



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/057
Order No.: 268 (NY/2014)
Date: 23 September 2014
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

OMWANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Note: This Order has been corrected in accordance with Order 2014-NY-268/Corr.1.

Introduction

1. On 16 September 2014, the Applicant, a Security Officer, Safety and Security

necessary preconditions for the grant of an order for suspension of action”. The Respondent made no mention of whether the Applicant had filed an additional request for management evaluation regarding the contested decision made by the Chief of SSS of 12 September 2014, namely to revoke the authorization to carry a service-issued weapon, but did refer to the performance notice which the Applicant mentioned in his 16 September 2014 letter (see para. 7 of the reply).

5. In response to Order No. 266 (NY/2014) dated 19 September 2014, the Respondent informed the Tribunal that the contested decision did not form part of the performance notice but was a separate decision and that, on the basis of his 12 September 2014 email (see para. 2(c) above), the MEU was currently assessing this decision. The Respondent further submitted some documents, including a SSS document labelled “in-service performance record” dated 1 July 2014 issued by an SSS Inspector. This document also included the performance notice referred to in his reply (see paras. 2(b) and 4 above).

6. On 21 September 2014, the Applicant filed and served an additional submission together with a series of documents. By Order No. 267 (NY/2014) dated 22 September 2014, the Tribunal requested the Respondent to file and serve his comments, if any, on the same day by 3:00 p.m., which the Respondent did.

Relevant background

7. Based on the parties’ submissions and the documents before the Tribunal, the relevant factual background may be presented as set out below.

8. On 27 February 2014, the Applicant was posted at an entrance to the United Nations Secretariat building in New York where he was operati labelleslt56l.berega

included in the SSS document entitled “in-service performance record”. The performance notice (see paras. 2(d) and 4 above) was also included in this document, and in it was indicated that this notice was issued for “negligent performance, or behavior pattern that warrants greater than just counselling, but less than the more serious ‘Notice of Counsel.’ Performance Notices will be reflected in an individual’s ePerformance Report”.

9. By email of 10 September 2014 from a SSS Sergeant from the SSS training unit, the Applicant was instructed to participate in a re-training program on how to handle the gate, apparently at the request of the inspector who had issued the performance notice.

10. By email of 12 September 2014, at 9.37 a.m., the SSS Sergeant informed the Applicant that he had been scheduled for a one hour “Delta Barriers Re-Training” on Monday, 15 September 2014.

11. On the same date, the Applicant emailed the MEU, copying a range of United Nations staff members, including the Chief of SSS and the SSS Sergeant, stating:

This is another email from [the SSS Sergeant], who has been treating my case contemptuously since the matter is already before your noble office. He has chs,ueJ0 “Sepave43he same Tnsistapy sinnt Iebe “Sepave4flecs ’ Performflecteverlreaded in

if it was, you do not get to decide what orders you will follow and what orders you decide not to follow. There is no dispute that you were the barrier operator on post 103, on Thursday, 27 February 2014,

before being arrested. I would like you to take this matter into serious consideration before something bad ha

- c. The Applicant has submitted a request for management evaluation of the contested decision, which evaluation is currently pending;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

Procedural conditions, including receivability

18. In *O'Neill* 2011-UNAT-182 (as also affirmed in *Christensen* 2013-UNAT-335), the Appeals Tribunal established that the UNDT shall examine its own jurisdiction although not

21. The Applicant stated that he had handed over his weapon with three loaded magazines on 12 September 2014. As results from the contested decision, the Applicant was placed on weapons restriction with immediate effect from 12 September 2014 until further notice. Consequently, the Tribunal considers that the contested decision only started to be implemented on 12 September and its implementation is still ongoing until an unknown date. The Tribunal observes that the Respondent makes no submission as to the contested decision having already been “implemented” pursuant to art. 2.2 of the Statute and 13.1 of the Rules of Procedure.

22. In conclusion, the Tribunal finds that the first three procedural conditions for the application to be receivable are fulfilled.

Substantive conditions

23. The Tribunal will further analyze the three substantive conditions: *prima facie*

a weapons restriction can be ordered only in relation to a weapon related infraction, medical fitness or failure of the annual weapon qualifications and that Delta barrier training do not represent a firearm qualification. On the contrary, it is a requirement that a security officer possess a weapon in order to work at exterior Delta barrier posts as well as interior posts. The Applicant states that restricting his service-issued weapon is a punitive and not a corrective measure. The Applicant contends that he did not disobey an order but respectfully informed the Chief of SSS that the re-training was a recommendation by the SSS Special Investigation Unit (“SIU”) related to the administrative review of the performance notice. The Applicant notes that the accident in February 2014 should have been referred to the car’s insurer and resolved by the United Nations Office of Legal Affairs in accordance with ST/SGB/230 (Resolution of torts claims). The Applicant alleges that the Delta barriers re-training was connected to the incident in February 2014 for which he is not responsible. The Applicant avers that the SIU recommendations were implemented by keeping the Applicant off the Delta barriers, placing the performance notice in his file and recommending re-training as a measure to correct his negative performance. The Applicant submits that, since he did not receive a copy of the performance notice and the investigation report, he had no chance to defend himself (including having access to review the original recording of the accident) or to make any observations before the notice was included in his file.

25. In response, the Respondent submits that the decision was lawful as the Applicant had been “insubordinate” by refusing “to carry out his supervisor’s direction to attend a ... re-training” and that:

... [t]he Applicant has presented no evidence to establish that there can be any serious or reasonable doubt that [the Chief of SSS], in his role as a commander of a paramilitary security force, authorized to use deadly force, acted lawfully and appropriately in revoking weapon authorization where the Applicant refused to carry out directives of his superiors.

26. The Respondent contends that the Appeals Tribunal in *Kamunyi* 2012-UNAT-194 held that “a security officer was required to comply with a direct order even where he believed the order was unlawful” and that the Applicant had failed to do so by not attending the re-training program. The Respondent refers to the “DSS Manual of Instruction on the Use of Force Equipment, including Firearms” (“MoI”) which in sec. 2.33 provides that “[a]ny breach of [...] unit SOP may result in the withdrawal of the [Weapon Authorization Card] by [Chief of Service]” and, sec. 2.34(1) states that “as determined by the [Chief of Service] any behavior, statement or act made by the Security Official which brings into question the Security Official's fitness to be armed” may result in the revocation of weapon authorization.

27. In his response to the additional submission filed by the Applicant on 21 September 2014, the Respondent submits that the allegations of harassment and discrimination against the Chief SSS are false and that the Applicant has failed to establish that there are serious or reasonable doubts as to the lawfulness of the contested decision which represented the Chief of SSS's broad discretion to disarm an officer as a result of refusing a direct order. The Respondent contends that the Applicant's insubordinate behavior brought into question his fitness to be armed, which may result in a revocation of weapon authorization according with the initial provisions included in the MoI. The Respondent avers that the orders for the safe operations of the Delta barriers had been in place since 2011, before the incident of February 2014. The Respondent submits that the Applicant is currently working on a night shift when there are very little to no activities in the United Nations complex and there is no need for him to carry a weapon.

28. The Tribunal notes that, as results from secs. 7.3(b), (c) and (d) of ST/SGB/2013/5 (Organization of the Department of Safety and Security), the Division of Headquarters Security and Safety Services is responsible for, *inter alia*:

7.3 The Division of Headquarters Security and Safety Services is responsible for the strategic management of safety and security operations at the Security and Safety Services/Sections locations, providing primary operational and technical support, including:

...

(b) Providing the framework to ensure standardization, and the integration of, practices and procedures in the Security and Safety Services/Sections;

(c) Acting as the focal point for consultation and advice within the Secretariat and with specialized agencies of the United Nations system regarding all security and safety policy issues, in particular the provision of security and safety operations at any United Nations system premises by providing policy direction and standards;

(d) Ongoing monitoring and evaluation of the effectiveness, efficiency and coherence of existing security arrangements, procedures, modalities and practices at the Security and Safety Services/Sections locations

29. It results that the activity of ongoing monitoring and evaluation of the effectiveness, efficiency and coherence of existing security arrangements, procedures, modalities and practices at the SSS/Sections locations (see sec. 7(d) of ST/SGB/2013/5) represents one of the important objectives of the Division of SSS at Headquarters.

30. The Tribunal notes that, as results from the uncontested facts presented by the parties, the Applicant, when operating a Delta barrier security point, was involved on 27 February 2014 in an incident resulti

the more serious “Notice of Counsel“ and which must be signed by the assistant chief or inspector and which is to be reflected in an individual’s performance report.

32. The Applicant filed a management evaluation request on 18 august 2014 in which he contested the following matters: the decision to give him a performance notice and to place the adverse material in his file; the decision to deny him a promotion in 2010 and 2014; the decision to require him to pay USD3.5 for parking; the decision to prohibit the use of personal cellphone while on duty; a denial of equal treatment and a decision to refer his complaint from 2 July 2014 to the Chief of SSS.

33. The Tribunal observes that the Applicant did not request a suspension of the implementation of the decision to impose on him a performance notice pending the management evaluation before the MEU or before the Tribunal in accordance with art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure. Consequently, the performance notice was implemented and reflected in his performance report.

34. On 14 August 2014, the Chief of SSS in New York issued a directive titled “Corrective Performance Training” in which he stated that:

1. All negative performance issues require the full attention of supervisors to ensure that the lapse is corrected at the earliest point. Supervisors who become aware of a performance issue have not fully discharged their responsibility by simply issuing a performance notice. It is also important for them to ensure the officer is fully equipped for the task to which assigned. ... As a consequence, and with immedi.15sno ths

a) It must be operationally practical, meaning that it should be conducted immediately following the sub-standard performance.

b) The re-training must be formally documented and become part of the officer's admin folder with SSS - formal retraining such as firearms, delta barriers, will require the use of established training programs with SSS Training and Development Unit.

c) Re-training must focus on the sub-standard performance

d) The retraining must be taught in accordance with existing SOP.

4. An officer who has been cited for not correctly performing a task such as delta barrier operations, whether through accident or negligence, shall not be permitted to resume that task until the appropriate training occurs. ...

35. The Applicant's supervisor considered it necessary for the Applicant to take a one-hour re-training course on Delta barriers in order to ensure that he would be formally ready to exercise his duties, including at the barrier posts. It appears that this measure was taken by the Applicant's supervisor, the Chief of SSS, in accordance with sec. 10.1 of ST/AI/2010/5 (Performance Management and Development System), which provides that

... When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measure may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

36. In case the performance shortcoming is not rectified following the remedial actions indicated in sec. 10.1 at the end of the performance appraisal (see sec. 10.2), the supervisor can apply the measure indicated in secs. 10.2–10.5 of ST/AI/2010/5.

37. The Applicant stated in his additional submission that he continued working at the Delta barrier controls with the knowledge of SSS after the incident until end of August, and this aspect is not contested by the Respondent. It appears that, in the present case, the re-training course was recommended a few months after the incident from February 2014 and the Applicant believed that, during the intermediate time, he proved his abilities to work at a Delta barrier security point. It also appears that the Applicant finds that it would be appropriate to wait for the outcome of the management evaluation of the decision imposing a performance notice, which was expected to be finalised on 19 September 2014, before doing the re-training program because, as he contested the performance notice and the result of the SIU investigation and taking the course before then could be viewed as him admitting to his alleged negligence.

38. It also appears that the Applicant's supervisor considered that the re-training course was necessary for the Applicant to address the performance shortcoming according with sec. 10.1 of ST/AI/2010/5 in order to be able to assign him as a Security Officer to any security point, including at a Delta barrier control. It does not appear that the Applicant was targeted personally by the Chief of SSS's directive of 14 August 2014 because this document reflects lessons learned from previous events and refers both to the Security Officers which by accident or by negligence can be involved in similar incidents as the one of February 2014.

39. The Respondent confirmed in his response to Order No. 267 (NY/2014) that "[t]he Applicant was not 'coerced' to attend training. This is strictly a performance issue and supervisors were trying to correct a performance issue". It appears that the Applicant's second refusal of 12 September 2014 to take the re-training course before the finalization of the management evaluation was considered by the Chief of SSS not only to be a performance issue but also a refusal of a direct order and an act of insubordination by an experienced Security Officer. Consequently, the Chief of SSS decided that such a behavior breached the Section's SOPs and decided to restrict

his weapon authorization, effective 12 September 2014 and until further notice. It appears that this administrative measure was taken in accordance with sec. 2.34(l) of the MoI which provides that: “Security officers may have restrictions placed upon their carrying a weapon by the [Chief of Security, Chief Security Advisor and Chief Security Officer (“CSA/COS/CSO”)]. A Weapons restriction may be applied where the following has occurred; ... as determined by the CSA/COS/CSO any behavior, statement or act made by the Security Official which brings into question the Security Official’s fitness to be armed”.

40. The Tribunal notes that art. 2.35 of the MoI stipulates that: “In every case where a Security Official is placed on Weapons Restriction by the CSA/COS/CSO, the concerned Security Official shall be notified in writing of the expected duration”. It appears that, in the present case, the decision made by the Chief of SSS does not contain the mandatory element concerning the expected duration of the restriction. The Tribunal observes that an unlimited weapons restriction may be considered as equivalent to a withdrawal of the authorization or as a punishment.

41. It appears from the facts that the Applicant’s refusal to take the re-training course was “temporary” until the finalization of the management evaluation regarding the imposition of the performance notice. The Tribunal observes that the corrective measure should be proportionate and reasonable in accordance with sec. 4.50 of the MoI (“[a]ny decision ... to place a Security Official on weapons restrictions based on questionable fitness-for-duty must be both reasonable and objective”). For this reason, the Tribunal considers that it *appears* that the Chief of SSS exercised his discretion when imposing a weapons restriction without taking into consideration sec. 2.35 of the MoI and thus the contested decision appears to be *prima facie* unlawful.

42. The Tribunal observes that, in a suspension of action case, it cannot make any final legal determination regarding the two aspects of the Applicant’s refusal to

46. The Tribunal considers that SSS is the only authority to establish which premises require Security Officers to carry a weapon and that the Tribunal has no competence to decide otherwise. Pursuant to sec. 1.51 of the MoI, after the weapons restriction was applied to the Applicant, he was assigned to a post that does not require possession of a weapon. If the Applicant considers that the Security Officers should have a weapon in such a post, he must then formally inform his superiors and

49. The Tribunal notes that the Applicant was recommended to participate in a re-training course and there is no evidence before the Tribunal that he will not be able to attend the course based on his weapons restriction and that he will be retaliated against or sanctioned.

50. The Tribunal finds that the Applicant will suffer no irreparable harm as a result of the weapons restriction pending the management evaluation.

51. Taking into consideration that two of the cumulative conditions for a contested decision to be suspended pending management evaluation are not fulfilled, the application is dismissed.

Conclusion

52. The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 23rd day of September 2014