BARAKAT

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 Nidal Abdul Karim Abdul Rahman 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”), not to short-list him for the post of Senior Medical Officer and to transfer him from Nuzha Health Centre to Main Baqaa’ Health Centre.

Facts

2. On 25 August 2004, the Applicant was offered and accepted the post of Medical Officer “B” at Irbid Town Health Centre on a fixed-term appointment, at Grade 14, Step 1.

3. By letter dated 15 September 2008, the Applicant was informed that he had been appointed on promotion at Grade 15 as Medical Officer “A” at Jarash Camp Health Centre upon his request.

4. Effective 1 February 2011, the Applicant was transferred to Nuzha Health Centre upon his request.

5. On 15 July 2012, the Agency circulated internally and externally a vacancy notice for the post of Senior Medical Officer (“SMO”).

6. The essential qualifications and experience required for the post as described in the Vacancy Announcement included:

   Minimum Qualifications

   A medical degree from a recognized university including an internship of at least twelve months duration.

   A valid governmental license to practice medicine in the country of duty station.

   At least five years of satisfactory professional working experience three of which at least should have been with public health services, preferably with the Agency.
Good command of spoken and written English and Arabic.

**Desirable Qualification** [sic]

Post-graduate degree or diploma in public health or other related disciplines.

Skill in use of computers for epidemiological applications.

7. The Agency received 46 applications for the post, including the Applicant's. All were jointly reviewed by the Health Department and the Human Resources Department against the essential post requirements and competencies outlined in the Post Description and the Vacancy Announcement

8. Out of the 46 candidates, 31 were short-listed and invited to take a written exam. All candidates who scored 50 percent and higher on the exam were invited to a personal interview. As the Applicant scored 40 percent out of 100, he was not included in the short-list.

9. On 25 and 26 November 2012, ten candidates were interviewed by a recruitment panel (the “Panel”). On 10 December 2012, the Panel produced its written recommendations. On 12 December 2012, the Director of UNRWA Operations, Jordan (“DUO/J”) approved the Panel’s recommendations, and a candidate was appointed as the SMO.

10. By email dated 7 January 2013, the Chief, Field Health Programme (“CFHP”) sent out to the Chief Area Officer et al. a list of the proposed promotions and transfers of several Medical Officers “A” (“MOA”) based on the latest selection for the posts of SMO and MOA. The email explained “[t]his proposal is recommended by the health programme for the interest of work and was coordinated and discussed with the concerned AHO’s”. The list indicated the Applicant’s proposed transfer from MOA in charge at Nuzha Health Centre to MOA at Main Baqaa’ Health Centre.

11. By email to the Staff Services Officer dated 13 January 2013, the CFHP explained the rationale behind the proposed transfers, noting in the case of the Applicant’s transfer:
Please note that this transfer and rotation is made to meet the interest of work and to cope with health reform requirements and make efficient use of available potentials of human resources in these health centres. The transfer of Dr. Barakat particularly is part of this process, and I discussed the rationale behind this transfer with him on telephone and AHO paid a visit to the HC and discussed this transfer with Dr. Barakat and that it is for the best interest of health [department/Agency].

This transfer does not make hardship on Dr. Barakat [sic].

12. By email dated 22 January 2013, the proposed promotions and transfers of the MOAs were transmitted to various Health Centres including the Applicant’s duty station at Nuzha Health Centre.

13. On 1 February 2013, the Applicant started his duties at Main Baqaa’ Health Centre.

14. By email dated 24 February 2013 to the DUO/J, the Applicant requested review of the decision not to short-list him for the post of SMO and to transfer him from Nuzha Health Centre to Main Baqaa’ Health Centre.

15. By letter dated 20 March 2013, the DUO/J replied to the Applicant’s request for decision review, namely:

[...]

Your case was thoroughly reviewed by all concerned; I have concluded that the surrounding circumstances and reasons justify the decision of Chief Field Health Program to transfer you from Nuza H/C to Main Baqaa H/C in the interest of the Agency. Regarding not inviting you to the interview for the post of Medical Officer “A”, I regret to inform you that you did not pass the written test and consequently you were not invited to the interview.

Based on the above, I conclude that the decision of your transfer and not inviting you to the interview [sic] for the post of Medical Officer “A” were not arbitrary or motivated by prejudice or extraneous factors and was in the line of the Agency’s Regulations and Rules and should stand.
You have the right to appeal the decisions above. Please refer to Area Staff Regulation 11 and Area Staff Rule 111 or you may contact the Registry of the UNRWA Dispute Tribunal for information on the next steps to initiate the formal dispute resolution mechanism should you wish to do so. […]

16. On 16 May 2013, the Applicant submitted an application to the Tribunal.

17. On 20 June 2013, the Respondent filed a Motion for Extension of Time to File a Reply. He submitted that he was not in a position to comply with the time limit for filing a reply due to the absence of the Applicant’s Official Status File and Panel’s report.

18. On 24 July 2013, the Respondent filed a Supplementary Motion for Extension of Time to File a Reply. By Order No. 098 (UNRWA/DT/2013) dated 3 October 2013, the Tribunal granted the Respondent’s request to file a late reply and directed the Respondent to file a reply within five calendar days from the date of the Order.

19. On 4 October 2013, the Respondent filed his reply.

20. On 1 October 2014, the Tribunal issued Order No. 101 (UNRWA/DT/2014) requesting the Respondent to produce evidence of the Applicant’s request to be transferred to Nuzha Health Centre.

21. On 2 October 2014, the Respondent filed his Response to Order No. 101 (UNRWA/DT/2014) producing evidence of the Applicant’s 12 January 2011 request to be transferred to Amman. The Tribunal notes that Nuzha Health Centre is located in Amman.

Applicant’s contentions

22. The Applicant contends the following:

(i) he did excellent in the exam for the SMO Grade 16 post; however, his answer sheet was prejudicially graded to ensure his failure. Personal connections clearly played a role in the scoring of the written examination;
(ii) the transfer was abusive, arbitrary, contrived and intended to be a disciplinary measure;

(iii) the transfer to Main Baqaa’ Health Centre was far away from his house and constituted a financial hardship for him and his five children;

(iv) he did not consent to the transfer; and

(v) personal connection clearly had a role to play with regard to the written examination.

23. The Applicant requests the Tribunal to order:

(i) compensation in the amount of 100,000 Jordanian Dinars\(^1\) for moral damages sustained when he was transferred from being a manager in Nuzha Health Centre to second Medical Officer in Main Baqaa’ Health Centre;

(ii) reinstatement as manager at Nuzha Health Centre;

(iii) additional financial compensation in the amount of 3000 Jordanian Dinars\(^2\) representing the transportation fees for his five children;

(iv) moral compensation through upgrading him to Grade 16 after re-correcting and re-marking his examination paper and comparing it with those of the candidates who were elected for Grade 16;

(v) appropriate measure to be taken against the CFHP for abuse of authority and retaliation; and

(vi) appropriate measure to be taken against the Chief Area Officer, North Amman.

**Respondent’s contentions**

24. The Respondent contends that:

(i) the Applicant’s candidature was given full and fair consideration;

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\(^1\) The approximate conversion is USD 141,022.

\(^2\) The approximate conversion is USD 4,231.
(ii) the short-listing process for the SMO post was properly made in accordance with the Agency’s Regulations and Directives;

(iii) the transfer of the Applicant was properly made pursuant to the Agency Staff Regulations; and

(iv) the relief sought by the Applicant has no basis.

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

Considerations

Was the short-listing process properly conducted?

26. It is important to examine the legal and administrative framework applicable in the case at bar. 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.

27. For the purpose of implementation of Area Staff Regulation 4.3, Area Staff Personnel Directive No. PD/A/4/Part II/Rev.7 (“PD/A/4”) provides:

Evaluation of applications

35. After the closing date of a vacancy the Recruitment Administrator reviews the applications, and generates a long list of applicants who meet all or most of the post requirements set out in the job description and vacancy announcement.

36. The shortlist is decided by the Hiring Director in conjunction with the Recruitment Administrator via the e-recruitment system. In the case of Programme or Support Department positions in the Field, the Field Director should ensure appropriate coordination with the relevant Programme or Support Department.

28. The Tribunal would like to point out that the Commissioner-General has broad discretion in making decisions regarding appointments. Furthermore, as per PD/A/4 in paragraph 9, the Commissioner-General has delegated the authority for
the appointment of area staff at posts Grade 17 and below to Field Directors for posts in their respective Fields.

29. In reviewing such decisions, it is not the role of the Tribunal to substitute its own decision for that of the Respondent regarding the outcome of the selection process. In other words, it is not for the Tribunal to assess the merits of the candidates for the position in question as to who was or was not suitable. However, the discretion of the Respondent is not unfettered and the Tribunal will examine whether the procedure, as set out in the Staff Regulations and Rules and other relevant issuances, was followed, and whether the staff member was given fair and adequate consideration in the selection process. As held by the United Nations Appeals Tribunal (the “UNAT”) in Abbasi 2011-UNAT-112, paragraph 26:

The UNDT has jurisdiction to rescind administrative decisions concerning the selection of staff on certain grounds. A decision not to select a staff member may be rescinded in circumstances where he or she did not receive fair and adequate consideration, there has been any kind of discrimination or bias against the staff member, or the proper staff selection procedures were not followed.

30. A vacancy announcement for the post of Senior Medical Officer was published internally and externally from 15 to 28 July 2012. Of the 41 candidates that applied, 31 were deemed to have met most or all of the requirements and were short-listed and invited to take an exam. Of the 31 candidates, 18 candidates, including the Applicant, took the exam. Ten out of the 18 candidates scored above the 50 percent threshold requirement. A total of nine candidates, including the Applicant, scored below 49 percent. Only the ten candidates who scored above 50 percent were invited for a personal interview.

31. Following the interviews, the Panel produced a recruitment report identifying and assessing the strengths and deficiencies of each of the ten interviewees. Of the ten, the Panel found four “suitable” candidates and ranked them as “1st, 2nd, 3rd and 4th choice”. Its conclusions and recommendations were signed by all the Panel members and then referred to the appointing authority - the
DUO/J - for decision. Looking at the record, the Tribunal finds that the Agency’s goal in recruiting for the post was to secure the highest standards of efficiency, competence and integrity. The record indicates that the Agency has complied with PD/A/4 with regard to advertising the post and short-listing the candidates.

*Was the decision to not short-list the Applicant biased?*

32. When the Applicant 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, he bears the burden of proving prejudice and must provide convincing evidence that the Respondent’s decision was tainted. As held by the UNAT in *Rolland* 2011-UNAT-122, paragraph 26:

> There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even **minimally** show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion (emphasis added).

33. The Applicant claims that the Respondent’s decision not to short-list him was based on favouritism. More specifically, the Applicant made allegations with regard to the insufficient qualifications and experience of some candidates who took the test and were short-listed. He alleged that one recommended candidate was external, another recommended candidate had been accused of sexual harassment and the subject of an investigation, that his [the Applicant’s] answers to the test were “among the best” and that one candidate had completed the test in half an hour because he had been told he was going to be selected. The Applicant claimed that the CFHP kept looking at his exam paper during the test, in order to identify his exam later and score it below 50 percent.

34. The Tribunal finds it quite inappropriate for the Applicant to identify the other candidates by name and to discuss their candidature and mention alleged charges of sexual harassment and investigation of individuals who are not parties
to his application and are not privy to these proceedings. The Applicant is a medical doctor and must surely understand the notion of confidentiality. This case is about his application, not the experience, personal file or alleged behaviour of third parties. The record clearly shows that the Applicant failed to score a passing grade on the exam and was, therefore, not short-listed. Academic achievements alone do not inevitably lead to a good performance in an exam.

35. As for the Applicant’s allegation that one of the candidates came from outside the Agency, the Applicant is reminded that the Vacancy Announcement indicates “[t]his vacancy notice is open to internal and external candidates”. There was no procedural irregularity in opening the post to external candidates.

36. The Applicant alleges that the DUO/J and the Field, Human Resources Officer did not address his concerns in their response to his request for decision review. Looking at the record, the Tribunal finds that the DUO/J when responding to the Applicant gave him a clear explanation as to why he had not been short-listed, as indicated in paragraph 15 above.

37. The Tribunal finds that the evidence in the file confirms that the Agency complied with its Area Staff Regulations and Rules and with the applicable staff selection procedures in the case at bar. There is nothing in the record that shows that the Applicant was not given fair and adequate consideration. The Tribunal also finds that the Applicant has failed to produce evidence – convincing or otherwise – of any lack of compliance by the Agency with its Area Staff Regulations, Rules and Personnel Directives in the selection process, and of any impropriety, bias, or prejudice on the part of the Agency in not short-listing the Applicant for the post of SMO.

Was the Respondent’s decision to transfer the Applicant made properly?

38. 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. The Commissioner-General may establish special conditions of service for staff members assigned to
any of the activities or offices of the Agency outside its area of operations. Staff members are responsible to the Commissioner-General in the exercise of their functions. The whole time of [sic] staff members shall be at the disposal of the Commissioner-General, who will establish a normal working week.

39. With regard to transfer decisions, Area Staff Regulation 4.3 stipulates:

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.

40. In addition, Jordan Field Office Circular No. J/30/2012 (the “Circular”) on transfers provides:

1. In accordance with Area Staff Regulation 1.2, the Commissioner-General or his/her delegate representative has the full authority to transfer any staff member in the best interest of the Agency. In JFO the authority to approve staff transfer has been delegated to the Field Human Resources Officer (FHRO).

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3. The JFO management can initiate staff transfer to achieve the highest degree of efficiency and effectiveness in managing the Agency’s workforce …

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**Modalities of transfer:**

10. Interest of the Agency: CAO, Chief TVET in consultation with the respective Chief of Programme or Department Heads can request staff transfer to any suitable post within the field of operations based on the Agency’s needs. Concerned managers shall submit any such request to the FHRO for review and final approval in accordance with the principles outlined in this circular.

41. Although mindful of the Commissioner-General’s broad discretionary authority in his application of the Agency’s Staff Regulations and Rules, the Tribunal nevertheless is also aware that this discretionary authority is not absolute and the Tribunal will not interfere with it unless the contested decision was
arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law.

42. The UNAT in *Kamanyi 2012-UNAT-194*, paragraph 3, states:

[The UNAT] holds that it is within the Administration’s discretion to reassign a staff member to a different post at the same level and that such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member.

43. Examining the record, it is important to point out that the Applicant was transferred to a post at the same grade and that the post involved responsibilities corresponding to his level, competence and skills. Moreover, as indicated in his email of 13 January 2013, which the Tribunal will quote again, the CFHP wrote:

Please note that this transfer and rotation is made to meet the interest of work and to cope with health reform requirements and make efficient use of available potentials of human resources in these health centres. The transfer of Dr. Barakat particularly is part of this process, and I discussed the rationale behind this transfer with him on telephone and AHP paid a visit to the HC and discussed this transfer with Dr. Barakat and that it is for the best interest of health [department /Agency [sic].

His transfer does not make hardship on Dr. Barakat [sic].

44. Based on the above, it is clear that the basis of the Applicant’s transfer was to cope with the Department’s health reform requirements and therefore was in the interest of the Agency. The Applicant also alleges that the transfer was a disciplinary action as he went “from being a clinic manager to a clinic where I do not hold the position of a manager...”. Such an allegation is misguided. Indeed, the transfer list found in Annex 11 indicates that the Applicant’s transfer was from MOA in charge at Nuzha Health Centre to MOA at Main Baqaa’ Health Centre. However, the Applicant remained an MOA. The Applicant may feel as if he was demoted since he was no longer “in charge” but he has failed to provide any evidence that the transfer caused him a decrease in his salary.

*Was the Respondent’s decision to transfer the Applicant biased?*
45. The Applicant alleges that his transfer was abusive and not made in the interest of the work or the Agency. The record indicates that the Applicant was not singled out; rather the record shows that six other Medical Officers were also transferred at the same time as the Applicant. In fact, this was not the first time the Applicant was transferred. When he entered the service of the Agency as Medical Officer “B” Grade 14 in August 2004, the Applicant was stationed at Irbid Town Health Centre. Upon promotion to MO “A” Grade 15 in September 2008, the Applicant was transferred to Jarash Camp Health Centre. On 1 February 2011, he was transferred to Nuzha Health Centre. Such evidence indicates to the Tribunal that it is not a rare occurrence for an MOA to be transferred based on the Agency’s needs.

46. Moreover, as indicated in Annex 15, the Applicant actually requested the 2011 transfer from Jerash to Amman. The Applicant’s request for transfer was accepted and authorized by the same CFHP whom the Applicant is presently accusing of retaliation and abuse. Furthermore, the Applicant has failed to produce evidence of abuse or retaliation in the present instance. He is reminded that in order for the Tribunal to consider any allegation made by either party, evidence - documentary, testimony or otherwise - is required.

47. The Applicant claims that he is ready to provide the names of many (“no less than 20”) colleagues if their testimony is needed in support of the CFHP’s dictatorial decision-making, adding that “they fear to lose their jobs and therefore remain silent”. The Applicant is reminded that he appealed the Respondent’s decision to transfer him and therefore has the burden of producing evidence in support of his allegations of abuse, retaliation and bias. The Tribunal is not obligated to call witnesses or take testimony under the Staff Regulations and Rules. How would the names of “no less than 20” colleagues assist the Tribunal in determining whether the decision to transfer the Applicant was abusive?

48. The Applicant claims that he did not consent to the transfer. While there is indeed no evidence of his consent, the Tribunal would like to remind the Applicant that a staff member’s consent to a transfer is not a right or an entitlement. Rather it is the Administration’s prerogative - as per the Staff
Regulations and Rules and other administrative issuances – if the interest of the Agency so requires.

49. Finally the Applicant alleges that he has suffered moral hardship (damage to his reputation) and financial hardship because of his transfer. In his email of 13 January 2013, referred to in paragraphs 11 and 43 above, the CFHP states that “[T]his transfer does not make hardship on Dr. Barakat”. If the CFHP’s determination is erroneous, as alleged by the Applicant, the Tribunal expects him to produce evidence to rebut the CFHP’s determination. The record confirms that when transferred from Nuzha Health Centre to Main Baqaa’ Health Centre, the Applicant kept his Grade 15 as Medical Officer “A”. The transfer did not affect his contractual rights, his conditions of employment or his salary. As for the financial hardship of paying 3000 Jordanian Dinars a year as transportation fees for his five children, the Applicant has produced no evidence to support his allegation. The Applicant is again reminded that a mere blanket statement or unsupported allegation does not constitute evidence. With regard to his alleged tarnished reputation, the Applicant has equally failed to produce any evidence. Based on the above, the Tribunal finds that the Applicant has failed to provide evidence – convincing or otherwise – to support his allegations of moral and financial hardship, or bias and arbitrariness on the part of the Agency.

50. As for the Applicant’s request for appropriate measures to be taken against the CFHP and the Chief Area Officer, (CAO) North Amman, for alleged misconduct, the Tribunal would like to refer to the jurisprudence of the UNAT in Aboud 2010-UNAT-100 that states:

As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action against another part.3

51. If the Applicant is requesting that an investigation be conducted into the alleged misconduct of his colleagues, the UNAT has also noted that “[i]n the majority of cases, not undertaking a requested investigation into alleged

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3 Citing the former Administrative Tribunal Judgment No. 1086 Fayache.
misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member”. Nwuke Judgment No. 2010-UNAT-099. Therefore, even if the Applicant had requested an investigation into the alleged misconduct, such a result or possible disciplinary action would have been taken against the CFHP and the CAO, North Amman, and not the Applicant. Therefore, such a request would in no way affect the Applicant’s rights and the Tribunal dismisses this request.

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

52. As the Applicant has failed to demonstrate any sort of pecuniary damage, procedural violation, bias or moral injury in connection with his transfer, the Tribunal is left with no basis for an award of compensation, as held by the UNAT in Antaki 2010-UNAT-095, James 2010-UNAT-009, Zhouk 2012-UNAT-224 and the United Nations Dispute Tribunal in Ibrahim UNDT/2011/115.

53. Having determined that the decision not to short-list the Applicant for the post of SMO and to transfer him to another Health Centre was properly conducted and was not tainted by error of law, procedural irregularity or bias, the Tribunal finds that there is no basis in fact or in law for the remedies sought by the Applicant.

Conclusion

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

Judge Bana Barazi
Dated this 16th day of October 2014

Entered in the Register on this 16th day of October 2014

Laurie McNabb, Registrar, UNRWA DT, Amman