UNRWA DISPUTE TRIBUNAL

Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

AL KHATIB

v.

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

JUDGMENT

Counsel for Applicant: Self-represented

Counsel for Respondent: Anna Segall
Introduction

1. This is an application by Hussam Al Khatib (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 demote him from the post of Head Teacher to the post of teacher and transfer him to another school.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (“JAB”) 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 JAB 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 JAB had been submitted to the Commissioner-General.

Facts

4. On 18 November 1996, the Applicant entered the service of the Agency as a teacher “B”, Grade 8, Step 1, at Baqaa Preparatory Boys School, in Amman, Jordan. Following several promotions and transfers, the Applicant occupied the post of Head Teacher, Grade 10, Step 9, at Jofeh Preparatory Boys School in Amman, Jordan, at the time of the events relating to the application.

5. In response to allegations of a sexual nature by a student (“the student”) against a teacher (“the teacher”) at Jofeh Preparatory Boys School, the Director of UNRWA Operations, Jordan (“DUO/J”) established a Fact Finding Committee (“FFC”) on 28 April 2009.

6. The FFC interviewed witnesses in relation to the allegations and set out its findings in a report dated 10 September 2009. The FFC found the student to be a
credible witness, i.e. that the teacher had been offering him a sexual relationship. The FFC also made findings with regard to the Applicant in his capacity as Head Teacher of the school, stating *inter alia*:

3) The testimony and later phone call of the Head Teacher Husam Mohamad [sic] Hasan Khatib [the Applicant], to one of the members of the Committee where he tried to discredit the student’s testimony and to suggest that the latter was suffering from “illusions” confirmed to the Committee an attempted cover-up was taking place to protect the math teacher […] The Committee did not believe the Head Teacher.

The Recommendation

2) The Committee also suggests disciplinary action be taken against the Head Teacher for attempting to cover-up the behavior of the Math Teacher.

7. By letter dated 28 September 2009, the Field Personnel Officer, Jordan (“FPO/J”) informed the Applicant of the findings of the FFC and invited him to respond by 29 September 2009. The Applicant replied on 29 September 2009 alleging that he was not aware of the allegations of a sexual nature brought against the teacher. He also added that, in his opinion, the student suffered from a psychological disorder.

8. In a handwritten note dated 8 November 2009 regarding a synopsis of the case prepared by the Personnel Assistant, the FPO/J recommended to downgrade the Applicant to the position of teacher and to transfer him to a different school. The recommendation was later endorsed by the Field Administration Officer, Jordan (“FAO/J”) and approved by the DUO/J.
9. By letter dated 15 November 2009, the FAO/J advised the Applicant of the following:

In particular, it has been established by the Investigation Committee formed by the Director of UNRWA Operations, Jordan on 28 April 2009 to look into the sexual harassment took [sic] place against one of the 9th grade students at Jofeh Preparatory Boys School that you attempted to cover up the defendant’s behaviors [sic] to protect him. Whereas, you called a member of the Investigation Committee and tried to discredit the student’s testimony and claimed that the subject student was suffering from illusion. Such irresponsible behaviors [sic], cannot under any circumstances, be accepted from a head teacher working with this Agency.

In view of the foregoing, it has been decided to demote you to the post of teacher and to transfer you to another school.

10. By letter dated 22 November 2009, the Applicant requested the DUO/J to reconsider the contested decision, asserting that he had not tried in any way to cover up for the teacher’s behaviour.

11. Effective 1 December 2009, the Applicant was transferred to Nazzal Preparatory Boys School in Amman, Jordan. He requested to work at Amman New Camp Preparatory Boys School, a request which was granted by the Agency.

12. By letter dated 13 December 2009, the DUO/J rejected the Applicant’s request for decision review.

13. On 10 January 2010, the Applicant filed an appeal with the JAB.

14. On 13 November 2011, the Applicant submitted to the Tribunal three separate requests for production of documents, i.e. the investigation report, several items of correspondence and some unspecific documents allegedly in the possession of the Respondent concerning the case.

15. On the same date, the Applicant filed a request to the Tribunal to add documents to his case. His request was granted by Order No. 012 (UNRWA/DT/2011) dated 20 December 2011.
16. Also on 13 November 2011, the Applicant filed to the Tribunal a request to obtain the Respondent’s reply as soon as possible. His request was rejected by Order No. 013 (UNRWA/DT/2011) dated 20 December 2011.

17. By Order No. 014 (UNRWA/DT/2011) dated 20 December 2011, the Tribunal rejected the Applicant’s request for production of documents in respect of the correspondence and the documents requested.

18. By Order No. 001 (UNRWA/DT/2012) dated 17 January 2012, the Tribunal ordered the Respondent to produce the report of the investigation conducted by the Agency into the allegations of misconduct of the teacher, which contained also findings concerning the Applicant’s conduct.

19. After having received and reviewed the report of the investigation, the Tribunal found that the disclosure of the report to the Applicant was not required for a fair and expeditious disposal of the proceedings. Therefore, the Applicant’s request for the investigation report was denied by Order No. 004 (UNRWA/DT/2012) dated 25 January 2012¹.

20. On 24 November 2012, the Respondent filed his reply.

Applicant’s contentions

21. The Applicant contends that:

(i) he was not informed of the case under investigation and was not asked for any explanations regarding the case by the FFC;

(ii) he was never provided with the evidence that proved the accusations against him;

(iii) his opinions should not be used to find him guilty of concealing facts or of trying to discredit the declaration given by the student;

(iv) his contact with a member of the committee was upon her request in case of any development and he did not try in any way to affect the investigation process;

¹ The Tribunal notes that the Respondent included in his reply a copy of the investigation report as Annex 15.
(v) he was not given suitable explanations when asked to reply to the allegations and feels that the decision to impose disciplinary measures on him was already made, regardless of his answers.

22. The Applicant requests the Tribunal to rescind the contested decision.

**Respondent’s contentions**

23. The Respondent contends that:

    (i) the decision to demote and transfer the Applicant was properly effected;

    (ii) the Applicant has failed to show that the decision to demote and transfer him was disproportionate or unwarranted.

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

**Considerations**

*Preliminary issue*

25. As stated above, the Respondent submitted his reply on 24 November 2012. In his reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings.

26. Article 30 of the Rules gives the authority to the Tribunal to shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal 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. It is the Tribunal’s belief that submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. Therefore, the Tribunal finds it is in the interests of justice – and that it would be appropriate for a fair and expeditious disposal of the case and would do justice to the parties – for the Tribunal to extend

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2 The Tribunal notes with the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: “The Dispute Tribunal shall not suspend, waive or extend the deadline for decision review”. 
the time limit under Article 6 and accept the late filing of the Respondent’s reply. Therefore, the Tribunal accepts the Respondent’s reply.

**Main Issues**

Was the Respondent's decision to demote and transfer the Applicant properly made?

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

28. 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.

29. Area Staff Regulation 10.2 in force at the time of the facts provides that:

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

30. Pursuant to Area Staff Personnel Directive No. A/10/Rev.1, paragraph 3.2, the Commissioner-General has delegated to Field Office Directors the authority to impose disciplinary measures on area staff serving in the Field.

31. With regard to what is “unsatisfactory” for the purpose of Area Staff Regulation 10.2, Area Staff Personnel Directive No. A/10/Rev.1 provides:

   4. Policy

   4.1 Disciplinary measures will normally be imposed for wilful misconduct, irresponsible conduct, or wilful 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 the
Directives of the Agency, and in particular, departures from the standards of conduct specified in Chapter I of the Staff Regulations;

B. wilful or irresponsible failure to comply with contractual obligations…

32. The disciplinary measures which may be taken against staff members whose conduct is unsatisfactory are provided in Area Staff Rule 110.1, paragraph 1:

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

33. 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.

9.2 A staff member may also be downgraded as a disciplinary measure while continuing to occupy the same post.

34. In relation to the transfer of a staff member, Area Staff Regulation 1.2 provides in relevant part that:

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…

35. In addition, Area Staff Regulation 4.3 provides that:

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.

36. With respect to a staff member’s obligation in the course of an investigation, paragraph 9 of General Staff Circular No. 5/2007 regarding “Allegations and complaints procedures and protection against retaliation for reporting misconduct and cooperating with audits or investigations” provides that:
It is the duty of staff members to cooperate with duly authorized audits, inspections or investigations and any individual who cooperates in good faith with such an audit, inspection or investigation shall be protected against retaliation.

37. Accordingly, while recognising that disciplinary matters are within the discretionary authority of the Commissioner-General, the Tribunal will follow the United Nations Appeals Tribunal in *Haniya* 2010-UNAT-024 and *Maslamani* 2010-UNAT-028 when reviewing a disciplinary measure. That is, 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. Noting however, as held by the United Nations Appeals Tribunal in *Abu Hamda* 2010-UNAT-022:

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 reasonably established?*

38. An investigation was conducted in relation to allegations of a sexual misconduct made by the student against the teacher at Jofeh Preparatory Boys Schools. The investigation focused on the teacher, the Applicant’s subordinate. The Applicant took part in the investigation as a witness only.

39. The record shows that the investigation was properly conducted. Nine witnesses, including the Applicant, were interviewed and relevant evidence was taken into consideration. The investigation report revealed that during his interview with the FFC, on 5 May 2009, the Applicant denied any knowledge about the allegations raised by the student. Three days later, on 8 May 2009, upon agreement with the teacher under investigation as indicated in his application, the Applicant called a member of the FFC. Indeed, the investigation report indicates that the Applicant informed the FFC member that one day, while he was looking for the School Counselor, he found him sitting with the student who was in a strange condition. The student was telling the School Counselor that “he could not see anything”, he was shaking and looked frightened. The Applicant explained that this was the first time that he saw the student in such a situation and the Applicant was very shocked. The Applicant suggested that the student was
suffering from “illusions”. The Applicant also explained that one of the teachers delivered to him a note with impolite words about the teacher and that the latter was very upset because of that. The paper stated *inter alia* that “[the teacher] [was] not a man, he [was] a dirty one and want[ed] to marry the student…”.

40. The FFC found in its report that (i) the student was telling the truth about the allegations against the teacher accused of sexual harassment, and that (ii) the Applicant tried to discredit the student’s testimony in order to cover up the serious misconduct of the teacher and to protect him. The FFC considered the Applicant not credible.

41. The evidence in the file indicates that the Applicant attempted to cover up the behaviour of the teacher, in clear contravention of his obligation as staff member, under Area Staff Regulation 1.4, to conduct himself at all times in a manner befitting his status as employee of the Agency. The Applicant's argument, that his opinions should not be used to find him guilty of concealing facts or of trying to discredit the declaration given by a student, is a lame excuse for such behaviour.

42. Based on the evidence gathered during the investigation and, in particular, taking into consideration the telephone call made by the Applicant to a member of the FFC, the Tribunal is satisfied that the facts on which the disciplinary measure was based were reasonably established, and would like to refer to the United Nations Administrative Tribunal Judgment No. 1022, *Araim* (2001), holding that:

> [T]he 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" … in other words sufficient facts to permit a reasonable inference that a violation of law had occurred.

*Do the facts amount to misconduct?*

43. The Tribunal further finds that the Applicant’s attempt to discredit the student’s testimony before the FFC in order to cover up the misconduct of the teacher was inconsistent with the standard of conduct expected of him as a staff member, more so as a Head Teacher. This attempt also legally supports the
characterisation of misconduct. While there is no evidence indicating that the Applicant was aware of the teacher’s behaviour prior to the investigation conducted by the FFC, the established facts show that the Applicant later attempted to discredit the testimony of the student who was the victim of the sexual harassment.

44. The Tribunal finds that when exercising the Commissioner-General’s delegated authority under Area Staff Personal Directive No. A/10/Rev.1 regarding disciplinary measures, the FAO/J did not err as a matter of law when stating that:

In particular, it has been established by the Investigation Committee formed by the Director of UNRWA Operations, Jordan on 28 April 2009 to look into the sexual harassment took [sic] place against one of the 9th grade students at Jofeh Preparatory Boys School that you attempted to cover up the defendant’s behaviors [sic] to protect him. Whereas, you called a member of the Investigation Committee and tried to discredit the student’s testimony and claimed that the subject student was suffering from illusion. Such irresponsible behaviors [sic], cannot under any circumstances, be accepted from a head teacher working with this Agency.

In view of the foregoing, it has been decided to demote you to the post of teacher and to transfer you to another school.

45. The Tribunal is of the opinion that in deciding to demote the Applicant pursuant to the authority delegated to him under Area Staff Personnel Directive No. A/10/Rev.1, the FAO/J complied in all respects with the requirements of applicable Area Staff Regulation 10.2 and Area Staff Rule 110.1. Furthermore, the Tribunal accepts the Respondent’s contention that the Applicant's transfer to another school, in itself, did not constitute a disciplinary sanction, but rather was an administrative measure taken under Area Staff Regulations 1.2 and 4.3 to prevent possible retaliation against the student.

Was the Respondent’s discretionary authority tainted by procedural irregularities, prejudice or other extraneous factors, or error of law?

46. The Tribunal must also consider whether the Respondent’s decision to demote the Applicant to the post of teacher and to transfer him to another school
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.

47. The Applicant claims that he was not informed of the case under investigation and was not asked for any explanations by the FFC regarding the case. He also argues that he was never provided with the evidence that proved the accusations against him. The Applicant further alleges that he was not given suitable explanations when asked to reply to the allegations and feels that the decision to impose disciplinary measures on him was already made, regardless of his answers.

48. The record in the file indicates that the Applicant was informed about the investigation and that he was interviewed as a witness. Upon the conclusion of the investigation, he was informed of the findings of the FFC and he was accorded the opportunity to provide evidence in his defence before the Respondent’s decision to demote and transfer him was made. The main evidence of the Applicant’s conduct was his own telephone conversation with a member of the FFC about the student’s behaviour and whose content was never challenged by the Applicant. The record shows that in his reply to the findings of the FFC, the Applicant even suggested that the student suffered from a psychological disorder but did not provide clear or convincing evidence in this respect. The Tribunal thus considers that the Applicant was given due process and that there was no procedural irregularity in this respect.

49. The Applicant also alleges that his contact with a member of the FFC was upon the member’s request and that he did not try in any way to affect the investigation process. Nevertheless, the facts clearly show that the Applicant contacted the FFC member in an attempt to discredit the testimony of the student by suggesting that he suffered from “illusions”.

50. The Applicant is reminded that, as held by the United Nations Appeals Tribunal, the burden of proof rests on him when he 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, and that he must adduce convincing evidence to substantiate his allegations.

51. Accordingly, the Tribunal finds that the Applicant has not provided any
convincing evidence to demonstrate that the decision to demote and transfer him
was exercised arbitrarily or capriciously, motivated by prejudice or extraneous
factors, or flawed by procedural irregularity or error of law.

Was the Respondent's decision to demote and transfer the Applicant so
disproportionate or unwarranted as to amount to an injustice?

52. As determined by the United Nations Appeals Tribunal in Aqel 2010-
UNAT-040, the level of the sanction falls within the ambit of the Administration
and can only be reviewed in cases of "obvious absurdity or flagrant arbitrariness".

53. When considering proportionality, and while recognising the
Commissioner-General’s broad discretionary power in relation to disciplinary
matters including the proper sanction for misconduct, the Tribunal takes special
note of the nature of an applicant’s post. Referring to the conduct of a staff
member, the United Nations Appeals Tribunal in Haniya 2010-UNAT-024 stated
at paragraph 34:

His misconduct is particularly grave in light of the position he held
[i.e., a position of trust that he failed to respect], and the
responsibilities he was entrusted with…

54. The Tribunal finds that the FAO/J was justified in his letter dated 15
November 2009 to the Applicant in stating that:

Whereas, you called a member of the Investigation
Committee and tried to discredit the student’s testimony and
claimed that the subject student was suffering from illusion.
Such irresponsible behaviors [sic], cannot under any
circumstances, be accepted from a head teacher working
with this Agency.

55. As Head Teacher, the Applicant was entrusted with the responsibility of
promoting an environment at UNRWA schools that supports effective teaching
and learning. As stated by the Respondent, the Agency considers the protection
and assistance of all students at its schools essential to the fulfillment of its education mandate.

56. The Tribunal thus finds that the Applicant’s demotion, i.e. the removal of supervisory duties from him, is a logical and proportionate response to his actions. The Tribunal also finds that while the decision to demote the Applicant was a disciplinary measure, the decision to transfer him to another school was an appropriate administrative decision taken in order to prevent a possible retaliation against the subject student. In this regard, it is important to note that the Respondent acceded to the request of the Applicant to work in a school of his choice.

57. Having determined that the facts on which the sanction was based have been properly established, and that they legally support the characterisation of misconduct on the part of the Applicant, the Tribunal finds that the sanction of demoting him and the decision to transfer him to another school were not so disproportionate as to amount to an injustice.

58. In light of the above, the Tribunal concludes that the Respondent’s decision to demote the Applicant was properly made in line with the Respondent’s broad discretionary power relating to disciplinary matters as well as with the applicable Area Staff Regulations, Rules and other related issuances. Furthermore, the Tribunal is of the opinion that in line with the Respondent’s broad discretionary authority to manage and administer his staff, the transfer of the Applicant, for the purpose of protecting the student, was a proper exercise of this authority in line with the applicable Regulations and Rules.

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

59. Having determined that:

(i) the facts on which the disciplinary measure was based have been reasonably established;

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3 The General Assembly encouraged UNRWA to continue making progress towards the protection of children in its Resolution 66/74 dated 9 December 2011, paragraph 12.
(ii) the facts legally supported the characterisation of misconduct;

(iii) the disciplinary measure was proportionate to the offence;

(iv) the Respondent’s discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law;

the Tribunal finds that the Applicant’s request for rescission of the Respondent’s decision to demote and transfer him has no basis in fact or in law.

Conclusion

60. Given all of the above, the Tribunal finds no merit to this application and dismisses it in its entirety.

(Signed)

Judge Bana Barazi

Dated this 21st day of January 2013

Entered in the Register on this 21st day of January 2013

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman