



**UNITED NATIONS APPEALS
TRIBUNAL
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NATIONS UNIES**

**Abu Hamda
(Appellant)**

v.

**Commissioner General of the
United Nations Relief and Works Agency for
Palestine Refugees in the Near East
(Respondent)**

JUDGMENT

[No. 2010-UNAT-022]

Before:	Judge Sophia Adinyira, Presiding Judge Jean Courtial Judge Kamaljit Singh Garewal
Case No.:	2010-027
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Aref R. Zafari

Counsel for Respondent: W. Thomas Markushewski

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. The Appellant, Abdulla Hanan Abu Hamda (Abu Hamda), a staff member of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), was demoted from the post of Deputy Field Pharmacist (grade 12) to Librarian (grade 10) with loss of salary, for misconduct. This Court affirms the decision of the UNRWA Commissioner-General that Abu Hamda committed misconduct, but finds mitigating factors. It therefore substitutes the disciplinary measure of demotion with that of a written censure.

Facts and Procedure

2. Abu Hamda joined UNRWA on 4 June 1979 as Assistant Field Pharmacist (grade 10) in the Syria Field Office. He was promoted to the post of Deputy Field Pharmacist (grade 12) effective 1 January 2001.

3. On 15 July 2002, the Assistant Field Pharmacist and two packers discovered four empty boxes of hormonal contraceptive pills during a stock replacement. The missing 10,500 sachets of Microgynon were valued at EUR 2,278.50.¹ Abu Hamda and the Field Pharmacist (FP) were informed on the same day. According to the documents on the record, Abu Hamda wrote to the FP on 21 July 2002 and 1 December 2003 urging the latter to take action, without success. No survey report was initiated to document the loss.

4. On 25 April 2004, Abu Hamda informed Chief, Field Health Programme (CFHP), about the missing Microgynon pills. A BoI was established soon thereafter.

5. In its report dated 1 June 2004, the BoI stated that it was “unable to ascertain whether the medicine [had] been misplaced or stolen (nor by whom, should the latter be the case)”, mainly due to the failure of the FP and Abu Hamda to make a timely report of the loss for almost two years. It found that Abu Hamda had failed to timely report the loss of a quantity of hormonal contraceptive pills; that, despite his knowledge of the manipulation of the stock, he had failed to reprimand his subordinate staff involved and

¹ 252 sachets were subsequently recovered from Abu Hamda’s office, reducing the value of loss to EUR 2,223.82.

to inform his supervisor; and that he submitted a false trimester report to cover up the missing quantity.

6. Since the BoI report raised more questions than answers, the UNRWA Commissioner-General approved the launching of another investigation by the Audit and Inspection Department (AID) into the missing medicine. On 24 September 2004, the AID submitted its report, in which it found that “the missing stock of Microgynon was indeed stolen/misappropriated and that [the FP] is responsible for the misappropriation”.

7. In a letter dated 25 October 2004, the Director of UNRWA Affairs, Syria (DUA/SAR), advised Abu Hamda of the BoI findings and charged him with “irresponsible failure on [his] part to comply with the relevant instructions of the Health Programme and a direct breach of Area Staff Regulations 1.1 and 1.4”. He invited him to respond to the allegations, which Abu Hamda did on 30 October 2004.

8. On 16 February 2005, Abu Hamda was removed from his post and demoted to grade 10 against the post of Librarian at Damascus Training Centre, subject to successful completion of one-year probation. UNRWA’s decision was essentially based on the BoI’s findings.

9. On 12 April 2005, Abu Hamda appealed the demotion decision to the UNRWA Area Staff Joint Appeals Board (UNRWA JAB). He requested access to ‘all documents that lead [sic] to the contested decision.’ After seeking clarification as to which documents Abu Hamda requested, the UNRWA Administration forwarded the BoI report and AID investigation report for Abu Hamda’s review on 25 January 2006.

10. In an undated report, by a majority of two to one, the UNRWA JAB found that there was “sufficient and cogent evidence” to support the decision to demote Abu Hamda. The minority JAB member, on the other hand, recommended that the UNRWA Commissioner-General consider reviewing the demotion decision, or in the alternative, consider granting Abu Hamda salary protection in his current post as Librarian. On 12 September 2008, the UNRWA Commissioner-General approved the JAB majority findings.

11. On 22 November 2008, Abu Hamda appealed the decision to demote him for misconduct to the former United Nations Administrative Tribunal (Administrative Tribunal). The application was returned to him for refilling by 20 March 2009. Abu Hamda resubmitted his application on 25 February 2009. UNRWA's Answer was received on 2 November 2009. The case was subsequently transferred to the United Nations Appeals Tribunal following the abolition of the Administrative Tribunal at the end of 2009.

Submissions

Abu Hamda's Appeal

12. Abu Hamda submits that the contested decision ignored the conclusions reached by AID, and that the UNRWA Administration would have dropped the charges against him had it read the BoI findings in conjunction with the AID conclusions.

13. With regard to the finding that he had submitted a false trimester report to cover up the missing quantity, Abu Hamda claims that the report was presumably changed by the FP.

14. Abu Hamda alleges that UNRWA violated his due process by initially withholding some documents from him, and that he was denied due process because he was not permitted to make further submissions following the cut-off set by the UNRWA JAB Secretariat when docketing the appeal for consideration.

UNRWA's Answer

15. UNRWA responds that the Appeal is time-barred. Abu Hamda received the impugned decision on 29 September 2008. Pursuant to the 90-day time limit, he should have filed his application with the Administrative Tribunal on or about 27 December 2008. Abu Hamda did not lodge his appeal with the former UNAT until 25 February 2009, two months beyond the deadline. He did not provide any explanation for the delay.

16. In the alternative, UNRWA maintains that the impugned decision was properly taken, as the facts on which it was based were established. The BoI made adverse

findings against Abu Hamda, which were subsequently confirmed by the AID. Furthermore, Abu Hamda's credibility was questionable.

17. UNRWA had considered the conclusions of both the BoI and the AID before it determined that Abu Hamda's conduct constituted misconduct, which justified the imposition of the disciplinary measure.

18. Abu Hamda was made fully aware of the allegations and evidence against him and was accorded fullest opportunity to rebut them and produce evidence in his defense.

19. The disciplinary measure of demotion was not disproportionate to Abu Hamda's willful, negligent, or irresponsible failure to perform the responsibilities of his post.

20. Abu Hamda failed to produce any evidence to show that the decision was biased, improperly motivated, or flawed by procedural irregularity or error of law.

21. Finally, UNRWA contends that the alleged violation of Abu Hamda's due process rights is without merit. While the UNRWA Area Staff Rules limit the proceedings before the UNRWA JAB to an appellant's statement of appeal and a respondent's reply, Abu Hamda was accorded the opportunity to submit additional observations.

Considerations

22. We will consider Abu Hamda's contentions in turn.

Preliminary Issue: Whether the Appeal is Receivable

23. We note that Abu Hamda's initial appeal before the former Administrative Tribunal, dated 22 November 2008, did not comply with the requirements of the Rules of the Administrative Tribunal. The Executive Secretary of the Administrative Tribunal therefore returned the appeal to him requesting that he resubmit a corrected version "no later than 20 March 2009". The Administrative Tribunal received the corrected appeal on 25 February 2009. The Appeals Tribunal is therefore satisfied that the Appeal is receivable.

Substantive Issues

24. The main issue for consideration in this matter is whether Abu Hamda has shown sufficient grounds for this Court to interfere in the disciplinary measure taken by UNRWA against him.

25. In doing so we have to consider (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the UNRWA Area Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence.

26. It is necessary to set out the provisions on disciplinary measures under the UNWRA Staff Regulations and Rules. Area Staff Regulation 10.2 provides that: “[T]he Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.” Area Staff Rule 110.1 provides:

Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct, provided that suspension pending investigation under staff regulation 10.4 or under rule 110.2 shall not be considered a disciplinary measure.

Whether the Facts on Which the Disciplinary Measure Was Based have been Established

27. Abu Hamda was demoted upon the following grounds:

- i. His failure to timely report the loss of Microgynon medicine;
- ii. His failure to discipline subordinates for manipulating stock; and
- iii. His submission of a false trimester report.

28. It was part of Abu Hamda’s job description as Deputy Field Pharmacist to assist the FP in ordering, storing, and distributing medical supplies and maintaining the proper records thereof. It was his, as well as the Field Pharmacist’s, duty to ensure the safety of the Agency’s properties under their care. Abu Hamda was the immediate supervisor of the Assistant Field Pharmacist as well as the packers who discovered the loss and reported it to him. It was his responsibility then to ensure that the appropriate action was taken to rectify the matter when his immediate supervisor took no action. It is our considered opinion that the fact that the FP was found to have misappropriated the

medicines did not exonerate Abu Hamda from his failure, for almost two years, to inform the CHFP, who was their overall supervisor. Judging from the report by the CFHP to the DUA/SAR, the report of the BoI, the comments of AID, and the responses and statements by Abu Hamda during the whole process, we find no difficulty in coming to the conclusion that Abu Hamda behaved irresponsibly in not informing the CFHP in a timely manner when his immediate supervisor failed to take action on the missing stock after his initial report to him.

29. We find that there was sufficient evidence to conclude that Abu Hamda was guilty of misconduct.

30. Abu Hamda claims that he did not attend the stock-taking. However, from the excerpts of statement to the BoI attributed to him Abu Hamda is quoted as saying that he saw the Assistant Pharmacist and one laborer moving stock from the ordinary store to the reserve store after the physical check by the Stock Material Inspection Officer (SMIO). On 8 February 2005 the Deputy Field Administration Officer and Field Personnel Officer sought clarification from Abu Hamda and the Assistant Pharmacist on this issue. Abu Hamda stated that he came upon the movement of the stock by chance, but did not approve of it. On the other hand, the Assistant Pharmacist and the two packers who did the manipulation thought that they had the tacit support of the FP and Abu Hamda.

31. From the foregoing we do not find any basis to doubt the BoI finding that Abu Hamda became aware of the manipulation of the stock by his subordinates during the SMIO inspection, and that he failed to reprimand them.

32. We find such conduct to be a dereliction of duty which amounts to misconduct warranting disciplinary action.

33. Unfortunately there was no copy of the trimester expiry date report of September 2003 attached to any of the statements before us. Consequently we were unable to verify Abu Hamda's claim that a page of the report had been substituted or whether the report was false in view of the shortage.

34. We will therefore give Abu Hamda the benefit of the doubt and hold that there was no proof that he had submitted a false trimester report.

Whether the Established Facts Legally Amount to Misconduct

35. We consider that Abu Hamda's failure to make a timely report about the manipulation of the stock amounted to a cover-up of a malfeasance which resulted in the loss of the Agency's property. It is the duty of every staff member to safeguard the property of his or her organisation. We consider the conduct of Abu Hamda in this respect to be irresponsible and inconsistent with his obligations to the Agency under the Area Staff Regulation 1.1, which provides: "[s]taff members, by accepting appointment, pledge themselves to discharge their functions with the interests of the Agency only in view."

36. We accordingly hold that the established facts amount to misconduct under the Area Staff Regulations and Rules.

Whether the Decision to Demote Abu Hamda was Arbitrary or Disproportionate

37. Disciplinary matters are within the discretion and authority of the Commissioner-General of UNRWA. It is however a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety. UNRWA in its Answer referred to the former UNAT Judgment No. 941 *Kiwanuka* (1991), which is of persuasive authority.

38. We note that due process was followed before the disciplinary measure was imposed.

39. However it is our considered view that UNRWA did not take into consideration the fact that the missing stock was misappropriated by Abu Hamda's immediate supervisor, and that could explain why no action was taken after the initial report. We also note that the junior members of the pharmacy staff were intimidated by the FP during the BoI investigation. We observe that the subordinates of the pharmacy staff (including Abu Hamda) were not aware that they ought to have taken proper steps to ensure an adequate response from the Agency at the requisite levels of seniority in order to safeguard the Agency property.

40. It was stated in the BoI Report that: “[t]he Board considers that the Agency’s rules and procedures provide sufficient guidance to staff in the case of missing supplies”.

41. However, no such guidelines were pointed out to Abu Hamda throughout the process. During the inquiries it was apparent that the junior members of the pharmacy staff felt that once they had made a report to their immediate supervisor that was the end and it was left to their supervisor to take the necessary disciplinary steps.

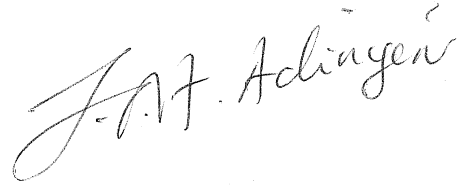
42. We find this very unsatisfactory. We recommend that adequate measures (in addition to those for the protection of junior staff who report misconduct and misdemeanors of their superiors) be put in place to prevent such reoccurrences.

Judgment

43. The decision of the Commissioner-General of UNRWA to discipline Abu Hamda for misconduct is affirmed. In light of the mitigating factors, we however find the disciplinary measure of demotion with loss of salary and transfer disproportionate to the offence. Accordingly, we set aside the disciplinary measure of demotion with loss of salary and transfer, and substitute it with a written censure. We hereby order the Commissioner-General of UNRWA to issue to Abu Hamda a written censure to be placed in his file, and that all loss of salary that Abu Hamda has suffered up to-date as a result of the demotion be refunded to him.

THE UNITED NATIONS APPEALS TRIBUNAL

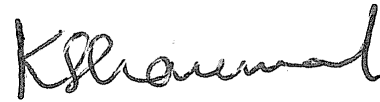
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Judge Adinyira, Presiding



Judge Courtial



Judge Garewal

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT