IHMAIDEH  

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 Mohammad Mahmoud Saleh Ihmaideh (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 appoint him to the post of Area Loan Supervisor.

Facts

2. Effective 1 August 2011, the Applicant was appointed to the post of Credit Extension Assistant (renamed Loan Officer shortly thereafter) at Grade 9, Step 1 in the Microfinance Department in Jordan for a Fixed-Term Appointment of five months.

3. The Applicant’s appointment was subsequently extended twice, the second time until 31 December 2013.

4. Between 5 and 18 August 2012, the Agency advertised a generic vacancy announcement for the post of Area Loan Supervisor for all areas.

5. The Applicant applied and was interviewed on 20 September 2012. Despite some concerns regarding his supervisory competencies that were established by the Interview Panel as compared to the other candidates, the Agency decided to include him on the Roster as the fourth recommended candidate. The Roster remained valid for one year until 20 September 2013.

6. Shortly after the inclusion of the Applicant on the Roster, the Agency became aware of activities undertaken by the Applicant that were inconsistent with his functions as a Loan Officer. On 11 December 2012, the Chief, Field Microfinance Programme/Jordan ("C/FMP/J") sent a Letter of Reprimand to the Applicant admonishing him for his inappropriate financial relationships with active clients of the Microfinance Department. Such relationships violate the applicable operational procedures included in the Microfinance Department’s Operations Guide (the “Guide”). Annex 7 of the Guide provides in relevant part:
Very Important

Each branch manager must ensure that all old and new staff members are informed of the Operations Guide and that they understand it properly. They should read the Guide and use it in the Department.

The conditions that govern the relationship between staff members of the Department and clients

* * *

3. Separation of official duties from personal interactions to avoid potential negative consequences especially in matters related to deferred payment and borrowing money from clients.

* * *

9. Loan officers must not build or develop personal relationships with clients that would negatively affect their ability in the future to deal with clients and their entitlements (emphasis in the original).

7. As for the Letter of Reprimand, it reads as follows:

This letter follows your meeting on 12/11/2012 and [t]he Credit Operations manager [sic]. At that meeting you have admitted to having financial relationships with Active MD clients. You have bought several items from clients, and most importantly you have bought a certain juice vending machine paying an advance payment and making arrangements to settle the outstanding balance on monthly basis by paying the client’s monthly instalments for MD loan on his behalf by yourself. Another such action was related to purchasing furniture from an existing client on credit.

Such findings not only contradicts with the set operations procedures which should be strictly adhered to mitigate the credit risks, but also such a behavior has raised serious questions about your credibility as a loan officer. Please be reminded that MD management, takes discipline, behavior, attitude, and conduct of staff members very seriously, and any attempt to jeopardize its operations will be dealt with in a serious manner. MD does not [and] will not tolerate such behavior.
Henceforth, you were served with this reprimand, with an official indication that similar actions will result in further disciplinary actions. I would sincerely urge you to examine your career priorities, and refrain from any behaviors which are not expected from an UNRWA staff member.

8. The Agency appointed the first three candidates on the Roster to Area Loan Supervisor positions in the Microfinance Department Branches in Bayader, Zarqa and Irbid on 1 November 2012, 11 November 2012 and 2 January 2013 respectively.

9. Between August 2012 and June 2013, the Agency advertised three specific vacancies announcements for Area Loan Supervisors, one for the Madaba Branch and two for the Jarash Branch of the Microfinance Department. The Applicant applied for two of these posts, i.e. the one for Madaba on 31 August 2012 and the one for Jarash on 1 July 2013.

10. The Agency found the Applicant unsuitable for the post of Area Loan Supervisor. The Agency appointed external candidates to the Madaba and the Jarash vacancies.

11. On 1 October 2013, the Officer in Charge/Human Resources Department responded to the Applicant’s complaint that he was not considered for the post of Area Loan Supervisor, explaining to him *inter alia* that the C/FMP/J did not recommend his appointment because he had been served with a Letter of Reprimand.

12. On 9 October 2013, the Applicant submitted a request for review of the decision not to appoint him to the post of Area Loan Supervisor.

13. By letter dated 27 October 2013, the Applicant submitted his resignation:

   I submit my resignation today on 27/10/2013 and the Sunday, November 10, 2013, will be the last working day for me upon my request.

14. On 28 October 2013, the Acting Director of UNRWA Operations/Jordan (the “A/DUO/J”) responded to the request for decision review, confirming that:
[...] the decision not to appoint you to the post of Area Loan Supervisor was not arbitrary or motivated by prejudice or extraneous factors but was fully and properly supported by the facts of the case. In particular, this decision was taken in accordance with the Area Staff Personnel Directive PD A/4/Part II/Rev. 7 paragraph 34...

The A/DUO/J concluded that the reasons stated in the Agency’s letter of 1 October 2013 justified the decision of the C/FMP/J not to recommend the Applicant’s appointment.

15. By letter dated 11 November 2013, the Human Resources Services Officer, Jordan confirmed the Applicant’s resignation effective close of business on 10 November 2013.

16. On 6 December 2013, the Applicant filed an application with the UNRWA Dispute Tribunal (the “Tribunal”) contesting the Agency’s decision not to appoint him to the post of Area Loan Supervisor arguing that he was qualified for the post and met the requirements. The Applicant also noted that any mistakes made by he and his colleagues were a result of a lack of guidance. Lastly, the Applicant alleges that while the Irbid Branch Manager had also been involved in inappropriate dealings with clients, he was nevertheless selected to travel to Italy for a training course.

17. On 4 January 2014, the Applicant submitted a Request for Relief in which he asserted the same contentions as in his application, essentially claiming that he was the subject of discrimination when he was not appointed to the post of Area Loan Supervisor.

18. On 20 January 2014, the Respondent filed his reply to the application and did not object to the Applicant’s 4 January 2014 Request for Relief.

19. On 2 October 2014, the Tribunal issued Order No. 102 (UNRWA/DT/2014) (“Order No. 102”) ordering the Respondent to produce a copy of the request for decision review.

20. By Motion dated 3 October 2014, the Respondent requested an Extension of Time to comply with Order No. 102.
21. On 7 October 2014, the Tribunal issued Order No. 106 (UNRWA/DT/2014), granting the Respondent’s request for an Extension of Time.

22. On 9 October 2014, the Respondent produced a copy of the Applicant’s request for decision review in accordance with Order No. 102.

**Applicant’s contentions**

23. The Applicant contends that:

   (i) he should have been offered the position of Area Loan Supervisor because he was listed on the Roster;

   (ii) when not appointing him to the position of Area Loan Supervisor, the Agency took only the Letter of Reprimand into consideration whereas it should have considered his performance;

   (iii) he and his colleagues did not receive proper training and therefore they committed mistakes; and

   (iv) he has been subject to discrimination because some colleagues who were served with a Letter of Reprimand were assigned as supervisors whereas he was not appointed to the post of Area Loan Supervisor solely on the basis of the Letter of Reprimand he had received.

24. The Applicant is seeking financial compensation because he was subjected to employment discrimination.

**Respondent’s contentions**

25. The Respondent contends that:

   (i) the decision not to recommend the Applicant for the post of Area Loan Supervisor was not arbitrary or flawed by procedural irregularity or error of law and was fully and properly supported by the facts of the case; and

   (ii) there is no basis for financial compensation as the Applicant did not provide evidence of any damages he may have suffered.

26. The Respondent requests that the Tribunal dismiss the application in its entirety.

**Procedural Issue**
27. The Tribunal notes that in his reply dated 20 January 2014, the Respondent did not object to the Applicant’s 4 January 2014 Request for Relief. The Tribunal considers that it does not need to issue a separate Order because the subject matter in the Request for Relief goes to the merits of the case and is basically a repetition of the application.

Considerations

Was the Respondent’s decision not to appoint the Applicant to the post of Area Loan Supervisor properly made?

28. 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.

29. 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 roster candidates

33. [...] At the discretion of the Hiring Director, a pre-approved roster candidate can be appointed or recommended for appointment, as applicable, without the need to initiate a vacancy announcement.

Advertisement of vacancies

34. If no suitable candidates are identified, or if the Hiring Director chooses to instead initiate a vacancy announcement, the Recruitment Administrator arranges for the vacancy to be advertised through the Agency’s e-recruitment system.

30. The Tribunal would like to point out that the Commissioner-General has broad discretion in making decisions regarding appointments. 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 procedures, as set out in the Area Staff Regulations and Rules and other relevant issuances, were 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.

31. As stipulated in PD/A/4 at paragraphs 33 and 34 quoted above in paragraph 29, it is clear that inclusion on a Roster does not guarantee appointment. Rather, the Hiring Director has the discretion to recommend or to appoint a candidate on a pre-approved Roster without having to initiate a vacancy announcement. However, the Hiring Director may also decide to initiate a vacancy announcement when no suitable candidates are identified. In other words, the Agency is in no way compelled to offer a post to Roster candidates and is free to issue a vacancy announcement even when there is an active Roster.

32. The Tribunal finds that when the Agency did not appoint the Applicant from the Roster, the Respondent was exercising his competence in accordance with the provisions of the applicable Area Staff Regulations and Rules and other administrative issuances. The Tribunal fails to see any procedural irregularity or error in law in the recruitment process with regards to the Applicant.

33. As noted earlier, the C/FMP/J had recommended - and the A/DUO/J confirmed - that the Applicant would not be appointed to the post of Area Loan Supervisor because he had been served with a Letter of Reprimand. The Tribunal finds that the Applicant’s supervisors paid “due regard” in “securing the highest standards of efficiency, competence and integrity”, pursuant to Area Staff Regulation 4.3 when they did not appoint the Applicant to the post of Area Loan Supervisor.
Was the Respondent’s decision not to appoint the Applicant to the post of Area Loan Supervisor arbitrary or biased?

34. When the Applicant alleges that the exercise of the Respondent’s discretionary authority was arbitrary or capricious, motivated by prejudice or extraneous factors, 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).

35. Based on the evidence above, and as already noted by the Tribunal, the evidence in the file shows that the Applicant’s candidature was given full and fair consideration and that he was not selected due to the fact that he had been issued a Letter of Reprimand. According to the jurisprudence of the UNAT, the presumption of regularity stands and the burden of proof shifts to the Applicant who must prove by clear and convincing evidence that he was denied a fair chance of promotion.

36. In his application, the Applicant wrote:

> In contesting the decision, my main contention is as follows: If my non appointment to the post of Area Loan Supervisor was based on the Letter of Reprimand, then why were other colleagues assigned as Supervisors despite the fact that they were too served with similar letters[?]

37. Beyond blanket statements the Applicant has not provided evidence that other Area Loan Officers have been appointed as Supervisors, or that the colleague he mentioned by name was offered the position of Area Loan Supervisor. Rather, it has been alleged by the Respondent that the Madaba and Jarash positions were offered to external candidates. Moreover, paragraph 27 of
the Respondent's reply contradicts the Applicant's assertion by noting that due to staff shortages, certain Loan Officers were asked to perform a limited number of additional duties. However, none of the said officers was actually appointed Area Loan Supervisors. In support of either the Applicant's allegation or the Respondent's submission, the Tribunal has received no evidence. The Tribunal notes that those colleagues who allegedly received Letters of Reprimand and were then given supervisory responsibilities are not part of the case. In the absence of evidence the Tribunal does not find that the Applicant has satisfied his burden of proof that the impugned decision was arbitrary or capricious or was motivated by prejudice or external factors.

38. In his Request for Relief, the Applicant notes that the Agency intends to hire [name of staff member] as Area Loan Supervisor although he had also received a Letter of Reprimand. The Tribunal finds it quite inappropriate for the Applicant to identify a colleague by name and allege that his colleague had been served with a Letter of Reprimand. The Tribunal also finds it inappropriate for the Applicant to mention improper dealings allegedly committed by his Branch Manager with clients. His colleagues are not parties to his application nor privy to these proceedings.

39. The Applicant's main contention is that when the Agency decided not to appoint him to the position of Area Loan Supervisor, it should have considered his performance rather than taking into consideration the Letter of Reprimand only. Actually, the Agency did just that: it considered the Applicant's performance and behaviour as a Loan Officer, that is, a Loan Officer who had contravened operational procedures by engaging in personal financial relationships with active clients of his Department. For example, the Applicant agreed to settle his outstanding debts with clients by assuming their loan installments and repaying the clients outstanding loans to the Agency. This is indeed what the Agency explained to the Applicant in its Letter of Reprimand, stating inter alia that his conduct "has raised serious questions about [his] ability as a loan officer" and urging him "to examine [his] career priorities and refrain from any behaviors which are not expected from an UNRWA staff member".
40. The Applicant contends that the reason mistakes were made was inadequate training. In his request for decision review, the Applicant attempts to explain one of these mistakes, noting that “[he] bought a device from [a client] and paid the installments to the Department in his account” adding “[T]his did not serve my personal interest and I did not have a financial relationship with him”. Does the Applicant need a training course to understand that, as a Loan Officer, entering into personal financial relationships with clients is improper? Actually, the Applicant was aware that his conduct was inappropriate because he wrote: “I would like to say that such action was the result of lack of training on the part of my managers”. If he was given the Guide to sign “only two months ago”, i.e., in early August 2013 as indicated in his request for decision review, why did he not submit evidence in support thereof? Why did he not challenge the Letter of Reprimand? The Tribunal finds that his claim of lack of or insufficient training remains unsubstantiated. The Applicant is reminded that in order for the Tribunal to consider any allegation made by either party, evidence — documentary, testimonial or otherwise — is required. A mere blanket statement does not constitute evidence.

41. As noted above, the Applicant did not contest the Letter of Reprimand he received and *ipso facto* his inappropriate dealings with the clients he served as Area Loan Officer. Furthermore, in the application he did not deny committing those breaches of the operation procedures of the Microfinance Department; rather he blamed them on the management which - allegedly - did not give him and his colleagues proper training.

42. Based on the above, the Tribunal finds that the Applicant has failed to produce evidence — convincing or otherwise — to support his allegations of bias, arbitrariness or discrimination on the part of the Agency.

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

43. In his request for relief, the Applicant seeks financial compensation - without further specifics - because he claims he was subjected to employment discrimination.
44. As the Applicant has failed to demonstrate any sort of pecuniary damage, procedural violation, bias or moral injury in connection with his non-appointment to the post of Area Loan Supervisor, 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. In Antaki 2010-UNAT-095, the UNAT held that “[c]ompensation may only be awarded if it has been established that the staff member suffered damages”. As the Applicant has not justified any material damage, the Tribunal cannot grant him any compensation in this regard.

45. Having determined that the decision not to appoint the Applicant to the post of Area Loan Supervisor 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 remedy sought by the Applicant.

Conclusion

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

Judge Bana Barazi  
Dated this 30th day of October 2014

Entered in the Register on this 30th day of October 2014

Laurie McNabb, Registrar, UNRWA DT, Amman