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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/062

Judgment No.: UNDT/2015/107

Date: 6 November 2015

Original: English

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**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

ADUNDO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Didier Sepho

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Security Officer at the S-2 level with the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”), contests the decision to place him on weapons restriction, and under the supervision of a Senior Security Officer, because of his refusal to undergo retraining pursuant to a Notice of Counsel issued for dereliction of duty. The Applicant requests that the Tribunal order rescission of the decision, removal of the Applicant from the

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14. On 19 August 2014, the Applicant received an official duty assignment for retraining. The same day, Sergeant Ellis Maronie from the Training and Development Unit (“TDU”) of SSS notified Mr. Mathew Sullivan, Inspector Operations, SSS, that the Applicant had attended a TDU classroom that morning and stated that he was not going to take part in retraining because it would “serve as a sign of guilt” in relation to the Notice of Counsel. The Applicant further stated that he was being harassed and that he had submitted a written rebuttal to the Notice of Counsel and was awaiting a written response. He would not take part in any retraining until he received such a response.

15. By email dated 19 August 2014, Mr. Bongi informed the Applicant that his refusal of the direction from his chain of command to attend training called into question his fitness to be armed. Therefore, with immediate effect, he would be placed on weapons restriction and co-assigned under the direct supervision of a supervisor or Senior Security 19 Au19 Au19 Au19place9(Au)-19 hA-t Tm 1 43(3(o))-wrbeTBT5 521

19. By Order No. 188 (NY/2015), dated 18 August 2015, the Tribunal informed the parties that a hearing on the merits was considered necessary to hear evidence from the Applicant and any witnesses that he proposed to call, as well as the Chief of the SSS, Mr. Bonggi, and any witnesses that the Respondent proposed to call. The parties were ordered to appear at a hearing beginning Monday, 21 September 2015.

20. On 25 August 2015, the Respondent filed a request for postponement of the hearing, stating that Mr. Bonggi and the Acting Chief of the SSS, Mr. Michael Browne, were not available to attend the scheduled hearing and would not be available until November 2015. They would be providing leadership, operational support, and oversight of the security management system of the Organization during September and October, which are busy months for the SSS because of the General Assembly and related meetings.

21. Since Mr. Bonggi was unavailable, the Tribunal issued Order No. 196 (NY/2015), dated 26 August 2015, ordering the parties to inform the Tribunal whether they were



26. The United Nations Department of Safety and Security Manual of Instruction on Use of Force Equipment Including Firearms (“the DSS Weapons MOI”) provides, so far as it is material to this case (emphasis added):

**Withdrawal of Authorization to Carry Weapons**

2.30 The authority to carry firearms by United Nations Security Officials is comprised of two components, the authorization by the United Nations and by the Host Country. If either component is revoked, either temporarily or permanently, the Security Official may no longer carry a firearm in that location for the duration of the revocation.

**Revocation of Authorization by United Nations**

2.33 Security Officials shall adhere to the strictest practice for handling and safeguarding their issued weapons. Any breach of the United Nations Use of Force Policy, Weapons Carry Policy or unit SOP may result in the withdrawal of the [Weapons Authorization Card] by the [Chief Security Advisor/Chief of Security/Chief Security Officer]. Security Officials carry a weapon on the authority of the [Chief Security Advisor/Chief of Security/Chief Security Officer]. The [Chief Security Advisor/Chief of Security/Chief Security Officer] may rescind authorization to carry weapons/firearms whether on a temporary or permanent basis, by placing the Security Official on Weapons Restriction.

**Weapons Restriction**

2.34 Security Officials may have restrictions placed upon their carrying a weapon by the [Chief Security Advisor/Chief of Security/Chief Security Officer]. A Weapons Restriction may be applied where the following has occurred;

1. as determined by the [Chief Security Advisor/Chief of Security/Chief Security Officer] any behaviour, statement or act made by the Security Official which brings into question the Security Official’s fitness to be armed.

**Duration of Weapons Restrictions**

2.35 In every case where a Security Official is placed on Weapons Restriction by the Chief Security Advisor/Chief of Security/Chief Security Officer, the concerned Security



Official *shall be notified in writing of the expected duration.*

- 2.36 Supervisors shall not use the duration of Weapons Restrictions as a punishment for misconduct where normal investigative or disciplinary procedures are applicable.

#### **Long Term Withdrawal of Authorization**

- 2.38 In the event that a Security Official's firearms permits, either the Host Country or UN is removed [sic] with no prospect of it being reinstated or if the Security Official is judged to be unlikely for the foreseeable future to meet the fitness-for-duty requirement, the [Chief Security Advisor/Chief of Security/Chief Security Officer] shall reassign the Security Official to duties that do not require the carriage of a firearm ...

#### **Consideration**

##### *Notice of Counsel and retraining requirement*

27. The Respondent submits that the issuance of a Notice of Counsel and the requirement that the Applicant participate in a retraining programme are intermediate or preparatory steps in the performance management process in SSS rather than final administrative decisions. He submits that the issuance of a Notice of Counsel can only be contested in the context of a final administrative decision adverse to the Applicant, such as a completed performance appraisal. The Respondent submits that completion of a retraining programme also forms part of the performance management process.

28. The Appeals Tribunal has stated that what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision (*Andati-Amwayi* 2010-UNAT-058, para. 19).

29. The Tribunal notes that, according to the Notice of Counsel issued to the Applicant, such a document "*will be reflected* in an individual's e-

Performance Report” (emphasis added). By Order No. 271 (NY/2015), dated 20 October 2015, the Tribunal ordered the Respondent to answer a number of questions in relation to the legal status and effect of a Notice of Counsel. The Respondent filed a response on 23 October 2015 and the Applicant filed comments on that response on 27 October 2015.

30. In his response dated 23 October 2015, the Respondent stated that a Notice of Counsel is issued in the context of performance management under the terms of ST/AI/2010/5 (Performance Management and Development System). He stated that the first step in managing a performance shortcoming is to notify the staff member of the shortcoming. A Notice of Counsel is not placed on a staff member’s Official Status File, but is instead held on an SSS working file for the purpose of performance management. The policy considerations were explained as follows:

The Performance Notice/Notice of Counsel template establishes a consistent approach in the management of a large workforce where supervisors do not enjoy the luxury of fixed worked [sic] stations and consistent administrative hours or administrative support. SSS is a dynamic environment for both supervisors and officers. SSS supervisors are normally tasked with first and second reporting officer duties for a larger number of subordinate officers than comparable supervisors throughout the United Nations System. Further, unlike other departments and sections within the Organization, staff in SSS work various shifts at various times and are directly supervised by a range of supervisors. As a result, all supervisors are not immediately aware of the performance history of a staff member and/or whether they are engaged in remedial measures to address performance issues. For this reason, it is important that these matters be reflected in a working file in order that a range of managers can be made aware of any performance issues current at any particular time. Ultimately, the template developed allows for a user-

31. The Respondent further stated:

The Performance Notice is only relevant for the reporting period in which it occurred. Accordingly, if the matters referred to in a Performance Notice are not incorporated in the staff member's end of year assessment then there will be no other reference to the performance shortcoming in the staff member's record.

The Tribunal assumes that the Respondent intended to refer in this paragraph to a Notice of Counsel, which was the measure applied in this case, and was referred to throughout the rest of the Respondent's submission, rather than a Performance Notice.

32. There is no reference to the Notice of Counsel in the Applicant's electronic performance appraisal system ("e-PAS") report



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d. The Tribunal has to be satisfied that the damage as described was attributable to action taken by the Respondent.

e. Where the unlawful act was performed maliciously or was highhanded and without due regard for the legitimate concerns and feelings of the staff member it is bound to have aggravated the feelings of distress and will accordingly attract a higher award.

f. The Tribunal has to take into account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly, the Tribunal has to bear in mind the principle of appropriateness and proportionality.

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

54. The Tribunal does not consider that an award for moral damages should be linked to the staff member's grade or status. Instead a principled approach should be adopted in that an assessment should first be made of the extent of damage suffered by the individual. The next step is to place a monetary value on the hurt without regard to the status of the individual. The Tribunal assesses the degree of moral damage to the Applicant as being towards the lower end of the scale for such awards.

55. In this case, the Tribunal may legitimately infer that the imposition of a restriction on carrying a firearm, without limitation of time, has caused the Applicant a significant degree of distress for which compensation is warranted in the sum of USD5,000.

**Conclusion**

56. The application succeeds in p9,AET1 720.96 126 157iAaYb5P(nclu)-3(clu)-3(sion)] TJETBT1 1