



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/025

Judgment No.: UNDT/2021/116

Date: 11 October 2021

Original: English

Before: Judge Margaret Tibulya

Registry:

d The Respondent's objection to some of the Applicant's proposed witnesses wa

C.

the truth. The Applicant provided a ripped shirt to the Kenyan police, which was placed into exhibits. It doesn't appear that the question was ever posed to anyone in the Kenyan police as to whether or not anyone assaulted the Applicant. The question was never posed to the Applicant's wife or son. The Kenyan Police provided a list of passers-by they wished to call as witnesses in court. None of these were questioned by the United Nations investigators. Additionally, the Applicant brought to the attention of the United Nations a number of grotesque violations of his rights that followed his arrest. These were not investigated and don't appear to have given anyone in the United Nations pause before abandoning the Applicant to the whims of the Kenyan authorities when the Organization revoked his immunity, in a country that is

h. The Applicant rejects the ASG/HR's contention that the video footage of the incident shows his actions without ambiguity. All incidences are ambiguous if not placed in proper context. The opportunity to put the incident in its proper context before the investigation was concluded was taken away from the Applicant and this cannot be remedied once the bias in the investigation is visible and formalized.

i. During his testimony, Mr. Swanson incorrectly stated that the leak of the Applicant's video did not come from OIOS. This is false as many investigators viewed the video on Gocase despite the fact that they should not

against the Applicant.

Burden and standard of proof

21. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.⁴ And, when termination is a possible outcome, the Administration must prove the facts underlying the alleged misconduct by “clear and convincing evidence”, which requires more than a preponderance of evidence but less than proof beyond reasonable doubt, and “means that the truth of the facts asserted is high.

Whether the facts on which the sanction is based have been established.

22. The Applicant was sanctioned for having engaged in a verbal and physical altercation with a Kenyan police officer and for damaging the officer’s umbrella. The Applicant has consistently admitted that the verbal and physical altercation took place and that he damaged the officer’s umbrella.⁵ He only challenges the investigation process which he maintains was biased and unfair since it didn’t consider the context of the interaction. He also complains that the most pertinent aspects of the case which were caught on video were never provided to him and he therefore didn’t speak to them in the context of the investigation.

23. Since the Applicant does not deny that he was involved in a verbal and physical altercation with a Kenyan police officer and that he damaged the officer’s umbrella, the Tribunal finds those facts, which formed the basis for the sanction, have been established through clear and convincing evidence.

⁴ *Nyambuza* 2013-UNAT-364.

⁵ Paragraphs 3 and 4 of annex 2, (the Applicant’s response to the charge letter) and his evidence before the Tribunal.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules.

24. Staff regulations 1.2

Whether there were multiple procedural violations which require that the impugned decision be nullified.

26. The Applicant maintains that the decision to terminate his contract was made on the basis of an unfair and biased investigation and that the decision was reached on the basis of inaccurate, false and/or incomplete information. He advances four complaints in this regard, the first being that a number of Closed Circuit Television (“CCTV”) video footage was made available to the investigators but he was not shown the one video (clip D) that showed the specific actions that were most relevant to the case. He argues that had he been shown that clip, he could have demonstrated step by step exactly what transpired.

27. The Applicant’s assertion that he was not shown video Clip D is factually incorrect. It was in evidence⁸ that he received all five video clips as supporting documents when the allegations memorandum was issued to him and that he had a chance to review them before submitting his comments. He stated that there were no word or page limits imp999.408 6439-49(we)6(r)-6(e)4(GWe)6()-49(v-21(e)4e)6()-4alim i4(d3u8(t)-4

29. The Applicant argued that the investigation findings were arrived at on the basis of a biased and incomplete investigation. In this regard he points to the fact that his wife, son and the victim police officer were not interviewed, and that the CCTV footage had no sound.

30. This argument does not, however, go to the key issue of whether the facts which formed the basis for the sanction were proved, which were admitted by the Applicant in any event. The argument was only raised to galvanise the assertion that mitigating factors such as the Applicant's state of mind prior to exiting his car and to what he could see from his vantage point, which his wife and son could have spoken to, were not considered, which will be traversed when determining the question of proportionality of the sanction.

31. The complaint that the victim was not interviewed was overcome by the

Case No.: UNDT/NBI/2020/025

Judgment No.: UNDT/2021/116

