UNDT/2011/081, Cabrera

UNAT Held or UNDT Pronouncements

Placing the Applicant on SLWFP. This Tribunal agrees with and adopts the Kamunyi reasoning that former staff rule 105.2 did not permit placing a staff member on SLWFP where an investigation was being made into possible wrong-doing by that staff member. The formal nature of the OIOS/PTF investigation. For an investigation to be regarded as merely preliminary in nature, some “reason to believe” must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must not have reached the stage where the reports of misconduct are “well founded” and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the ASG. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member. It is a fundamental principle of due process that where an individual has become the target of an investigation, then that person should be accorded certain basic due process rights. The identifications of the eight staff members and their linkage to criminal wrong-doing meant that the investigation by the OIOS/PTF had long since passed the preliminary stage and that a de facto investigation into actual misconduct was taking place. A de facto suspension. A suspension under former staff rule 110.2 constitutes an involuntary directive for the staff member to cease all work-related duties and responsibilities, for some period of time (defined at the outset but normally not greater than 3 months) pending completion of an investigation into possible grave wrong-doing, including acts or behaviour that would discredit the United Nations. For a suspension to occur, the Organization must officially charge a staff member with misconduct and the decision must be that of the Secretary-General or his designate. The staff member also should be given reasons for the suspension. The decision to place the Applicant on SLWFP bore all the markers of a suspension during a disciplinary investigation under ST/AI/371, rather than the characteristics of a benign administrative measure, such as a SLWFP under former staff rule 105.2(a)(i). In reality, the Respondent charged the Applicant with misconduct on a sub silentio basis, made a decision that the case

against the Applicant should be pursued, and constituted its special OIOS/PTF to look into the matter. Breaches of the Applicant's due process rights. Under ST/AI/371, sec. 6, the Applicant was not: (a) informed in writing of the allegations against him; (b) informed of his right to respond; (c) provided a copy of the documentary evidence of the alleged misconduct; (d) notified of his right to the advice of another staff member or retired staff member to assist in his responses; (e) informed of the reason for the suspension; (f) informed of the probably length of the suspension; (g) offered information on how to obtain such assistance; (h) given a specified time to answer the allegations and produce countervailing evidence (sec. 7). The de facto suspension was not based on reports that were "well founded" under sec. 3 of ST/AI/371. The reasons proffered by the Organization did not form a sufficient basis for placing the Applicant on SLWFP. Pursuant to sec. 7 of ST/AI/371, the Applicant was not accorded the right to be given a specified time to answer the allegations and to be informed of the procedure for producing countervailing evidence. According to sec. 9(a) of ST/AI/371, the Applicant was not properly informed that the case was closed, that the charges had been dropped and that no further action would be taken.Outcome: Applicant awarded two years' net base salary in compensation.

Decision Contested or Judgment/Order Appealed

Placement on speacial leave with full pay pending investigation.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Full judgment

Full judgment

Applicants/Appellants

Cabrera

Entity

DM

Case Number(s)

UNDT/NY/2010/027/AT/1659

Tribunal

UNDT

Registry

New York

Date of Judgement

6 May 2011

Duty Judge

Judge Kaman

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

TEST -Rename- Benefits and entitlements-45
Special leave (with or without pay)
Compensation
Due process
Discretionary authority

Applicable Law

Administrative Instructions

- ST/AI/371

Staff Rules

- Rule 105.2
- Rule 110.2
- Rule 110.3
- Rule 110.4

Related Judgments and Orders

UNDT/2010/034
UNDT/2010/214
UNDT/2010/122
2010-UNAT-089
2010-UNAT-042
2010-UNAT-096
2010-UNAT-094
2010-UNAT-092