



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SCHWALM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Brandon Gardner, OSLA

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Joint Operations Officer (“JOO”) at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”). She serves on a continuing appointment at the P-4 level.
2. On 9 April 2021, she filed an application for suspension of action (“SOA”) seeking to suspend the decision to reassign her to a P-4 Substantive Operation Support/Coordination Officer (“the Position”) in MINUSCA (“the contested decision”).
3. The Respondent filed his reply on 13 April 2021.

Relevant facts

4. On 25 September 2018, a former United Nations Police (“UNPOL”) staff member made a formal complaint of harassment against the Applicant. A fact-finding panel was convened by the Special Representative of the Secretary-General (“SRSG”) and Head of MINUSCA to establish the facts and details surrounding the allegations made against the Applicant.¹
5. On 15, 16 and 30 November 2018, the Applicant submitted a management evaluation request (“MER”) concerning the decision to deprive her of her functions including her removal as Deputy Chief, Joint Operation Centre (“JOC”). She also challenged how her first reporting officer (“FRO”) and second reporting officer (“SRO”) had managed her performance during the 2017-18 performance cycle, among other issues.²
6. On 8 August 2019, the Management Evaluation Unit (“MEU”) issued its decision and recommended: upholding the decision not to assign her as Deputy Chief

¹ Reply para. 4 referencing annex 6 of the application.

² Application, annexes 1 and 2.

of JOC; redoing her 2017-2018 performance evaluation; and assigning her tasks and responsibilities commensurate to a P-4 JOO.³

7. By memorandum dated 17 February 2020, the SRSG/MINUSCA informed the Applicant of the outcome of the 25 September 2018 complaint. The fact-finding panel had found that she had created an unhealthy working environment by engaging in abuse of authority and harassment against the UNPOL staff member within JOC and that her behavior was inappropriate and constituted a breach of the United Nations core values of respect for diversity.⁴ The SRSG concurred with the fact-finding panel and decided to take managerial action by immediately reassigning the Applicant to another section, but in a non-supervisory or managerial capacity. He further instructed the Chief of Staff and/or Chief of JOC to immediately communicate and clarify to all JOC members the decision to retain a sole military Deputy in accordance with a JOC Organogram dated December 2018.⁵

8. On 7 January 2021, the Applicant received a letter from the SRSG dated 21 December 2020, informing her of the decision to temporarily re-assign her to a P-4 Programme Management Officer Supply Chain Management post in MINUSCA from “21 December 2021 to end on 26 February 2021.”⁶ She challenged this decision by way of a SOA before the UNDT on 8 February 2021. On 16 February 2021, the Tribunal issued Order No. 046 (NBI/2021) in which it found that the Applicant had accepted her reassignment and rejected her application as moot.

9. On 26 March 2021, the Applicant received a memorandum from the Officer-in-Charge (“OIC”) of the MINUSCA Human Resources Section informing her of the contested decision. She was also informed that her previously approved flexible work arrangements under the Mission Support Division had ceased with effect from 25

³ Application, annex 2.

⁴ Application, annex 6.

⁵ Ibid.

⁶ Application, para. 12 and annex 9.

March 2021.⁷

10. On 8 April 2021, the Applicant submitted a management evaluation request concerning the contested decision.⁸

Considerations

11. Articles 2.2 of the Dispute Tribunal's Statute and 13 of the Tribunal's Rules of Procedure, which clothe the Tribunal with jurisdiction over applications for suspension of action, require an applicant to satisfy the Tribunal that the contested decision appears *prima facie* to be unlawful, that the matter appears to be of particular urgency and that its implementation would appear to cause irreparable damage.

Is the contested decision prima facie unlawful?

12. It is a settled principle of law that the reassignment of a staff member to another position is proper if the authority to reassign was properly delegated.⁹

13. One of the arguments advanced by the Applicant is that the contested decision was not made by the SRSG as required by Annex IV, Chapter I of ST/SGB/2019/2 (Delegation of Authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules).

14. The Respondent, on the hand, maintains that the contested decision was made by the SRSG and that the MINUSCA Chief of Staff only implemented it. As proof, the Respondent attached an email from the Special Assistant to the Chief Human Resources Officer, MINUSCA, dated 13 April 2021, as Annex 6 to his reply. The relevant part of the email is reproduced below:

Please be informed that the SRSG copied to this email approved the

⁷ Application, annex 11.

⁸ Application, annex 15.

⁹ *Perez-Soto* 2013-UNAT-329, para. 31.

immediate redeployment of [Applicant] who will be performing against the attached ToRS.

15. The Respondent's assertion however begs the question as to whether the SRSG did in actual fact ever approve of the reassignment of the Applicant to the Position.

16. The mere fact that the SRSG was copied-in the email of 26 March 2021 does not amount to evidence of his approval of the contested decision. The Tribunal would have expected to see express instructions emanating from the SRSG especially given the contentious context of the issues surrounding the Applicant's current relationship with the MINUSCA Administration. On the basis of that email alone, the Tribunal finds that the contested decision is *ultra vires* and, at least *prima facie*, unlawful, it having not been taken by the SRSG who is the appropriately delegated authority for that purpose. Having so found, the Tribunal does not consider it necessary to investigate the other arguments advanced by the parties.

Is the matter of particular urgency?

17. The Tribunal is in full agreement with the Applicant that this matter presents urgency principally because if the impugned decision is not suspended, she is likely to be forced to report to Kaga Bandoro, and to the Substantive Operation Support/Coordination Officer post, on the basis of a decision that is *prima facie* unlawful. This urgency also justifies the granting of an order staying the implementation of the impugned decision.

Whether implementation of the decision would appear to cause irreparable damage

18. The Tribunal would answer this question in the affirmative considering that a suspension of action is the only remedy to prevent the Administration from implementing the unlawful decision to reassign the Applicant to another post.

Conclusion

19. The application for suspension of action is granted pending management

evaluation.

(Signed)

Judge Margaret Tibulya

Dated this 15th day of April 2021

Entered in the Register on this 15th day of April 2021

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi