



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/GFO/2008/03

Judgment No.: UNRWA/DT/2011/017

Date: 11 December 2011

Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

BARAKAT

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
W. Thomas Markushewski

Introduction

1. This is an application by Nasser Mohamed Barakat (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to censure and suspend him without pay for two weeks.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the Joint Appeals Board (JAB) has been submitted to the Commissioner-General.

Facts

4. Effective 17 June 2001, the Applicant was engaged by the Agency in Gaza as a Site Engineer on a fixed-term full-time appointment. On 1 August 2004, his appointment was converted from category “Z” to “X”.

5. On 1 April 2007, the Officer-in-Charge, Maintenance Division (“OiC-MD”) received an e-mail from “manfrid off” (“manfridoff@hotmail.com”), addressed to his UNRWA e-mail account advising that the sender (a former senior staff member) would soon be returning to Gaza and asking the recipient to keep his return top confidential.

6. On 6 April 2007, OiC-MD received another e-mail at his UNRWA account from the above sender expressing regret that the recipient had not been selected for a post and requesting him to advise the sender of any misconduct on the part of four staff members whom the sender named.

7. On 22 April 2007, an e-mail was sent from manfridoff@hotmail.com to the private e-mail accounts of OiC-MD and the Chief, Special Environmental Health Programme, Gaza.

8. On 9 May 2007, an e-mail was sent in English, from manfer_hof@hotmail.com to the private e-mail account of an UNRWA site engineer. Suspicious, this engineer, who usually communicated with Mr. Off in German, asked Mr. Off by e-mail if he had sent the 9 May 2007 e-mail. On 3 July 2007, Mr. Off confirmed he was not the author of that e-mail.

9. According to a memorandum dated 21 May 2007 from PALTEL (telephone company operating in the Gaza Strip) to the Attorney General Gaza, obtained at the request of the OiC-MD, the 22 April 2007 e-mail referenced above, originated from an internet connection using an IP address registered to Mrs. Nuzha Yousef Barakat, the Applicant's 75 year old (illiterate) mother in whose apartment block the Applicant resided.

10. On 9 June 2007, the Field Administration Officer, Gaza, was informed of the OiC-MD's allegation that the Applicant had "forged emails". The Field Legal Office, Gaza, was requested to further investigate the case.

11. On 14 August 2007, the Legal Assistant and Legal Aid Assistant wrote that the Applicant "could have sent these emails knowing that the letter that was sent from PALTEL to the Attorney General on 21 May 2007 confirms that these emails were sent through tel. No. 2850347 and this telephone No. is registered in the name of Mr. Barakat's mother." The e-mail indicates that when confronted

with the letter of PALTEL, the Applicant refused to comment or answer questions.

12. By letter dated 18 September 2007, the Director of UNRWA Operations, Gaza (“DUO/G”) notified the Applicant that he had been found to have engaged in serious misconduct and that “[his] actions ... constitute a failure to uphold the standards of conduct required of an UNRWA staff member. The impersonation of a former staff member using a hotmail email account represents fraudulent conduct.” The DUO/G requested the Applicant to provide his comments on the allegations within 15 days.

13. By letter dated 2 October 2007, the Applicant submitted his comments, arguing that the IP address assigned to his family home was accessible by a number of people in his building who could have sent the e-mails to frame him, identifying several of his colleagues who know or visit the building. The Applicant also alleged that the OiC-MD is prejudiced against him.

14. On 27 November 2007, after reviewing the Applicant’s 2 October 2007 comments, the DUO/G censured and suspended the Applicant for two weeks without pay finding that “the impersonation of a staff member using a hotmail account ... constitutes failure to uphold the standards of conduct required of an UNRWA staff member and a violation of UNRWA’s Area Staff Regulations and Rules.”

15. On 28 December 2007, the Applicant requested a review of the decision to censure and suspend him.

16. On 23 January 2008, the DUO/G confirmed the appropriateness of the sanction imposed.

17. On 21 February 2008, the Applicant filed an appeal. On 3 February 2009, the JAB received additional documentation from the Applicant referring to an incident which had occurred in October 2008, suggesting that his phone line had been misused and that PALTEL acknowledged its responsibility.

Applicant's contentions

18. The Applicant contends that:

- (i) computers in four apartments, including his own, used the same ADSL connection such that an e-mail sent from any of these computers would originate from the IP address associated with the Applicant's mother's telephone line;
- (ii) the main ADSL subscriber, Dr. Kamal Barakat (brother of the Applicant), used the Applicant's mother's telephone line;
- (iii) his supervisors targeted him and there were many conspiracies against him because of his stance against wrongdoing in the workplace;
- (iv) he was framed by someone who accessed a computer in one of the apartments sharing the ADSL connection with his mother's telephone line.

The Applicant requests the Tribunal to order the Respondent to conduct a further investigation to "lift some of the libel and oppression campaigns that fell on me."

Respondent's contentions

19. The Respondent mainly contends that the decision to censure and suspend the Applicant was properly made, and that the relief he is seeking has no legal basis.

Considerations

Main Issues

Was the Respondent's decision to censure and suspend the Applicant without pay for two weeks properly made?

20. It is important to look at the legal and administrative framework applicable in the case at bar. Area Staff Regulation 10.2 in effect during the material time, provides:

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

21. In relation to what is "unsatisfactory" for the purposes of Area Staff Regulation 10.2, Area Staff Personnel Directive No. A/10, paragraph 4, provides:

4. Policy

4.1 Disciplinary measures will normally be imposed for willful misconduct, irresponsible conduct, or willful failure to perform assigned duties or to carry out specific instructions.

* * *

4.3 . . . the following are examples of instances where disciplinary measures would normally be imposed:

A. Refusal to carry out and discharge the basic duties and obligations specified in the Staff Regulations, Rules and Directives of the Agency, and in particular, departures from the standards of conduct specified in Chapter I of the Staff Regulations;

B. willful or irresponsible failure to comply with contractual obligations;

- C. willful or irresponsible failure to comply with written or oral instructions of supervisors;
- D. repeated minor infractions.

22. In relation to the disciplinary measures that may be taken against staff members guilty of unsatisfactory conduct, Area Staff Rule 110.1, paragraph 1, provides:

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

23. In relation to written censure, PD A/10, paragraph 7.1, states that:

A written censure is a letter addressed to a staff member in which he/she is advised of serious shortcomings in behavior. The necessity of 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.

24. With regards to suspension without pay, PD A/10, paragraph 8.1, states:

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.

25. When reviewing a disciplinary sanction imposed by the administration, the United Nations Appeals 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, as affirmed in *Haniya* 2010-UNAT-024.

26. Looking at the evidence in the file, the Tribunal notes that the investigation included witness interviews and an interview with the Applicant, that it found evidence - on a balance of probabilities - that the Applicant had impersonated Mr. Off in e-mail communications with Agency staff, and was the author of at least 3 and possibly 4 e-mails impersonating a former senior staff member. Indeed, the evidence indicates that:

- (i) the 6 April 2007 and 22 April 2007 e-mails from manfridoff@hotmail.com were sent from the Applicant's home computer linked to the ADSL line registered in the name of his illiterate mother;
- (ii) the e-mail sent from manfer_hof@hotmail.com to the private e-mail account of an UNRWA site engineer on 9 May 2007 is similar to the 22 April 2007 e-mail sent from the account of manfridoff@hotmail.com in that it originated from a false e-mail account, contained similar English errors, and impersonated a former Gaza Field staff member;
- (iii) the Applicant had previously used disguised identities when making otherwise anonymous allegations. On 21 June 2006, the Applicant had used hotmail account n9939@hotmail.com with a user name "Thomas King" to communicate allegations to the Deputy DUO/G. When the Deputy Director replied to "Mr. King" expressing an interest in the allegations, the return e-mail introduced the Applicant as the sender.

27. Also, the Tribunal notes that the alleged perpetrator - presuming it was not the Applicant - would have had to know that all of the apartments in the building had the same ADSL internet account and would need to be sure that the IP address would be identified so as to assign the blame on the Applicant. The Tribunal finds such a scenario highly unlikely.

28. The Tribunal is satisfied that the facts on which the Respondent's decision to censure and suspend the Applicant were reasonably established, and is reminded of the jurisprudence of the United Nations Administrative Tribunal in Judgment No. 1022, *Araim* (2001), paragraph V stating:

The Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means "reasonably sufficient for legal action" (The Random House College Dictionary Revised edition 1982), in other words sufficient facts to permit a reasonable inference that a violation of law had occurred.

29. Bearing in mind the Commissioner-General's broad discretionary authority with regard to disciplinary matters, including the determination of what constitutes "misconduct" under the Staff Regulations and Rules, the Tribunal finds that the establishment of the facts regarding the Applicant's impersonation of another (i.e. a former senior staff member) for the apparent purpose of eliciting information that could be used to malign others legally supports the determination of misconduct. The Tribunal further finds that in censuring and suspending the Applicant, the Respondent acted in compliance with the applicable Area Staff Regulation 10.2, Area Staff Rule 110.1, and Area Staff Personnel Directive No. A/10.

30. With regard to the Applicant's claim that his supervisors were prejudiced against him, he is reminded of the United Nations Administrative Tribunal Judgment No. 93, *Cooperman* (1965), paragraph XII, providing that the burden of proof rests on him and that he must produce convincing evidence that a discretionary administrative decision was tainted by prejudice or improper motivation.

31. The record in the file indicates that investigations were conducted with objectivity and thoroughness. The Applicant had been made fully aware of the

evidence against him and had been accorded the fullest opportunity to rebut it. In his defence, the Applicant has not provided any convincing evidence that the investigation and the decision to discipline him were arbitrary, capricious, motivated by prejudice or other extraneous factors, or were flawed by procedural irregularity or error of law. The Applicant has not produced any evidence in support of his allegations that he was the target of a conspiracy or that he was framed by his supervisors.

32. Furthermore, the Applicant has failed to show that the decision to censure and suspend him without pay for two weeks for misconduct was so disproportionate or unwarranted as to amount to an injustice. With regard to proportionality of censure and suspension, the Tribunal points out to the Commissioner-General's broad discretionary power in relation to disciplinary matters, and to the United Nations Administrative Tribunal jurisprudence. Indeed, in its Judgment No. 1481 (2009), paragraph XIX, it held that "the Tribunal ... lastly, ascertains whether the sanction is proportionate to the characterization of the misconduct." As analyzed above, the Applicant having engaged in misconduct, the fraudulent nature of which affects his honesty and integrity, and the Respondent having imposed the appropriate sanction in conformity with the applicable Regulations, Rules and other relevant issuances, the Tribunal finds that censure and suspension for two weeks without pay were not so disproportionate as to amount to an injustice.

33. Finally, for clarification purposes, with respect to the Applicant's additional documentation accusing the employees of PALTEL of intentionally exchanging the fuse of his telephone line with that of another line on 7 October 2008, the Applicant has not provided convincing evidence in support of his allegation. He is also reminded that this alleged incident occurred more than 18 months after he sent the e-mails impersonating Mr. Off.

34. Given all the above, the Tribunal finds that:

- (i) the facts on which the Respondent's decision to discipline the Applicant have been reasonably established;
- (ii) the Respondent determined within the proper exercise of his discretion that the Applicant's actions amounted to misconduct;
- (iii) there is no evidence of any improper motive or procedural flaw in the Respondent's disciplinary and/or decision-making process;
- (iv) the sanction was made in accordance with the Area Staff Regulations, Rules and Directives;
- (v) the sanction was not so disproportionate to the offence as to constitute an injustice.

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

35. The Applicant has requested that the Tribunal order the Respondent to conduct a further investigation. The Tribunal notes that there is no right on the part of the Applicant and no obligation on the part of the Respondent, within the Staff Regulations and Rules of the Agency, to have a further investigation conducted. The Tribunal refers to the jurisprudence of the United Nations Appeals Tribunal in *Nwuke* 2010-UNAT-099, paragraph 30, holding that:

A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules.

The Tribunal determines that the relief sought by the Applicant has no basis in fact or in law.

Status Conference

36. On 26 October 2011, the Tribunal held a status conference, specifically to ask the parties if they had any new relevant evidence to submit in this case.

37. On the eve of the status conference, the Applicant submitted comments in response to the Respondent's reply filed on 7 October 2011. The Respondent objected to the filing of the Applicant's comments. As these comments did not raise any new issue, the Tribunal admitted them in evidence. Suffice it to note that they do not constitute any evidence - convincing or otherwise - which would help the Applicant discharge his onus of proof.

Conclusion

38. There is no merit to this application, and it is dismissed in its entirety.

(Signed)

Judge Bana Barazi

Dated this 11th day of December 2011

Entered in the Register on this 11th day of December 2011

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman