Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

BARAKAT

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 Nasser Barakat (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, to suspend him without pay for one week and to deduct twenty days\(^1\) from his annual leave, for the period from 3 March to 25 March 2009.

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 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 had been submitted to the Commissioner-General.

Facts

4. Effective 17 June 2001, the Applicant was employed by the Agency as a Site Engineer on a fixed-term appointment. Effective 1 August 2004, the Applicant's appointment was converted from category "Z" to "X".

5. By email dated 2 March 2009, the Assistant Head, Camp Development Division ("AHCDD") informed two site engineers about the temporary transfer of the Applicant in the following terms:

   This is to inform you that OIC-MD was so cooperative when we sought his support for engineers from MD (Maintenance Division). To this effect, He [sic] will transfer to us Eng. Wael

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\(^1\) Although the Applicant claims twenty-four days were deducted from his annual leave, only twenty days, representing the working days during this period, were deducted from his annual leave.
Hamdan to work in the damage assessment in the north area and Eng. Naser Barakat to work in the damage assessment in Gaza area. The two engineers will be transferred as from tomorrow 3.3.09, and they will work in the damage assessment for three weeks.

The transfer was later changed by the Officer-in-Charge, Maintenance Division to switch the assigned areas between the two engineers, "due to their resident locations", such that the Applicant was to work in the north area.

6. From 3 March to 25 March 2009, the Applicant did not report to duty with the Camp Development Division ("CDD") in the north area of Gaza where he had been transferred.

7. By email dated 17 March 2009 to the Director of UNRWA Operations, Gaza, the Applicant described the events since he received notice of the transfer and explained his objection to being transferred, as follows:

On March 3, 2009 I received a telephone call from my supervisor Eng Imad Nasir while I was in the site informing me that I am transferred from maintenance division, he was talking with deep regret and expressed his sorrow about the decision that beyond his control [sic]. I received this order calmly and tried to appease his worry saying that I have no option but to obey the orders giving [sic] to me as I used to go along my years of service … I got shocked when the Acting Asst MD, Eng. Ahmed [K]raizem, informed me that I should go to work under the supervision of my cousin at north area in the damage assessment…

I immediately got angry and refused to obey the decision because of deep family disputes and clashes between my family and cousin that Mr. Skeik and all the division know well [sic].

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I acknowledge that I repeatedly told my supervisor and the assistance [sic] that I can't carry out Mr. Sheik order and I can write this officially if his order is given to me in writing.

Although my supervisor withdrew all projects and duties under my supervision, I kept show up [sic] at my normal duty station at beach maintenance office.

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On March 16, 2009 I got surprised when I found the office lock has changed so that I couldn't open the office to register my attendance. I received a verbal sign that I wouldn't be included in the attendance sheet and very likely wouldn't receive a salary this month …

8. By letter dated 23 March 2009, the Field Administration Officer, Gaza ("FAO/G") advised the Applicant inter alia as follows:

I have been informed that you have failed to report to your duty station at the ECSD, Gaza Field Office since 3 March 2009. Due to the war in Gaza, you were transferred to assist in the assessment of damage sustained at UNRWA compounds and other locations in Gaza. I have been informed that you refused this transfer and have subsequently refused to report for work.

Therefore, you are hereby advised that unless, by 29 March 2009, you return to your duty station or submit your resignation from the Agency service, you may be separated from the Agency service by reason of your abandonment of post under the provisions of Area Staff Rule 109.4 with effect from 24:00 hours on 29 March 2009.

… Meanwhile, you are considered to be on unauthorized absence without pay as from 3 March 2009.

9. On 26 March 2009, the Applicant resumed his duties and was assigned to work in the Camp Development Division at a workplace different from the north area.

10. By email dated 26 March 2009 to the FAO/G and to the Officer-in-Charge, Engineering and Construction Services Department, the Applicant disputed the decision to transfer him. He explained that he refused the transfer because of a "deep family dispute" with his cousin with whom he was supposed to work in the new position. He requested to have an investigation conducted to prove that he showed up for work during the alleged absence days from 3 March 2009 to 25 March 2009 and that he "refrained to obey the instruction given to [him] from OIC-MD only to prevent unavoidable clashes and protect [himself] from not to appear [sic] as a troublemaker that would lead to fire [him] from [his] job…"

11. By letter dated 12 August 2009, the Officer-in-Charge, UNRWA Operations, Gaza advised the Applicant of the allegations against him, as follows:
I am very concerned about your unauthorized absence from duty between 3 March 2009 and 25 March 2009. You had been instructed to report to duty with the Camp Development Division to assist in very important and urgent work which your supervisors considered took precedence over the work you had been doing. Under the Area Staff Regulation 1.2, as a staff member you are subject to the authority of the Commissioner General of the Agency, (or those to whom she has delegated this authority) and to assignment to any of the activities or offices of the Agency. The decision to redeploy you from the Maintenance Division to the Camp Development Division was entirely within the Agency's discretion.

I am concerned that your refusal to report to duty with the Camp Development Division as instructed from 3 March until 26 March 2009 may be considered as insubordination and conduct warranting disciplinary action under the applicable Area Staff Rules and Regulations.

The Applicant was then given fifteen days to respond to the allegations against him.

12. By email dated 27 August 2009, the Applicant responded to the allegations against him, namely that he had been deliberately assigned to work under the supervision of his cousin with whom he had a family dispute.

13. By letter dated 31 August 2009, the Deputy Director of UNRWA Operations, Gaza considered the Applicant's explanations in his letter of 27 August 2009 and decided that the Applicant's behaviour warranted a written censure, suspension without pay for one week, and that the Applicant's failure to report to duty between 3 March and 25 March 2009 be deducted from his annual leave. The Deputy Director of UNRWA Operations, Gaza explained his decision as follows:

You have tried to explain your improper conduct by claiming that you refused to implement the assignment of your supervisors to the CDD assuming that you would be assigned to work under the supervision of your cousin with whom you had a family dispute. However, I note that you had not raised this concern in an attempt to find a workable solution until your email to the FAO on 17 March 2009, over two weeks after you had been instructed to transfer to the CDD. Your letter to the Director of 4 March 2009 made no reference to these concerns.
Had you raised these concerns in a timely manner, the Agency would have sought a workable compromise to ensure that the work to which you were assigned was done in an efficient manner … Your refusal to follow instructions and not to seek a reasonable compromise meant that the Agency was deprived of your services in the very important task of evaluating the damage sustained by refugees' homes during Operation Cast Lead.

You have failed to give an acceptable response to your unauthorized absence from duty as instructed between 3 March 2009 and 25 March 2009. You had been instructed to report to duty with the Camp Development Division to assist in very important and urgent work which your supervisors considered took precedence over the work you had been doing. Under the Area Staff Regulation 1.2, as a staff member you are subject to the authority of the Commissioner General of the Agency, (or those to whom she has delegated this authority) and to assignment to any of the activities or offices of the Agency. The decision to redeploy you from the Maintenance Division to the Camp Development Division was entirely within the Agency’s discretion.

14. By email dated 5 September 2009 to the Director of UNRWA Operations, Gaza, the Applicant requested administrative review of the decisions taken against him by the Deputy Director of UNRWA Operations, Gaza.

15. By letter dated 8 September 2009, the Director of UNRWA Operations, Gaza replied to the Applicant's request. The contested decisions were upheld.

16. The Applicant filed his appeal dated 30 September 2009 to the JAB, which received it on 5 October 2009.

17. On 30 October 2012, the Respondent submitted his reply.

18. By email dated 14 November 2012, the Tribunal requested clarifications from the Respondent concerning the period during which the Applicant was absent from duty.

19. By email dated 19 November 2012, the Respondent informed the Tribunal that the Applicant was absent from duty from 3 March 2009 to 25 March 2009 inclusive, and that his work week was from Saturday to Thursday.
Applicant’s contentions

20. The Applicant contends that:

(i) he protested the verbal instruction given to him on 3 March 2009 to transfer to "avoid drastic consequences" as he was to work with his cousin with whom he had a deep family dispute;

(ii) he continued to attend at his normal duty station;

(iii) the decision to transfer him was "intentional and prepared in advance to cornering [him] and to give others the impression that [he] was troublemaker and guilty".

21. The Applicant requests the Tribunal to rescind the contested decisions.

Respondent’s contentions

22. The Respondent submits essentially that the decisions to censure and suspend the Applicant and to deduct days from his annual leave were properly made.

23. The Respondent requests that the Tribunal dismiss the application.

Considerations

Preliminary issue

24. In his reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings. The Tribunal accepts the Respondent's reply. 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 that it 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.

Main Issue

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

25. It is important to look at the legal and administrative framework applicable in the case at bar. Former Area Staff Regulation 10.2 provides that:

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

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

27. With regard to what is “unsatisfactory” for the purpose of former 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;
C. wilful or irresponsible failure to comply with written or oral instructions of supervisors;

D. repeated minor infractions.

* * *

28. 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...

29. 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.

30. Concerning suspension without pay, Area Staff Personnel Directive No. A/10/Rev.1 provides:

8.1 Staff members suspended without pay as a disciplinary measure shall be relieved of their duties for the total period of suspension. During this period, no salary or allowances will be paid. Suspension without pay will not exceed 30 calendar days without the prior written approval of the Director of Personnel.

31. With regard to the decision to transfer the Applicant and his alleged absence from work, the Tribunal recalls the following Regulations and Rules:

32. Area Staff Regulation 1.2 provides:
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…

33. Area Staff Regulation 4.3 provides:

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.

34. Area Staff Rule 109.4, at paragraphs 1 and 2, provides:

1. Where a staff member voluntarily absents himself/herself from duty and such absence neither has been authorised nor is subsequently authorised in accordance with these rules, then such staff member may be separated from Agency service by reason of abandonment of post as provided hereunder.

2. Where a staff member has absented himself/herself in the manner described in paragraph 1 above for three or more consecutive working days, the Commissioner-General may send to such staff member a letter informing him/her that unless, by a specific date (determined at the Commissioner-General's discretion), he/she reports for duty or submits a written explanation of his/her absence which is acceptable to the Commissioner-General, he/she shall be deemed to have been separated from Agency service by reason of abandonment of post under the provisions of this rule.

35. 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. However, the Tribunal notes, as held by the United Nations Appeals Tribunal in Abu Hamda 2010-UNAT-022, that:

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?

36. 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
Applicant himself admitted that he refused to comply with the oral instruction of his supervisor to temporarily transfer him to the CDD to assess damages in the north area of the Gaza strip. Although the Applicant argues that he disagreed with the transfer for personal reasons, i.e. he was supposed to work with his cousin with whom he had a family dispute, the evidence shows that he did not bring this reason to the attention of management until his email dated 17 March 2009. Had the Applicant explained the grounds of his refusal, the management may have found a workable compromise to ensure that the work to which he was assigned would be done in an efficient manner.

37. Furthermore, the Tribunal notes that the Applicant only resumed his duties after having been advised on 23 March 2009 that, unless by 29 March 2009 he returned to work or submitted his resignation, he may be separated from service by reason of abandonment of his post. Although the Applicant alleges that he kept "show[ing] up at [his] normal duty station at beach maintenance office" in March 2009, it remains that he, as a staff member of the Agency, was subject to the authority of the Commissioner-General and was therefore bound to follow the instructions of his supervisor and report to duty at the station he was transferred to.

Do the facts amount to misconduct?

38. The establishment of the facts regarding the Applicant’s refusal to follow his supervisor's instruction concerning his temporarily transfer to CDD in the north area of Gaza as well as his failure to report to his new duty station during the period from 3 to 25 March 2009 as instructed, clearly support the characterisation of misconduct on the part of the Applicant.

39. Under the Area Staff Regulation 1.2, the Applicant was subject to the authority of the Commissioner-General (or those to whom he delegated this authority) and to assignment by him to any of the activities or offices of the Agency. The decision to temporarily transfer the Applicant to another division was within the Agency's discretionary authority. The Tribunal finds that the Applicant's conduct was unsatisfactory as he failed to comply with the instruction of his supervisor. Therefore, the Agency's decision to impose disciplinary
measures on him was in accordance with Area Staff Personnel Directive No. A/10/Rev.1, paragraph 4.3(c).

40. Noting that “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 comply with the instruction of his supervisor to be temporarily transferred to the CDD and that these facts legally support the determination of misconduct on the part of the Applicant.

41. The Tribunal also finds that in censuring the Applicant and suspending him without pay for one week, 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.

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

42. The question to ask now is whether the Respondent’s decision to censure and suspend the Applicant without pay 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.

43. The evidence shows that the Applicant failed to comply with the instruction of his supervisor to be temporarily transferred to the CDD to assess damages in the north area of the Gaza strip and that the Applicant failed to report to his new assignment during the period from 3 to 25 March 2009. The record in the file indicates that the Agency took into account all the relevant facts of the case when deciding to censure and suspend the Applicant without pay for one week. The Tribunal notes that the Applicant admitted himself not to have complied with the instruction of his supervisor for personal reasons. The Tribunal thus considers that there was no need for the Agency to conduct an investigation. However, the evidence shows that by letter dated 12 August 2009, the Applicant
was informed of the allegations against him and was given the opportunity to rebut such allegations. The evidence further demonstrates that in reaching the decision to impose disciplinary measures on the Applicant, the Agency respected his due process right.

44. The Tribunal thus fails to see any improper motivation or procedural error in the sequence of steps which led to the disciplinary measure against the Applicant. The Tribunal refers to the jurisprudence of the former United Nations Administrative Tribunal Judgment No. 834, *Kumar* (1997) which clearly states 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 disciplinary measures imposed on him.

45. The Applicant asserts that the decision to transfer him was "intentional and prepared in advance to cornering [him] and to give other the impression that [he] was a troublemaker and guilty". The Tribunal finds that the Applicant has not provided any evidence to substantiate his allegations. The evidence shows that he was one of the two engineers who were temporarily transferred and that it was a decision of management at a critical time of the Agency's operations following the end of Operation Cast Lead².

*Was the sanction imposed proportionate to the offence?*

46. As held by the United Nations Appeals Tribunal in *Sanwidi* 2010-UNAT-084, the principle of proportionality means that an administrative

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² The Applicant's temporary transfer was an example of the type of relief efforts necessary to address the devastating effects of Operation Cast Lead. In the 2009 Commissioner-General's Report to the General Assembly, the impact of Operation Cast Lead was described *inter alia* as follows:

4. During an intensive armed conflict from 27 December 2008 to 19 January 2009 in the Gaza Strip, UNRWA provided shelter in its schools to some 50,000 people displaced by the fighting. Non-governmental organizations placed the overall number of persons killed between 1,387 and 1,417. The Gaza authorities reported 1,444 fatalities. The Government of Israel provided a figure of 1,166. Among the Palestinians killed, it has been estimated that between 310 and 350 were children; 5,015 Palestinians were reportedly wounded, including 11 UNRWA personnel while on duty at Agency premises; and 13 Israelis were killed. About 60,000 homes, belonging to refugees and non-refugees, were damaged or destroyed, as were hundreds of industrial facilities and businesses…
action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive.

47. In view of the Applicant's insubordination at a critical time of the Agency's operations as described above, and given that the facts on which the sanction was based have been established, that the Applicant has been properly found to have engaged in misconduct, and that the decision to censure him and to suspend him without pay for one week was not flawed by arbitrariness or error of law, the Tribunal is of the opinion that the disciplinary measures imposed on the Applicant were not so disproportionate or unwarranted as to amount to an injustice.

Was the Respondent's decision to deduct twenty days from the Applicant's annual leave properly made?

48. Former Area Staff Rule 105.1, paragraph 11, in force at the time of the facts, provides that:

Any absence from duty not specifically covered by other provisions of these rules shall be charged to the staff member's accrued annual leave; if he/she has no accrued annual leave, it shall be considered as unauthorised, and pay and allowances shall cease for the period of such absence.

49. The Tribunal finds that the Agency's decision to deduct days from the Applicant's annual leave due to his unauthorised absence from duty from 3 March to 25 March 2009 (inclusive) was properly made. The Tribunal also finds that the Respondent correctly deducted 20 days from the Applicant's annual leave as his work week was from Saturday to Thursday.

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

50. 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, nor 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 neither in respect of the disciplinary measures imposed on him nor in respect of the decision to deduct 20 days from his annual leave.

Conclusion

51. For the reasons provided above, the Tribunal dismisses the application.

_________________(Signed)____________
Judge Bana Barazi

Dated this 20\textsuperscript{th} day of November 2012

Entered in the Register on this 20\textsuperscript{th} day of November 2012

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