

Development Unit, Mr. Gregory Remeter. The Applicant filed his own sworn statement supported by that of Mr. Sory Ibrahima Sacko, Security Officer, SecuriCom.

6. The process of cross-examination by interrogatories and sworn answers concluded on 10 August 2020. The Tribunal then heard the parties' oral closing submissions on 1 September 2020.

Facts

7. On 24 October 2016, the Applicant purchased a Volkswagen Touareg carrying Burkina Faso license plate number 11 JM 7149 from Mr. Blaise Kiema, a United Nations staff member based in Mopti. The Applicant did not transfer the vehicle's registration into his name. The vehicle's insurance, which had been under the name of "Souley Ibrahim", had expired on 25 December 2015.

8. On 16 December 2016, the Applicant sent an e-mail to Mr. Remeter, in Mopti, informing him that he would stop in Bamako on the way to his leave destination, and that his personal holster was broken. He asked whether it would be possible to provide him with a normal holster, a tactical holster and a bag for the "Glock pistol 36" ("the Glock"). The same day, Mr. Remeter responded, stating that the Applicant should contact other staff to ascertain whether the items were available in Mopti. On 21 December 2016, the Applicant traveled from Mopti to Bamako, off duty, with the vehicle.

9. The Applicant was in possession of his service weapon, the Glock, which he said was for his protection even though he was not on duty. The Applicant arrived in Bamako at around 4.30 pm. *En route* to Faso Kanu where he was to stay with friends, later identified as the home of a Mr. Calice, the Applicant met a friend, later identified as Mr. Diallo, at a restaurant in B Hotel. He had two beers while at the hotel. He then spent some time at his friend's home in Faso Kanu.

10. As narrated by the Applicant, at around 9 p.m., in the Touareg, while *en route* to meet someone else at a restaurant called Hippodrome, he collided with a motorcycle at an intersection. He drove on for a short distance before parking on the right side of the street. He was surrounded by several motorcyclists who formed a hostile mob. They were hitting his vehicle, which prompted him to drive on, continuing for another 150 metres and then stopping again on the right side of the street. The motorcyc

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mitigating factors were considered, namely that the Applicant may have been of the impression he had permission.

26. In the course of the proceedings before this Tribunal, the Respondent raised the point that should the Tribunal find that the firearm was left in the Applicant's room, that too was an offence under section 7.3 of the MINUSMA Standard Operating Procedure SOP/SEC-007/14 ("MINUSMA Weapons and Training SOP") of August 2014, which merited separation from service. The MINUSMA Weapons and Training SOP stipulates that "Security Officers will not leave their assigned firearms or other weapons at the place of residence or office."

Applicant

27. The Applicant's principal contentions may be summarized from his written and oral submissions as follows:

a. The decision to impose the sanction of separation from service was based on an improper assessment of the facts and specific circumstances of the case. The Respondent identified the Applicant's alleged possession of his service weapon after having consumed alcohol as the core of the case as to serious misconduct. However, the finding that the Applicant carried the firearm at the time of the accident was not based on any clear and convincing evidence. It was based on the beliefs of the Applicant at a time when he was in shock and his utterances thereafter.

b. The Respondent's finding that the Applicant carried the firearm at the time of the accident was also based on issues of credibility raised regarding the purported testimony by the Applicant and Diallo about the firearm being found in a hotel room. The Respondent's witness was questioned about where thisp (5) a H P C

members of the hostile crowd. It is also implausible that if the Applicant had the firearm with him for protection at the time of the accident, he would not have brandished it or fired in the air it to scare off the hostile crowd.

k. According to the Applicant, the Respondent's introduction before the Tribunal of an "even if" position has been put forward at too late a stage to be considered as justifying the sanction imposed. This "even if" position is based on the Respondent's submission that a finding that the firearm was left in a bedroom provides a basis for the Tribunal to find that separation from service was justified. However, according to the Applicant it is too late for this to be considered by the Tribunal. The Respondent's clear finding leading to the decision being reviewed was that the Applicant was in possession of his firearm at the time of the accident after having consumed alcohol. Although the Applicant's case was that the firearm was not with him there was no finding of that fact by the Respondent.

l. Furthermore, the Applicant was never charged with an offence related to leaving the firearm in a bedroom. It would be procedurally unfair for the Applicant's sanction to be upheld based on an offence he was not charged with and had no opportunity to defend. The Respondent cited in support *Tshika* UNDT/2014/122 at para 119 and *Kamara* 2014-UNAT-398 where it was observed in *obiter dicta* at para 35 that a "sanction based on charges that are more numerous than those initially imposed would be illegal.

firearm which in the instant case no witness saw in the Applicant's possession.

n. The Applicant submits that the appropriate sanction for the minor traffic offence would have been a written censure.

o. On the issue of appropriate relief to be awarded, the Applicant contends that although his fixed-term appointment was ending when he was separated from service it was anticipated

insure his vehicle, that he consumed alcohol, namely two beers before driving, that the collisions occurred, and the Applicant did not stop immediately.

c. Further the Respondent contends that the alcohol consumed was

severe sanction at the level of separation from service, with compensation *in lieu* of notice and separation indemnity, was justified. The Respondent cited cases 346, 350, 290 and 292 in the United Nations Office of Human Resources Compendium of Disciplinary Measures as similar instances where this level of sanction was imposed.

1. However, if the Tribunal finds that the misconduct was not sufficiently proven the Respondent argues that the relief to be awarded to the Applicant should be limited based on the fact that his fixed-term appointment was at an end with no entitlement to renewal.

Consideration

29. In reviewing the Secretary-General's exercise of discretion in this matter, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally cor1q0.00-ebtp0(1q00.00-ebtp0(1q00.00-ebtp31 Tm 0

relieved him of his United Nations assigned service weapon, laptop and personal possessions. The focus of Malian police officers on the scene was to assure the Applicant's safety as a United Nations staff member. The Applicant's report about the hostile crowd is not in dispute. He said that after his minor accident with a motorcycle his vehicle was on the edge of the road and the crowd started knocking on it. They were gathering stones. He was afraid and attempted to escape them by moving off in the vehicle thereby hitting another motorcycle while reversing.

34. The Applicant was involved in a minor traffic accident, during his private time, in his own vehicle. It was the Applicant who contacted MINUSMA from the police station he was rescued to.

35.

- c. He had a collision with a motorcycle yet failed to stop immediately;
- d. He ran over another person's motorcycle that was blocking his way;
- e. He carried his service weapon with him (in contravention of sections 1.53 and 4.44 (a) of the United Nations Firearms Manual, and sections 3.2, 4.8.3 , 4.9.1 , and 4.9.10 of the MINUSMA Weapons and Training SOP even though he was not on duty and had not obtained authorization to carry it off-duty.

47. The Respondent has neither cited a definition of intoxication in MINUSMA or United Nations rules nor established that the Applicant's level of 0.50 mg/l was beyond the approved limit. The Applicant suggests the United Nations Manual on Road Safety Management in the Field DPKO/DFS/2016.07 ("Manual on Road Safety"), at para 18, as authority that the Applicant's blood level was within prescribed limits. However, the Manual measures for *blood* alcohol where 0.05 mg/l is within permissible range. The test done on the Applicant was only a measure of alcohol in the breath which was 0.51 mg/l.

48. The Respondent contends that this breath alcohol content is equivalent to 0.107g/dl which is double the 0.05 limit under section 18 of the Manual on Road Safety. No evidence was adduced to this effect, and it is unclear how the Respondent arrived at this figure. The question of whether the Manual on Road Safety applies to staff members when driving their privately owned vehicles, while on leave, was not properly addressed by the Respondent.

49. The specific allegation of driving after having consumed alcohol can only be a sanctionable offence if the Applicant was, in fact, intoxicated. The charge letter does not allege intoxication. There is no indication that the Mali Police considered this to be an issue for prosecution. Only MINUSMA QRT tested the Applicant's alcohol level and assessed his appearance. The form recording the assessment shows only that there was a moderate smell of alcohol and his eyes seemed glazed. For all other signs of alcohol's effects, the form was ticked with the answers "no". The level of alcohol recorded was 0.50 in a breath test.

50. The only rule that was cited as applicable in this case referred to a *blood* alcohol level as a measure of intoxication. The Applicant was not subjected to a blood test. In these circumstances, the Tribunal finds that there was no clear or convincing evidence before the Respondent that the Applicant drove while intoxicated.

51. The Applicant was also alleged to have been in possession of his service weapon having consumed alcohol. Importantly, the fact of possession of the firearm at the time of the accident is disputed. There are no known eye witnesses. The handwritten words at the top of the Respondent's Impaired Driving Observation form that "The above-mentioned staff member was observed to be "IN POSSESSION OF UN FIREARM" remain unexplained.

52. It is well-established in cases such as *Liyanarachchige* 2010-UNAT-087 that,

In a system of administration of Justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

53. The burden of proving possession of the firearm at the accident scene in a clear and convincing manner to justify separation from employment was on the Respondent. The Respondent's conclusions are, however, expressly based not on clear on convincing evidence but on probability.

54. Firstly, this aspect of the Respondent's conclusions is based on the improbability that the Applicant could have been mistaken in at first believing he had his firearm with him, and it was stolen. Secondly, the Respondent contends that it is improbable that the Applicant would not have kept his weapon with him, thus it is not true that it was found in his bed room where he left it. These considerations of probabilities do not rise to the high level of probability for a clear and convincing case that the firearm was with the Applicant and he lost it at the time of the accident.

55. The Applicant had presented the Respondent with ironclad proof that he was mistaken about being in possession of the firearm, and losing it, when he was robbed of other items. In fact, the firearm was found not to have been lost at all. It was located in the Applicant's room within hours of the incident. The Applicant and Djibril Diallo corroborate each other in all aspects of the facts relevant to the whereabouts of the firearm.

56. In the Respondent's case, much is made of what they contend are inconsistencies in the Applicant's evidence in accounting for the missing firearm. This perceived inconsistency relates mainly to the contention in the investigation report that the Applicant's firearm and items were found in a hotel room. This according to the Respondent is inconsistent with the Applicant's case that he was staying with friends in Faso Kanu. Counsel for the Applicant on the other hand has highlighted in the interrogatories, as well as in oral closing submissions, that this aspect of the Respondent's case is based on a mistranslation of statements made by the Applicant and Diallo during the investigation.

57. The Respondent's contention that, as this issue of mistranslation was not previously raised, the Tribunal ought not to take it into account in reviewing the disciplinary decision, is without merit. In *Tshika* it was observed by Judge Boolell

the information available to the Respondent at the time he decided on the sanction was that the firearm was found in the bedroom.

59. The Applicant's initial statement and that of Diallo were taken in French. The true meaning of what the Applicant

mistaken due to his panicked state under attack from the mob when he first thought his firearm went missing. The Respondent accepts that he would have been in fear.

64. There seems to be no basis on which the Respondent could have found clear and convincing evidence that the Applicant had the firearm with him after he drank beer that night. This conclusion seems to be based on a hunch by the Respondent. No witness has come forward to say the Applicant was seen with the firearm at the

64. ~~64.~~ scene of the accident. Instead the sole independent witness, Mr. Sory Sihhyma(indes)-89(f)-6(roo,q0.000

Applicant, that it was never lost. Even a few weeks later when he gave his second statement the Applicant still held honestly to the view that he believed he had his firearm with him during the incident. He did say it was possible he forgot he had left it in his room.

76. It is irrelo

reasonable for the Applicant to have believed that Mr. Rementer understood from the 16 December 2016 email exchange between them that the Applicant intended to carry his firearm while on leave and needed a holster for that purpose.

81. There was no basis for sanctioning the Applicant for not stopping immediately after the first collision. By all accounts, his life was in severe danger from the angry mob. He had to be rescued by a police man in plain clothes. The Applicant points out that the sanction letter does not specify a local law or United Nations rule mandating immediately stopping after an accident. Additionally, there is a United Nations rule that mandates that staff should not stop when facing road rage - Manual on Road Safety, p.64. Furthermore, on the record before the Respondent, the vehicle did stop within “a stone’s throw” of the accident scene so there was no basis for a finding that he did not stop.

82.

- a. Was it proportionate based on the standard of proof to which any or all allegations were proven?
- b. Was it comparatively proportionate based on similar cases?

85. The Applicant cites the Manual on Road Safety as providing sanctions for traffic violations similar to those in the instant case and termination is not envisaged as a possible sanction particularly for a first offence.

86. In light of the fact that the more serious aspects of the allegations were clearly not established the sanction of termination was disproportionate. It would have been more appropriate, to have imposed a sanction in line with those for minor traffic offences. This is so even taking into account the factor of the admitted conduct of leaving a firearm unattended in his bedroom. The Applicant was never charged with that conduct so though serious it cannot stand retroactively as a basis for termination.

Conclusion

87. The Application succeeds in part. The appropriate sanction to have been imposed based on the circumstances arising from the Applicant's unfortunate traffic accident and subsequent mob attack was not separation from service. A lesser sanction could have been imposed.

88. The contested decision is rescinded and the sanction imposed is set aside.

89. The Applicant is to be reinstated or paid compensation *in lieu* at the rate of one year's net base salary plus interest at the US Prime Rate, from the date of the filing of his application, to the date of this Judgment, to compensate for the two-year delay in concluding the determination.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 10th day of September 2020