”) had suggested that she apply for Special Leave Without Pay (“SLWOP”), a suggestion which she rejected for financial reasons.

7. By letter to the Applicant dated 2 October 2008, the DUO/WB confirmed that the Agency did not provide financial assistance to staff pursuing doctoral degrees and that its policy has always been to offer SLWOP in such situations. The DUO/WB agreed with the CFEP and reiterated that the Applicant could elect to apply for SLWOP for one year, in which case she would be entitled to return to her current post or an equivalent post, or request a formal transfer to Jordan Field, in which case she would have to vacate her current post with no guarantee of return to a specific post. The DUO/WB also indicated that the options offered to the Applicant were the same as would be offered to any staff in similar circumstances.

8. On 24 November 2008, the Applicant was reprimanded by the Area Education Officer, Hebron (“AEO/H”) for reporting late without permission on 16 and 26 October and on 9, 16 and 23 November 2008, noting that with regard to her position as Head Teacher, her continued tardiness warranted the issuance of a written reprimand.

9. By an undated letter from the Applicant received by the AEO/H on 27 November 2008, the Applicant requested financial assistance, and permission to travel to Jordan every Friday and return to her duty station at 10:00 a.m. on Sundays, in other words to be absent on Saturdays and 2 hours on Sundays, in order to continue her PhD studies.

10. The Applicant was again late to her duty station on Sunday, December 14 2008.

11. By letter dated 15 December 2008 to the CFEP, the Applicant requested a review of the administrative decision of 24 November 2008 to reprimand her as well as acknowledging that she had been late to her duty station on the previous day. The Applicant further asked for permission to travel to Jordan every weekend and stated:
12. By letter dated 19 December 2008, the Field Administration Officer/West Bank censured the Applicant, noting *inter alia* that her absence from her duty station since 19 October 2008 had left the pupils unattended, that she had disregarded the advice of her immediate supervisor by continuing to absent herself, adding that that behavior was totally unacceptable of an UNRWA staff member and against standing regulations and rules. Consequently, he issued her a Letter of Censure and decided to transfer her to a teaching post in another school.

13. On 22 December 2008, the AEO/H advised the Applicant that as a result of her continued disregard of Agency instructions, her failure to comply with her basic duties and obligations as specified in the Area Staff Regulations and Rules and with expected standards of conduct, and her repeated absence from school, she was transferred from her Head Teacher post (where she was in a position of responsibility and a role model for the students) at Halhoul Basic Girls School to a teacher post at Beit Jala School. The AEO/H explained that the decision was made in accordance with Area Staff Regulation 4.3 providing 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” and with consideration for the proper functioning of the school and the welfare of its students, such transfer being without any change to the Applicant’s grade, step or salary.

14. By letter dated 24 December 2008 to the DUO/WB, the Applicant sought administrative review of the decision to censure her. She further sought approval for her request for leave for Jordan on Fridays, absence on Saturdays and return to duty on Sunday mornings at around 11:00 a.m.

15. By letter dated 31 December 2008, the DUO/WB responded that the Agency supported the Applicant’s initiative in pursuing a PhD but that since she was an UNRWA employee, she was bound to follow the established procedures for requesting and taking leave. The DUO/WB, recalling that she had approved the Applicant’s transfer to the post of teacher at a school near her home to give
her more flexibility in order to accommodate her studies, advised the Applicant to formally apply for SLWOP for the days she needed to be away in Jordan, adding that in due course, the Agency can find a position of head teacher for her to fill.

16. By e-mail dated 8 January 2009 to the DUO/WB, the Applicant sought administrative review of the decision to transfer her from Head Teacher to a teacher post.

17. By letter dated 12 February 2009, the DUO/WB warned the Applicant that in spite of meeting with her and informing her verbally and in writing of applicable regulations and rules and the need to comply with UNRWA’s policies concerning transfers and leave, the Applicant had continued to be absent without permission each Saturday and part of each Sunday, and she had not completed a leave application form and had not transferred to the school in Beit Jala.

18. By letter dated 16 February 2009 to the DUO/WB, the Applicant, for the second time requested administrative review of the decision to transfer her from Head Teacher to the post of teacher and cancellation of the reprimand and censure.

19. By letter dated 27 February 2009, the DUO/WB served the Applicant with a letter of suspension without pay for one week, indicating that she had failed to comply with the directives set out in her letter to her dated 12 February 2009, and had not reported to duty at Beit Jala School. Unless she resumed her duties within ten days at Beit Jala School and accounted for unauthorized absence, the Applicant, she wrote, would be considered as having abandoned her post.

20. By letter dated 12 March 2009, the Applicant resigned, stating that she wanted to continue her PhD studies. She further mentioned that she hoped to re-join UNRWA after earning her PhD. Effective 18 March 2009, the Applicant was separated from service with the Agency on resignation.

21. On 28 April 2009, the Secretary of the Joint Appeals Board received the Applicant’s undated appeal.
Applicant’s contentions

22. The Applicant contends that:

(i) the impugned decisions contradict Area Staff Personnel Directive No. A/5/Rev. 4, part II, and Area Staff Rule 105.2, paragraph 1.2.2, on study leave;

(ii) “my request for half a day on Sunday was rejected, while my immediate supervisor Area Education Officer is attending for PhD program in the same university, and claims that he has obtained an official approval for leave and is absent for duty on Fridays and Saturdays”.

The Applicant requests all administrative actions against her to be rescinded or, in the alternative, to be paid “all [her] UNRWA financial interest including [her] reward (pay of one month per year for 23 years of service).

Respondent’s contentions

23. The Respondent submits that:

(i) the decision to suspend the Applicant without pay is not receivable as she failed to request administrative review;

(ii) the elements of the application relating to the decisions to reprimand, censure and transfer the Applicant are time-barred;

(iii) the decisions to reprimand, censure and transfer the Applicant were properly made;

(iv) the remedies sought by the Applicant have no legal basis;

(v) with regard to her request of final payment for separation and indemnity entitlements, following her resignation on 12 March 2009, the Applicant received all of her separation benefits, including her Provident Fund credits, due upon resignation.

Considerations

24. The Tribunal will first examine whether the decision to suspend the Applicant without pay is receivable, and whether the decisions to reprimand, censure and transfer the Applicant are time-barred. If the Tribunal has reason to
interfere with these decisions, then it will examine them as well as other issues raised by the parties.

Main Issues

Is the element of the application relating to the Respondent's decision to suspend the Applicant without pay receivable?

25. Looking at the legal and regulatory framework, the Tribunal would like to cite former Area Staff Rule 111.3, in effect at the time of the facts, which provides that:

1. A staff member who wishes to appeal under the terms of staff regulation 11.1, shall as a first step, address a letter to the Agency's administration requesting that the administrative decision concerned, or the disciplinary action, be reviewed, and setting out his/her reasons for this request.

26. The former United Nations Administrative Tribunal (“UN Administrative Tribunal”), in Judgment No. 905, El-Far (1998), paragraph III, held that:

It is quite clear that the number of cases in which there are grievances and which are submitted for administrative review by the Secretary-General is greater than the number of those that reach the JAB or even the Tribunal. This proves the importance of administrative review in dissipating dissatisfaction and settling grievances. It is of the utmost importance that the Administration be given this opportunity … because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated … Administrative review under the UNRWA Area Staff Rules is not a mere embellishment or option. It is an integral part of internal procedures and the rules require that it be exhausted. The Staff Rules make administrative review an obligatory internal procedure, and not an optional one nor one that can be waived, except by the Respondent.

In Judgment No. 878, Orfali (1998), paragraph III, it also held that:

The JAB does not have the power to waive non-compliance with the requirement of requesting administrative review.

And, in Judgment No. 571, Noble (1992), paragraph V, it affirmed that:
… the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision…renders any further consideration of that decision by the Tribunal beyond its competence.

27. The United Nations Appeals Tribunal has affirmed that the United Nations Dispute Tribunal does not have jurisdiction *ratione materiae* over complaints that were not subject to administrative review or management evaluation, where administrative review was a mandatory step under the relevant staff rules, *Crichlow* 2010-UNAT-035, and further that this preliminary step must be exhausted before the jurisdiction of the United Nations Dispute Tribunal can be invoked, *Planas* 2010-UNAT-049. The United Nations Appeals Tribunal has also held that the United Nations Dispute Tribunal cannot waive time limits for decision review, *Costa* 2010-UNAT-036.

28. The Tribunal notes that the Applicant, who was suspended without pay on 27 February 2009 and resigned on 12 March 2009, has not requested at any time administrative review of the Agency’s decision to suspend her without pay. The Tribunal also notes that the Respondent has not waived the requirement of administrative review in the Applicant’s case. Consequently, the Tribunal finds that the element of the application relating to suspension without pay is not receivable and that the Applicant, by her non-compliance with the relevant Area Staff Rules in effect at the time, has rendered consideration by the Tribunal of the decision to suspend her without pay beyond its competence.

*Are the elements of the application relating to the Respondent’s decisions to reprimand, censure and transfer the Applicant time-barred?*

29. In addition to paragraph 1 of former Area Staff Rule 111.3, quoted in paragraph 24 above, the Tribunal would also like to refer to paragraphs 2 and 3 of that Rule in regard to the manner and timing of request for administrative review:

2. This letter shall be sent within thirty days from the date on which the staff member receives written notification of the decision in question, and shall be addressed:

   * * *
(B) in the case of staff members of Field Offices, to the UNRWA Field Office Director in charge of the Field Office.

3. A staff member who wishes to appeal under the terms of staff regulation 11.1, after having sent a letter to the Agency’s administration in accordance with the foregoing provisions of this rule, shall submit a written appeal, specifying his/her allegations, to the Secretary of the Joint Appeals Board within the following time limits:

* * *

(B) In the case of staff members of Field Offices, within thirty days from the date of the receipt of a reply from the UNRWA Field Office Director, or, if no reply has been received from the latter within thirty days of the date of the staff member’s letter, then within the next thirty days.

30. Looking at the record, the Tribunal notes that:

(i) on 15 December 2008, the Applicant requested review of the 24 November 2008 decision to reprimand her,

(ii) on 8 January 2009, the Applicant requested review of the 19 December 2008 decision to transfer her,

(iii) on 24 December 2008 and then for the second time on 16 February 2009, the Applicant requested review of the 19 December 2008 decision to censure her.

Furthermore, the Applicant’s request dated 16 February 2009 for administrative review of the decision to censure her is a repeat of her request of 24 December 2008 as well as her request for administrative review of the decision to transfer her dated 8 January 2009. The Tribunal would like to remind the Applicant that according to the jurisprudence of the United Nations Appeals Tribunal, repeated submissions do not toll the deadlines for contesting the decision or give rise to a new administrative decision, thereby restarting the time period, *Sethia* 2010-UNAT-079.

31. Having not received a response by, respectively:

(i) 15 January 2009 (regarding the Letter of Reprimand);
(ii) 8 February 2009 (regarding the Transfer); and

(iii) Either 24 January 2009 or 18 March 2009 (Letter of Censure);

in other words 30 days after each of her letters, the Applicant had therefore until:

(i) 15 February 2009 to file her appeal contesting the reprimand;

(ii) 10 March 2009 to file her appeal challenging the transfer;

(iii) 24 February 2009 or even 18 April 2009 to file her appeal regarding the censure.

However, as evidenced in the record, the Applicant’s undated appeal was received by the JAB on 28 April 2009.

32. The Tribunal would like to point out that the United Nations Appeals Tribunal has consistently reaffirmed the importance of observing the time limits prescribed for the various stages of the appeal process, noting that time limits are of utmost importance for ensuring the smooth functioning of any administration and must be interpreted restrictively, Mezoui 2010-UNAT-043.

33. Former Area Staff Rule 111.3, paragraph 4, provides that the Joint Appeals Board may, in its discretion, waive the time limits in former Area Staff Rule 111.3 only in exceptional circumstances. However, the burden is on the Appellant to demonstrate that he/she was prevented from lodging his/her appeal in time due to “serious reasons” or to “circumstances beyond [his] control”, as held by the United Nations Appeals Tribunal in Diagne et al. 2010-UNAT-067.

34. Looking at the record, the Tribunal finds that the Applicant has failed to comply with the time limits set out in Area Staff Rule 111.3 and to demonstrate that she was prevented from submitting her application in time due to serious reasons or to circumstances beyond her control. Consequently, the Tribunal finds that the elements of the application relating to the Respondent’s decisions to reprimand, censure and transfer the Applicant must be dismissed *ratione temporis* as non-receivable by the Tribunal.

35. Having determined that one element of the application (suspension without pay) is not receivable and that the other elements (reprimand, censure and
transfer) are time-barred, the Tribunal does not consider it necessary to examine the additional issues raised by the parties.

Conclusion

36. For the reasons provided above, the application is dismissed.

(Signed)
Judge Bana Barazi
Dated this 26th day of March 2012

Entered in the Register on this 26th day of March 2012

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