

# UNDT/2019/149, Nyawa

## UNAT Held or UNDT Pronouncements

Regarding the question of whether material facts were sufficiently established, the Tribunal concluded that they were sufficiently established except the allegations that the Applicant instructed other staff members to provide false information. The parties disputed whether the Applicant was a supervisor as charged. The Applicant did not fall under the category of “supervisor “ as per the UNON Security and Safety Service (UNON/SSS) SOP No 13. Undisputedly though, the Applicant carried out team leader functions and the UNON/SSS Daily Orders which assigned the Applicant to provide “security surge services” at the UNHCR facility in Dadaab indicate clearly his designation as such. “Team leader” is not a term used in the Staff Regulations and Rules; the UNON/SSS SOPs at the time of the incident did not relate to it either, be it in relation to a supervisory function or otherwise. This designation, therefore, does not legally amount to the Applicant having the power to exercise supervisory functions over the other staff members in his team. The position of team leader was not autonomously defined in the controlling legal instruments, probably due to the assumption that team leaders are higher ranking security officers and thus supervisors. This function was, however, sufficiently established in practical terms and delineated discrete obligations in ensuring that the team carries out the responsibilities such as might be spelt out in the Daily Orders. Next, the Tribunal reviewed the Applicant’s argument that his due process rights were not observed. The Applicant claimed that he was not informed of the offence or nature of misconduct during the investigations contrary to the Special Investigations Unit (SIU)’s SOP No. 7. The Respondent argued in response that SOP did not create any substantive rights. The Tribunal found that while the SOP does not create substantive rights, it may legitimately create expectations as to procedural standards by which SIU abide, and the Respondent, being the author of the SOP, cannot simply brush it off when it fits him better (at the same time, it may be recalled, the Respondent holds the Applicant accountable as supervisor according to the SOPs). The Applicant does not point to any material information that he would have withheld if he were warned as per the SIU/SOP. Neither did this Tribunal rely

substantively to the detriment of the Applicant on any information that he had supplied prior to the receipt of the charging letter. The Applicant's argument on this score is, therefore, rejected. Regarding the question of whether the established facts qualify as misconduct, the Tribunal found that by failing to report a supervisee's breach of the Organization's rules and regulations to the officials responsible for taking appropriate action, the Applicant violated staff rule 1.2(c) (failure to report unsatisfactory conduct). The Applicant also violated staff regulation 1.2(b) (failure to uphold the highest standards of integrity). The Applicant committed this misconduct having had supervisory responsibility in terms of responding to incidents and reporting them. Regarding the proportionality of the offense, the Tribunal found that the sanction of deferment, for a period of two years, for eligibility for consideration for promotion and the administrative measure requiring the Applicant to attend a course on gender sensitivity, are both reasonable and not disproportionate, given the seriousness of the principal offence which was unreported and that it involved violence against a woman. However, the Tribunal fails to see any purpose of combining the measure of deferment for eligibility for promotion with a written censure. The Tribunal therefore rescinded written censure.

## Decision Contested or Judgment/Order Appealed

The decision to impose on the Applicant the disciplinary measures of deferment, for a period of two years, for eligibility for consideration for promotion, together with written censure and the administrative measure of a requirement to attend a course on gender sensitivity for failing to report the incident involving his supervisee and take appropriate action and for instructing other staff members to provide false information.

## Legal Principle(s)

Judicial review of a disciplinary case requires the Dispute Tribunal to examine: a. whether the facts on which the sanction is based have been established; b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and c. whether the sanction is proportionate to the offence. Moreover, part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.; Staff Regulations and Rules do not define supervisors but rather describe their functions as individuals authorized to give binding instructions to subordinates,

evaluate their performance and who must be notified of absences. Any SOP which contradicts the staff rules and regulations should not have been issued or should have been immediately withdrawn; such an SOP, indeed, would be incapable of creating rights, be it substantive or procedural. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability. A less onerous sanction is preferred where it would be equally effective. Written censure is the most lenient of all the disciplinary measures. Its purpose is exhausted by stigmatizing the impugned conduct, creating a record of disciplinary violation of the staff member for the future and fostering correction of behavior, without, however, resorting to financial sanction and/or loss of employment. The retributive and preventive effect of a written censure is inherent to, and thus subsumed by, any other, more onerous disciplinary measure, all of whom stigmatize and create a record of misconduct in addition to more severe financial and/or status-related consequences that they entail. Cumulative application, therefore, of written censure with any other disciplinary measure does not contribute in any way to the “desired end” and, as such, is unreasonable.

## Outcome

Judgment entered for Applicant in full or in part

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Nyawa

## Entity

UNON

## Case Number(s)

UNDT/NBI/2017/33

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

11 Oct 2019

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Disciplinary matters / misconduct

Disciplinary measure or sanction

Facts (establishment of) / evidence

Failure to report misconduct

Non-disciplinary/administrative measures

## Applicable Law

Administrative Instructions

- ST/AI/2010/5

Staff Regulations

- Regulation 1.2(b)

#### Staff Rules

- Rule 1.2(c)
- Rule 3.3(a)
- Rule 6.2(f)

## Related Judgments and Orders

2018-UNAT-862

2017-UNAT-776

2015-UNAT-550

2013-UNAT-302

2014-UNAT-403

2011-UNAT-164

2012-UNAT-209

2015-UNAT-523

2018-UNAT-859