ABU AJAMI

v.

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

JUDGMENT

Counsel for Applicant:
Legal Office (Staff Assistance)

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Omar Abu Ajami (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. Effective 12 May 2004, the Applicant entered the service of the Agency as a Teacher at Sukhneh Preparatory School, Jordan, at level 6C. His appointment was subject to a probationary period of one year as of 12 May 2004. On 29 July 2004, his appointment was retroactively converted from Category “Z” to “X”, at Grade 09, step 1, effective as of the date of his appointment. On 12 May 2005, the Applicant’s appointment was confirmed upon his satisfactory performance during the one year probation period. On 20 May 2009, the Applicant’s appointment was extended until 11 May 2012. At the time of the termination of his appointment, the Applicant was a Teacher at Al Mafraq Preparatory Boys School, Grade 10, step 5.

3. On 4 November 2009, the Arabic School Supervisor (“ASS”) sent a letter to the Agency’s Area Education Officer, Zarqa (“AEO/Z”) regarding the performance of the Applicant, noting:
   - The Applicant has not attended several workshops he was invited to attend. On most occasions, he justified his absence with being sick.
   - In an evaluation exam conducted to his sixth grade class, none of the students passed the exam.

4. By letter dated 19 November 2009, the Chief Field Education Programme, Jordan (“CFEP/J”) reprimanded the Applicant, citing the low performance level of his students and his absence from several workshops.

5. At the request of the CFEP/J, a three-member Evaluation Committee was established to evaluate the Applicant’s performance. On 6 December 2009, the
Committee visited the Applicant’s classroom to observe his lecture and reviewed relevant documents relating to the Applicant’s performance, including inter alia daily attendance records, daily and semester planning records and administrative assignments. Based on this review, the Evaluation Committee recommended the following:

- the Applicant is no longer fit to the needed assignments and duties;
- to serve the Applicant with a final warning;
- to review the Applicant’s performance during the second semester and re-evaluate him accordingly;
- to have the ASS Zarqa follow up the Applicant’s performance.

6. By memorandum dated 29 December 2009, the Evaluation Committee established to assess the Applicant’s performance issued its report to the CFEP/J. In its report, the Committee concluded inter alia that the Applicant was no longer fit to undertake the duties assigned to him, that he should be given a “final warning”, that his work should be reviewed and his performance assessed during the second school term.

7. By letter dated 31 December 2009, the Officer-in-Charge (“OiC”) of the Personnel Division, Jordan, requested that the Applicant provide comments on the fact that on 23 November 2009, he failed to attend a workshop on Effective Class Management claiming that he had to accompany his sick wife to the hospital.

8. By letter dated 7 January 2010, the Applicant responded to the letter of the OiC, Personnel Division, Jordan, explaining that he had been absent from the workshop because he had to accompany his wife to the hospital for a treatment. He attached a medical report to his letter.

9. By memorandum dated 11 January 2010, the CFEP/J conveyed to the Field Personnel Officer, Jordan (“FPO/J”) the findings and conclusions of the Evaluation Committee convened to assess the Applicant’s performance. The CFEP/J stated inter alia that:
The [Applicant] is not competent in his work. He lacks the knowledge and skills needed in planning, preparing, implementing and evaluation [sic] of remedial plans, authentic assessment and strategies.

* * *

He had seven days sick leave with medical report and 7 days as leave without medical report since January 2009.

By 24 December 2009 he had only entered the first mark on Edu wave [sic] leaving the rest of marks. He should have entered all the marks by that time.

The concerned school supervisor carried out an assessment test for his students and the passing rate was Zero%[sic]. No action was taken consequently from [sic] the teacher for remedy.

The way he presents his lessons lacks logical sequence of presentations.

He does not follow up the written work of students.

He deliberately missed attending two workshop[s] which he was invited to.

Based on the foregoing, it’s recommended to serve him with a letter of censure.

10. On 20 March 2010, the AEO/Z issued a letter of reprimand to the Applicant citing his lack of daily planning in respect of his school day of 9 March 2010.

11. By letter dated 18 April 2010, the AEO/Z conveyed to the CFEP/J an assessment of the Applicant’s performance during the first term of the scholastic year 2009-2010. He noted the low level of achievement among the Applicant’s students and recommended that the Applicant’s appointment not be renewed.

12. On 16 May 2010, the Applicant’s Performance Evaluation Report (“PER”) for the 2009-2010 scholastic year was issued¹. His overall performance was rated “unsatisfactory” and it was recommended to defer the payment of his annual salary increment and termination or non-renewal of his appointment.

¹ The PER indicates that the reason for which the report was required was “01 Jun 2010-Annual Increment”.
13. By letter to the Field Human Resources Officer, Jordan (“FHRO/J”) dated 16 May 2010, the CFEP/J recommended not to renew the Applicant’s appointment and provided *inter alia* the following comments in relation to his performance:

1. The teacher intentionally refuses the services provided to him by not attending the workshops he’s invited to attend.

2. A committee was formed to assess his performance who concluded that the teacher is becoming unable to perform the tasks required of him.

3. He was reprimanded by the CFEP on his students’ level of Achievement = Zero% in a class of 19 students on November 2009 [sic].

4. All the services needed were extended to the teacher.

5. After the committee reported the weak performance points for the teacher… [he] was invited to attend a workshop on “Building of Remedial Plan”. After that, when he was followed up, the same weak performance issues remain the same [sic].

14. On 27 June 2010, the OiC, Human Resources Department, Jordan, issued a “Letter of Censure” to the Applicant in relation to a complaint concerning the standard of his official conduct. The letter provides *inter alia*:

[It has been confirmed by your supervisors that your punctuality has not been satisfactory; you failed to attend scheduled training courses on 28 September 2009, 15 October 2009 and 23 November 2009. In view of the foregoing, it has been decided to serve you with this Letter of Censure.

15. By letter dated 8 August 2010, the Human Resources Career Management Officer, Jordan, notified the Applicant of the decision to defer his annual salary increment for six months starting 1 June 2010. The decision was based on his poor performance as reported in his PER for the period ending on 31 May 2010.

16. By letter dated 23 September 2010, the Head Teacher drew the Applicant’s attention to his failure to have daily teaching plans. The Head Teacher requested the Applicant to provide him with his teaching planning. By letters dated 2 October 2010 and 10 October 2010, the Head Teacher reiterated his request to the Applicant.
17. On 18 October 2010, the AEO/Z issued a letter of “caution” to the Applicant citing his failure to have daily teaching plans, the brevity of the material taught during his classes and his weakness in following the students’ attendance for nine days.

18. On 31 October 2010, the AEO/Z reported to the CFEP/J the results of a review of the Applicant’s performance based on three visits to his classes. He recommended that the Applicant’s appointment be terminated, stating:

   Based on the head teacher’s reports as well as the Arabic school supervisor’s follow up visits, the above-mentioned teacher has got an unsatisfactory performance (under performance). Moreover, in 2009, a committee was formed to evaluate the teacher’s performance. Based on its follow up visit on 6/12/2009, the committee reported that the teacher has got an unsatisfactory performance. Another assessment follow up visit was conducted on 10/10/2010, the report of the visit showed the following:

   - The teacher has got an unsatisfactory performance in both technical and administrative aspects.

   - The teacher does not show acceptance of guidance, he does not do his main duties such as planning, curriculum implementation, evaluation, etc.

   - Another follow up visit was conducted and showed that the teacher lacks the basic competencies.

   - An achievement exam was implemented by the school supervisor; the results showed that only four students out of twenty-four passed the exam.

19. On 2 November 2010, the Applicant’s PER for 2010 was completed\(^2\). The Applicant’s overall performance was rated “unsatisfactory” and it was recommended that his appointment be terminated. The Applicant did not sign the report.

20. By memorandum dated 21 November 2010, the Human Resources Career Management Officer (“HRCMO”) provided to the Director of UNRWA Operations, Jordan (“DUO/J”) a full record of the Applicant’s poor performance and recommended to terminate the Applicant’s appointment. By another

\(^2\) The PER indicates that the reason for which the report was required was “01 Dec 2010 – Annual Increment”
memorandum of the same date, the HRCMO reiterated his recommendation stating:

It was reported by the supervisors of the staff member Mr. Omar Abu Ajami (E/NO. 5Z1388) that the work performance of the said staff member is below the minimum acceptable standard required by the Agency despite all supervisory and guidance services provided. The said staff member failed to achieve the minimum acceptable level of performance. Based on this, it is recommended to terminate the service of the staff member for [sic] the interest of the Agency.

21. On the same day, the DUO/J approved the recommendation to terminate the Applicant’s employment with the Agency.

22. On 5 December 2010, a Special PER was completed for the Applicant. The Applicant’s overall performance was rated “unsatisfactory” and it was recommended that his appointment be terminated. The Applicant did not sign the PER.

23. By letter dated 19 December 2010, the Deputy Director of UNRWA Operations, Jordan (“D/DUO/J”) informed the Applicant of the decision to terminate his appointment in the interest of the Agency, stating inter alia:

This is to inform you that serious complaints have been received concerning the standard of your work performance, it was reported that your work performance is below the minimum acceptable standard required by the Agency. Despite all supervisory and guidance services provided to you by your supervisors, your performance during the last year has been below standards, you was [sic] unable to provide good learning environment, and this was reflected negatively on students’ achievements.

You have been repeatedly counselled and warned to improve the standard of your work performance but your work performance did not improve. Your overall substandard performance has seriously undermined the Agency’s confidence in you as a teacher. Therefore, it has been decided to terminate your service for [sic] the interest of the Agency under Staff Regulation 9.1 and Staff Rule 109.1 with immediate effect. Your last day in the Agency’s services will be close of business January 23, 2011.

3 The PER indicates that the reason for which the report was required was “Special Periodic Report for performance of SM, 1 Dec 2010”.
24. By letter dated 18 January 2011, the Applicant requested administrative review of the decision to terminate his appointment in the interest of the Agency.

25. By letter dated 6 February 2011, the DUO/J replied to the Applicant’s request for decision review. He concluded that there were no new facts justifying a change in the decision taken. Therefore, the decision was upheld.

26. On 21 March 2011, the Applicant filed an application with the UNRWA Dispute Tribunal (the “Tribunal”).

27. On 24 January 2013, the Respondent filed a reply without requesting leave from the Tribunal to take part in the proceedings and to file a late reply. The reply was written in English with some annexes in Arabic.

28. By email dated 22 February 2013, the Respondent requested leave from the Tribunal to file an amended reply. His request was granted by email dated 26 February 2013 and he was given until 5 March 2013 to file an amended reply.

29. On 1 March 2013, the Respondent filed an amended reply requesting leave from the Tribunal to take part in the proceedings and submit a late reply. The reply was again filed in English with some annexes in Arabic.

30. On 14 March 2013, the Tribunal issued Order No. 004 (UNRWA/DT/2013) requiring the Respondent to provide an English translation of each document in Arabic annexed to his reply. On 25 March 2013, after having requested an extension of time, the Respondent obeyed the Tribunal’s Order.

Applicant’s contentions

31. The Applicant contends that:

   (i) from 2004 to the end of the scholastic year 2009-2010, his performance rating was “very good” but as of the beginning of the scholastic year 2010-2011, he was “inflicted with depressive psychosis” that negatively affected his “classroom performance”;

   (ii) results issued at the end of the first semester of the scholastic year of 2010-2011 show an increase in the success rate among his students whereas the success rate was previously much lower;
(iii) he is on medication and will recover and be able to perform his duties very well because his doctor has indicated that his condition is treatable.

32. The Applicant requests to be reinstated in his post.

**Respondent’s contentions**

33. The Respondent contends that:

   (i) the decision to terminate the Applicant’s appointment was a proper exercise of the Respondent’s discretionary authority;

   (ii) the Applicant has not provided clear and convincing evidence showing that the decision to terminate his appointment was tainted by procedural or other irregularities.

34. The Respondent requests the Tribunal to dismiss the application.

**Considerations**

**Preliminary Issue**

35. As stated above, the Respondent filed his amended reply on 1 March 2013. In his amended reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings and to file a late reply.

36. Article 30 of the Rules of Procedure of the Tribunal gives the authority to the Tribunal to shorten or extend time limits fixed by the Rules or to waive any rule\(^4\) 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. The Tribunal finds that it is in the interest of justice – and it would be appropriate for a fair and

---

\(^4\) The Tribunal notes 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 deadlines for decision review”.

Page 9 of 14
expeditious disposal of the case, and would do justice to the parties – for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s reply rather than exclude a party on a procedural basis. Therefore, the Tribunal accepts the Respondent’s reply.

Main Issue

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

37. Area Staff Regulation 9.1 provides that:

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.

38. Area Staff Regulation 9.3 states that:

(A) A staff member whose temporary appointment is to be terminated shall be given not less than 14 days’ written notice of such termination or such notice as may otherwise be stipulated in his/her letter of appointment…

39. Area Staff Rule 109.1, paragraph 1, provides in relevant part:

Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member’s probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

40. The Applicant’s initial letter of appointment provides, in paragraph 7 “SEPARATION FROM SERVICE” as follows:

This appointment may be terminated at any time in accordance with the staff regulations and the 1999 Area Staff Rules. In particular:

(a) Should the Agency terminate your appointment after it has been confirmed, you will receive not less than 30 days written notice of such termination.

41. The Applicant’s record of employment shows that his appointment had been confirmed on 12 May 2005 after he had satisfactorily completed the
probationary one year period. It also shows that, at the time of his termination, his appointment was valid until 11 May 2012. The Tribunal notes that the Applicant was given not less than 30 days’ written notice of the termination of his appointment as he was notified of the decision by letter dated 19 December 2010 and his termination was effective on 23 January 2011.

42. The Tribunal notes, as confirmed by the Respondent, that the Applicant enjoyed a record of satisfactory performance from May 2004 to October 2009. However, as of November 2009, his performance was unsatisfactory. The evidence shows that the decision to terminate the Applicant’s appointment was based on his shortcomings, properly documented through correspondence between November 2009 and December 2010. His unsatisfactory performance is related to technical and administrative aspects of his work. On the technical side, his failings are related to his teaching knowledge and skills. The evidence shows, for example, that the achievement of his students was assessed as very low with none of his nineteen students passing a relevant competency exam in November 2009 and only four of twenty students passed a similar exam in October 2010. On the administrative side, the evidence shows that the Applicant failed to produce daily teaching plans, to keep daily attendance records of the students and to attend several workshops to improve his performance.

43. The Applicant’s shortcomings were documented in three PERs, several letters of reprimand and censure, internal correspondence and the report dated 29 December 2009 of the Evaluation Committee established to assess the Applicant’s competencies and work performance. While reviewing the evidence, the Tribunal noted that only one of the three PERs is signed by the Applicant, i.e. the PER dated 16 May 2010 in which inter alia his overall performance was rated unsatisfactory and termination or no renewal of his contract was recommended. The Applicant’s PERs dated 2 November 2010 and 5 December 2010 were not signed by the Applicant but both included a note by the Applicant’s supervisor stating that the reports were “discussed with [the] staff member concerned”. The Tribunal finds that even considering only one out of the three Applicant’s PERs, there is enough evidence in the file to substantiate his unsatisfactory performance. The Tribunal notes, in particular, the findings of the Evaluation Committee which,
after a thorough review process, concluded that the Applicant was “no longer fit to the needed assignments and duties”.

44. The Applicant was notified of the shortcomings in his performance through the PERs and several letters of reprimand and censure. The record shows that the Agency made efforts to help him improve, yet he continued to perform at a less than satisfactory level. The Tribunal notes, in particular, that the Applicant was invited to attend several workshops aimed to assist him in improving his performance. However, the Applicant did not attend the seminars nor take any corrective action to improve his performance.

45. The United Nations Appeals Tribunal (“UNAT”) gives the Agency and the Commissioner-General broad discretionary authority in the application of the Agency’s Staff Regulations, Rules and other administrative issuances. The jurisprudence of UNAT establishes that this authority will not be disturbed unless the decision was arbitrary or capricious, was motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law. The jurisprudence also determines that the burden of proof rests on an applicant alleging that the exercise of the Respondent’s discretionary authority was vitiated.

46. The Tribunal notes that the Applicant does not challenge the conclusion that his performance as of November 2009 was unsatisfactory. The Applicant’s principal contention is that the decision to terminate his appointment should not have been taken until he had been afforded an opportunity to receive treatment and recover from the psychological condition that, he argues, caused his poor performance. He claims that his work performance was negatively affected because he was “inflicted with depressive psychosis” due to the stress associated with his divorce and raising his children.

47. Without entering into an examination of whether or not the Applicant suffered from “depressive psychosis”, the evidence shows that he disclosed to the Agency that his poor performance was the result of a psychological illness only on 18 January 2011, when he filed a request for decision review, i.e. more than a year after the Agency first notified him of his poor performance commencing in November 2009.
48. The Tribunal reminds the Applicant that pursuant to Area Staff Rule 106.2 paragraph 6, it was incumbent upon him to inform his supervisors as soon as possible of “absences due to illness or injury” that could incapacitate him from discharging his duties as a teacher. However, there is no evidence that the Applicant had informed the Agency of his psychological illness before it made the decision to terminate his appointment, despite being afforded repeated opportunities to provide explanations about his poor performance.

49. In support of his alleged illness, the Applicant has provided to the Tribunal one medical report issued by a psychiatrist on 29 January 2011 attesting that he had suffered from “depressive psychosis” and that he was under treatment. The Tribunal notes that this report has been issued post facto, i.e. after the decision to terminate the Applicant’s employment was taken, and as such does not serve to prove that the decision was unlawful or that the exercise of the Respondent’s discretionary authority was vitiated.

50. In his request for decision review, the Applicant argued that, upon realising that his performance was affected by his psychological condition, he verbally requested to be placed on “unpaid vacation” but that his request was refused by the school management. The Applicant, however, failed to provide evidence in support of his request and there is no record in the file of any formal request from the Applicant to be placed on unpaid leave.

51. The Applicant also claims that the achievement record of his students during the first semester of the scholastic year 2010-2011 has improved in relation to previous periods. However, this assertion does not suffice, without further evidence, to modify the record of his unsatisfactory performance from November 2009 to December 2010.

52. In light of the above, the Tribunal finds that the Applicant’s record of performance establishes that the broad discretionary authority accorded to the Agency in respect of termination of appointments was properly exercised. The Tribunal also finds that the Applicant failed to provide any evidence of arbitrariness, prejudice, extraneous factors, procedural irregularity or error of law on the part of the Respondent.
Is there any legal basis for the remedy sought by the Applicant?

53. With respect to the Applicant’s request to be reinstated, the Tribunal finds that there is no basis for his claim as the decision to terminate the Applicant’s appointment was properly made and complied with applicable Area Staff Regulations and Rules. The contested decision was based on the properly formed conclusion that the Applicant did not have a satisfactory performance as a Teacher.

Conclusion

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

(Signed)

Judge Bana Barazi

Dated this 19th day of May 2013

Entered in the Register on this 19th day of May 2013

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman