

Introduction

1. The Applicant is a Warehouse Assistant at the GS-4 level in the United Nations Mission in Liberia (UNMIL). On 18 August 2014, he filed an Application for suspension of the decision dated 23 June 2014 to extend the Applicant's Administrative Leave Without Pay (ALWOP) from 4 July 2014.

2. The Respondent filed a Reply to the Application on 19 August 2014 in which it was asserted, inter alia, that the Application was not receivable.

Facts

3. The Applicant joined the United Nations in June 2004. His appointment was renewed on a number of occasions and is due to expire on 30 June 2014.

4. On 27 December 2013, the UNMIL National Staff Association (NASA) staged a sit-in action outside the UNMIL base. During this time, different forces were deployed to observe, including the Jordanian Police Unit, Nigeria forces, and Liberian National Police.

5. The Applicant submitted that on his way home from the UNMIL base, he realized that he had forgotten something inside and proceeded back to the main entrance which was locked. He knocked at the gate to gain entrance and was attacked by three Jordanian police who were part of UNIL security resulting in severe internal and external injuries.

6. On 3 January 2014, the Applicant was handed a letter which informed him

SRSG replied on 6 February 2014 stating that an internal investigation had been initiated.

8. On 12 February 2014, while the Applicant was still on bed rest due to his injuries, he was visited by an investigator from the Office of Internal Oversight Services (OIOS), who asked if the statements made by the Applicant's brother in his letter were the Applicant's statements. The Applicant replied in the affirmative and was asked to sign the statement.

9. On 31 March 2014, a letter was brought to the Applicant's house, which stated that the ALWP which started on 6 January 2014 was due to expire on April 2014, and that the Applicant would be notified of any fresh decision.

10. By a letter, dated 2 April 2014, which the Applicant states he received on 3 April 2014, he was informed that he was being placed on ALWOP, effective

- a. The decision to extend the Applicant's placement on ALWOP has already been fully implemented and, as such, it cannot legally be the subject of a suspension of action.
- b. The Respondent cited *Nwuke*, UNDT/2012/002 as authority that where a contested decision has been fully implemented, suspension of action cannot be granted.
- c. Also cited in support were these three orders rendered in the matters of *Applicant*, Order No. 087 (NBI/2014), *Applicant*, Order No. 097 (NBI/2014) and *Applicant*, Order No. 167 (NBI/2014) where the applicants challenged the renewal of their placement on ALWOP were all rejected as the decisions to place the applicants on ALWOP had already been implemented.

15. In response, the Applicant argued that while the UNDT has found that a suspension of action cannot be obtained to restore a situation or reverse an unlawful act which has already been implemented, it has also found that a decision with "ongoing legal effects" is receivable because it can only be deemed to be implemented in its entirety at the end. In support of her submission the Applicant cited *Gallieny* Order No. 060 (NY/2014) and *Calvani* UNDT/2009/092.

16. On the issue of receivability, the Tribunal finds and holds that the latest ALWOP on which the Applicant was placed and which became effective on 2 July 2014 is without a doubt still ongoing and has not been fully implemented. Its

Prima facie unlawfulness

a. Staff rule 10.4 stipulates that a staff member shall be placed on ALWP except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on ALWOP.

b. In this case, the Applicant has been on administrative leave for over 220 days, or over seven months, the majority of which has been without pay.

c. The Administration continues to maintain that the ALWOP is not a disciplinary measure, it appears to follow that as more information was gathered, the decision was made to convert then extend the leave from with pay to without pay. The increase in severity and punitive nature of stripping the Applicant of his salary has the *de facto* effect of serving as a disciplinary measure.

d. Staff rule 10.4(b) envisions an estimated three months as the duration of the investigative process. Several investigations were undertaken and multiple witnesses interviewed with regard to the Applicant's participation in the sit-in strike of UNMIL NASA on 27 December 2013. It was submitted on behalf of the Applicant that it is not practicable to extend his ALWOP for an additional three months after the initial period, when, in the present case, he is being kept in the dark as to the status of the investigation well into the third period of administrative leave.

e. Staff rule 10.4(c) provides that in "exceptional circumstances" the Secretary-General can take away all or part of a staff member's pay while on administrative leave. However, there is no clear articulation of what these "exceptional circumstances" may be for the purpose of placement on ALWOP.

has no confidence that his situation could improve in the foreseeable future.

l. In *Calvani*, the learned judge considered that there were effectively two decisions to be considered, the decision to place the applicant on administrative leave and the decision to make that ALWOP. The Applicant's situation can be contrasted with that in *Calvani* where the learned judge felt that a risk of hindering the investigation meant that there was no particular urgency in relation to reinstating the applicant to the functions of his post.

m. It is the Administration which continues to extend the leave, while

r. A decision which leaves the Applicant without salary and health care coverage indefinitely must be seen as causing irreparable harm as it negatively affects his financial, professional and personal life. The consequences of the decision described above also give rise to an irreparable harm. The realities of trying to support a family in Monrovia, during a time of geoc(v)9(i9 ET Q q BT /F 0 0 rg 0.9981 0 0 1 152.88 606.72 Tm [(d)5p1 11

prior to placement on ALWOP. Rather, the Organization's legislative instruments specifically mandate that such evidence be shared with the staff member if and when he or she is formally alleged to have engaged in misconduct.

e. In this case, a decision has not yet been made regarding whether to pursue this matter as a disciplinary case against the Applicant and, accordingly, he is not yet entitled to receive a copy of the investigation report and supporting documentation.

f. The Respondent submits that a requirement to seek a staff member's comments on the evidence prior to placement on ALWOP would effectively eviscerate the urgent and interim nature of this measure, in that it would require the disciplinary process to be carried out before a staff member could be placed on ALWOP. This would defeat the purpose of administrative leave as an interim measure to address concerns about security, safety and other concerns that would not be effectively addressed with a staff member's continued presence in the workplace.

g. The Applicant was interviewed in connection with the investigation into the events of 27 December 2013 and, therefore, did have the opportunity to provide his account of events. Furthermore, in the notification letters sent to him by the Department of Field Support (DFS), he was notified of the reasons for his placement on administrative leave and, subsequently, ALWOP. As the Tribunal held in *Ba* UNDT/2012/025, the investigators made it clear to the Applicant what their investigation was about and the references made thereto in the letter placing him on Administrative Leave could have left the Applicant in no doubt as to the reasons behind his placement on ALWOP.

h. Regarding the Applicant's contention that his placement on ALWOP has the *de facto* effect of serving as a disciplinary measure, the Respondent submits that, contrary to a disciplinary measure – which is final unless reviewed by the Tribunal – the Applicant's placement on ALWOP includes an internal review mechanism, in that, if the reasons for

his placement on ALWOP are not ultimately found to warrant his separation or dismissal, all pay withheld will be restored to him without delay. As such, the Applicant's placement on ALWOP is a preventive, rather than a punitive measure.

i. A finding that a staff member's placement on ALWOP constitutes a *de facto* disciplinary measure would be contrary to the letter of the Organization's legislative issuances because it would effectively mean that every placement on ALWOP, regardless of the reasons therefor, would be *prima facie* unlawful.

j. Regarding the Applicant's contention that the duration of his ALWOP is too lengthy, the Respondent notes that the legislative instruments of the Organization specifically contemplate that administrative leave may extend beyond three months. In this respect, staff rule 10.4(a) states that administrative leave may continue throughout the investigation and until the completion of the disciplinary process, without imposing a time limit on those processes.

k. Staff rule 10.4(b) recognizes that a hard and fast timeframe cannot be imposed on the investigation and disciplinary processes, by noting that the three-month time limit should be adhered to only insofar as practicable. The notion of practicability in staff rule 10.4(b) must be read with reference to the investigation and disciplinary processes at issue in staff rule 10.4(a). In this light, staff rule 10.4(b) clearly envisages that administrative leave may continue for longer than three months, in those cases where the investigation and disciplinary process, if any, continues for longer than three months.

l. In this case, given the nature of the matter under investigation and the number of implicated staff members, the investigation was complex and required interviews with many staff members. The report and supporting documentation are voluminous. While the investigation has concluded, consideration is presently being given to whether to pursue this matter as a disciplinary case. In the circumstances, the Respondent submits

that the continuation of the Applicant's ALWOP beyond three months is proper.

m. Regarding the Applicant's contention that his placement on ALWOP is unlawful because there is no clear articulation of what constitutes "exceptional circumstances" for the purpose of placement on ALWOP, th

u. The withholding of a staff member's salary is a financial measure. Any damage to the Applicant resulting from the decision to place him on ALWOP may be directly compensated by damages.

v. The Applicant alleged that, since 27 December 2013, he has incurred approximately USD4000 in medical expenses. The Respondent notes that this allegation is unsupported by evidence. Moreover, the Applicant has not provided any indication whether these expenses were incurred prior or subsequent to his placement on ALWOP.

w.

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underscore the fact that, as it held in the case of *Contreras* UNDT/2010/154¹ the word “discretion” is not synonymous with the word “power” and that in public administration, discretion must be exercised judiciously. In other words, the exercise of discretionary power is not absolute and any exercise of discretion by a public officer must be exercised carefully and with a sense of accountability.

35. The Tribunal in view of the foregoing considerations, finds and holds that

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of August 2014

Entered in the Register on this 26th day of August 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi