NIJIM

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 Hanan Nijim (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 her appointment during her probationary period.

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 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 it 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 1 May 2008, the Applicant joined the Agency as a Dental Surgeon, grade 14, at Ein El Tal Health Centre in Syria (the "Health Clinic"). Her appointment was subject to a probationary period of 12 months.

5. The Senior Dental Surgeon, Syria ("SDS/SAR") submitted a report dated 6 July 2008 to the Chief Field Health Programme ("CFHP/SAR") based on his observations on a visit to the Health Clinic to, inter alia, evaluate the practices of several procedures implemented there by the Applicant. The report reflected the following shortcomings in the Applicant's performance:

   (i) shortage in applying infection and cross infection control;
   (ii) none of the filling procedures were observed;
   (iii) she has no idea about applying composite fillings;
   (iv) she has no idea about step by step procedures for treatment of NCD patients (hypertension patients);
(v) extractions not well done;
(vi) wrong diagnosis in several dental cases;
(vii) very slow implementation of dental procedures.

The report also made reference to lack of coordination or collaboration of the Applicant with her colleagues.

6. By Inter Office Memorandum dated 8 July 2008, the CFHP/SAR drew the Applicant's attention to the following shortcomings which were pointed out after the preliminary evaluation:

(i) your technical competence is not fully adequate, specially in the infection control procedures, filling procedures, composite fillings and extractions;
(ii) you tend to have difficulties in dealing with people as well as with your colleagues.

He also drew the Applicant's attention to improve her performance in a two-month period after which her performance would be re-evaluated for consideration of her appointment with the Agency.

7. By Inter Office Memorandum dated 3 August 2008, the Area Officer, North Syria ("AON/SAR") put in writing the discussion he held with the Applicant concerning her performance as follows:

This is to record in writing that I have met with you and discussed with you the several complaints which have been received concerning your performance and official conduct from the date you assumed your duties as Dental Surgeon. In particular, the difficulty you are facing in dealing and communicating with local community and with some of your colleagues especially the dental nurse who works with you in the same room.

That I have also met with your supervisors … and agreed upon the necessity for you to improve your technical and communication skills.

That … will continue to give you guidance and training on how to improve and overcome your shortcomings.

That we hope you would improve your performance and conduct as soon as possible; otherwise, this will negatively affect your confirmation in the post.
8. The SDS/SAR submitted a second report dated 31 August 2008 to the CFHP/SAR based on a subsequent visit to the Health Clinic for the purpose of, *inter alia*, evaluating the Applicant's performance. In this report, the SDS/SAR identified several ongoing weaknesses in the Applicant's performance related to her technical abilities, diagnosis expertise, infection control procedures, and administration of medicines. The SDS/SAR recommended that the Applicant's employment be terminated.

9. By Inter Office Memorandum dated 2 September 2008, the CFHP/SAR brought to the attention of the Deputy Field Administrative Officer, Syria ("D/FAO/SAR") issues regarding the performance of the Applicant, stating *inter alia* that:

1. … I visited Ein El Tal health center and met with [the Applicant] and discussed with her the difficulties in dealing with her colleagues as well as clients. Also, the issue has been discussed with AO, North and AHO North who expressed that they have received many complaints regarding [the Applicant's] difficulties in dealing with people as well as her low experience and industry regarding oral health services.

2. … I have asked [SDS/SAR] to visit Ein El Tal dental clinic to re-evaluate the technical aspects of [the Applicant]. [SDS/SAR] visited Ein El Tal on 31 [A]ugust 2008 and provided his technical report … The report stated that [the Applicant's] technical performance is far below acceptable standards and might be harmful to the refugees.

3 [The Applicant] has received guidance as well as training by SDS, AHO, North, DCFHP and MOA Ein El Tal.

4. Training has been given to [the Applicant] as the following [sic]:

4.1 – She has been invited to the annual meeting of all dental surgeons held in Damascus on 1.5.2008, during the meeting the new technical instructions on oral health services were reviewed and explained.

4.2 – She has been trained on practical issues for one month at Nairab dental clinic by Nairab dental surgeon from 1 to 30 May 2008.

4.3 – Frequent visits by SDS (three visits) for on spot training and supervision.

4.4 – AHO, North and MOA Ein El Tal provided her with administrative guidance.
The CFHP/SAR recommended that the Applicant's appointment be terminated during the probationary period.


11. By letter dated 13 October 2008, the Applicant wrote to the Director of UNRWA Affairs, Syria ("DUA/SAR") requesting the following:

Please investigate officially and ask all patients I treated on my performance to find out how unfair I was treated as I'm punctual, didn't steal, no misconduct, I hurt no patient and my probationary period is one year (this is very important).

Since decision of my appointment was issued on … and since I started my work … I was exposed to a ferocious attack… When you commence the investigation, I do have a lot to say supported by documented evidence and witnesses. Therefore, please don't reject my request.

12. By letter dated 5 November 2008, the D/FAO/SAR pointed out the Applicant's shortcomings in her performance following the mid-term PER review, noting inter alia:

…. on the whole you are a staff member with an unsatisfactory performance though you have been given guidance and professional training for one month at Nairab Health Center before you started your work at the Ein Tal Health Centre.

* * * *

With reference to your letter of 13 October 2008 to the DUA/SAR stating that you did not steal, that you did not commit misconduct, you do not have a security capacity and that you did not cause actual harm to any patient, I have to advise that none of your supervisors alleged anything like this against you. Therefore, your statement referring to these topics is irrelevant.

13. The SDS/SAR by Inter Office Memorandum to the CFHP/SAR dated 23 December 2008, listed a number of ongoing problems with the Applicant that he had observed during his latest visit to the Health Clinic on the same day, in addition to the lack of improvement in the Applicant's performance.
14. By Action Slip dated 7 January 2009, the CFHP/SAR recommended to the D/FAO/SAR that the Applicant be separated from the Agency in light of previous performance issues.

15. The Applicant's overall performance was again rated unsatisfactory in her PER dated 27 January 2009.

16. By memorandum dated 25 February 2009, the Medical Officer "A" ("MOA") of the Health Clinic reported an incident to the CFHP/SAR that occurred on 7 January 2009 in which a patient underwent a root extraction for more than two hours and subsequently lost consciousness and went into convulsions. The patient had to be administered first aid by the MOA and sent to the emergency section of Al Kindi Hospital.

17. By memorandum dated 26 February 2009, the Senior Health Advisor to the Director of UNRWA Affairs, informed the D/FAO/SAR that he had reviewed the incident of 7 January 2009 and considered it to be the result of malpractice on the part of the Applicant which, along with ongoing concerns about her:

   … should be seriously considered for the sake of Refugee Patient protection as well as quality of care provided by UNRWA…

18. By letter dated 1 March 2009, the Field Administration Officer, Syria ("FAO/SAR) informed the Applicant that her service with the Agency was being terminated without notice during the probationary period. He noted, *inter alia*,

   Further to [the] Agency's letter … of 5 November 2008, I write [to] you in connection with your periodic report which was completed by your supervisors on 27 January 2009 for the evaluation of your performance during probation.

   This report … indicated that your industry is lacking in application; your output is regularly insufficient; your work as a whole is of poor quality; you are not as reliable as you should be; your judgment is sometimes at fault; you tend to have difficulties in dealing with people; your knowledge of your field of work is not yet fully adequate; on the whole you are [an] area staff member with an unsatisfactory performance.

   In addition, it has been reported that you unduly prolonged the dental treatment for an old patient who suffered from ischemic
heart disease which necessitated rushing him to hospital in a state of emergency; that you continue to deal impolitely with your dental nurse, your colleagues at the centre, your immediate, administrative and technical supervisors; and that you are dealing carelessly with the dental equipment at the centre which caused defects in most of them.

All the foregoing indicated that you are not responding to the guidance and instructions of your supervisors, and are unwilling to improve your performance and official conduct.

Therefore it has been decided to terminate your services with the Agency during probation without notice under Area Staff Rule No. 109.1 effective close of business on 2 March 2009.

19. By letter dated 23 March 2009 to the FAO/SAR, the Applicant requested administrative review of the decision to terminate her appointment during the probationary period.

20. On 6 May 2009, the Applicant filed an appeal with the JAB.

21. On 23 November 2011, the Applicant submitted the following additional documents to the Tribunal:

(i) A letter from Al Kindi Hospital's Department of Internal Emergency, Surgery Emergency and Jaws Surgery which states that Mohammad Ibrahim Ibrahim, born in 1955, from Ein El Tal Refugee Camp was not admitted from 7 January to 2 March 2009.

(ii) Reference checks from former employers attesting that the Applicant is "excellent in root canal treatment and operative fillings"; and a declaration from the Syrian Dental Association that no complaint has been made against her.

22. On 6 September 2012, the Respondent submitted his reply. The Tribunal accepted this submission. Article 30 of the Rules gives the authority to the Tribunal to shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. It is the Tribunal's belief that submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. Therefore, the Tribunal finds that it is in the interests of justice and would be appropriate for a
fair and expeditious disposal of the case and would do justice to the parties for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s reply.

**Applicant’s contentions**

23. The Applicant contends that:

   (i) she was not accepted at the Health Clinic by her colleagues as a result of pressure from the Chief Nurse, who "had some sort of a control over all members of the clinic", was conspiring against her and was involved in the incident of 7 January 2009 (when the patient lost consciousness), considered by the Applicant as a "fake drama";

   (ii) the PERs undermined her technical capabilities and were an attempt to ruin her reputation. Furthermore, she requested an investigation with regard to her PER of September 2008 without receiving a response to her claim;

   (iii) she was entitled to receive protection from the Agency as a whistle-blower after having raised various allegations against the staff at the Health Clinic.

24. The Applicant does not make any particular request to the Tribunal.

**Respondent’s contentions**

25. The Respondent contends that:

   (i) he objects to the admissibility of the additional documents submitted by the Applicant on 23 November 2011 without leave of the Tribunal;

   (ii) the decision to terminate the Applicant's appointment was properly effected.

26. The Respondent requests the Tribunal to dismiss the application.

**Considerations**

27. At the outset, the Tribunal wishes to address the Respondent's objection concerning the documents submitted by the Applicant on 23 November 2011.
While, as a general practice, a party must first request leave from the Tribunal to submit additional documents before actually filing them, the Tribunal accepts the documents submitted by the Applicant on an exceptional basis.

28. Pursuant to Article 14 of the Tribunal's Rules of Procedure, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. The Tribunal finds that it is in the interests of justice and would be appropriate for a fair and expeditious disposal of the case, and would do justice to the parties for the Tribunal to exceptionally accept the documents submitted by the Applicant in the case at hand.

Was the decision to terminate the Applicant’s appointment properly made?

29. Area Staff Regulation 4.2 provides:

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

30. The purpose of probation is made clear in Area Staff Personnel Directive A4/Part VII/Rev.7, which provides that:

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…

* * *

11. In all circumstances satisfactory probationary service is a condition for confirmation of appointment, transfer and promotion.

12. Appointment may be terminated without notice during the probationary period or during any extension thereof.

31. As for termination, former 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
32. The Applicant was well aware of the fact that she was under probation. Indeed, her Letter of Appointment specifies in paragraph 4 that:

This appointment shall be subject to probationary service of one year effective on 01/05/2008 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.

33. The Tribunal takes guidance from the former United Nations Administrative Tribunal ("UN Administrative Tribunal") holding in Judgment No. 1010 _Kanj_ (2001) that probation means that a staff member must complete a period in which he/she must demonstrate efficiency and adaptation to his/her working conditions.

34. The Applicant’s appointment was terminated during her one year probationary period as she joined the Agency on 1 May 2008 and her contract was terminated on 2 March 2009. The record in the file shows that the decision to terminate her appointment was based on the Applicant’s shortcomings, properly documented through correspondence, between July 2008 and February 2009. The Applicant's performance as a Dental Surgeon was consistently considered unsatisfactory. Her failings are related as much to her technical skills, knowledge of her field of work and her poor skills in dealing with people. The record also shows that the Agency made efforts to help her improve, yet she continued to perform at a less than satisfactory level, and failed to meet the requirements of the post during the probationary period.

35. Although the United Nations Appeals 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.

36. The Applicant is reminded that the burden of proof rests on her when she 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 she must adduce convincing evidence to substantiate her allegations.

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

38. The Applicant alleges that she was not accepted at the Health Clinic by her colleagues as a result of pressure from the Chief Nurse, who "had some sort of a control over all members of the clinic", was conspiring against her and was involved in the incident of 7 January 2009, considered by the Applicant as a "fake drama". The Applicant is reminded that in order for the Tribunal to consider any allegation made by either party, documentary evidence is required. The Tribunal will not take into account vague references to a conspiracy, or mere statements by the parties, i.e. unsubstantiated allegations, as they do not constitute probative evidence. The Tribunal considers that the Applicant has not adduced any evidence of an alleged conspiracy against her. In any event, the Applicant's termination of contract is related to her unsatisfactory performance which was properly evaluated and the Applicant has not adduced any evidence of alleged pressure exerted by the Chief Nurse resulting in the Applicant's negative evaluation.
39. Concerning the incident which occurred on 7 January 2009, the Tribunal notes that it is a serious incident related to the Applicant's malpractice on a patient. The Tribunal notes that the Applicant provided a letter from Al Kindi Hospital stating that Mohammad Ibrahim Ibrahim (the Applicant's patient) was not admitted in the hospital from 7 January to March 2009. However, the Tribunal wishes to point out that, whether or not the patient was admitted on Al Kindi Hospital, the mere incident by itself is serious and the Applicant does not seem to understand its seriousness. Indeed, she considered it as a "fake drama" while in the MOA's report it is stated that following a dental treatment, Mohammad Ibrahim Ibrahim "lost consciousness and went into a state of convulsion". Furthermore, the Tribunal finds it suspicious that the Applicant only submitted the Hospital's letter in November 2011 while it is dated September 2009.

40. The Applicant argues that the PERs undermined her technical capabilities and were an attempt to ruin her reputation and provides, as evidence in her favour, reference checks from former employers and a declaration from the Syrian Dental Association that no complaint has been made against her. The Tribunal, however, finds that this evidence does not serve to assess the Applicant's performance during her probationary period with the Agency which can only be evaluated, as it was, through the PERs.

41. The Applicant argues that she did not receive a response concerning two investigations that she requested the Agency to conduct: an investigation with regard to her PER of September 2008 and another related to several issues raised in her complaints regarding the Health Clinic. In this regard, the Tribunal notes that there is no right on the part of the Applicant and no obligation on the part of the Respondent, within the Staff Regulations and Rules of the Agency, to have an investigation conducted. The Tribunal refers to the jurisprudence of the United Nations Appeals Tribunal in Nwuke 2010-UNAT-099, paragraph 30, holding that:

A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules.
42. The Applicant also alleges that she was entitled to receive protection from
the Agency as whistle-blower after having raised allegations of misconduct
against some staff at the Health Clinic.

43. General Staff Circular No. 5/2007 on "Allegations and complaints
procedures and protection against retaliation for reporting misconduct and
cooperating with audits or investigations" provides that:

**Purpose**

1. The purpose of this circular is to provide protection for
individuals who report allegations or complaints of misconduct,
misappropriation of Agency assets, fraud, corruption or abuse of
authority or cooperate with duly authorized audits or investigations…

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3. This circular prohibits retaliation against individuals who report
allegations or complaints of misconduct, misappropriation of
Agency assets, fraud, corruption or abuse of authority or cooperate
with duly authorized audits or investigations…

**Definitions**

5. For the purposes of this circular,

"Misconduct" includes any failure to comply with obligations
under the Charter of the United Nations, UNRWA Staff
Regulations and Staff Rules or other relevant administrative
issuances…

"Protected activity" means the action of an individual who -

(i) reports, in good faith or on reasonable grounds, allegations
or complaints of misconduct, misappropriation of Agency
assets, fraud, corruption or abuse of authority; or…

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"Retaliation" means any direct or indirect detrimental action
recommended, threatened or taken because an individual engaged
or was thought to have engaged or be about to engage in a
protected activity.

44. The United Nations Appeals Tribunal has ruled in *Koumoin*
2011-UNAT-119 that in cases of retaliation, an applicant has to establish that he
was a "genuine whistle-blower" and that he was subject of retaliation following a report of possible misconduct.

45. In the case at hand, the Applicant did not produce any convincing evidence that she was a genuine whistle-blower. The evidence shows that the Applicant only raised allegations of misconduct against some staff at the Health Clinic after management brought to her attention her unsatisfactory performance. The Tribunal finds that there is no connection between the alleged misconduct reported by the Applicant and the decision to terminate her probationary appointment based on unsatisfactory performance. Thus, there is no evidence of any kind of retaliation against the Applicant.

46. The Tribunal finds that the Applicant’s record of performance - properly evaluated - establishes that the broad discretionary authority accorded to the Agency in respect of termination of appointments during probationary periods was properly exercised.

47. 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.

Conclusion

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

_______________(Signed)____________
Judge Bana Barazi

Dated this 24th day of September 2012

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

Laurie McNabb, Registrar, UNRWA DT, Amman