UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2018/087
Order No.:	146 (NY/2020)
Date:	1 October 2020
Original:	English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

KENNEDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
James Pace, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 27 December 2018, the Applicant, a staff member with the Department of Safety and Security ("DSS") filed an application to contest the decision to "find the Applicant guilty of gross negligence and to impose the penalties of written censure, two years ineligibility for promotion, and reduction of four steps in grade from S-3/Step 11 to S-3/Step 7".

2. On 28 January 2019, the Respondent filed a reply submitting that the application is without merit.

3. On 1 October 2020, the case was assigned to the undersigned Judge.

Consideration

The issues of the case

4. The Appeals Tribunal has consistently held that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see *Fasanella* 2017-UNAT-765, para. 20).

5. In the present case, the Tribunal defines, on a preliminary basis, the issues to be adjudicated upon as follows:

a. Was it lawful to impose the disciplinary sanction of placing a written censure against the Applicant, two years ineligibility for promotion, and reduction of four steps in grade from S-3, step 11 to step 7?

b. If so, what relief, if any, is the Applicant entitled to?

The relevant legal framework for imposing the disciplinary sanction

6. Regarding imposing a disciplinary sanction for misconduct, staff rule 10.1(a) provides that "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and 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".

7. In this regard, staff rule 10.1(b) further stipulates that "[t]he decision … to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority". Among the exhaustive list of possible disciplinary sanctions, it follows from staff rule 10.2(a) that "[d]isciplinary measures may take one or more of the following forms only: (i) Written censure; (ii) Loss of one or more steps in grade; … (vi) Deferment, for a specified period, of eligibility for consideration for promotion …".

8. Regarding the judicial review of a disciplinary sanction, the Appeals Tribunal has consistently held the this requires the Dispute Tribunal "to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] 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". In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred", and when "termination is a possible outcome, misconduct must be established by clear and convincing evidence [which] means that the truth of the facts asserted is highly probable". See para. 32 of *Turkey* 2019-UNAT-955.

9. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion,

however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

10. The Appeals Tribunal, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

11. Among the circumstances to consider when assessing the Administration's exercise of it discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Were the facts on which the sanction was based appropriately established?

12. The Applicant indicates in the application that "[w]hile the underlying facts in this case are not in dispute, the interpretation given by the Administration appears contrived and retaliatory". The Respondent takes note of this in the reply.

13. Concerning these facts, the Tribunal notes that in the letter informing the Applicant of the contested decision, the Under-Secretary-General for Management ("the USG") concluded that "after a thorough review of the entire dossier, including

your comments dated 29 August 2018", the following facts had been established by "clear and convincing evidence":

> a. "After printing, on 17 May 2017, confidential [United Nations] information, in the form of email correspondence about security-related issues, [the Applicant] lost this printed correspondence and did not report this loss to anyone"; and
>
> b. "The same printed correspondence containing confidential information was published by [Inner City Press] the next day".

14. When finding that the Applicant's "actions amount to gross negligence", the USG further referred to "the fact that, at the relevant time, [the Applicant] had worked as a Security Officer with the Organization for almost twenty-four years".

15. The Tribunal further observes that the parties also agree what the confidential information concerns, namely, the "email exchanges" from 17 to 21 March 2017 that are listed in the interoffice memorandum from the Officer-in-Charge of the Office of Human Resources Management dated 1 August 2018 with the subject, "Allegation of misconduct", and appended thereto.

Case management

16. In addition to the parties' agreement on the facts, the Tribunal takes note that neither party has required any further evidence to be produced and that the case record appears to be complete.

17. In light thereof, the Tribunal finds that no further evidence is necessary. The remaining issues to be determined are therefore of legal nature, namely: (a) whether the stipulated facts amount to misconduct, and (b) if the sanction is proportionate to the offence.

18. Regarding the possible holding of a hearing, the Appeals Tribunal in *Nadasan* 2019-UNAT-918, para. 39 (affirmed in *Ganbold* 2019-UNAT-976, para. 28) held that

even if the facts on which the disciplinary measure was based have been appropriately established, the Dispute Tribunal "will normally undertake an oral hearing as provided for in disciplinary cases under Article 16 of [the Dispute Tribunal's] Rules of Procedure, but the Tribunal may decide not to (re)hear witnesses or gather additional evidence".

19. The Tribunal will therefore instruct each of the parties to inform whether they wish a hearing to be held, and if so, state the purpose therewith. If neither party wishes a hearing, the Tribunal will instruct them to file written closing statements responding to the outlined issues and thereafter proceed to adjudicating the matters before it.

IT IS ORDERED THAT:

20. By **4:00 p.m. on Wednesday, 14 October 2020**, each party is to file a submission indicating if he wishes the Tribunal to hold a hearing, and if so, what would be the purported objective be therewith;

21. By **4:00 p.m. on Wednesday, 21 October 2020,** if neither party requests a hearing to be held, each of them is to file a written closing statement responding to each of the issues outlined in the present Order. As no new submissions or evidence are allowed at this stage, the closing statement is solely to summarize the submissions already on record. The closing statement is to be seven pages maximum, using Times New Roman, font 12 and 1.5 line spacing. Unless otherwise directed, the Tribunal will thereafter proceed to adjudicate the matters before it forthwith.

(Signed)
Judge Alexander W. Hunter, Jr.
Dated this 1st day of October 2020