



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

MALOR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision made by the Assistant Secretary-General (“ASG”), Office of Human Resources Management (“OHRM”), to impose on him the sanction of a written reprimand, and include it in his official status file (“OSF”) following his failure to file a financial disclosure statement for 2006 within the imparted deadlines. The Applicant submits that the disclosure requirements of sec. 2.1 of ST/SGB/2006/6 (Financial disclosure and declaration of interest statements) did not apply to him, that the Administration failed to take reasonable steps to notify him of his obligations and that his delayed compliance (on 21 August 2009) with the bulletin did not amount to misconduct. He requests that the contested decision be rescinded and expunged from his OSF.

2. The Respondent submits that the evidence on record fully supports his assertion that the Applicant was informed of his obligation to file a financial disclosure statement and that the decision to impose a reprimand was appropriate.

3. On 4 June 2012, the undersigned Judge was assigned to the present case.

4. On 27 September 2012, pursuant to Order No. 167 (NY/2012), dated 15 August 2012, the parties submitted a joint statement which identified agreed-upon and contested facts and legal issues. The Applicant further requested that the Tribunal hold an oral hearing in the present matter.

5. Pursuant to Order No. 235 (NY/2012), dated 21 November 2012, the Tribunal held an oral hearing on 18 December 2012, following which both parties submitted written closing statements to the Tribunal on 10 January 2013 and 15 January 2013.

Background

6. The following facts were submitted by the parties as part of their 27 September 2012 joint statement.

7. The Applicant began his service with the Department of Public Information (“DPI”) in New York on 31 January 2003 as a Chief Executive Producer, United Nations Radio, at the P-4 level.

8. In October 2005, the Applicant was deployed on emergency basis to Pakistan as the United Nations Humanitarian Spokesperson and Media Officer with the Office for the Coordination of Humanitarian Affairs until his return to New York in February 2006.

9. On 16 September 2006, the Applicant was assigned for two years to the United Nations Mission in Liberia (“UNMIL”) as Spokesperson and Deputy Chief of Public Information. He was granted a Special Post Allowance (“SPA”) to the P-5 level.

10. On 7 May 2007, the Ethics Office emailed the Applicant to inform him that he was required to participate in, and comply with, the Financial Disclosure Programme set out in ST/SGB/2006/6 for 2006. The following week, the Ethics Office emailed the Applicant advising him that he should contact his Information Technology department if he had not received the password to access the Financial Disclosure System. This communication was followed by a 22 May 2007 email which stated that, “[d]ue to unforeseen technical difficulties, some staff members ha[d] not yet received their password”. The Applicant submits that he did not receive either of these communications.

11. By emails dated 15 June 2007, 17 July 2007 and 2 August 2007, the Ethics Office reminded the Applicant of his obligation to file a financial disclosure statement for 2006. As part of its final communication, the Applicant was advised that, if he did not file a statement within seven days, the matter would be referred to the head of his Department or Office. The Applicant submits that he never received these emails.

12. By internal memoranda dated 17 August 2007 and 1 October 2007, the then Director, Ethics Office, requested that the then ASG for Peacekeeping Operations

bring to the Applicant's attention the fact that he had yet to file a financial disclosure statement for 2006. As of the close of business on 31 December 2007, the Applicant had not filed a financial disclosure statement for 2006 and the Financial Disclosure System could no longer be accessed.

13. By memorandum dated 15 December 2008 from the Chief, Human Resources Policy Service, OHRM, the Applicant was charged with misconduct as a result of his failure to file a financial disclosure statement for 2006, in violation of former staff regulations 1.2(b) and (n) and section 2.1 of ST/SGB/2006/6.

14. By memorandum dated 24 April 2009, the Applicant provided his comments on the allegations. On or about 21 August 2009, the Applicant submitted a financial disclosure statement for 2006 following which, on 10 November 2009, he was informed that the disciplinary case against him would be closed but that he would be issued a reprimand that would be placed in his OSF. Due to the Applicant returning to New York from UNMIL, the letter of reprimand was only received by the Applicant on 10 May 2010.

15. On 9 July 2010, the Applicant requested management evaluation of the decision to place a reprimand in his OSF. However, on 14 July 2010, the management evaluation unit ("MEU") determined that "[i]n light of the fact that the reprimand was placed on [his] file following a disciplinary process, the MEU has concluded that [the Applicant is] not required to request a management evaluation prior to applying to the United Nations Dispute Tribunal for relief ... [the] request for management evaluation is not receivable".

16. The Applicant appealed the decision to place a reprimand in his OSF on 6 August 2010.

Consideration

Receivability

17. The present case meets all of the receivability requirements identified in art. 8 of the Tribunal's Statute.

18. The Tribunal notes that, while not the focus of the present judgment, a written reprimand is a non-disciplinary sanction which is reviewable by the MEU. The MEU therefore must consider requests to review the imposition of reprimands receivable.

Applicable law

19. ST/SGB/2006/6 provides in part:

Financial disclosure statement

2.1 The following staff members have an obligation to file an annual financial disclosure statement:

- (a) All staff members at the D-1 or L-6 level and above;
- (b) All staff members who are procurement officers, or whose principal occupational duties are the procurement of goods and services for the United Nations;
- (c) All staff members whose principal occupational duties relate to the investment of the assets of the United Nations, the United Nations Joint Staff Pension Fund or of any accounts for which the United Nations has fiduciary or custodial responsibility;
- (d) Other staff members whose direct access to confidential procurement or investment information warrants the filing of a financial disclosure statement;
- (e) All staff members serving in the Ethics Office.

2.2 The relevant head of department or office shall determine, in accordance with guidelines issued by the Ethics Office, the staff members who shall file financial disclosure statements under sections 2.1(b), (c) and (d) above.

20. ST/SGB/2006/6 identifies two separate groups of staff members that are required to file a yearly financial disclosure. Namely, sec. 2.1(a) states that "all staff

members at the D-1 or L-6 level” bear such a responsibility whereas sec. 2.2 states that “[t]he relevant head of department or office shall determine, in accordance with guidelines issued by the Ethics Office, the staff members who”, aside from the ones that are part of the first group, bear responsibilities that require them to file financial disclosure statements.

Was the Applicant at the D-1 or L-6 level?

21. The Respondent, as part of his initial reply to the Applicant’s application stated “that the Applicant was not a Director at the D-1 level or a staff member at the L-6 level who are clearly required under the provisions of former staff rule 1.2(n) to file a financial disclosure statement”. However, the Respondent also submitted as part of his closing statement that “[t]he Applicant acknowledged, in cross-examination, that the position of Chief, PIO [at UNMIL], was a D-1 position. It was, therefore, reasonable for the Organization to require him to file a financial disclosure statement”.

22. On the other hand, the Applicant stated that while the position he encumbered was “normally a D-1 position” he was not paid as such and that for financial decisions he had to actually obtain the approval of the Chief of Mission.

23. The facts presented to the Tribunal sustain the position that prior to joining UNMIL the Applicant was employed at the P-4 level and that upon joining UNMIL as Spokesperson and Deputy Chief of Public Information he was granted an SPA to the P-5 level.

24. The Respondent has not provided the Tribunal with any evidence that the Applicant either applied for a D-1 level position, that he was performing at the D-1 level, that his contract was modified in writing before or after joining UNMIL to reflect the fact that he was encumbering on a D-1 level post or that at any time he was remunerated at the D-1 level. If a staff member is to have the duties and responsibilities associated with a post of a specific level then, under the basic

concepts of contract law, he or she should also benefit from the rights associated with that post.

25. Furthermore, ST/SGB/2006/6 does not state that staff members who perform *de facto* at the D-1 level have an obligation to file a final disclosure statement but rather only staff member who are legally (*de jure*) appointed “at the D-1” level (emphasis added).

26. The Tribunal notes that the Respondent also makes a separate argument that the Applicant was identified by UNMIL on the list provided to the Ethics Office as being a staff members who was required to file a financial disclosure statement, a process that is a result of sec. 2.2 of ST/SGB/2006/6. Nevertheless, a staff member cannot have an obligation to file a financial disclosure statement under both sec. 2.1(a) and secs. 2.1(b), (c) or (d) of ST/SGB/2006/6. Either that responsibility stems from the staff member’s functions at the D-1 level or above or, as stated in sec. 2.2 of ST/SGB/2006/6, by being identified by the “relevant head of department or office”. By stating that the Applicant was identified on the list provided to the Ethics Office, the Respondent further supports his own assertion that the Applicant was not employed at the D-1 level and did not therefore have any of the financial disclosure responsibilities that would stem from that position.

27. The Tribunal finds that the Applicant did not have an obligation to file a financial disclosure statement under sec. 2.1(a) of ST/SGB/2006/6 for 2006.

Was the Applicant otherwise required to file a financial disclosure statement?

28. Section. 2.2 of ST/SGB/2006/6 establishes the procedure by which staff members who are required to file a financial disclosure statement under secs 2.1(b), (c) and (d) are to be identified. More specifically, it states that “the relevant head of department or office shall determine, in accordance with guidelines issued by the Ethics Office”, who these staff members are.

29. It is only upon receiving information from the relevant head of department regarding the identity of staff members that meet the criteria identified in ST/SGB/2006/6 that the Ethics Office can contact the respective staff members and inform them of their obligation to file a financial disclosure statement.

30. In the present case, the Respondent submits that he “endeavoured, but has been unable to retrieve the list of staff members that were required to file financial disclosure statements for the year 2006”. Nevertheless, the Respondent contends that the fact that the Applicant appeared on the corresponding list for 2007 should be sufficient to “inform the Tribunal as to the Applicant’s obligations in 2006”.

31. In support of his position that the Applicant was correctly identified as a staff member who had to file a financial disclosure statement the Respondent produced several emails that were sent to the Applicant by the Ethics Office requesting that he comply with his obligation to file a financial disclosure statement. The Applicant stated that he never saw these emails and that had he seen them he would have, as he did the following year, complied with the request as the financial information he provided for 2007 was the same as the prior year.

32. Further, the Respondent also provided the Tribunal with a 17 August 2007 memorandum addressed to the ASG for Peacekeeping Operations in which the Director of the Ethics Office requested the ASG’s assistance with “bring[ing] the non-compliance [with their filing obligations] to the attention of the listed staff members”, with the name of the Applicant appearing on the said list. There is no evidence before the Tribunal that the ASG for Peacekeeping Operations contacted the Applicant regarding this matter.

33. Even though the Respondent benefits from a certain amount of discretion when taking an administrative decision, such as determining who has to comply with certain financial responsibilities towards the Organization, he has not provided the Tribunal with the list that he asserts was provided to the Ethics Office, as required

by sec. 2.2 of ST/SGB/2006/6, identifying the Applicant as a staff member who was required to file a financial disclosure statement for 2006..

34. The process by which staff members, who are required to file financial disclosure statements under sections 2.1(b), (c) and (d), are identified has to be conducted anew each year. The list for 2007 which reflects the name of the Applicant cannot have a retroactive effect and is not sufficient to inform the Tribunal as to who was identified on the list provided to the Ethics Office for 2006, regardless of any communication which the Respondent asserts was transmitted to the Applicant.

35. As stated by the Respondent in his submission, “mere speculation is not sufficient” for the Tribunal to affirm the Respondent’s contention that the Applicant was appropriately identified and informed of his filing obligation or that the Tribunal should consider the presence of the Applicant’s name on the list for subsequent years as sufficient to inform it as to what transpired with regard to the financial disclosure requirements for 2006. Indeed, in that same vein, the Tribunal would have to put value behind the Applicant’s submission that seeing that upon being contacted by the Ethics Office in 2008 he complied with his filing obligations for 2007, he would have surely complied with any prior obligation if so informed as the information included in that year’s financial disclosure statement had not changed in relation to the prior year.

36. In conclusion, the Tribunal finds that the Respondent does not meet the burden of proof to sustain the assertion that he identified and included the Applicant on the list of staff members required to file a financial disclosure statement for 2006 as warranted by sec. 2.2 of ST/SGB/2006/6. In the absence of such a list, none of the ensuing communications sent by the Ethics Office to the Applicant stating that he was required to file a financial disclosure statement are relevant as there is no evidence that the Organization complied with its own initial obligations under sec. 2.2 of ST/SGB/2006/6.

Decision

37. In view of the foregoing, the Tribunal rescinds the Applicant's written reprimand. Any record of it is to be removed from the Applicant's Official Status File.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of February 2013

Entered in the Register on this 12th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York