NEMRAWI

v.

COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Khaled Nemrawi (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his appointment in the interest of the Agency.

Facts

2. On 8 February 2011, the Applicant entered the service of UNRWA as a Teacher in the Jordan Field, at Grade 8, Step 01, on a fixed-term appointment expiring on 7 February 2014. The Applicant’s appointment was subsequently extended to 7 February 2018.

3. In a document titled “Notes on performance improvement discussions – unofficial session” dated 2 December 2014 and signed by the Applicant and his supervisor, specific areas for improvement were identified for the Applicant.

4. On 4 December 2014, the Applicant was placed on an informal Opportunity to Improve (“OTI”) process of 90 days. The informal OTI process included objectives and performance indicators.

5. On 11 February 2015, the Applicant met with his immediate supervisor for the midpoint review of his yearly Electronic Performance Evaluation Report (“ePER”). The ePER states:

   The performance of the staff member is sub-par. The quality of work and/or meeting the objectives and indicators agreed upon at the beginning of the year did not meet expectations and there have been no exceptional circumstances that would prevent him from meeting expectations. No noticeable improvement has been made in terms of the criteria despite the support and guidance provided by the supervisor.

6. Follow up meetings were held on 10 March 2015 and 20 April 2015. A document titled “Notes on performance improvement discussions – unofficial session” dated 20 April 2015 and signed by the Applicant and his supervisor, indicates that a test which was given on 19 April 2015, to evaluate the Applicant’s
students yielded unsatisfactory results (only 6 percent passed). The document also indicates that the Applicant had been informed of his unachieved objectives and advised to prepare a remedy plan for immediate implementation. Another document in the case files shows that a second test to evaluate the students was given on 23 April 2015, and yielded equally unsatisfactory results (7 percent passed).

7. By letter dated 26 April 2015, the Area Education Officer (“AEO”), Irbid Area Office, drew the Applicant’s attention to the importance of improving his work and to the negative consequences if the situation did not improve.

8. On 26 April 2015, the Applicant’s immediate supervisor noted in an email to the Human Resources Assistant that the Applicant’s performance had not improved and requested to place him on a formal OTI process.

9. The Applicant was enrolled in a formal OTI program from 3 May 2015 to 7 October 2015. The Applicant agreed to the OTI working plan, which set out the unachieved objectives and corresponding performance indicators, and included a list of remedial actions.

10. The Applicant acknowledged on 17 June 2015 that the overall rating of “Does not fully meet expectations” on his ePER had been explained to him by his immediate supervisor. The ePER covered the period from 1 September 2014 to 31 August 2015.

11. Three progress reports for the periods of 3 May to 20 May 2015, 21 May to 21 June 2015 and 1 September to 30 September 2015 showed no improvement in the Applicant’s performance. The Applicant signed each of these reports.

12. By email dated 21 October 2015 to the Chief Field Education Programme (“CFEP”), the Head Field Human Resources Office extended the Applicant’s formal OTI process for another 90 days.

13. Three progress reports were made for the period 11 October 2015 to 10 January 2016 based on class visits, class tests and meetings with the Applicant during which his supervisor explained to him the best method of attaining
discipline in the classroom and handed him educational material on the issue. The progress reports showed very little improvement if none at all. The pass rates for the 8th grade students on three tests to evaluate their level in the Arabic language were at unacceptable levels of 23 percent, 15 percent and 19 percent respectively.

14. On 6 January 2016, the Education Specialist (Arabic) sent a memorandum to the AEO summarising the major technical shortcomings in the performance of the Applicant for the period 10 October 2015 to 10 January 2016.

15. On 10 January 2016, the issue of the Applicant’s performance was referred to the CFEP.

16. On 21 January 2016, the CFEP confirmed that the Applicant’s performance had failed to improve and recommended his separation.

17. By letter to the Applicant dated 22 February 2016, the Director of UNRWA Operations, Jordan (“DUO/J”) informed the Applicant that his services would be terminated in the interest of the Agency, effective 22 March 2016, for unsatisfactory performance.

18. On 21 April 2016, the Applicant requested a decision review. No response was given by the Agency.

19. On 2 August 2016, the Applicant submitted an application to the UNRWA Dispute Tribunal (the “Tribunal”). On 3 August 2016, it was transmitted to the Respondent.

20. On 2 September 2016, the Respondent submitted his reply to the Tribunal. On 4 September 2016, it was transmitted to the Applicant.

21. On 22 September 2016, the Respondent filed a motion for extension of time to translate his reply to Arabic. It was transmitted on the same day to the Applicant. No response was received from the Applicant.

22. By Order No. 077 (UNRWA/DT/2016) dated 3 October 2016, the Tribunal granted the Respondent’s motion for extension of time to submit the Arabic
translation of the reply and ordered that the translation be filed on or before 7 October 2016.

23. On 7 October 2016, the Respondent filed the Arabic translation of his reply with the Registrar. As the Respondent had copied the Applicant on his email to the Registrar, the Registrar did not transmit the translation a second time to the Applicant.

Applicant’s contentions

24. The Applicant contends:

i) He worked hard during the OTI process and took into consideration the instructions provided by the Agency;

ii) He was told by the Arabic Language Supervisor that his and the students’ performance had noticeably improved;

iii) He was not given any prior notice, and the decision to terminate his services came as a surprise and caused him a psychological shock;

iv) The decision to terminate his services was unjust, inappropriate and inconsistent with the values of education; and

v) The Agency should have sent a neutral party, rather than the School Principal, to check the facts.

25. The Applicant requests the Tribunal:

i) To award him “material and moral compensation for the psychological pains that [he] suffered as a result of the termination decision”; and

ii) To redress the wrongs done to him.
Respondent’s contentions

26. The Respondent contends:

   i) The decision to terminate the Applicant’s appointment was properly
      made in accordance with Area Staff Regulation 9.1 and Area Personnel
      Directive A/23;

   ii) The record is clear that the decision to terminate the Applicant’s
       appointment was based on shortcomings, properly documented, relating
       to the overall performance of the Applicant and his potential as a
       Teacher;

   iii) The Applicant has not produced any convincing evidence of any
        arbitrariness or capriciousness, prejudice or improper motivation,
        procedural irregularity, or error of law on the part of the Agency; and

   iv) The relief sought by the Applicant has no legal basis.

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

Considerations

Preliminary issue

28. On 13 November 2016, the Applicant filed observations on the
    Respondent’s reply without requesting leave from the Tribunal. The observations
    were transmitted to the Respondent. The Tribunal accepts the filing of the
    observations and reminds the Applicant, as it reminds all parties, of the necessity
    of requesting leave to submit any document to the Tribunal, as per Practice
    Direction No. 2 which is accessible on the intranet.

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

29. On separation from service, Area Staff Regulation 9.1 provides:
The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

30. It is to be noted that the Applicant’s Letter of Appointment stipulates that his “appointment may be terminated at any time in accordance with the Area Staff Regulations and Rules” and that, should the Agency terminate his appointment after it has been confirmed, he “will receive not less than 30 days written notice of such termination.”

31. Area Personnel Directive No. PD/A/23 (“PD/A/23”), under the chapter on “Managing Underperformance”, provides in detail how the OTI process is to be conducted. As it would be too long to quote in full, the Tribunal will quote the relevant parts with regard to the informal and the formal OTI processes:

**Informal OTI process**

29. Having identified the underperformance in one or more of the objectives the immediate supervisor needs to discuss the matter with the staff member. Specific examples need to be presented to the staff member that highlight how performance is considered to have deteriorated, and how this varies from the agreed objectives and indicators in the ePer. The staff member must be given an opportunity to provide an explanation in order to understand the underlying reasons for the decline in performance.

**Formal OTI process**

33. If, no more than 90 days after the date of the performance improvement discussion, the staff member’s performance has not reached a satisfactory standard, supervisors must liaise with HR and the second supervisor to commence the formal OTI process. The formal OTI process cannot take place without a preceding informal OTI process.

32. PD/A/23 also provides that, upon completion of the formal OTI period, the second supervisor, in consultation with the Department Head, has two options regarding the staff member: to certify that the staff member’s performance has returned to an acceptable level/improved or that it has not. In the latter case, in consultation with the Human Resources Department, the Department Head can
extend the OTI period by another 90 days or recommend removal of the staff member from his or her functions.

33. Examining the record, the Tribunal finds that, when terminating the Applicant’s services for poor performance, the Respondent acted in compliance with the Area Staff Regulations and Rules, the informal and formal OTI processes, and the deadlines and extensions as outlined in PD/A/23.

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

34. The Tribunal must consider whether or not the Applicant’s performance justified the decision to terminate his appointment for poor performance. Although the Commissioner-General has broad discretionary authority in evaluating a staff member’s performance, the Agency must act in good faith and respect procedural rules. Its decision must not be arbitrary or motivated by factors inconsistent with proper administration.

35. The Tribunal recalls that, as held by the United Nations Appeals Tribunal (“UNAT”), there is a presumption of regularity of an administrative decision. The Applicant has the burden of proving that his supervisors failed to adhere to the Staff Regulations, Rules and other relevant administrative issuances, or that the decision was exercised arbitrarily, motivated by prejudice or bad faith or flawed by procedural irregularities or error of law.

36. As noted above, the Respondent applied the proper procedures for managing underperformance. Moreover, not only does the record reflect that the Agency followed proper procedures for managing the Applicant’s underperformance, but it also shows clearly that the Applicant’s unsatisfactory performance did not improve by the end of the OTI process.

37. Indeed, when the Applicant was placed on an informal OTI process, the areas for improvement were specified and communicated to him. He was required to: develop himself in scientific aspects, vary his teaching strategies in line with the students’ abilities and spend efforts in controlling the classroom and
organising the lesson flow. The reports of meetings with the Applicant on 10 March 2015 and 20 April 2015 indicate that the Applicant did not use constructive teaching strategies and did not control his class and that the results of two evaluation tests of his students were unacceptably low. On 26 April 2015, the Applicant was advised in writing that he needed to improve his performance.

38. The Applicant was then enrolled in a formal OTI process from 3 May to 7 October 2015. The OTI working plan, agreed to by the Applicant, included improvement in the level of the 8th grade students in the Arabic language, control of the students by providing activities that suited their abilities and implementation of suitable educational strategies for an inclusive education.

39. Three progress reports were made over the period of the formal OTI process. They showed no progress with regard to the control of the students and the implementation of suitable educational strategies. The reports also showed that the pass rates of the 8th grade students over three evaluations were 30 percent, 32 percent and 7 percent, respectively, which was below the required level and clearly unacceptable to the Agency.

40. The Agency gave the Applicant yet another chance for improvement by extending the OTI process for another 90 days, i.e. until 8 January 2016. Three progress reports were made during the extended OTI process, showing that the Applicant’s performance in the specified areas, and the attainment level of the 8th grade students failed to improve notwithstanding follow up meetings and technical assistance and guidance being given to the Applicant.

41. The Applicant claims that the Arabic Language Supervisor told him that “[he] was showing continuous improvement.” However, the Applicant’s claim is contradicted by the Education Specialist (Arabic), who summarised in a memorandum dated 6 January 2016, the Applicant’s major shortcomings and concluded that the Applicant, despite all of the assistance provided to him, had not attained the required level of performance. The Applicant cannot just make allegations without substantiating them, such as with a letter or statement from the Education Specialist (Arabic).
42. The end result of the unsuccessful and lengthy OTI process was a managerial recommendation to terminate the Applicant’s services. The Tribunal notes that the Applicant was informed by letter dated 22 February 2016 that he would be separated from the Agency. The Applicant’s allegations that the Agency made a hasty decision when terminating his services and that he “was not given a written warning before this unjust decision” are baseless. Indeed, the OTI process – both informal and formal – in total lasted for a period of over one year, and in his letter of separation, the Applicant was given a month’s notice, putting the end of his service at close of business 22 March 2016.

43. The Applicant claims that he did not know the basis and criteria the Agency relied upon in reaching its decision to terminate his appointment. The Tribunal finds the Applicant’s statement astonishing to say the least. After all, the Applicant was a participant in a lengthy OTI process. He was made aware at every step of the process of his shortcomings based on performance indicators and criteria, and he was informed of the students’ poor results. How can he claim lack of knowledge?

44. As for the Applicant’s contention that the School’s Principal should not be the person evaluating him and that the Agency should have appointed “a neutral party to check students’ opinions through a secret ballot about [him]”, the Tribunal would like to remind the Applicant that the OTI process is a legal and legitimate procedure and is consistent with the Agency’s PD/A/23. Also, the Applicant surely must know that his immediate supervisor, i.e. the School Principal, has the authority to participate in the OTI process and to make reports on his work and his performance. The Applicant is reminded that he had agreed to the work plan contained in the OTI, and he cannot post facto claim that there are other or better measures to evaluate his performance.

45. The Applicant contends that the OTI process and close supervision put him under considerable stress. One is left to wonder how the Applicant expected the Agency to help him improve his performance if not by technical assistance, close supervision, follow up meetings and progress reports throughout the OTI process. If the Agency had done nothing, the Applicant would have claimed – and
justifiably so – that he received no help and was given no chance to improve. The Agency painstakingly made sustained and abundantly documented efforts to improve the Applicant’s shortcomings, in the Applicant’s own interest and in the students’ interest. If this caused stress to the Applicant, the Agency is not to blame for it.

46. The Tribunal reminds the Applicant that it is his burden to prove that the Agency’s decision was arbitrary or prejudiced. However, the Applicant has not provided any evidence in support of his claims and allegations.

47. Given all of the above, the Tribunal fails to see any arbitrariness or bias in the manner in which the Respondent conducted the OTI process or in the Respondent’s attempts to improve the Applicant’s performance. The Tribunal finds that there is no bias in the decision to terminate the Applicant’s appointment as it was a decision taken in the interest of the Agency, notably to have a competent teacher provide sound learning to the students attending the Agency’s schools. Indeed, if the Applicant had not been terminated, it is the students who would be wronged as he would not be able to get them to an appropriate pass level.

**Is there any legal basis for the Applicant’s request for relief?**

48. The Applicant requests to be paid compensation in the staggering amount of one million US dollars “for the health and psychological impact, the moral harm and frustration that [he] suffered from when [he] was terminated from the Agency.”

49. The Applicant is reminded – as are all applicants regularly reminded in the Tribunal’s Judgments – that when claiming psychological or health negative impacts allegedly caused by the Agency’s decision, he must substantiate his allegations, such as providing medical certificates. The Applicant has provided no evidence in support of his claim for compensation.

50. As held by the UNAT in Appellee 2013-UNAT-341, no compensation can be awarded in the absence of any procedural errors or any breach of legal rights.
51. Having determined that the Respondent acted pursuant to the Agency’s regulatory framework and established a solid basis for his decision to terminate the Applicant’s services, and that the Respondent’s discretionary authority was not tainted by evidence of procedural irregularity, prejudice, other extraneous factors or error of law, the Tribunal finds that the Applicant’s request for remedies has no basis in fact or in law and must be denied.

Conclusion

52. The application is dismissed.

(Signed)

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Judge Bana Barazi
Dated this 12th day of November 2017

Entered in the Register on this 12th day of November 2017

(Signed)

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Laurie McNabb, Registrar, UNRWA DT, Amman