
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/077

Judgment No.: UNDT/2021/066

Date: 8 June 2021

Original: English

Before: Judge Joelle Adda

Introduction

1. The Applicant, a staff member of the Department for General Assembly and Conference Management (DGACM), contests the decision to impose on her the disciplinary sanction of loss of two steps in grade as a written censure for having engaged in unauthorized outside activity.
2. The Respondent replies that the application is without merits.
3. A hearing was held on 16 March 2021, at which the Applicant gave testimony.
4. For the reasons set out below, the Tribunal grants the application in part and rescinds the decision to impose against the Applicant the disciplinary sanction of loss of two steps in grade but upholds the disciplinary sanction of written censure.

Facts

5. In the investigation report dated 29 December 2017, the Office of Internal Oversight Services (“OIOS”) found that based on its investigation the information indicated that the Applicant had engaged in a range of unauthorized outside activities, including the “alteration of a United Nations document in the General Assembly document (the actual reference number of the document is redacted) for the benefit of third parties and other assistance potentially inconsistent with her obligations as an international civil servant. The OIOS specifically found that the Applicant

- (i) Was a United Nations staff member during the time relevant to this report;
- (ii) Provided assistance to third parties outside the scope of her duties;
- (iii) Engaged in the improper alteration of [the General Assembly document];
- (iv) Provided an unauthorized official United Nations reference for third parties;

- (v) Was actively involved in the activities of at least three [N Governmental Organizations (NGOs)]/Foundations;
- (vi) [Was] a trustee of [a foundation] without approval;
- (vii) Sought employment for her niece with third parties she assisted;
- (viii) Arranged an internship for her daughter with third parties she assisted; and,
- (ix) Maintained social relations with third parties she assisted.

6. By interoffice memorandum dated 21 November 2018, Chief of the Human Resources Policy Services in the Office for Human Resources Management (the Chief) presented the “allegations of misconduct” to the Applicant (the allegation letter). Before outlining any specific allegations, the Chief highlighted that findings in the OIOS investigation report which are specifically discussed below (e.g. the Applicant’s alleged engagement in the issuance of the General Assembly document) are not being pursued further as part of formal allegations of misconduct against [her]” (para. 3).

7. As part of the facts in the allegation letter, it was indicated that the Applicant had known AA (name redacted) since 2002 or 2003 and developed ‘a longstanding relationship or faith and trust [with AA]’ with [AA], that or around 2005, her daughter, “worked with [AA] as an intern at the Mission of [a United Nations member state] and [AA] provided a

2013, [the Applicant] sent [her] draft talking points to him. After [AA] made his statements at a lunch event on 15 February 2013, [she] mailed February 2013, [she] forwarded to [CC, name redacted] DGACM, [AA's] statement. [The Applicant] used [her United Nations ("UN")] e-mail [email address redacted] in [her] communication with [AA];

c. "On or before 12 March 2013, [the Applicant] drafted, for [AA], a "short concept note" in relation to an event [name redacted] and by email dated 12 March 2013, [she] sent him [her] draft. [The Applicant] used [her] UN e-mail [email address redacted] in [her] communication with [AA]";

d. "By e-mail dated 13 March 2013, [AA] forwarded [the Applicant] at [her] personal e-mail account [email address redacted] an e-mail reading: Dear [title redacted] As per our conversation with [DD, name redacted] the company said to be included in [a project proposal, title redacted] UN will be: Company Name: [name redacted] ("the Company"). Thank you. Please be sure to include the above mentioned company in the proposal to UN [c]. [AA's] e-mail was entitled: Company Name";

e. "On or before 14 March 2013, [the Applicant] drafted a letter entitled 'Letter Global Business incubator' and by email dated 14 March 2013, using [her] UN e-mail ... [she] sent him [her] draft. The draft was a letter, dated 14 March 2013, with a document symbol [c] General Assembly document reference redacted, from [the permanent representative of a United Nations Member State EE, name redacted] to the Secretary General, in which [EE] stated that [the Company] had offered to host one of the first centres in the network of Global Business Incubator centres in a public-private partnership with [the NGO];

f. By e-mail dated 16 March 2013, [AA] provided [the Applicant] with a revised version of the letter from [EE] to the Secretary General. On or before 16 March 2013, [the Applicant]

March 2013, [she] sent [her] edits to [AA]. By e-mail dated 17 March 2013, [the Applicant] re-sent [her] revised draft to [AA].

g. “On or before 14 May 2013, [the Applicant] revised, for [AA] [the General Assembly document] from [EE] to the Secretary General. By email dated 14 May 2013, [the Applicant] sent [her] revision to [AA]. The letter contained [EE’s] statement that [the Company] had ‘been appointed to serve as the representative for the implementation of the permanent for the Expo center for the country of the south with the local authority, [sic]’, and that this is one of the first centres in the network of incubator centres in a public-private partnership with the support of and leading partner [the NGO]. Particularly, [the Applicant] added the following paragraph [sic] in the original]

‘In this regard, I am pleased to inform you that in response to the recommendation, [the Company] has welcomed the initiative and has been appointed to serve as the representative for the implementation of the permanent for the Expo Center for the country of the south with the local authority. This is one of the first centres in the network of incubator centres in a public-private partnership with the support of and leading partner [the NGO].

As envisaged, I foresee an important role this permanent exposition centre of innovation and excellence will play in not only accelerating the development and deployment of technologies, including through South-South and triangular cooperation, but also in harnessing the potential of ICT [unknown abbreviation] for sustainable economic growth, investment, capacity building and job creation, particularly in developing countries. [sic]”

h. “On or before 8 July 2013, [the Applicant] revised [AA’s] message to [title redacted] of DGACM, inviting him to a high level meeting in [name of city redacted]. By e-mail dated 8 July 2013, [the Applicant] sent [her] revision to [AA]”;

i. “In September 2013, [AA] requested [the Applicant] to ‘work on a document regarding Global South South Development Expo Center and by e

mail dated 1 October 2013, [she] told him that [she] had been busy with the General Assembly and [she] would need more time until the weekend. On or before 6 October 2013, [the Applicant] drafted the following (italics in the original):

'The General Assembly, through the adoption of Resolution [number and date redacted] endorsed the Nairobi outcome document of the High-level United Nations Conference on South-South Cooperation. More specifically, reference is made here to [paragraph numbers redacted]

By e-mail dated 6 October 2013, [the Applicant] sent [AA her] draft”;

j. “By e-mail dated 7 October 2013, [AA sent] [the Applicant] a document entitled [name redacted] and told [her] that he would send a final draft to [her] the next day for review

Consideration

Standard of review in disciplinary cases

11. The Appeals Tribunal has consistently held the “[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the ~~Authority~~ ~~Authority~~. 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~~ ~~is proportionate~~ to the offence”. See, for instance, para 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladi* 2019-UNAT-956, para. 15, which was further affirmed in *Nyaw* 2020-UNAT-1024.

12. The Appeals Tribunal has 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* 2010-UNAT-084, para. 40). In this regard, “the Dispute Tribunal is not conducting a merit-based review, but a judicial review explaining the

“reliance” on its para. 3 is “misplaced. The Applicant’s editing of the General Assembly document was discussed in detail (see quotation in para. 7 above.) Further, “the facts section was structured in a way to demonstrate that the General Assembly document was not discussed in isolation but was part of the many documents that the Applicant edited and reviewed [for A]”. Finally, “during the disciplinary process, the Applicant put forward her defense on the allegations relating to [the General Assembly document] and therefore “suffered no prejudice in this regard”.

17. The Tribunal notes that a very basic tenet of due process in a disciplinary case is that each of the relevant facts and allegations of misconduct must be presented to the accused person in such a manner that s/he can easily understand them and thereby afforded a fair and just opportunity to defend herself/himself. If the Administration cannot subsequently sanction a staff member against the backdrop of any such fact and/or allegation (in line herewith, see ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) particular para. 8) Further, this is a matter of access to justice, which not only relates to the involved staff member’s right to defend herself/himself, but also to the Tribunal’s ability to undertake a proper judicial review as per *Sanwidi* order to assess whether relevant matters have been ignored and irrelevant matters considered”.

18. When describing the facts on which the allegations of misconduct are grounded, the Administration must therefore do so in writing and in a structured, concise and precise manner. Normally, at minimum, this would require the Administration to make clear and specific references to dates and events and list these in appropriate order (chronological, prioritized or otherwise) to describe what was relevant and necessary, what was irrelevant. In line herewith, see *Sanwidi* as quoted above and para. 4 of ST/AI/371 and ST/AI/371/ asse/1 (a)-5eal6 (is)11 .004n5nd

initiated after the entry into force of ST/AI/2017/1 and para. 13.2 only states that “investigations and disciplinary processes initiated prior to the entry into force of the present instruction shall continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1” (it is added)

21. The presentation of the formal allegations in the allegation letter is therefore at best bewildering. Whereas the Tribunal understands that the acts involved in editing and reviewing the General Assembly document could, in principle, be viewed distinctly and distinguishably from the act of “engagement” in its reissuance—while one act has to do with the preparing of the content of the document, the other act could theoretically be strictly limited to its publication—this is, however, not all evidence from the allegation letter. The introductory open-ended and negative reference to findings that are not “discussed below”, adding as an example the “engagement in the reissuance” of the General Assembly document, simply lacks the clarity and precision that must, at minimum, be expected when conveying a matter as important as the formal allegations of misconduct to a staff member. The Applicant’s assistance with editing and revising the General Assembly document could consequently reasonably be understood as being part of her “engagement” with its reissuance.

22. The ambiguity and imprecision of the description of the “formal allegations” in the allegation letter of the

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b. The Applicant receiving various requests for assistance from AA through her United Nations email address;

c. The Applicant's provision of the recommendation letter of 16 June 2015 for AA and DD to a building complex in which she stated her official title as a United Nations official and indicated that she knew DD through her work.

Did the Applicant's behavior amount to misconduct?

The legal provisions stated in the contested decision

25. In the sanction letter, the USG found that the Applicant's conduct was in violation of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and (p) as well as staff rule 1.2(s). When read together, these provisions require in essence, a staff member to seek prior approval from the Secretary-General for undertaking certain activities that falls outside her/his regular tasks and functions. Also, the USG found that the Applicant had breached ST/SGB/2004/15 (Use of information and communications technology res26i3vy (e)4 (e)4(ks)9 (a)4 (d (a)4 (t)-2 (a)4 ())]Ti

27. The Applicant submits that the outside activities that she was engaged in are not only permitted but also encouraged by the Organization as per the commentary to staff rule 101.2(p) and staff regulation 1.2(b) and (p), in particular as the Applicant was not employed by the NGO or otherwise remunerated. The Respondent has not provided any previous examples of where a staff member has been disciplinarily sanctioned for any such involvement, and the Applicant assisted an NGO and not a private consultancy firm. In addition, AA was a former diplomat of a Member State and the Applicant's continued interaction in the intergovernmental processes required engagement with the representatives of Member States. The Applicant was made the victim of circumstances and the arbitrary application of rules by the Administration making [her] the scapegoat that related to another matter.

28. The Respondent submits that (a) the Applicant's activities were not permitted under the Staff Regulations and Rules, and (b) the Applicant's continued interaction in the intergovernmental processes required engagement with the representatives of Member States. The Applicant was made the victim of circumstances and the arbitrary application of rules by the Administration making [her] the scapegoat that related to another matter.

29. The Tribunal observes that if a United Nations staff member assists a non-United Nations entity, such as an NGO, with preparing substantive to a communication document to or about the United Nations, then, even if not remunerated, this would typically constitute an outside activity that would require the Secretary-General's prior approval in accordance with staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s). The reason is essentially that the Organization would have a direct or at least a perceived interest in the relevant communication document. Even if the document as such bears no significance to the Organization, other non-United Nations actors could be led to believe that the relevant non-United Nations person/entity has either been unduly favored or that a precedent has been created for the United Nations to provide such assistance to non-United Nations actors in the future.

30. If the assistance provided by the staff member to a United Nations entity, such as the NGOs not related to or concerned with the United Nations, it would instead depend on the circumstances whether this would constitute outside activity that would require the Secretary-General's prior approval. The key question would be if the Organization could have, or even be perceived to have, an interest therein with reference to staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s).

31. In light of the established facts and also noting that the USG in the sanction letter withdrew the allegations concerning a speaking engagement for AA, the Tribunal's findings regarding individual allegations of misconduct—when reading the sanction letter together with the allegation letter—are the following:

- a. The "short concept note" The Applicant forwarded this note to AA via her United Nations email of 12 March 2016, and it stated as follows:

Music for Peace and development is a network of Representatives of Member States of the United Nations of the South and the organizations of the UN System, Civil Society and Academia who believe in the power of music for peace building.

and the importance of building solidarity and [redacted] from
areas in

work, she would therefore have needed prior approval from the Secretary General and by not doing so, she overstepped the boundaries of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q), staff rule 1.2(s) and ST/SGB/2004/15. Accordingly, the USG did not exceed her authority when finding that this was an act of misconduct.

b. The draft letter on "Global Business Incubator". The Applicant forwarded a draft of this letter to A/0w 2[4 (A/2 (pp1)-j -09 [(14.956 3630.38 0 Td [(US)- 01u

AA had requested her assistance thereabout in an email of 7 February 2016 to her United Nations and private email addresses. "Dear [the Applicant's first name] How are you? I hope you are doing well. I am in need of a good assistant and I would like to know if you know some one Using the United Nations email address the Applicant then reached out to the relevant person, who then, according to the ensuing emails, sent her *curriculum vitae* to AA and tried to contact him via telephone after the Applicant had provided her with AA's contact details. The Applicant was not privy to any emails or participating in any conversations between AA, his staff and the relevant person

The Tribunal finds that the Applicant reaching out to the relevant persons in response to AA's search for an assistant does not entail any inculpatory action by itself under the Staff Regulations and Rules ST/SGB/2004/15. That the Applicant used her United Nations email address to communicate AA's contact details was not fully in line with ST/SGB/2004/15, but taking into account the harmless character of the content of the correspondence it would lead to an absurd or perverse result (with reference to *Sanwidi*) if this was to amount to an act of misconduct. Consequently, the Tribunal finds that the Administration exceeded the limits of its discretion when listing this issue as an independent act of misconduct in the allegation letter later

were no exceptional circumstances in this case warranting rescission of the sanction”
Rather, the record demonstrates that when interacting with Applicant, [AA] was
not acting on behalf of [a Member State] as President of [the NGO], and “the mere
customary title used by former diplomats such as [AA] does not justify the Applicant’s
professed belief that his requests were from or for the Member” States

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of two steps in grade together with a written censures does not follow from the case summary whether the relevant staff member was reprimanded for her/his services or what the mitigating circumstances were.

38. The present case distinguishes itself in several ways from this other case, because:

a. The Applicant did not breach her duty to report another staff member for possible misconduct

b. Where the other staff member undertook work for a private consulting firm, the Applicant assisted an NGO. While none of such entities are related to the United Nations, one is work for profit, where the other one typically has an altruistic objective which the NGO in the present case, in principle taking into account any criminal charges, also had

c. The Applicant received no payment for her assistance which is not known whether the other staff member did so. However, absent a clarification from the Respondent since this person worked for a private consulting firm, this reasonably be assumed

39. In the present case, the USG accepted two mitigating factors in the sanction letter, namely that (a) "it took a relatively long period of time to resolve the matter" and that (b) "the record contains no evidence of [the Applicant] receiving remuneration". All other mitigating circumstances claimed by the Applicant were rejected (a) the Applicant making "an honest mistake"; (b) that the Applicant's interactions with AA relate to interactions with Member States; and

Remedies

Rescission of the contested decision

43. The Applicant requests that the contested decision be rescinded under art. 10.5(a) of the Dispute Tribunal's Statute as "the circumstances were exceptional, [she] was made the victim of circumstances and the arbitrary application of rules by the Administration" and made a "scapegoat and 'on the basis of disproportionality, bias, bad faith, concealing and misrepresenting facts". She also refers to *Samandara* (citing *Sanwidi* 2010-UNAT-084).

44. The Respondent submits that "[i]n determining the appropriate sanction, considerations were given to all relevant circumstances including aggravating and mitigating factors". By the sanction letter, the Applicant was "informed of the Administration's considerations given to her claimed mitigating factors", and contrary to the Applicant's contention, "there were no exceptional circumstances in this case

... Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be “blatantly illegal, ~~unlawful~~, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” or to be obviously absurd or flagrantly arbitrary [Sanwidi, paras 39-40]. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the objective of staff discipline.

disciplinary measures as outlined in its various compendiums and the relatively minor degree of gravity of the Applicant's offences, the Tribunal finds that the decision to impose against her the disciplinary sanction of loss of two steps is disproportionate and therefore to be rescinded, but considering the established accounts of misconduct also decided that the disciplinary sanction of written censure to remain (similarly, see .42 00cJ 0 Tw 2

56. If payment of the above amount, namely loss of salary with interest, is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the US Prime Rate from the date of expiry of the 60 day period to the date of payment.

(Signed)

Judge Joelle Adda

Dated this 8th day of June 2021

Entered in the Register on this 8th day of June 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York