Before:    Judge Bana Barazi

Registry:  Amman

Registrar: Laurie McNabb

AL AZZEH

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. This is an Application by Muhannad Al Aziz (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 in the interest of the Agency.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (“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 at 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 JAB has been submitted to the Commissioner-General.

Facts

4. Effective 12 October 2005, the Applicant was appointed as a Teacher, Vocational Education on a Fixed-Term Appointment in the Hebron Area in the West Bank. On 7 November 2008, the Applicant was transferred on promotion to the position of Head Teacher at Dheisheh Boys School, in the Bethlehem Area, in the West Bank.

5. By e-mail dated 18 August 2009, the Hebron Area Officer informed the Assistant Field Legal Officer, West Bank that the Applicant had been arrested by the Palestinian Authority Military Intelligence (“PAMI”) on charges of sexually abusing two minor age boys.

6. On 19 August 2009, the Officer-in-Charge, Director of UNRWA Operations, West Bank (“OiC/DUO/WB”) wrote to the Director General, Palestinian Authority Police seeking information about the reasons for the
Applicant’s detention on 18 August 2009 including charges, if any, in order to assess “whether the facts constitute sufficient reason for applying appropriate disciplinary measures against him”.

7. By letter dated 19 August 2009, the OiC/DUO/WB suspended the Applicant with pay pending the outcome of an investigation into reports that the Applicant had been detained on 18 August 2009, stating:

    Kindly be advised that the Agency received confirmed reports that you were detained on 18 August 2009.

    An investigation into this incident is underway and, pending the outcome of the investigation, you are hereby suspended from duty with pay effective immediately in accordance with the provisions of Staff Rule 110.2. This suspension is without prejudice to your rights as a staff member.

    Should the investigation determine that you disregarded Agency practice, you may be subject to disciplinary measures in accordance with Staff Rules and Regulations, up to and including dismissal.

8. An investigation was conducted by the Field Legal Officer, West Bank (“FLO/WB”) on the events leading to the Applicant’s detention. The Applicant provided his responses to the FLO/WB in two interviews, on 25 August and 10 September 2009, denying having sexually assaulted the minors.

9. By memorandum dated 15 September 2009, the FLO/WB submitted to the Director of UNRWA Operations, West Bank (the “DUO/WB”) an investigation report setting out the facts, analysis of findings and his conclusion, i.e. that the Applicant failed to conduct himself in a manner befitting his status as an employee of the Agency, and the fact that he was a Head Teacher of a preparatory boys’ school only added weight to this conclusion.

10. By letter dated 23 September 2009, the DUO/WB provided the Applicant with a copy of the findings of the investigation as well as its conclusion and gave him fourteen days to provide a response to the allegations. In that letter, the Applicant was reminded that the investigation concluded the following:
(1) In the early hours of 18 August 2009 you were found in your private car in a remote area of Bethlehem in the presence of two boys, aged 14 and 15, including a Palestine refugee. You were detained and questioned by the Military Intelligence who alleged that the boys accused you of raping them, accusations which you denied. You were eventually released by the authorities without charge or trial on the same day.

(2) Leaving aside the unsubstantiated allegations of rape made against you, an analysis of your own account of events on 18 August 2009 reveals that you failed to conduct yourself in a manner befitting your status as an Agency employee, and took a course of action that adversely reflected on your status and integrity as an Agency employee under Area Staff Regulation 1.4. The fact that you are a Head Teacher of the Dehieshe [sic] Boys’ School, an important position of trust, adds significant weight to this conclusion.

(3) The investigation team is of the view that these incidents are a serious breach of Area Staff Regulation 1.4 which calls inter alia for staff “…not (to) engage in any activity that is incompatible with the proper discharge of their duties with the Agency.” Incidents such as these call for the imposition of disciplinary measure, up to and including dismissal from service.

11. By undated letter, the Applicant responded to the DUO/WB denying the accusations against him, and rejecting the findings of the investigation. His contentions are summarised below at paragraph 17.

12. By letter dated 23 November 2009, the DUO/WB responded to the Applicant, clarifying some of the issues raised by him and notifying the Applicant that his contract was terminated in the interest of the Agency. The DUO/WB also advised the Applicant that she did not find his response compelling enough to vitiate the findings of the Field’s investigation, drawing his attention to paragraphs 13, 14 and 17 of the investigation report. The DUO/WB concluded that she had lost confidence in the Applicant’s ability to continue to function as a Head Teacher, a post where integrity is of utmost importance.

13. By letter dated 17 December 2009 to the DUO/WB, the Applicant reiterated his innocence and requested a review of the impugned decision.
14. By letter dated 14 January 2010, the DUO/WB recalled a meeting held with the Applicant and his lawyer on 5 January 2010 when the Applicant had been given another opportunity to respond to the allegations against him. The DUO/WB confirmed to the Applicant the decision to terminate his employment in the interest of the Agency.

15. On 11 January 2010, the Applicant filed an appeal with the JAB.

16. On 15 May 2012, the Respondent filed his Reply with the Tribunal.

**Applicant’s contentions**

17. The Applicant contends that:

   (i) the investigation report based its analysis on what was claimed as documents from the military intelligence, and these documents were obtained illegally;

   (ii) the case against him ended vis-à-vis the police after it was referred to the Attorney General who concluded that there was no evidence to prove any of the accusations against him;

   (iii) the boys entered his car without permission;

   (iv) with regard to the investigation by the Agency:

      (a) the investigator pushed him to admit the allegations;

      (b) he was prevented from having a lawyer present;

      (c) the allegations against him were not proven;

      (d) the declaration was translated poorly;

      (e) he “suffered from a crisis in the delivery of [his] thoughts because of poor translation and urgency of the investigation”;

      (f) he was never informed by the investigator of the allegations against him;

      (g) the Agency decision was wrong as it relied on the interrogation report and on incorrect information provided by the Area Officer;

   (v) he did not break the context and spirit of Regulation 1.4, rather he embodied a positive image of the Agency by providing assistance to individuals.

The Applicant requests the Tribunal to order the Respondent to rescind the termination decision and to reinstate him to his former post as a Head Teacher.
Respondent’s contentions

18. The Respondent contends that:

   (i) the termination of the Applicant’s appointment was properly
       effected;
   (ii) the remedies sought by the Applicant have no legal basis.

Considerations

Main Issues

Was the Respondent’s decision to terminate the Applicant’s employment in the interest of the Agency properly made?

19. It is important to refer to the legal and administrative framework applicable in the case at bar and to the existing jurisprudence.

20. Area Staff Regulation 1.4 provides in relevant part that:

   Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their employment with the Agency.

21. Area Staff Regulation 9.1 provides that:

   The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

22. Former Area Staff Regulation 10.2 stipulates that:
The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

23. In relation to what is “unsatisfactory” for the purposes of Area Staff Regulation 10.2, Personnel Directive A/10, paragraph 4, provides the various disciplinary measures described in Chapter X of the Area Staff Regulations and in Area Staff Rules 110.1 and 110.2. In relevant part it states:

1. 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 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;

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

D. repeated minor infractions.

24. The Tribunal would like to recall that the Commissioner-General is accorded broad discretionary authority with regard to disciplinary matters, including the determination of what constitutes “misconduct”. As noted by the former United Nations Administrative in Judgment No. 1321 (2007), paragraph IX:

The Tribunal wishes to affirm, once again, that it is within the discretionary authority of the Secretary-General to decide whether a staff member has met the standards of conduct laid down in the Charter and the Staff Regulations & Rules.
25. Accordingly, while recognising that disciplinary matters are within the broad discretionary authority of the Commissioner-General, and that “where a termination of service is connected to any type of investigation of a staff member’s possible misconduct, it must be reviewed as a disciplinary measure”, the United Nations Appeals 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, Haniya 2010-UNAT-024.

Have the facts on which the sanction was based been reasonably established?

26. The Tribunal would like to recall the jurisprudence of the former United Nations Administrative Tribunal Judgment No. 1022, Araiim, (2001), paragraph V, providing that:

…the Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means “reasonably sufficient for legal action” (The Random House College Dictionary Revised edition 1982), in other words sufficient facts to permit a reasonable inference that a violation of law had occurred,…

27. The Tribunal notes that in addition to the Palestinian Authority’s investigation, an Agency investigation was conducted by the FLO/WB. The Applicant was interviewed twice by the FLO/WB, on 25 August and 10 September 2009, and an investigation report was produced on 15 September 2009.

28. In reviewing the record, the Tribunal notes that the direct evidence is not conclusive as to the Applicant having sexually assaulted the two minors in the early morning hours of 18 August 2009. The Tribunal also notes that the Applicant was released without charges following his detention and interrogation by the PAMI.

29. At the outset, the Tribunal would like to point out that it has not taken into consideration the statements given by the minors to the PAMI, as the Agency was unable to approach the minors to gather evidence given the sensitivity of the subject matter. Moreover, the Agency was unsuccessful in its attempt to obtain
such information from the police and alternatively, as noted by the FLO/WB’s investigation report, received the statements through an anonymous source:

Nevertheless, through the AO/H and A/FLO, we were able to obtain copies of the statements given by the minors to the Military Intelligence that night (these statements came from an individual from the community with ties to the Police on condition of anonymity; given their close match to the general facts – aside from the allegations of sexual assault offered by HT Azzeh, we have no reason to distrust their authenticity).

The Tribunal disagrees with such a conclusion. Given that these statements were obtained from an anonymous source and not the PAMI itself, it is impossible for the Tribunal to determine their authenticity and therefore they will not be included in the Tribunal’s considerations.¹ Rather, the Tribunal has considered the Applicant’s oral interviews with the FLO/WB as well as his written submissions to the DUO/WB and the JAB in regard to the facts of 18 August 2009.

30. The parties are not contesting the fact that the Applicant picked up two boys near the cinema in Bethlehem around 2:30 a.m. on 18 August 2009. According to the Applicant, the boys entered his car on their own accord after he approached them. While driving, the Applicant asked the two minors why they were in the street at such a time, they replied they were “bored” and evaded his questions as to where they lived. The boys then asked the Applicant to take them to the Gilo checkpoint (an Israeli checkpoint separating Bethlehem and Jerusalem). The Applicant then stopped the car and was approached by an old man and a police officer who both asked him if there was a problem. The Applicant responded that there was no problem and drove off with the two minors still in his car. The Applicant was arrested shortly after by the PAMI.

¹ While the Tribunal would normally remove such evidence from the official record, it is unable to do so as the alleged testimonies were not included in the Respondent’s Reply. Instead, where the Respondent refers to such alleged testimonies (paragraph 25 of Reply), the reference is the FLO/WB’s investigation report (which merely summarises the alleged testimonies) and not the source text itself. The Tribunal advises the Respondent in future cases to include all relevant documentation in his submission, otherwise the Tribunal will have no other choice but to deem it unreliable and exclude it from the record.
31. The Tribunal finds that the Applicant’s explanations make no sense. Moreover, the Tribunal finds several contradictions in the Applicant’s explanations for his actions. For example, in the Applicant’s first interview with the FLO/WB he stated: “[i]t was strange indeed to find two kids on the street at that time, that’s why I stopped to ask them what they were doing…” However, when the Applicant was asked by the FLO/WB in his second interview if he thought it was strange to stop at 2:30 in the morning for two individuals on the side of the road, the Applicant replied “No” stating, “I felt compelled to ask about these two people. I would have stopped for any hitchhiker”.

32. In fact, in an undated letter to the DUO/WB, the Applicant explained the custom of roadside assistance in Palestine:

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[t]he Palestinian society has its own customs. When a person stops his car to help any pedestrian who asks for help, the driver gives him the permission to get into the car just by stopping, and willingness to give assistance. The normal situation for the driver is to continue in his way, that is, the direction that takes him to the place he wants (my home).
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33. Given the above and the Applicant’s self-declared itinerary that he was heading home from the location where he had spent the evening, it stands to reason that after picking up the boys he would have continued on his route home. Yet, when the Applicant was apprehended by the PAMI, he was in an entirely opposite direction of his home. When the FLO/WB asked the Applicant why he had not followed his route home after having picked up the minors, the Applicant replied “I don’t know … I turned toward them, they got in the car and I continued driving in that direction … It is forbidden for me there to make a U turn”. The Tribunal finds such an explanation highly unconvincing.

34. Nevertheless, giving the Applicant the benefit of the doubt, let us presume that the Applicant was acting in good faith, as he alleges that in his culture one would assist individuals in need of help. Did the Applicant expect the Agency - and ultimately the Tribunal - to give any credence to his explanation that he wanted “to help [the boys] to get rid of any psychological or social crisis they are
suffering from” or that his purpose “was to identify this [the boys’] behavioral pattern which was in the heart of (his) specialization and social duties”? Did he, as a Head Teacher or even as a plain individual, believe that the time and place to give psychological assistance to two minors was alone in a parked car at 2:30 a.m.?\(^2\) As to why he did not enlist the assistance of the police when they approached him in his parked car and asked if there was any problem, the Applicant gave this explanation: “[h]ow can I ask the police for assistance in the delivery of two minors to their homes while I am fully able to do this alone?” which shows, in the Tribunal’s opinion, poor judgment indeed, as confirmed by the ensuing events.

35. Recalling the facts and assuming they are credible, i.e.: (i) the minors entered his car uninvited without the Applicant objecting, (ii) the minors evaded his questions as to where they lived, (iii) the minors repeated that their presence in the streets and their request to be dropped at the Gilo checkpoint were the result of mere boredom, the Tribunal finds that in the very least these facts should have raised enough concern or suspicion in the Applicant’s mind to end the encounter. Yet the Applicant found nothing odd about this behaviour and, when asked by the FLO/WB why he did not then ask the minors to exit the car, the Applicant responded “[b]ecause I was trying to assist them in any way possible. I wanted to try to understand who they were and then take them home. But they evaded the questions to give me any details about themselves”. The Tribunal finds that the Applicant failed to exercise reasonable judgment, that he showed dismal insensitivity to his conduct as a staff member of his position and that he has not grasped - either through feigned or genuine naïveté - how his actions could affect or indeed affected his integrity as a staff member and a Head Teacher in a boys’ school.

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\(^2\) The Applicant further explained:

I can’t deny in those moments that I was highly interested in realizing the reasons for this behaviour had generated inside myself. That benefits me at the professional level and I think that this reason is enough to keep them with me in the car and talking to them about the causes of their walking around.
36. The record and the facts admitted by the Applicant clearly point to the following: the Applicant was alone in his car with two minors at 2:30 a.m. Furthermore, the Tribunal finds that the explanations provided by the Applicant are not only contradictory, but also utterly fail to justify his actions. Recalling the Commissioner-General’s broad discretionary authority with regard to disciplinary matters, the Tribunal finds that the Applicant failed to “bear in mind the reserve and tact incumbent upon [him] by reason of [his] employment with the Agency” and that his actions were “incompatible with the proper discharge of [his] duties with the Agency” within the meaning of Area Staff Regulation 1.4.

37. In view of the legal and administrative principles set above, as well as the Applicant’s conduct, as confirmed by the events, and in line with the broad discretionary authority accorded to the Commissioner-General, the Tribunal finds that the Respondent was justified in terminating the Applicant’s employment in the interest of the Agency under Area Staff Regulation 9.1.

Was the sanction imposed proportionate to the offence?

38. With regard to proportionality, suffice it to recall the Commissioner-General’s broad discretionary power in relation to disciplinary matters and the special note taken by the United Nations Appeals Tribunal of the nature of an applicant’s post when considering proportionality.

39. The Tribunal finds that the termination of the Applicant’s appointment in the interest of the Agency was an appropriate discretionary administrative decision. The Tribunal recalls its Judgment Abu Alouf UNRWA/DT/2011/004 in which it noted that termination in the interest of the Agency has milder effects than a termination for misconduct as the former preserves certain termination benefits not payable if a staff member’s appointment is terminated for misconduct, or if he/she is summarily dismissed for misconduct. In the case at bar, the Tribunal finds that even though the Respondent was exercising his authority to legitimately sanction the Applicant’s misconduct, he did it in such a manner which was less severe on the Applicant. Consequently, the Tribunal finds that the Respondent’s decision to terminate the Applicant’s services in the interest of the Agency was neither disproportionate nor unwarranted as to amount to an injustice.
Was the Respondent’s discretionary authority tainted by procedural irregularity, prejudice or other extraneous factors, or error of law?

40. The question to ask at this point is whether the Respondent’s decision to terminate the Applicant’s employment in the interest of the Agency 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 Asaad 2010-UNAT-021. The record in the file indicates that following the Applicant’s arrest on 18 August 2009 and interrogation by the PAMI, the Agency advised the Applicant on 19 August 2009 that he was suspended with pay pending an investigation. Indeed, an investigation was conducted by the FLO/WB on the events leading to the Applicant’s detention. The Applicant was interviewed twice, on 25 August and 10 September 2009. He was confronted with the allegations brought against him and was accorded the opportunity to address them. The Applicant was provided with a copy of the findings of the investigation and given fourteen days to rebut the findings on which the contested decision was based. The Applicant was given a further opportunity to respond to the allegations brought against him during a meeting with his lawyer and the DUO/WB on 5 January 2010. The Tribunal thus considers that the due process right of the Applicant was respected.

41. The Tribunal fails to see any improper motivation or procedural error in the way the Respondent handled this matter. Actually, the Tribunal is impressed with the poised and neutral manner in which the interviewing officer put questions to the Applicant and handled the interviews. As for the Applicant’s claim that he was never informed by the investigator of the allegations against him, the Tribunal finds that the Applicant lacks good faith since the Agency had clearly indicated to him, as pointed out in the paragraph above, what the allegations were and given him time to address them. With respect to the Applicant’s claim that there were flaws in the investigation of the Agency due to “poorness of translation”, the Tribunal notes that the DUO/WB sent a letter to the Applicant on 23 November 2009 acknowledging a translation error concerning a letter from the Head of the Palestinian Authority Police and noted that this did “not substantially alter the principal findings of the field investigation report and that the whole
investigation report had been reviewed and no other mistake found”. Finally, the Applicant did not submit any evidence that “he was prevented from having a lawyer” and the record indicates that the investigation was conducted in accordance with the standard Agency practices regarding internal investigations.

42. The Tribunal 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 clear and 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 and the administrative decision to terminate his appointment in the interest of the Agency.

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

43. Considering that:

(i) the Respondent’s decision to terminate the Applicant’s employment in the interest of the Agency was properly made;

(ii) the sanction imposed was not disproportionate to the offence;

(iii) 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.
Conclusion

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

(Signed)

Judge Bana Barazi
Dated this 24th day of June 2012

Entered in the Register on this 24th day of June 2012

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