ABDO

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. This is an application by Faredda Mohammad Abdo (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 issue her a letter of censure, to demote her from Head Teacher to Teacher and to suspend her without pay for thirty days.

Facts

2. On 2 December 2001, the Applicant entered the service of the Agency as a Teacher, Level 6B, step 01, in the Damascus Area, Syria, on a fixed-term appointment expiring on 30 November 2003. On 1 August 2004, the post of the Applicant was retroactively converted to Grade 9, step 3. At the material time, the Applicant occupied the post of Head Teacher Grade 10, step 9, at the Qudeiriyeh School, Syria.

3. When complaints of corporal punishment allegedly exercised by the Applicant on 21 October 2010 were brought up by the parents of seven students, the Director of UNRWA Affairs, Syria (“DUA/SAR”) assigned, according to the Respondent on or about 8 November 2010, two investigators along the following terms of reference: (i) to ascertain if the Applicant exercised corporal punishment on students on 21 October 2010, and (ii) to determine if there was a pattern of misconduct or if this was an isolated incident.

4. The investigators interviewed the students, a number of their parents, the Staff Counsellor, the School Supervisor and the Applicant with regard to the allegations. They set out their findings in an undated report: the Applicant was found by the investigators to have exercised corporal punishment by slapping two girls on their faces and hitting them together with other girls with a book on their heads consequently breaching the Education Technical Instruction establishing discipline in a violence-free educational environment. The investigators recommended inter alia that appropriate action be taken against the Applicant for
exercising corporal punishment and that she be trained on how to improve her communication skills and how to deal with clients.

5. By a letter dated 17 January 2011, the Field Administration Officer, Syria (“FAO/SAR”) informed the Applicant of the findings of the investigation and invited her to provide her comments in this regard. The letter states *inter alia* that:

Following the decision of the Agency to conduct an investigation related to the allegation made against you concerning your resorting to corporal punishment against the students at Qudeiriyeh School, Damascus area. An investigation has been conducted and its conclusion has been presented to the Administration Department.

In accordance with UNRWA’s rules and procedures, and in the interest of due process, you are hereby provided with an opportunity to respond to the conclusion of the investigation which states that you exercised corporal punishment against pupils […] and […] by slapping them several times on the faces and by hitting these two girls together with other students […] with a book on their heads.

* * *

It is the Agency’s responsibility to achieve a fully informed and fair decision and ensure due process. Therefore, according to the principle of administrative fairness and the rules of justice, you are offered this opportunity to present your comments with respect to the conclusion of the investigation by 24 January 2011.

6. By an undated letter to the FAO, the Applicant responded to the allegations. She argued *inter alia* that she held only a book of no more than 25 pages in her hand at the time of the incident, that she used the book to keep the girls away from the student they were hitting, and that the school counselor had conspired with the mother of the girls to influence them to make a complaint. The Applicant also requested the matter to be re-investigated. The Applicant’s letter states *inter alia* that:

On the day of the incident, I found that a fifth grade pupil fell on the ground after she was slapped by her schoolmates to the extent that she fainted and had very high temperature. This status caused a lot of tension and fear. So, I just asked the school attendant […]
to take care of the pupil […] I also asked the counselor […] to take care of other pupils. At this moment, my main feeling was anxiety for the pupil […] and not anger towards other pupils. I did no feel angry so that I hit [sic] other pupils.

* * *

The investigators depended only on the statements of the parents who were angry enough to state a complaint against me but they were not present during the incident. The investigators did not consider the witness [sic] of the people who were there during the incident.

7. On 27 February 2011, an UNRWA consultant investigator undertook a detailed review of the evidence collected by the investigators. In his review report, which is undated, the consultant investigator confirmed the findings and conclusions of the original investigation report and fully supported the recommendations of the investigators.

8. By letter dated 1 August 2011, the DUA/SAR informed the Applicant that the facts as established through the investigation report supported a finding that the Applicant had engaged in misconduct, in particular by slapping two students several times on their faces and by hitting them and other students over their heads with a book. The DUA/SAR advised *inter alia* that:

   In determining the appropriate disciplinary measures in this case, I found a number of factors support the imposition of severe disciplinary measures. Such factors include your position of responsibility and supervision as a Head Teacher, the gravity of the offense, the potential risk to other students, and the Agency’s clearly communicated policy of zero tolerance for corporal punishment.

By the same letter, the DUA/SAR served the Applicant with the following disciplinary sanctions:

   (A) You will be removed from the Post of Head Teacher at Qudeiriyyeh School;
(B) You will be demoted to a Teacher Post, including a downgrade of 2 steps at Grade 10 and loss of the Head Teacher’s allowance;

(C) This letter will serve as a written censure for misconduct and will be placed in your Official Status File;

(D) You will be suspended without pay as a disciplinary measure for a period of 30 days effective 28 July 2011;

(E) You will be given training in classroom management in coordination with Staff Development Office and Education Programme.

9. By letter dated 21 August 2011, the Applicant requested review of the decision to impose disciplinary measures against her, stating inter alia:

…it is clear without any question or doubt that the investigation was incomplete and limited as it relied basically on the sayings of the students and their parents and ignored all the facts that were proved and stated by the statements of some teachers…

I rely in my complaint to the fact that the statements of the student [name] and her Parent were neglected. They confirmed the importance of what I said and the falsity of the other students’ statements. Whereas the board did not accept their statements, then the issued decision is incomplete and unfair against me and the harmed student.

The severity of the punishment and its disproportionate [sic] with the act (if true). With keeping all my defenses which prove that I did not commit any violence or punishment against any student in the school, I demand my right in expanding the investigation to include the parents who were misled because they have many statements which reveal the truth and contribute in showing my innocence. I repeat that the sanction is unfair, harsh and disproportionate with the act (if we assume that the action really happened)…

10. According to the Respondent, the Agency did not respond to the Applicant’s request for decision review.

11. By letter dated 4 September 2011, the Applicant was transferred to the post of English Teacher at Asdoud School effective 4 September 2011. The
Applicant was then re-transferred to Beit Dajan School in the same post effective 11 September 2011.

12. On 9 October 2011, the Tribunal received a document entitled “Statement of Appeal” submitted by the Applicant, dated 29 August 2011. By letter dated 9 October 2011, the Registrar of the Tribunal requested the Applicant to complete and submit an application form within three weeks from the receipt of the Registrar’s letter. The Applicant received the Registrar’s letter on 18 October 2011.

13. On 6 December 2011, the Applicant resubmitted her application with a batch of loose papers. By letter dated 23 January 2012, the Registrar confirmed receipt of the application and requested the Applicant to resubmit her application in compliance with Practice Direction No.1 and to provide a copy of her request for decision review.

14. On 30 January 2012, the Tribunal received the application in compliance with the Registrar’s instructions. On 7 March 2012, the Tribunal forwarded the application to the Respondent.

15. On 23 October 2012, the Applicant filed a motion to the Tribunal requesting disclosure of the “investigation minutes” related to her case.

16. On 8 November 2012, the Applicant’s motion was transmitted to the Respondent.

17. By Order No. 061 (UNRWA/DT/2012) dated 13 December 2012 on Production of Documents, the Tribunal ordered the Respondent to produce to the Tribunal the complete unredacted report of the investigation; a redacted version of the same report and all statements given by the Applicant in connection with the investigation by 21 January 2013.

18. On 21 January 2013, the Respondent complied with the Tribunal’s order and produced an un-redacted version of the requested documents. On 25 March 2013, the Respondent provided the Tribunal with a redacted version of the same documents for disclosure to the Applicant.
19. On 26 March 2013, a redacted version of the report of investigation was transmitted to the Applicant.

20. On 17 May 2013, the Respondent filed his reply which was transmitted to the Applicant on 19 May 2013.

**Applicant’s contentions**

21. The Applicant contends the following:

   i. the investigation was limited and incomplete since it relied on the testimonies of individuals who were not present at the incident, and failed to take into account the testimonies of anyone who was present at the incident;

   ii. some of the evidence used is unreliable since a number of allegations were withdrawn by individuals after they realized that they had been misled by several ringleaders;

   iii. there is lack of admissible evidence for a reliable investigation to be properly carried out;

   iv. the Education Department failed to consider any “punishment alternatives”.

22. The Applicant requests:

   i. reinstatement as a Head Teacher at Qudeiriyeh School;

   ii. reimbursement of the Head Teacher allowance;

   iii. retaining the two steps of the downgrading;

   iv. removal of the censure from the record;

   v. reimbursement of one month’s salary due to her suspension without pay;

   vi. mediation.
Respondent’s contentions

23. The Respondent submits that the decision to issue a letter of censure, demote and suspend the Applicant without pay was properly effected.

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

Considerations

Preliminary Issue

25. As stated above, the Respondent filed his reply on 17 May 2013. In his reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings and to file a late reply.

26. Article 6 of the Tribunal Rules of Procedure (“Rules”) provides that the Respondent shall submit his reply within 30 calendar days from the date of the receipt of the application by the Respondent.

27. Pursuant to Article 30 of the Rules, the Tribunal has the authority to shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require, and under Article 14 of the Rules, the Judge 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.

28. Although not condoning the Respondent’s lack of due diligence in failing to request an extension of time to file the reply before the expiration of the 30-day time limit, the Tribunal fails to see how justice would be served if the Tribunal were to render its Judgment on the merits of the case without having the submissions of both parties, or if it were to decide the case on a mere procedural or technical issue.

29. Indeed, the United Nations Appeals Tribunal in Bertucci 2011-UNAT-121 noted that the principle of respect for the right to a defence and the right to an effective remedy before a judge is recognized by Article 8 of the Universal Declaration of Human Rights. Implicit in this recognition is the point that a
Tribunal should exercise its discretion with caution when it comes to excluding a party from participating in the proceedings, even when the Tribunal may have the authority to do so. The Tribunal finds that it would be in the interests of justice and appropriate for a fair and expeditious disposal of the case for the Tribunal to receive the full chronicle of the case from both parties in order to render a fair and comprehensive Judgment that would do justice to the parties and to the system of administration of justice in general rather than exclude a party on a procedural basis.

30. The Tribunal notes that, since its inception, it has been working through a large backlog of cases and reviewing and deciding cases, one case at a time, generally with few exceptions, in chronological order of the date of the filing. In other words, the Applicant’s case was sitting in a queue for several months, and therefore, the late filing of the reply did not prejudice the due process rights of the Applicant.

**Main Issue**

*Was the Respondent’s decision to issue a letter of censure, to demote and to suspend the Applicant without pay for one month properly made?*

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

32. **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.

33. **Area Staff Regulation 10.2†** provides that:

> The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

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† The Tribunal notes that the Respondent erroneously refers to former Area Staff Regulation 10.2. However, the applicable regulation to the present case is current Area Staff Regulation 10.2 which is in force since 1 June 2010.
34. Area Staff Rule 110.1 states that:

Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct…

35. Pursuant to Area Staff Personnel Directive A/10/Rev.1 on Disciplinary Measures, the Commissioner-General has delegated to Field Office Directors the authority to impose disciplinary measures on area staff serving in the Field.

36. 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.

37. Concerning suspension without pay, Area Staff Personnel Directive No. A/10/Rev.1 provides at paragraph 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.

38. With regard to demotion, Area Staff Personnel Directive No. A/10/Rev.1 provides:

9.1 Demotion is the transfer of a staff member from his/her post to another post at a lower grade. This can arise either because of inadequate performance on the part of the staff member or as a disciplinary measure. Demotion should involve a loss of salary, but the loss may be minimised at discretion.

39. The Education Technical Instruction No. 1/08 (“ETI No. 1/08”) on establishing discipline in a violence-free educational environment in UNRWA schools, dated July 2008, provides the following at paragraph 1.3:
g. Corporal punishment, other cruel and degrading forms of punishment and all violence against children or students are strictly forbidden in all UNRWA schools and Training Centres, at all times, and under all conditions and circumstances. This prohibition must be observed without exception by UNRWA Education Department staff.

* * *

h. Corporal punishment is defined as any punishment involving the application of physical force or the issuance of orders or instructions to a student with the intention of causing physical pain, discomfort or humiliation. In this ETI, the term “corporal punishment” includes other cruel or degrading forms of punishment referred to in this definition.

i. Corporal punishment may take a number of forms and includes, but is not limited to, hitting, slapping, smacking, spanking, punching, kicking, pinching and causing physical discomfort to the student …

j. Also prohibited are any forms of punishment or treatment of students that undermine their dignity, or which are degrading or humiliating. These include verbal abuse, threats of future use of physical force, the use of obscene or disrespectful language, the use of intimidating or threatening gestures and any punishment that denigrates scapegoats, frightens or ridicules children or students.

40. Paragraph 4.1.a of ETI No. 1/08 provides that corporal punishment and other forms of violence against children or students are strictly forbidden in all UNRWA schools and Training Centres, at all times and under all conditions and circumstances.

41. Paragraph 4.1.b of ETI No. 1/08 provides that, in accordance with the Agency’s Staff Regulations and Rules, corporal punishment constitutes “misconduct” and is sanctioned by disciplinary measures:

…UNRWA staff proven to have been involved in administering, aiding, or concealing corporal punishment will be liable to severe disciplinary measures as stipulated in UNRWA Staff Regulations Cod/A/59/Rev. 25 and Personnel Directive No. A/10/Rev.1. These measures
include written censure, suspension without pay, demotion, termination and dismissal.

42. Guided by the jurisprudence of 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 established?

43. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measures were based have been established.

44. In early November 2010, two investigators were assigned by the DUA/SAR, and given terms of reference, to investigate allegations of corporal punishment brought up by the parents of seven students against the Applicant. With regard to the allegations, the investigators interviewed seven student victims (the “students”), the parents of the students, the school counsellor, the school supervisor and the Applicant.

45. The investigators set out their findings and conclusions establishing that corporal punishment had been exercised by the Applicant against several students based on inter alia:

- the testimonies of the students that the Applicant exercised corporal punishment against them;
- the testimonies of the students, as witnesses, that the Applicant slapped two students on the face;
- the statement of the Applicant that she was holding a book when she was talking with the students;
the statement of the school counsellor who asserted the complaints against the Applicant, and testified that violence was common in the school.

46. The investigators found that the Applicant exercised corporal punishment by slapping two students on their faces several times and by hitting them together with other students with a book on their heads. The investigators recommended inter alia that appropriate action be taken against the Applicant for exercising corporal punishment and that she be trained on how to improve her communication skills and how to deal with clients.

47. On 27 February 2011, an Agency consultant investigator was requested to review the evidence collected by the investigators. The record shows that the consultant investigator conducted a detailed examination of the evidence with regards to the allegations of corporal punishment. In an undated report, the consultant investigator submitted a review of the report of investigation. In his report, the consultant investigator confirmed the conclusions, findings and recommendations of the original two investigators. He also noted that the Applicant changed her initial statement in an attempt to cover the fact that she used a book to hit the students.

48. As summarised below, the record evidences that the Applicant has contravened the provisions of ETI No. 1/08 and Area Staff Regulation 1.4 in the following manner:

- the Applicant had exercised corporal punishment by slapping two students several times on their faces and by hitting them and other students over the heads with a book;

- the Applicant’s treatment of the students was degrading and humiliating;

Do the facts amount to misconduct?

49. The establishment of the facts regarding (i) the Applicant exercising corporal punishment against seven students and (ii) the Applicant treating the students in a degrading and humiliating manner, supports the characterisation of misconduct on the part of the Applicant and merits disciplinary measures. The Applicant is reminded that ETI No. 1/08 states inter alia that staff proven to have
been involved in administering, aiding, or concealing corporal punishment will be liable to severe disciplinary measures as stipulated in UNRWA Staff Regulations Cod/A/59/Rev.25 and Personnel Directive No. A/10/Rev.1.

50. 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;
- the facts established the Applicant’s exercise of corporal punishment against seven students and the Applicant’s treating of the students in a degrading and humiliating manner; and
- these facts legally support the determination of misconduct on the part of the Applicant.

51. As evidenced in the record, the DUA/SAR had before him sufficient evidence to support the conclusion that the Applicant’s actions as described above clearly amounted to misconduct. The Tribunal also finds that in applying disciplinary measures against the Applicant (demotion from Head Teacher to Teacher with downgrading of two steps at Grade 10 and loss of the Head Teacher’s allowance; issuance of a letter of censure and suspension without pay for thirty days, the Agency complied with the requirements of Area Staff Regulation 10.2, Area Staff Rule 110.1, Area Staff Personnel Directive No. A/10/Rev.1 and ETI No.1/08.

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

52. The question to ask now is whether the Respondent’s decision to demote the Applicant, to issue her a letter of censure and to suspend her without pay for thirty days 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.

53. The record in the file indicates that the Agency, upon hearing about allegations of corporal punishment, duly assigned two investigators and took into account all the relevant facts of the case and accorded the Applicant the opportunity to rebut the allegations against her during her interview with the investigators as well as upon the conclusion of the investigation. The Agency also had a consultant investigator review thoroughly the evidence collected by the investigators and gave due consideration to his review report. The evidence demonstrates that the DUA/SAR took into account the Applicant’s comments before the decision was made to demote her, issue her with a letter of censure and suspend her without pay for thirty days. The Tribunal considers that the Applicant was given due process and that there was no procedural irregularity in this respect.

54. The Tribunal thus fails to see any improper motivation or procedural error in the sequence of steps which led to the disciplinary measures against the Applicant. The Tribunal refers to the jurisprudence of the former United Nations Administrative Tribunal Judgement 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 investigation and the disciplinary measures imposed on her.

55. The Applicant challenges the investigation and the evidence gathered by the investigators. She argues that the investigation was limited and incomplete because it relied on the testimonies of individuals who were not present at the incident, and that it failed to take into account the testimonies of anyone who was present at the incident. She also claims that some evidence is unreliable since a number of allegations were withdrawn by individuals after they realised that they had been misled by ringleaders. She argues that there is lack of admissible evidence for a reliable investigation to be carried out properly.

56. Contrary to what the Applicant claims, the Tribunal finds that the investigation was properly conducted and that admissible and relevant evidence
was collected by the investigators. The Tribunal notes, in particular, that the report of the investigation and the evidence was subject of a thorough review by a consultant investigator who came to the same conclusion as the initial investigators.

57. The Tribunal considers that 1) the testimony of seven students, each of whom complained of the Applicant hitting and/or slapping them and corroborated to a certain extent each other’s account of the same behavior, 2) the testimony of several witnesses who saw the injuries (redness of the face, for example) shortly after the corporal punishment was inflicted, and 3) the Applicant’s own testimony are significant and sufficient evidence to establish that corporal punishment indeed occurred. While there were no eye witnesses - apart from the seven students - when the incident occurred, the testimony of their parents, the school counsellor and the school supervisor support the statements made by the individual complainants.

58. With respect to the Applicant’s allegation that three witnesses withdrew their statements, the Tribunal notes that none of them had witnessed the incident. The Applicant’s allegation in this respect is therefore not relevant evidence. The Tribunal considers also irrelevant the Applicant’s contentions relating to the character of the father of one of the complainant students.

Was the sanction proportionate to the offence?

59. As held by the United Nations Appeals Tribunal in Sanwidi 2010-UNAT-084, the principle of proportionality means that an administrative 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. The United Nations Appeals Tribunal also held in Aqel 2010-UNAT-040 that the level of sanction falls within the ambit of the Administration and can only be reviewed in cases of “obvious absurdity or flagrant arbitrariness”.

60. When considering proportionality, the Tribunal takes special note of the nature of an applicant’s post, as held by the United Nations Appeals Tribunal in
Haniya 2010-UNAT-024. As Head Teacher, the Applicant was entrusted with the duty to promote an environment in the school that supports effective teaching and learning and that is free of violence. As held by the United Nations Appeals Tribunal in *Abu Jarbou 2013-UNAT-292* at paragraph 42:

> The position of trust and responsibility [the Appellant] held as Principal of the Center is of primary importance to our consideration of proportionality. ..., a manager and supervisor is in a position of leadership and is supposed to be a role model for the staff members he supervises.

61. The Tribunal finds that the DUA/SAR was justified in stating in his letter dated 1 August 2011 to the Applicant that:

> In determining the appropriate disciplinary measures in this case, I found a number of factors support the imposition of severe disciplinary measures. Such factors include your position of responsibility and supervision as Head Teacher, the gravity of the offense, the potential risk to other students, and the Agency’s clearly communicated policy of zero tolerance for corporal punishment.

62. As the facts on which the sanction was based have been established, as the Applicant has been properly found to have engaged in misconduct and as the decision to issue her a letter of censure, to demote her and to suspend her without pay for thirty days 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.

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

63. Considering that:

   (i) the facts on which the disciplinary measures were based have been established;

   (ii) the facts legally amount to misconduct;

   (iii) the disciplinary measures were proportionate to the offence;
(iv) 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.

Conclusion

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

(Signed)

Judge Bana Barazi

Dated this 1st day of October 2013

Entered in the Register on this 1st day of October 2013

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman