



Case No.: UNDT/NY/2011/026

Judgment No.: UNDT/2013/080

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 ST/SGB/2004/15 (Use of information and communication technology resources and data).

Relevant background

2. The Applicant joined the United Nations on 1 July 1991. He currently holds a fixed-term appointment at the S-4 level, as a Security Sergeant 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 50 emails that contained images and videos that were sexual and pornographic in nature. The Applicant sent at least 26 such emails from his UN Email Account to other staff members in the United Nations, mostly forwarding the messages he had received and, at times, adding some text to the messages. 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 5 September 2008, the Applicant received an email from OIOS inviting him to attend a fact-finding interview on 17 September 2008. At the start of the interview, the Applicant was informed that he was the subject of the allegations under review and of his rights with regard to the interview and OIOS’s investigation process.

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 “I do not think so”. Upon reviewing the accuracy of the interview record, the Applicant affirmed its content and signed the interview record.

6. On 12 January 2009, the Applicant receive][[thaware”The

Legal issues

14. The following legal issues, which were agreed upon by the parties to the statement

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

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as part of the parties' joint submission, the parties agreed that "[t]hese aspects of the application are formally withdrawn".

Respondent's submissions

17. 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 basic 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

18. 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.

19. 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 an 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.

20. 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 in accordance with the provisions set out in this bulletin and such other administrative issuances as may apply to them;

(b) Authorized users shall promptly report to the appropriate United Nations authority any violation of the provisions of this bulletin of which they become aware.

...

Section 4

Limited personal use

4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:

(a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining

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

21.

misconduct”. A review of the 3 December 2010 letter by which the Applicant was informed of the charge of misconduct states that he was “charged with the improper use of the property of the United Nations, whereby [he] received and distributed pornographic materials...[and] failing to fulfill [his] obligation ... to promptly report those violations of the bulletin of which you became aware...”.

24. The Applicant submits that in addition to not being aware of ST/SGB/2004/15, it was the Organization’s “duty to regularly inform its employees concerning the various rules and regulations” and that he therefore can not be held responsible for not following some of the provisions contained in ST/SGB/2004/15. The Applicant further states that “it cannot reasonably be accepted that a failure of a staff member to report potential misconduct of a colleagues will, in itself, amount to misconduct for which disciplinary measures may be imposed”.

25. During the course of the investigation conducted by OIOS, and as part of his submissions, the Applicant recognized that he received “at least 50 emails that contained images and videos, some with pornographic content and some with sexual content”, and that he also “sent at least 26 such emails from his UN Email Account to others in the UN” and that he distributed “a video depicting an act of bestiality by a woman”.

26. The Applicant, by his own recognition, sent and received the contested emails thereby breaching the applicable rules governing the use of ICT resources, as well as staff rule 110.1, resulting in the determination that the Applicant’s actions amounted to misconduct. The Applicant does not contest the Organization’s finding of misconduct based on his receipt and distribution of the contested emails, but rather only that not reporting the actions of a fellow staff member can not reasonably amount to misconduct.

27. The duty to report misconduct is reflected in specific administrative issuances, including, for example, sec. 2(b) of ST/SGB/2004/15 which imposes a clear and specific obligation on staff members to report any violation of that bulletin of which

they become aware. In *Ishak* UNDT/2009/072, the Tribunal held that “[i]t is clear that the applicant has a right and a duty to report to his management any misconduct that comes to his notice”.

28.

Proportionality of sanctions

31. 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 110.3”. However, as part of the parties’ joint submission in response to Order No. 253, 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

32. 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 applicab0

42. 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 indicate that the Respondent took into consideration the fact that the Applicant cooperated with the investigators, was sincere and that he recognized the impugned facts. Finally, the Applicant has not put forward any evidence that would suggest that he suffered any harm from the delay in finalizing the disciplinary charges against him.

43. Taking the above into consideration, the Tribunal finds that the Applicant's due process rights were respected and that the disciplinary measures that were applied against him were lawful, proportional and were taken in accordance with the regulations and rules.

