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 Mohammad Samih Ahmad 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 terminate his appointment in the interest of the Agency.

Facts

2. Effective 1 May 2000, the Applicant entered the service of the Agency as a Sanitation Labourer, Level 1A at Baqaa Camp, Jordan under a fixed term appointment expiring on 31 December 2001. His appointment was further extended until 31 December 2003. On 1 January 2004, the Applicant’s post was converted into the post of Sanitation Labourer, Grade 1, Step 5. His appointment was extended several times until 31 December 2011.

3. By letter dated 10 July 2007, the Area Health Officer, North Amman Area (“AHO/NAA”) reprimanded the Applicant for not abiding by the instructions of his supervisors.

4. By letter dated 20 February 2008, the Director of UNRWA Operations, Jordan (“DUO/J”), following the Applicant’s failure to report to duty on 20 December 2007, drew his attention to the fact that his work performance and attitude were not in line with the standard of performance expected of UNRWA staff members. Accordingly, the DUO/J urged the Applicant to ensure that his attitude and performance would be above criticism in the future.

5. By letter dated 3 April 2008, the AHO/NAA reprimanded the Applicant for the second time for not performing his duties, regularly failing to abide by working hours and abandoning his duties without permission during working hours.

6. By letter dated 22 June 2008, the AHO/NAA reprimanded the Applicant for the third time for repeated lack of punctuality.
7. On 23 November 2008, the Deputy Field Administration Officer and Acting Field Personnel Officer, Jordan (D/FAO/J) served the Applicant with a letter of reprimand in relation to an incident occurred on 14 September 2008. The letter states *inter alia* that:

I write to inform you that a complaint has been received concerning the standard of your work performance and official conduct. In particular, on 14 September 2008 you were found during working hours with your working tools inside a private store leaving your area not cleaned.

Upon reviewing your personal file it has been noticed that your attention was called several times for the same reasons. Such irresponsible behaviors, which reflects [sic] negatively on you and your future career, are not accepted under any circumstances from a staff member working with this Agency…

8. By letter dated 17 March 2009, the D/FAO/J informed the Applicant of the deferral of his annual increment for three months due to unsatisfactory performance.

9. On 14 July 2009, the Field Administration Officer, Jordan (“FAO/J”) issued a letter of censure to the Applicant stating *inter alia* as follows:

I write to inform you that a complaint has been received concerning the standard of your work performance and official conduct. In particular, I have been informed that despite your attention was drawn several times to improve our [sic] punctuality you are still on the habit of leaving your duty station without permission from your supervisors, and your area was found unclean on several occasions. Such irresponsible behaviors can not under any circumstances be accepted from a staff member working with this Agency.

Upon reviewing your personal file, it has been found that you were served with five letters of reprimand for the same reasons.

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1 The Tribunal notes that the Applicant was afforded the opportunity to provide his comments in respect of the incident before the issuance of the letter of reprimand.

2 The Tribunal notes that the Applicant was given the chance to provide comments in respect of his alleged performance shortcomings prior to the issuance of the letter of censure. However, the file record does not include a reply from the Applicant.
In view of the foregoing, it has been decided to serve you with this letter of censure and suspend you from duty without pay for three days (the dates of which will be conveyed to you by your supervisors in due time)...

10. By letter dated 23 July 2009, the Field Human Resources Officer, Jordan (“FHRO/J”) informed the Applicant of the deferral of his annual increment for three months due to unsatisfactory performance and the fact that he had been issued with a letter of censure.

11. By letter dated 11 April 2010, the Field Personnel Officer, Jordan (“FPO/J”) informed the Applicant that a complaint had been received concerning the standard of his work performance and official conduct. The letter states *inter alia* as follows:

   […] In particular, it was reported that your area was found unclean on 14 March 2010 and the garbage collecting carriage was at a store, you left the work without permission and you did not sign the attendance record.

   In accordance with UNRWA’s rules and procedures, and in the interest of due process, you are hereby, provided with an opportunity to respond to the aforesaid complaint.

12. By an undated letter, the Applicant responded to the above-mentioned letter admitting that he had placed his cart in the store but arguing that he did so in order to go to pray and that most of the labourers had done the same.

13. Between May 2010 and May 2011, some letters were exchanged between managers about the “unsatisfactory performance” of the Applicant. None of them was addressed to the Applicant.

14. By letter dated 10 May 2011, the DUO/J informed the Applicant of the decision to terminate his appointment in the interest of the Agency with effect on 12 May 2011, stating:

   This is to inform you that serious complaints have been received concerning your work performance. In particular, it was reported by your supervisors that your work performance has been and remains below the minimum acceptable standards required by the Agency.
despite all the supervision and guidance provided by your supervisors. As a matter of fact, your inability to improve your performance has impacted negatively on the sanitation services provided to refugees and the overall health environment in camps.

Your overall substandard performance has seriously undermined the Agency’s confidence in you as a sanitation labourer. Therefore, it has been decided to terminate your service for 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 12 May 2011.

As you are entitled 30 calendar days written notice of such termination, you will be paid compensation in lieu of the notice period in accordance with Staff Regulation 9.3 (B).

15. By letter dated 22 June 2011, the Applicant requested administrative review of the decision to terminate his appointment in the interest of the Agency. The Agency did not reply to the Applicant’s request.

16. On 13 October 2011, the Applicant filed an application with the UNRWA Dispute Tribunal (the “Tribunal”).

17. On 7 March 2012, the application was transmitted to the Respondent.

18. On 5 April 2013, the Respondent filed his reply. In his reply, the Respondent requested leave from the Tribunal to take part in the proceedings and to file a late reply.

Applicant’s contentions

19. The Applicant contends that:

(i) the decision was made in an arbitrary way. He did not have the opportunity to provide his comments prior to the issuance of the decision to terminate his appointment;

(ii) he was not informed about the content of his performance evaluation reports. The reports were tainted by prejudice against the Applicant;
(iii) the last “disciplinary action” against him was taken more than a year prior to the decision to terminate his appointment;

(iv) he suffered from a “series of sanctions” which indicates the existence of a plot against him by the Chief Foreman. The Applicant was also transferred by the Chief Foreman to several areas in the camp without justification;

(v) the “sanctions” imposed against him were taken without any prior investigation even though the Applicant requested that an investigation be conducted.

20. The Applicant requests to be reinstated in his post and to receive financial compensation for the alleged “physical and mental damages caused by the arbitrary termination”.

**Respondent’s contentions**

21. The Respondent contends that:

   (i) the decision to terminate the Applicant’s appointment in the interest of the Agency 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.

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

**Considerations**

**Preliminary Issues**

*The Respondent’s request to take part in the proceedings and to file a late reply*

23. As stated above, the Respondent filed his amended reply on 5 April 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.
24. 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\(^3\) 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 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.

The Applicant’s request to present witnesses

25. The Tribunal takes note of the Applicant’s request in his application to hear the testimonies of some of his colleagues about his working conditions. The Applicant states that his colleagues could testify about the fact that some officers of the Agency allegedly asked him to repair their cars during his working hours. The Tribunal examined the evidence contained in the file and considers that these testimonies are not necessary as there is enough evidence in the file concerning the Applicant’s performance. Therefore, the Applicant’s request is rejected.

Main Issue

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

26. 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.

\[^3\text{The Tribunal notes the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: “The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review”.}\]
27. 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.

(B) In lieu of the notice period, the Commissioner-General may authorise compensation calculated on the basis of salary and allowances which the staff member would have received had the date of termination been at the end of the notice period.

28. 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.

29. The Applicant’s initial letter of appointment provides, in paragraph 8 “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.

30. The Applicant’s record of employment shows that, at the time of his termination, he had an appointment valid until 31 December 2011. The Tribunal notes that the Applicant was informed of the decision to terminate his appointment by letter dated 10 May 2011 and his termination was effective on 12 May 2011. While the Agency did not give the Applicant a notice period, it paid him compensation in lieu of such period in accordance with his initial letter of appointment and Area Staff Regulation 9.3 (B).

31. The Tribunal notes that the Applicant had a record of unsatisfactory performance since July 2007. The evidence shows that the decision to terminate the Applicant’s appointment was based on his shortcomings, properly documented through several letters of reprimand and censure, between July 2007 and May
2011. His unsatisfactory performance, as communicated to the Applicant through such letters, is related to his failure to abide by the instructions of his supervisors, for abandoning his post during working hours, for not performing his duties properly and for lack of punctuality.

32. While realizing that the Applicant had received feedback on his lack of satisfactory performance on several occasions, the Tribunal notes that, at the time the decision was made on 10 May 2011, the current Area Personnel Directive No. PD/A/23 on Performance Management and the Area Staff Personnel Directive A/22/Rev.5 on Area Staff Development Policy had not been yet introduced. The evidence shows that the Applicant’s supervisors brought “to [his] attention any aspects of work or conduct which [were] the subject of less than satisfactory report”, as required under Personnel Directive No. A/14 dated 1 September 1959, in force at the time of the contested decision.

33. The Applicant’s shortcomings were documented in several letters of reprimand or censure and internal correspondence. While reviewing the evidence, the Tribunal noted that none of the Applicant’s performance evaluation reports was presented as evidence of his unsatisfactory performance. The Respondent based his decision to terminate the Applicant’s appointment on the above-mentioned letters and correspondence. Therefore, the Applicant’s claim that he was not informed about the content of his performance evaluation reports is not relevant. Indeed, there is no evidence to demonstrate that these alleged performance evaluation reports actually exist. The evidence shows that the Applicant received at least four letters of reprimand and a letter of censure concerning his performance shortcomings. The Tribunal notes that the Applicant did not challenge the content of such letters at the time that they were communicated to him. The Applicant cannot contest them now before the Tribunal as his application is only against the decision to terminate his appointment. Therefore, the letters are considered as valid evidence of his unsatisfactory performance.

34. Even without taking into consideration the Applicant’s performance evaluation reports, if they exist, or the Agency’s internal correspondence
concerning his performance, the Tribunal finds that there is enough evidence in the letters of reprimand and censure to substantiate the Applicant’s unsatisfactory performance. Furthermore, the record shows that although the Agency constantly urged the Applicant to improve his performance, he did not take any corrective action to do so and he continued to perform at a less than satisfactory level.

35. The United Nations Appeals Tribunal (“UNAT”) gives the Agency and the Commissioner-General a 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 discretion authority was vitiated.

36. The Applicant argues that the decision to terminate his appointment was made in an arbitrary way because he did not have the opportunity to provide his comments prior to the issuance of the decision. While it is true that the Applicant was not notified of the Agency’s intention to terminate his appointment in advance, the Tribunal finds that he was well aware of the shortcomings in his performance. The Applicant is reminded that he did not challenge any of the letters of reprimand or censure issued, between July 2007 and April 2010, about his unsatisfactory performance. By these letters, the Agency repeatedly urged the Applicant to improve his performance and he had the opportunity to do so over the years. Indeed, the decision to terminate his appointment in the interest of the Agency is not a disciplinary measure as per Personnel Directive No. A/10/Rev.1, but rather an administrative decision taken as a result of the Applicant’s failure to improve his work performance.

37. Having said the above, the Tribunal notes that the last letter addressed to the Applicant concerning his performance shortcomings dates back to 11 April 2010 while the decision to terminate his appointment was taken on 10 May 2011. The evidence shows that between May 2010 and May 2011, some letters were exchanged between managers about the Applicant’s unsatisfactory performance.
However, none of them was addressed to the Applicant. The Applicant argues, in this respect, that the last “disciplinary action” against him was taken more than a year prior to the decision to terminate his appointment.

38. The Tribunal finds unacceptable the delay of the Agency in taking a final decision in respect of the Applicant’s case. The Tribunal does not accept the Respondent’s argument that the Agency “held off for a long time from taking the more serious decision of terminating his appointment, thereby affording the Applicant with more than ‘one last chance’ of improving his performance, in vain”. The evidence rather shows that the Agency simply disregarded the Applicant’s case for about one year which is not the appropriate attitude of an exemplary employer as the Agency is expected to be. However, had the Agency taken a decision in April 2010, the Applicant’s employment may have been terminated at that time. Therefore, the delay of the Agency in taking a decision did not prejudice the Applicant and did not cause him any damage.

39. The Applicant also claims that he suffered from a “series of sanctions’ which indicates “the existence of a plot against him by the Chief Foreman”. He points out that he was transferred by the Chief Foreman to several areas in the camp without justification. The Applicant is reminded that in order for the Tribunal to consider any allegation made by either party, evidence is required. The Tribunal will not take into account vague references to a conspiracy, or mere statements by the parties, i.e. unsubstantiated allegations, as they do not constitute probative evidence. The Tribunal considers that the Applicant has not adduced any evidence of an alleged conspiracy against him. In any event, the Applicant’s termination of appointment is related to his unsatisfactory performance which was properly documented and the Applicant has not adduced any evidence of an alleged plot against him by the Chief Foreman resulting in the negative assessment of his performance.

40. The Applicant further argues that the “sanctions” imposed against him were taken without any prior investigation even though he had requested that an investigation be conducted. The Applicant is reminded that there is no right on his part and no obligation on the part of the Respondent, within the Staff Regulations
and Rules of the Agency, to have an 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.

41. Furthermore, the Applicant does not clarify to which “sanctions” he refers. If he is referring to the letters of reprimand and censure, the Tribunal notes that he did not challenge their content. If he is referring to the decision to terminate his appointment, the Tribunal notes that this decision is not a disciplinary measure but rather an administrative decision taken in view of the Applicant’s unsatisfactory performance.

42. 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?*

43. With respect to the Applicant’s request to be reinstated and to be paid financial compensation for the alleged “physical and mental damages caused by the arbitrary termination”, the Tribunal finds that there is no basis for his claims 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 Sanitation Labourer.
**Conclusion**

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

_________(Signed)_________
Judge Bana Barazi

Dated this 3rd day of June 2013

Entered in the Register on this 3rd day of June 2013

_________(Signed)_________
Laurie McNabb, Registrar, UNRWA DT, Amman