



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KISAMBIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Pallavi Sekhri, ALS/OHRM, UN Secretariat

Introduction

1. On 22 March 2017 at 4:17 p.m. New York Time, via email, the Applicant, a staff member at the P-3 level with a permanent appointment serving as a Population Affairs Officer in the United Nations Department of Economic and Social Affairs (“DESA”), submitted an application requesting suspension, pending management evaluation, of the following decisions:

- a. The decision by [the Under-Secretary-General for Management (“USG/DM”)], on or about 27 February 2017, to release the details of the staffing list of all New York staff for purposes of apportionment of electoral units of the Staff Union to [the President of CCISUA], [President of UNISERV], and polling officers who are not members of the United Nations Staff Union [(“UNSU”)] [...].
- b. The decision by the Office of the Legal Counsel, on or about 27 February 2017, to clear and promulgate an amended and adulterated Statute and Regulations of the United Nations Staff Union, in contravention of the established legal provisions for amending such, as claimed in various broadcast email to members of the United Nations Staff Union by the Department of Management on behalf of [the President of CCISUA] and [President of UNISERV] [...]
- c. The refusal or failure by the Secretary-General to assure that the Staff Union is organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially and conducted by Polling Officers selected by the staff under electoral regulations drawn up by the Staff Union and agreed to by the Secretary-General, as required by staff regulation 8.1 (b) and staff rule 8.1 (d).

2. Upon the instruction sent by the Registry on 22 March 2017 at 4.45 p.m., the Applicant re-filed his application through the electronic filing portal on 22 March 2017 at 6:17 p.m.

3. The case was registered on 23 March 2017 at 9:14 a.m. under Case No. UNDT/NY/2017/022.

4. On 23 March 2017, the application was assigned to the undersigned Judge. Also on 23 March 2017, the Registry transmitted the application to the Respondent.

5. On 23 March 2017, the Tribunal issued Order No. 53 (NY/2017), noting that the application indicated the “date on which the decision[s] [were] to be implemented” was “22 March 2017,” and instructed the parties to file a submission by 4:00 p.m. the same day (23 March 2017), informing the Tribunal whether each decision had been implemented, and if so, the date of the respective implementation. If the decisions were not implemented the Respondent was instructed to file a reply by 27 March 2017.

6. On 23 March 2017, the Respondent submitted his response to Order No. 53 (NY/2017), and indicated, *inter alia*, that, “[t]he Application challenges three alleged actions [...]. Even if these alleged actions amount to administrative decisions, they have already occurred and cannot be suspended”.

7. On 23 March 2017, the Applicant filed a “Motion for Extension of Time to Comply with Order [No. 53 (NY/2017)]”, requesting an extension until 1:00 p.m. on 24 March 2017 to file his response.

8. On 23 March 2017, the Applicant filed his response to Order No. 53 (NY/2017) wherein he referenced his submission as a “Motion to inform [the] Tribunal that decisions have not been implemented”, and set forth, *inter alia*, that “[t]he results of the 2017 N[ew]Y[ork] Staff Council Elections are still pending. Therefore, the Respondent’s decision to accept or approve the results of those elections has not been implemented”.

The Applicant further stated that:

3. It should be noted that on 23 March 2017 at 3:13 p.m., the Respondent transmitted a letter [...] replying to the Applicant’s letter dated, 17 March 2017 [...] to [the Secretary-General] [...] in which the Applicant requested the Respondent to [...] investigat[e] the actions, events, persons and illegality surrounding the circumstances leading up to the announcement and conducting of the Staff Union

elections scheduled to be held at Headquarters on 22 and 23 March 2017. [T]he Respondent stated that “it is not the role of the Administration to review or investigate such a process.” [...]. The Tribunal has already determined (judgment UNDT/2013/110) that the Respondent's refusal to carry out a requested investigation in connection with the conduct of Staff Union elections is receivable by the Tribunal.

4. The Respondent's actions indicate that he is inclined to approve or accept the results of the 2017 NY Staff Council Elections. It is this ultimate decision that the Applicant is seeking to suspend.

9. On 27 March 2017, the Respondent filed his reply requesting the Tribunal reject the application for suspension of action because the contested decisions are no longer pending management evaluation, since the Management Evaluation Unit (“MEU”) had informed the Applicant, on 27 March 2017, that his request for management evaluation was not receivable.

Factual and procedural background

10. In his application, the Applicant sets out the following chronology of facts (emphasis omitted):

1. I was elected President of the United Nations Staff Union in the elections that took place on 10 to 11 December 2013. The Polling Officers announced the results (document is attached) in a broadcast to the Staff and duly informed [...], then Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) on 17 December 2013.

2. On 20 December 2013, I wrote a memorandum to the ASG/OHRM requesting her to facilitate the full-time release for the incoming President, First Vice-President and Second Vice-President, and partial time release for the staff representatives in accordance with the General Assembly resolution 51/226 (paragraphs 11 and 12), the applicable Staff Rules and Regulations and established practice, including ST/AI/293 and the report of the Secretary-General to the Fifth Committee (A/C5/50/64 of 10 May 1996).

3. In a memorandum dated 24 December 2013, [...], Under-Secretary-General, Department of Management (USG/DM), referred to my memorandum to [ASG/OHRM], dated 20 December 2013 and inform[ed] me “that a number of staff members have reported

allegations of irregularities in connection with the recently held elections of the UNSU.” The USG/DM declared that the Administration would “refrain from taking any action that may prejudice the outcome of the efforts by the Arbitration Committee to resolve these disputes.” [...]

4. On 24 January 2014, the Staff Union’s Arbitration Committee wrote to [USG/DM] to clarify that the December 2013 Staff Union elections were conducted via a valid process.

5. From 1 January 2014 to date, the Secretary-General has refused to grant time release and facilities to the staff representatives elected in the December 2013 elections.

6. On 11 January 2017, the Staff Union’s Secretary wrote to Under-Secretary-General for Legal Affairs, requesting him to certify at the earliest time possible the claim that the “transitional statutes” were “cleared by the Office of the Legal Adviser [sic] as being compliant with the Staff Rules” and, if so, to provide the Staff Union’s Secretary with the name, official function of the officer who “cleared” the so called “transitional statutes”, as well as the relevant Staff Regulations and Rules that conferred such authority to the Office of Legal Affairs to enable the alteration and abrogation of the Staff Union’s Statute and Regulations.

7. On 16 January 2017, the Staff Union President wrote to the Secretary-General, bringing to his attention that the actions pertaining to the imminent elections were illegal, and pointing out that “leapfrogging” into Staff Union elections conducted by the Department of Management and its chosen external parties, and based on mutilated Statute and Regulations of the United Nations Staff Union, will undermine your goodwill toward the staff in New York.”

8. On 27 February 2017, the Staff Union President wrote to the Secretary-General, referring to “the mass email circulated in the early hours of this morning, 27 February 2017, purporting to convene illegal Staff Union elections (as ruled by the Arbitration Committee of the United Nations Staff Union).” The Staff Union President requested an immediate meeting with the Secretary-General to discuss this situation, “which is perilously close to spiralling out of control, wreaking havoc at the Secretariat and dealing a grievous blow to the rule of law at the Headquarters of the Organization.”

9. On 17 March 2017, the Staff Union President wrote to the Secretary-General, imploring him that “in accordance with your responsibilities as Secretary-General, and in line with the relevant provisions of the resolutions of the General Assembly governing staff representation at the United Nations, and not least Staff Regulation 8.1 (b), I hereby respectfully request that you immediately announce and

enact a thorough investigation into the actions, events, persons and illegality surrounding the circumstances leading up to the announcement and conducting of the Staff Union elections scheduled to be held at Headquarters on 22 and 23 March 2017.” The Staff Union president pointed out that:

“The imminent Staff Union elections were announced with the imprimatur of the Department of Management, which has ignored and defied the longstanding established prerogatives of the Staff Union and the 45th Staff Council since January 2014. The announcements were made via official United Nations communications, including, inter alia, as regards the purported grounds for their calling, the announced mechanisms for that purpose, the issuance of the unilaterally “amended” Statute and Regulations of the United Nations Staff Union, as well as the naming of persons external to the Staff Union as Staff Union officials, Polling Officers and Observers of the “45th Staff Council. I must also bring to your attention the unequivocal declaration by the Staff Union’s bona fide Arbitration Committee that the impending Staff Union elections are illegal, null and void, a reality continuously ignored by your senior officials in the Department of Management and the Office of Legal Affairs in spite of the copious official, public documentation provided to them, as well as explicit repeated calls to the Department of Management to desist from interfering in the affairs of the Staff Union.”

11. On 22 March 2017, the Applicant submitted a request for management evaluation seeking evaluation of the same three administrative decisions set forth above at para. 1 and in his application.

12. On 27 March 2017, the MEU informed the Applicant that his request is not receivable.

Applicant’s submissions

13. The Applicant’s principal contentions may be summarized as follows:

Receivability

a. The decisions set forth in the Applicant’s application have not yet been implemented;

b. The Tribunal's judgment UNDT/2013/110 determined that the Secretary-General's refusal to carry out the requested investigation pertaining to the UNSU elections in 2011 was receivable;

Prima facie unlawfulness

c. The USG/DM's email of 4 January 2017, sent on behalf of the Presidents of CCISUA and of UNISERV, both of whom lack standing, was an act of interference into internal UNSU matters;

d. The Office of Legal Affairs' decision of about 4 January 2017, to clear amended UNSU Statute and Regulations, contravened the established legal provisions for amending such;

e. The Secretary-General's refusal and/or failure to ensure that UNSU elections are conducted in accordance with procedures (agreed to by the UNSU and the Secretary-General) violated staff regulation 8.1(b) and staff rule 8.1(d);

f. The Secretary-General's refusal to conduct an investigation into the UNSU elections violates staff regulation 1.1(c) and breaches the Applicant's rights;

Urgency

g. The matter is urgent because the "disputed elections are scheduled to begin today, 22 March 2017";

Irreparable damage

h. The Secretary-General's refusal to afford a time release and facilities to staff representatives elected to the Staff Council in 2013 presented the Secretary-General with powers to be arbiter of UNSU disputes with prejudice

to the UNSU Arbitration Committee, setting a precedent that the administration can refuse to abide by UNSU election results that it does not like and that it can hold elections at its choosing. The illegal elections effect the election of individuals who have spent UNSU members' contributory funds without the mandate and authority to do so since 1 January 2014 to date and allow them to cover up fraudulent expenditures of UNSU funds.

Respondent's submissions

14. The Respondent's principal contention is that the Application is not receivable for several reasons, which may be summarized as follows:

- a. The Applicant lacks standing and did not identify administrative decisions capable of being challenged before the Tribunal;
- b. The Tribunal does not have jurisdiction over disputes arising from challenges to union elections;
- c. The decisions have already been implemented;
- d. The contested decisions are no longer pending a management evaluation as required by art. 2.2 of the Tribunal's Statute because on 27 March 2017, the MEU informed the Applicant that his request for management evaluation was not receivable. There is, thus, no longer a basis for the Applicant's request or jurisdiction to order a suspension.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

15. Article 2.2 of the Dispute Tribunal's Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute

Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

16. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

17. Article 13.1 of the Tribunal's Rules of Procedure states:

The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

18. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether the Applicant requested management evaluation of the contested decisions and whether the evaluation is ongoing

19. It follows from art. 2.2 of the Tribunal’s Statute and art. 13.1 of its Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256).

20. As results from the case record, the Applicant submitted his request for management evaluation on 22 March 2017, contesting the following three decisions:

- a. The decision by [the Under-Secretary-General for Management (“USG/DM”)], on or about 27 February 2017, to release the details of the staffing list of all New York staff for purposes of apportionment of electoral units of the Staff Union to [the President of CCISUA], [President of UNISERV], and polling officers who are not members of the United Nations Staff Union [(“UNSU”)] [...].
- b. The decision by the Office of the Legal Counsel, on or about 27 February 2017, to clear and promulgate an amended and adulterated Statute and Regulations of the United Nations Staff Union, in contravention of the established legal provisions for amending such, as claimed in various broadcast email to members of the United Nations Staff Union by the Department of Management on behalf of [the President of CCISUA] and [President of UNISERV] [...]
- c. The refusal or failure by the Secretary-General to assure that the Staff Union is organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially and conducted by Polling Officers selected by the staff under electoral regulations drawn up by the Staff Union and agreed to by the Secretary-General, as required by staff regulation 8.1 (b) and staff rule 8.1 (d).

21. The MEU concluded its review on 27 March 2017, when it informed the Applicant by letter, that his request was not receivable. Thus, as the management’s evaluation of these three decisions is no longer ongoing, the Tribunal finds that the first condition is not fulfilled.

22. With regard to the decision referenced in the Applicant's response to Order No. 53 (NY/2017), as "the Respondent's actions indicate that he is inclined to approve or accept the results of the 2017 NY Staff Council Elections [...]", the Tribunal finds that these actions were not included in the management evaluation request filed on 22 March 2017 and there is no evidence on the record of a pending management evaluation request. Therefore, in the absence of a pending management evaluation, an application for suspension of action is not receivable.

23. The Tribunal considers that since one of the cumulative and mandatory conditions for a suspension of action is not fulfilled, there is no need for the Tribunal to further analyze the remaining conditions.

Conclusion

24. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is denied.

Signed

Judge Alessandra Greceanu

Dated this 29th day of March 2017