



Case No.: UNDT/NY/2011/027

Judgment No.: UNDT/2013/081

Date: 22 May 2013

Introduction

1. By an application filed with the Registry of the United Nations Dispute Tribunal on 7 April 2011, the Applicant contests the decision to impose on him the disciplinary sanction of a written censure, a loss of two steps in grade, and a deferral for two years of his eligibility for salary increment following conduct that was determined to not be in accordance with the provisions of the ST/SGB/2004/15 (Use of information and communication technology resources and data).

Relevant background

2. The Applicant joined the United Nations on 23 January 1981. He currently holds a permanent appointment at the TC level as a Working Leader in the Office Space Planning Unit, Department of Management at the United Nations Headquarters in New York.

3. In 2007 and 2008, the Applicant received, from other official United Nations email accounts, at his official United Nations Lotus Notes email account (“UN Email Account”) at least 5 emails that contained images and videos that were sexual and pornographic in nature. The Applicant also sent several such emails from his UN Email Account to other staff members in the United Nations. One such email included a video depicting an act of bestiality by a woman. The Applicant did not report receiving such emails from other staff members.

4. On 7 May 2008, the Investigations Division, Office of Internal Oversight Services (“OIOS”), initiated an investigation into the Applicant’s use of his UN Email Account. On 28 November 2008, the Applicant received an email from OIOS informing him that they “need[ed] to interview [him] as a subject in a case that is being investigated by this Office”. OIOS invited him to attend a fact-finding interview on 2 December 2008.

5. As part of the interview, during which the Applicant was not represented by counsel, OIOS stated the allegations of which he was the subject and asked him to clarify the facts and comment on documents pertaining to the alleged communications. At the end of the interview, the Applicant was asked whether there was anything that had not been discussed that he thought was relevant to the matter. The Applicant responded “no”. Upon reviewing the accuracy of the interview record, the Applicant “declined to sign it unless he was provided with a copy of it or advise [sic] from his staff representative”. On 14 May 2009, upon having been provided with a draft of the investigation report, the Applicant provided his comments regarding the reports proposed findings and conclusions. On 22 May 2009, OIOS transmitted a memorandum to the Department of Management titled “Investigation report on misuse of information and communication technology by a staff member at the United Nations Headquarters”.

6. On 23 March 2010, the Applicant received a memorandum from the Office of Human Resources Management (“OHRM”) informing him that “[o]n the basis of the [22 May 2009 OIOS] investigation report and supporting documentation, [he was being] charged with the improper use of property of the United Nations, whereby [he] received, over a period of time, and distributed pornographic materials [...] on the United Nations computer system”. The Applicant was also charged with failing “to promptly report those violations of ST/SGB/2004/15 of which [he] became aware”. He was asked to provide OHRM with a written statement or explanation in response to the allegations raised against him. Furthermore, he was informed of his right to seek the assistance of counsel in formulating his comments.

7. On 19 April 2010, the Applicant provided his responses regarding the charges of improper use of property of the United Nations and the failure to report violations of ST/SGB/2004/15. In his comments, the Applicant recognized the alleged facts and accepted that his conduct was not in accordance with the provisions of ST/SGB/2004/15. However, in addition to apologizing for his actions, the Applicant stated that the Organization had not respected his due process rights, including

the right to be assisted by counsel, during the investigation and that he “was not advised of [the interviews’s] purpose let alone that [he] a “subject” of an investigation into potential misconduct” He also put forward a number of mitigating circumstances including that at the time of the events he was not aware of ST/SGB/2004/15 and that “it cannot be true that failing to report such conduct will lead to disciplinary action, let alone in these particular circumstances”.

8. On 3 December 2010, the Applicant received a letter informing him that, “after a thorough review of the Investigation Report, supporting documentation and your comments on the charges”, the Respondent had decided to impose on him the disciplinary measure of a censure, a loss of two steps in grade and a deferral for two years of his eligibility for salary increment.

9. On 7 April 2011, the Applicant filed the present application and the Respondent submitted his reply on 9 May 2011.

10. On 4 June 2012, the undersigned Judge assigned to this matter.

11. On 5 December 2012, the Tribunal issued Order No. 255 (NY/2012) directing the parties to submit a joint statement identifying the agreed facts and legal issues, as well as whether a judgment could be rendered.

Legal issues

13. The following legal issues, which were agreed upon by the parties as part of their joint statement, will be assessed by the Tribunal:

- a. Did the Applicant's failure to report the receipt of emails containing pornographic material that were ~~sent~~ sent by other staff members amount to misconduct?
- b. Were the Applicant's due process rights respected?

the Applicant when determining the level of sanctions to be imposed against him;

c. The Applicant initially submitted that the impugned decision ~~was~~ *vires*. However, as part of the parties' submission, the parties agreed that "[t]hese aspects of the application are formally withdrawn".

Respondent's submissions

16. The Respondent's principal contentions may be summarized as follows:

a. The facts in the present case are not in dispute and the Applicant "does not contest the proportionality of the sanction";

b. The reporting of misconduct is a ~~dis~~ obligation of staff members and ignorance of the law is not an excuse;

c. The Applicant's due process rights were respected during the OIOS investigation as well as during the ensuing disciplinary process. The Applicant does not put forward any evidence that would indicate that the mitigating circumstances that he put forward were not taken into account when determining the applicable sanction;

d. The sanctions imposed on the Applicant were a valid exercise of the Respondent's discretionary authority. The record of the investigation indicates that the Applicant was fully aware of all the claims held against him and the allegations were sufficiently particularized.

Consideration

Applicable law

17. Staff regulation 1.2(b) of ST/SGB/2008/4, dated 1 January 2008, states:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

18. Staff rule 110.1, ST/SGB/2006/1, dated 1 January 2006, states in part:

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

19. ST/SGB/2004/15 states in part:

Section 2

Conditions applicable to use of ICT resources and ICT data

- (a) Use of ICT resources and ICT data shall in all cases be

or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);

(b) Would not reasonably be expected to compromise the interests or the reputation of the Organization;

...

(f) Does not interfere with the activities or operations of the Organization or adversely affect the performance of ICT resources.

...

Section 5

Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

...

(c) Knowingly, or through gross negligence, using ICT resource or ICT data in a manner contrary to the rights and obligations of staff members.

Receivability

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

Misconduct

21. Section 4.1(a) of ST/SGB/2004/15 states that activities that do not meet the standard of an international civil servant, and which would therefore result in a breach of the staff rules, include the "use of ICT resources for purposes of obtaining or distributing pornography". Similarly, staff rule 110.1 states that a staff member's failure to comply with his obligations, including the United Nations

that the applicant has a right and a ~~do~~ duty report to his management any misconduct that comes to his notice”03 Tw1.4.9(Duct)]136ni4

Proportionality of sanctions

30. As part of his application, the Applicant stated that he did “not contest the proportionality of the sanction(s) imposed”. Rather, the Applicant submitted that the application was “directed at the *ultra vires* nature of the accessory sanction of deferment, for two years, of his eligibility for salary increments, which was not one of the sanctions foreseen in former Staff Rule 10.3”. However, as part of the parties’ joint submission in response to Order 125, the Applicant stated that he was “no longer challeng[ing] the respondent’s decision on the grounds ... that the impugned decision was *ultra vires*. These aspects of the application are formally withdrawn”. The proportionality of the sanction is therefore not an issue in the present case.

Due process rights

31. The Applicant submits that his due process rights were breached during the OIOS investigative process due to him not having counsel present during the interview as well as a result of the over one-and-a-half year delay between the date on which he was charged with misconduct and the date upon which he was notified of the applicab1

still be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.

34. In *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once a staff member has become the target of an investigation he or she should be accorded certain basic due process rights.

35. The right to defend oneself and present evidence in one's own support is proclaimed by article 14 of the International Covenant on Civil and Political Rights, a general legal instrument on human rights, and is also mirrored in the regional instrument of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

assisted by a lawyer is a fundamental

right of a staff member to defend himself or herself.

A staff member who decides to defend himself or herself

assisted by counsel.

37.

the completion of the interview, the Applicant stated that there were no other relevant issues that he wished to address that he did not have any complaints as to the manner in which the interview was conducted or the way he was treated by the investigators, but he did not sign the record of the interview. OIOS provided him the opportunity to complete his statement and submit additional evidence, which he did on 14 May 2009. The Applicant fully exercised his right to defend himself and at no point in time during the course of the interview did the Applicant state that he wanted a lawyer present nor was this right, as his right to defend himself, ever denied.

38. In addition to being able to defend himself in person during the investigation, at no time prior to being charged with misconduct by OHRM, did the Applicant raise the issue of his lack of legal representation during the OIOS investigation. There is no evidence before the Tribunal that the Applicant requested, and was denied, either access to counsel or further opportunities to defend himself during the investigation conducted by OIOS.

Delay and mitigating circumstances

39. As stated in *Mokbel* UNDT/2012/061, “[d]ecisions on disciplinary matters, particularly relating to allegations of serious misconduct, must be taken within a reasonable time”. It is the responsibility of the Organization to conduct disciplinary matters in a timely manner to avoid a breach of the staff member’s due process rights. Nevertheless, as stated in *Simmons* UNDT/2012/163, it is also “for the Applicant to substantiate any [injury] which [he] alleges to have suffered resulting from the excessive delay (*Sikha* 2010-UNAT-094, *Antaki* 2010-UNAT-095)”.

40. In the present case, the parties agreed as part of their joint submission that the delay in applying the disciplinary sanction was due to the fact that for “a year and a half, from mid 2009 to the end of 2010, representatives of OSLA and the Respondent met and discussed the appropriate sanction in relation to pending

cases before the Office for Human Resources Management, involving the misuse of ICT resources”.

41. Consequently, the Tribunal finds that there is no evidence before it that would suggest that the Respondent did not act reasonably and in a timely manner when determining the disciplinary sanction to be applied in the present case or that no consideration was given to any mitigating circumstances. To the contrary, the sanctions imposed on the Applicant in

Conclusion

In view of the foregoing, the Tribunal DECIDES:

43. The application is considered partially withdrawn in relation to the sanction of