# UNITED NATIONS APPEALS TRIBUNAL
# TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1061

**Mohammed Yousef abd el-Qader Abu Osba**

**(Appellant)**

**v.**

**Commissioner-General**
**of the United Nations Relief and Works Agency**
**for Palestine Refugees in the Near East**

**(Respondent)**

## JUDGMENT

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| Before: | Judge Kanwaldeep Sandhu, Presiding<br>Judge John Raymond Murphy<br>Judge Jean-François Neven |
| Case No.: | 2020-1361 |
| Date: | 30 October 2020 |
| Registrar: | Weicheng Lin |

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| Counsel for Appellant: | Yahya Fawzi Abu Drayeh |
| Counsel for Respondent: | Rachel Evers |

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a teacher at the Zarqa Preparatory Boys' School No. 1, ("Zarqa School"), Jordan Field Office ("JFO") on a fixed-term appointment with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA or Agency"), disputed his separation from service for misconduct before the UNRWA Dispute Tribunal ("UNRWA DT" or "UNRWA Dispute Tribunal"). The UNRWA DT dismissed the application.

2. By means of the present Judgment, we dismiss the appeal and affirm the UNRWA DT Judgment.

## Facts and Procedure

3. In its Judgment, the UNWRA Dispute Tribunal made the following findings, which we adopt.

4. Effective 3 September 2012, the Appellant was employed by the Agency on a fixed-term appointment, Grade 8, Step 1, as teacher at Russeifeh Preparatory Boys' School No. 2, JFO.

5. At the time material to the events giving rise to the present case, the Appellant was employed as Teacher, Grade 9, Step 4, at Zarqa School, JFO.

6. On 22 November 2016, the Chief Area Office, Zarqa Area Office ("CAO/ZAO") reported allegations of corporal punishment committed by the Appellant against two students at Zarqa School.

7. On 28 December 2016, the CAO/ZAO reported further allegations of corporal punishment committed by the Appellant against another student at Zarqa School.

8. On 17 April 2017, the Officer-in-Charge ("OiC"), Director of UNRWA Operations, Jordan ("DUO/J") issued the terms of reference for an investigation to be conducted into the allegations raised against the Appellant. On 18 May 2017, the DUO/J amended the terms of reference to include an additional allegation of corporal punishment by the Appellant.

9. On 18 June 2017, the investigator issued a Report of Investigation. The investigator interviewed and obtained statements from the five complainants and the Appellant. In addition, the investigator interviewed thirteen witnesses. The complainants and witnesses outlined several instances where the Appellant allegedly engaged in corporal punishment in the school such as punching and kicking students and hitting them with a wooden stick. The Appellant was interviewed on 1 May 2017 and generally denied practicing corporal punishment against the complainants. Except for an explanation regarding his actions against complainant AJS, the Appellant provided no other explanation for the instances set out in the investigation report. The investigator also reviewed documents of earlier administrative measures that had been taken against the Appellant and noted other investigations of the Appellant regarding similar allegations. The investigator concluded the Appellant engaged in corporal punishment against two of the complainant-students, MYA-S and MAS, and recommended an administrative measure be imposed against him.

10. On 6 July 2017, the Head, Field Legal Office, Jordan ("H/FLO/J") issued a due process letter to the Appellant, informing him of the investigative findings and inviting him to respond to the allegations within 15 days of receipt of the letter.

11. On 23 July 2017, the Appellant responded to the due process letter in writing. He rejected the allegations against him. In the letter, he stated he did not hit students AJS or MAS and did not break Area Staff Regulation 1.1;[1] however, if he did it was "without meant or knowledge of the details". Further he stated that he "may have practiced some wrong practices with these kids because I am not used to deal[ing] with kids as I used to work with higher grades. But the School Principal transferred my work to the 5th grade." Also, he advised that he was "in the OTI [Opportunity to Improve] group … which used to make [him] nervous", but he gave the students higher grades than they deserved. Finally, he advised that he was "suffering from private problems last year which have ended … [and] this will improve [his] performance …" He promised to improve his attitude towards his students and be careful with their safety. As a result, he requested a reduced administrative measure.

12. On 12 June 2018, the DUO/J imposed on the Appellant the disciplinary measure of separation from service with termination indemnity.

[1] Area Staff Regulation 1.1 reads: "Staff members, by accepting appointment, pledge themselves to discharge their functions with the interests of the Agency only in view."

13. In the termination letter, the DUO/J found the following, based on the investigation report and the Appellant's response to the due process letter:

- The Appellant's statement that [he] engaged in behaviour which was not proper is vague and does not provide additional information or context to [his] denial of engaging in corporal punishment;
- As a teacher with many years of experience, it is not credible that [the Appellant] could not manage a group of younger students without resorting to violence;
- The OTI suggests that there were performance issues, and it would be expected that at this time, [the Appellant] ought to have been seeking to demonstrate exemplary behaviour, rather than lashing out at students; and
- Personal problems do not justify improper conduct vis-à-vis [the Appellant's] students.

14. Accordingly, the DUO/J found the evidence substantiated that the Appellant had "engaged in corporal punishment against Complainants 1 (AJS), 3 (MAS), and 4 (MYA-S) when [the Appellant) kicked, hit with a stick, and threw on the ground and trod on the stomach of the various complainants respectively". In addition, the DUO/J stated that this conduct constituted a clear violation of the Agency's Rules and Regulations, including the United Nations Standards of Conduct for International Civil Service, UNWRA Area Staff Regulations 1.1 and 1.4, and Educational Technical Instruction (ETI) No. 1/08.

15. The DUO/J issued the disciplinary measure of separation with termination indemnity. In doing so, the DUO/J explained that, in addition to the facts of the misconduct, he had considered the following:

- Position and function: [The Appellant's] fiduciary duty as a teacher, which involves daily interaction with children, aggravates significantly the misconduct in question;
- Nature of the misconduct: Violence against children is serious misconduct;
- Status of the complainants: [The Appellant] misused the trust inherent in [his] position to engage in violence against vulnerable children;
- Reputational harm to the Agency as a result of violence against children;
- Past record of discipline: [The Appellant has] been disciplined multiple times for engaging in corporal punishment against children, and also received an administrative measure in this regard. This is a significant aggravating feature

> given that disciplinary sanctions have not had a remedial effect on [his] behaviour to date;
>
> - [The Appellant] expressed remorse for [his] actions; and
> - [The Appellant's] behaviour could result in serious reputational damage to the Agency.

16. After requesting a decision review, the Appellant filed an application with the UNRWA Dispute Tribunal on 29 July 2018.

17. In Judgment No. UNRWA/DT/2019/074, the UNWRA Dispute Tribunal denied the Appellant's request for an oral hearing and dismissed the application on the record. It determined that (1) the facts on which the separation from service with termination indemnity was based had been established by clear and convincing evidence upon the record; (2) the facts legally supported the conclusion of misconduct; (3) the disciplinary measure was proportionate to the offence; and (4) the Agency's discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law.

18. On 29 January 2020, the Appellant appealed the above UNRWA DT Judgment to the United Nations Appeals Tribunal ("Appeals Tribunal"). The Commissioner-General of UNRWA filed an answer to the appeal on 8 April 2020.

## Submissions

### Appellant's Appeal

19. The Appellant submits that he did not hit the students and says the UNRWA Dispute Tribunal erred when it stated that he had admitted this in the investigation. He alleges that the Agency and the UNRWA Dispute Tribunal put in a "false and incorrect" investigation.

20. The Appellant alleges that the other teachers in the school were the perpetrators or wanted him dismissed.

21. The Appellant objects to the UNRWA Dispute Tribunal's denial of his request for an oral hearing "in the presence of" the complainant students and his lawyer. The Appellant also requests an oral hearing for this purpose before the Appeals Tribunal.

22. He submits he has suffered psychological harm and requests that he be reinstated as well as removal of all penalties against him.

**The Commissioner-General's Answer**

23. The Commissioner-General or Respondent submits that the appeal is not well founded on any of the grounds provided for under the Statute of the Appeals Tribunal (the "Statute") and as such, the appeal is defective.

24. Further, the Respondent submits that the UNRWA Dispute Tribunal did not err as a matter of fact, law, or procedure when it dismissed the Appellant's application on the merits.

25. The Respondent requests dismissal of the appeal.

## Considerations

*Request for oral hearing before the Appeals Tribunal*

26. We deny the Appellant's request for an oral hearing before the Appeals Tribunal.

27. The Appellant does not provide reasons why an oral hearing before the Appeals Tribunal should be granted in this appeal. He reiterates his complaint of the UNRWA Dispute Tribunal's decision. It appears he is seeking an oral hearing to either confront the complainant students or respond to existing evidence. An oral hearing before the Appeals Tribunal is not for this purpose as the Appeals Tribunal is not a first instance trier of fact. Rather, it "is established (…) as the second instance of the two-tier formal system of administration of justice".[2]

28. This Tribunal does not find that an oral hearing is necessary or would "assist in the expeditious and fair disposal of the case" within the meaning of Article 18(1) of the Appeals Tribunal's Rules of Procedure.

[2] Article 1 of the Statute of the Appeals Tribunal.

*Did the UNWRA Dispute Tribunal err in law, fact, jurisdiction or process?*

29. The Appeals Tribunal's authority in reviewing the Dispute Tribunal's judgments is set out in Article 2(1) of the Statute. It provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal of the Dispute Tribunal's judgment in which it is asserted that the Dispute Tribunal a) exceeded its jurisdiction or competence; b) failed to exercise jurisdiction vested in it; c) erred on a question of law; d) committed an error of procedure, such as to affect the decision of the case; or e) erred on a question of fact, resulting in a manifestly unreasonable decision.

*Is the Appeal defective?*

30. The Respondent says the Appellant has failed to identify grounds for his appeal as required by Article 2(1) of the Statute and as such, his appeal is defective.[3]

31. We agree. An appellant has the burden to demonstrate that the UNRWA Dispute Tribunal judgment is defective and to identify the specific errors allegedly committed by the UNRWA Dispute Tribunal. On appeal, a party cannot merely repeat arguments that failed before the UNRWA Dispute Tribunal. More is required. An appellant must demonstrate that the UNRWA Dispute Tribunal has committed an error of fact or law warranting intervention by the Appeals Tribunal.[4]

32. In this instance, the Appellant has failed to specifically identify the errors allegedly committed by the UNRWA Dispute Tribunal and therefore, the appeal is defective for that reason. However, we have previously recognized that if an appellant is not legally represented, as is the case here, some latitude may be allowed in the interests of justice.[5]

33. Therefore, although the Appellant has not clearly formulated the grounds of appeal, the main issue on appeal for our consideration is whether the UNRWA Dispute Tribunal erred in dismissing the application.

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[3] In support of his contention, the Respondent cites *Abdel Rahman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-610, para. 20,

[4] *Madi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-853, para. 21, citing, *inter alia*, *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30. See also *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

[5] *Madi, supra.*

*Review of the UNWRA DT Judgment for errors*

34. The issue on appeal is whether the UNRWA DT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision by the Agency to separate the Appellant from service with termination indemnity was lawful.

*a) Standard of review in disciplinary cases*

35. The UNRWA DT correctly applied settled law that "(j)udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is to 'examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence.'".[6]

36. The UNRWA DT examined i) whether the facts on which the disciplinary measure was based were established (by a preponderance of evidence, but where termination was a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the established facts amounted to misconduct; iii) whether the sanction was proportionate to the offence; and iv) whether the staff member's due process rights were respected.

*b) Relevant legal framework for disciplinary cases*

37. UNRWA Area Staff Regulation 9.1 provides that "[t]he 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". Regulation 10.2 provides that "[t]he Commissioner-General may impose disciplinary measures on staff members who engage in misconduct", while Regulation 10.3 says "[t]he Commissioner-General may summarily dismiss a staff member for serious misconduct".

38. In terms of corporal punishment, the Agency's ETI No. 1/08, in Article 1.3, provides the following definition: "any punishment involving the application of physical force or the issuance of orders or instructions to a student with the intention of causing physical pain,

[6] Impugned Judgment, para. 41, quoting *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18.

discomfort, or humiliation … includ[ing] other cruel or degrading forms of punishment". It also strictly prohibits corporal punishment which constitutes misconduct subject to "severe disciplinary measures … includ[ing] written censure, suspension without pay, demotion, termination, and dismissal".

39. If the allegations against the Appellant are supported by evidence, the alleged actions constitute corporal punishment that amounts to misconduct and, therefore, a violation of these Regulations and Rules. As a result, the Appellant would also have failed to observe the standards of conduct expected of him as set out in UNRWA Area Staff Rule 110.1(1) that provides that

> … Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the UNRWA Area Staff Regulations and UNRWA Area Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

*c) Have the facts on which the disciplinary measure was based been established by clear and convincing evidence?*

40. By letter dated 12 June 2018, the DUO/J imposed on the Appellant the disciplinary measure of separation from service with termination indemnity for having engaged in corporal punishment and physical violence against three students in November and December 2016.

41. As set out in *Nadasan*,[7] there may be instances, where the Dispute Tribunal will conclude that the facts on which the disciplinary measure was based have been established by clear and convincing evidence during the investigation proceedings. In such cases, the UNDT will normally undertake an oral hearing as provided for in disciplinary cases, but the Tribunal may decide not to re-hear witnesses or gather additional evidence. If, on the other hand, the Dispute Tribunal does not find the evidence established during the disciplinary proceedings is sufficient, it will undertake a "fresh" or "*de novo*" investigation meaning that the Dispute Tribunal will re-hear witnesses and/or gather other evidence to examine and assess whether the above-mentioned standard of proof has been met. However, the

[7] *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, paras. 39-40.

Dispute Tribunal is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General. It will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based.

42. Before *Mbaigolmem*,[8] it was not disputed that the Dispute Tribunal had authority to rehear the witnesses of the disciplinary proceedings to assess whether there was sufficient evidence to conclude that misconduct occurred, and the Dispute Tribunal has done that several times. However, the Appeals Tribunal clarified in *Nadasan* that clear and convincing evidence can be established without an oral hearing in certain circumstances and this is in the discretion of the Dispute Tribunal.

43. In the present case, the UNRWA DT indicated that it considered this was a case "where the record before the Tribunal arising from the investigation [was] sufficient for the Tribunal to render a decision without the need for an oral hearing".[9] Without an oral hearing, the determination was based entirely on the documentary evidence and written submissions before the UNRWA DT. The record outlined instances of the Appellant using a wooden stick on one of the complainants, throwing another down on the ground and treading on the belly of a complainant, kicking another, all corroborated by witness testimony.

44. Article 11(1) of the UNRWA Dispute Tribunal's Rules of Procedure provides that the Judge hearing a case has discretion to hold oral hearings.

45. The question is whether the UNRWA DT's exercise of discretion in not holding an oral hearing here was unreasonable and as such an error of procedure "such as to affect the decision of the case".[10]

46. We find the UNRWA DT's refusal to hold an oral hearing was reasonable and was not an error of procedure "such as to affect the decision of the case".

[8] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819.
[9] Impugned Judgment, para. 30.
[10] Article 2(1)(d) of the Statute of the Appeals Tribunal.

47. We do not accept the Appellant's allegation of procedural unfairness for not being granted an oral hearing before the UNRWA DT to "hear the testimony of the students whose names appear in the decision" and "to hear the defense of the [Appellant] and the [illegible] of the decision in a hearing that does justice to the parties before [sic] issuance of the decision".

48. We find that any error in procedure in not granting the oral hearing by the UNRWA DT did not "affect the decision of case". As we stated in *Michaud*:[11]

> … This is also one of those cases where the so-called "no difference" principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

49. In the present case, we find the ultimate outcome amounts to a foregone conclusion and the "no difference" principle applies in the face of the "clear and convincing evidence". The relevant allegations were corroborated in the investigation report by the testimony of thirteen witnesses and the testimony of each of the complainants that corroborated each other's allegations. In addition, the Appellant expressly admitted to "some wrong practices" and requested a lesser administrative measure, which is implicitly an admission.

50. Therefore, without evidence of a tainted investigation, it was reasonable for the UNRWA DT to place greater weight on the consistent, corroborated evidence contained in the investigation report over the uncorroborated, unspecific denials of the Appellant coupled with his implicit admission.

51. Applying the above-mentioned standards and criteria to the present case, we find that the UNRWA DT did not err as there was clear and convincing evidence supporting the Appellant's misconduct based on the record which contained the testimony of the thirteen witnesses and the complainants that the Appellant engaged in the prohibited corporal punishment.

[11] *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 60.

52. In paragraphs 34-39 of its Judgment, the UNRWA DT considered the Appellant's submissions of the unfairness of the DUO/J's decision and his denial that he had inflicted corporal punishment on any student. However, this was weighed against the accounts of the complainants and the corroboration of the allegations provided during the investigation, particularly the supporting evidence of thirteen witnesses.

53. The Appellant has variously argued that the complaints were based on "inaccurate and unconfirmed information" and the Head Principal and/or the Director and/or the UNRWA DT had been personally unfair to him. However, he has provided no support for these allegations or explained how the information relied upon was inaccurate or false. His arguments have varied through the process. His response has been inconsistent. For example, in his response to the investigation report, he denied using corporal punishment but then suggested that he "may have practiced some wrong practices" and requested another opportunity to improve his behaviour if he did deserve punishment. In his application to the UNRWA DT, he argued that the testimony of the students was false, and that a progressive approach to sanctions was not applied. But in the present appeal, he suggests that other teachers at the school "incited" the allegations and the Agency and UNRWA DT "changed the investigation and put in a false (…) and incorrect investigation". He makes new allegations including that he was asked for funds to facilitate his return to work. None of the differing explanations and arguments made by the Appellant are accompanied by supporting proof.

54. Under the well-established jurisprudence, the burden of proving any allegations of ill-motivation rests with the applicant.[12] While the Appellant has made the above allegations of improper considerations on the part of other teachers and the UNRWA Dispute Tribunal, he did not provide evidence in support of those allegations and hence these allegations can have no merit.

55. Therefore, we find that the UNRWA DT did not err in holding that the documentary evidence before it was sufficient to conclude that the Appellant had committed the alleged acts of corporal punishment against student-complainants, AJS, MAS, and MYA-S when he kicked, hit with a stick, and threw on the ground and trod on the stomach of the various complainants. The evidence and testimony provided was convincing evidence of the allegations in the disciplinary investigation, which in some ways were corroborated by the

[12] See, for instance, *Obeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 38; *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081, para. 35.

Appellant's response to the investigative findings. Although the Appellant did provide a general denial of the allegations, he also expressed remorse and suggested that he might have engaged in inappropriate conduct. The convincing evidence was that the Appellant engaged in the alleged corporal punishment.

*d) Whether the established facts legally amount to misconduct and proportionality of the disciplinary sanction*

56. In assessing the seriousness of misconduct and reviewing the proportionality of a disciplinary sanction, the Appeals Tribunal has consistently granted extensive discretion to the Secretary-General, (and the Commissioner-General here), to determine whether a staff member's conduct amounted to misconduct, and to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. The Appeals Tribunal's role is to determine whether such exercise of discretion was reasonable in the circumstances.[13]

57. We find no fault in the UNRWA DT's finding that the Appellant's conduct towards the students amounted to prohibited corporal punishment and serious misconduct deserving of the administrative measure of separation with termination indemnity.

58. UNRWA Area Staff Regulations 9.1, 10.2 and 10.3 give the Commissioner-General wide discretion to impose disciplinary sanctions, including termination, for misconduct. Articles 1.3 and 4.1 of ETI clearly prohibit corporal punishment as misconduct that is subject to severe disciplinary measures including termination.

59. By committing corporal punishment, the Appellant engaged in misconduct and violated these Regulations and Rules. In addition, the Appellant also failed to observe the standards of conduct expected of him set out in UNRWA Area Staff Rule 110.1 that provides that failure to "observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct".

[13] See *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407, paras. 30-31.

60. We find that the Commissioner-General's determination that the Appellant's behaviour amounted to serious misconduct subject to termination was a reasonable exercise of his discretion. It is established that due deference be given to the Secretary-General (or in this instance, the Commissioner-General) to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Agency in the exercise of its rule-making discretion. The Agency is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements.[14]

61. The principle of proportionality of disciplinary measures was set out in *Sanwidi*:[15]

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General."

62. Area Staff Rule 110.3 gives the Commissioner General the discretion to impose a disciplinary measure:

> 4. The decision to impose a disciplinary measure shall be within the discretionary authority of the Commissioner-General. For the imposition of disciplinary measures other than summary dismissal, such authority is delegated to the Director of Human Resources for Headquarters staff and Field Office Directors for Field staff. The authority to further define the conditions and procedures concerning the imposition of disciplinary measures is delegated to the Director of Human Resources.
>
> Disciplinary measures
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> 5. Disciplinary measures under Area Staff Regulation 10.2 may take one or more of the following forms only:
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> A) written censure;
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> B) loss of one or more steps in grade;
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> C) deferment, for a specified period, of eligibility for salary increment;

[14] *Nadasan supra*, para. 41.
[15] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

> D) suspension without pay for a specified period;
>
> E) fine;
>
> F) deferment, for a specified period, of eligibility for consideration for promotion;
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> G) demotion with deferment, for a specified period, of eligibility for consideration for promotion;
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> H) separation from service, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, with termination indemnity;
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> I) separation from service, also known as termination for misconduct, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, and without termination indemnity pursuant to Area Staff Rule 109.9;
>
> J) summary dismissal.

63. It was reasonable for the Commissioner-General to determine that the Appellant's misconduct rendered him unfit for further service with the Agency and to, therefore, impose separation. The Appellant inflicted violence against these students, not for the first time based on previously substantiated allegations of the Appellant's use of corporal punishment against students. Therefore, although he had been disciplined previously for the same misconduct and was given the opportunity to improve (OTI), he continued in the prohibited behaviour.

64. Area Staff Personnel Directive (ASPD) A/10 provides that separation from service is "with notice or compensation in lieu of notice, and with termination indemnity".

65. Therefore, we are satisfied that separation from service with compensation with termination indemnity was fair and proportionate to the seriousness of the offence in accordance with the Area Staff Rules and directives below.

*e) Whether the staff member's due process rights have been respected*

66. Regarding the right to due process during the Agency's investigation and imposition of the disciplinary measure, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.[16]

[16] *Thiombiano v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-978, para. 34, citing *Muindi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-782.

67. UNWRA Staff Rule 110.1(3) and (4) sets out the disciplinary process:

> … The decision to launch an investigation into allegations of misconduct shall be within the discretionary authority of the Commissioner-General. Such authority is delegated to Field Office Directors and HQ Department Directors.
>
> … The decision to impose a disciplinary measure shall be within the discretionary authority of the Commissioner-General. For the imposition of disciplinary measures other than summary dismissal, such authority is delegated to the Director of Human Resources for Headquarters staff and Field Office Directors for Field staff. The authority to further define the conditions and procedures concerning the imposition of disciplinary measures is delegated to the Director of Human Resources.

68. Although the UNWRA Staff Rule does not specifically outline the requirements for due process in disciplinary cases, the common law requirements of due process in such instances should apply including adequate notice of the allegations, the opportunity to respond to those allegations and the right to seek legal advice if requested. We find those requirements of due process were met here. In the H/FLO/J letter of 6 July 2017, the Appellant was informed about the allegations against him and had an opportunity to respond and defend himself within 15 days of receipt. He was also interviewed as part of the investigation and given the opportunity to provide his evidence and testimony on the allegations. He was given a charge letter and supporting documents, and had the opportunity to comment on the allegations before the disciplinary measure was imposed, which he did. He was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements.[17]

69. Due process does not always require that a staff member defending a disciplinary action of separation has the right to confront and cross-examine his accusers.[18] This is particularly the case when the accusers and witnesses are young children where it may be inadvisable for such a confrontation to occur. In this instance, the Appellant's request to "face his accusers" must give way to the need to protect minor witnesses from the emotional distress the confrontation would entail as long as the Appellant was afforded the fair and

[17] See *Oh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-480; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.
[18] *Applicant supra*, para. 33.

legitimate opportunity to defend his position.[19] Due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against him. In this instance, the Appellant was aware of the evidence against him, the identities of the complainants and the testimonies of the witnesses as set out in the investigation report and as such, was able to prepare a defense to each of the alleged incidents described in the report.[20] He presented largely a blanket denial of using corporal punishment, an implicit admission along with a request for a lesser administrative measure, and unsupported allegations of improper motive on the part of other teachers in the school, the Agency, and now the UNRWA DT.

70. In summary, the UNRWA DT did not err in finding that the decision to terminate the Appellant's fixed-term appointment was lawful.

[19] *Ibid*., para. 36 *et seq*.
[20] See *Oh supra*, para. 40, and *Applicant supra*.

## Judgment

71. The appeal is dismissed and Judgment No. UNRWA/DT/2019/074 is hereby affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

| *(Signed)* | *(Signed)* | *(Signed)* |
|---|---|---|
| Judge Sandhu, Presiding<br>Vancouver, Canada | Judge Murphy<br>Cape Town, South Africa | Judge Neven<br>Brussels, Belgium |

Entered in the Register on this 17th day of December 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar