

Judgment No. 2022-UNAT-1194

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Counsel for

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question, he did not follow the Complainant into the corridor to hand her the signed transfer form but sent a student. However, the witnesses did not mention the student and the Appellant could not recall the name of that student. In explaining why he changed his mind regarding the enrollment, the Appellant stated he did so after one of the teachers stated it was a “humanitarian” issue as the Complainant’s son had thalassemia which accounted for his previous troublesome conduct. However, the investigators noted the Appellant could not fully

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The Commissioner -General's Answer

37. The Commissioner-General or the Agency submits that the UNRWA DT did not err as a matter of fact, law or procedure when it dismissed the Appellant's application on the merits.

Further, he contends c o 0 . 6

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55. We reject the Appellant's claim that the UNRWA DT committed an error in procedure, and we reject that the Appellant not receiving the recordings and hearing transcript affected the decision of the case. Further, the Appellant does not claim that he could not properly prepare his appeal without the audio recording or a transcript, but instead agrees in his submissions that the evidence in the record provides an adequate basis for the Appeals Tribunal to rescind the contested decision and overturn the Impugned Judgment. Therefore, this claim is without merit.

56. We agree with the Agency that the Appellant merely repeats arguments raised before the UNRWA DT and the appeals procedure is not an opportunity for a party to reargue his or her case.<sup>16</sup>

57. The UNRWA DT held that the Appellant was given the 11 April 2017 Investigative

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59. In the Impugned Judgment, the UNRWA DT made factual findings to establish the events of 35 August 2016. The findings were primarily based on its assessment of the evidence presented to it. The findings were based on the evidence presented to it, and the Tribunal found no error in the DT's findings.

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61. As a result, in reviewing the evidence and the findings of the UNRWA DT, including the unexplained retraction by the Complainant and her unexplained absence at the hearing, we find the UNRWA DT could not have found her version of events to the investigators be credible to the high evidentiary standard required. We do not discount the complaint or find that the Complainant may not have been a credible witness had she testified at the hearing and

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discharged on the evidence adduced.” This did not occur here. The UNRWA DT did not hear the Complainant’s testimony as she did not attend the hearing, dismissed her written retraction based on reasons not supported in evidence, and received Appellant’s testimony without oath or affirmation.

66. As previously established by the Appeals Tribunal in *Molari*, when termination is a possible outcome, misconduct must be established by “clear and convincing evidence” which “means that the truth of the facts asserted is highly probable.”<sup>23</sup> This imports two high evidential standards: “clear” evidence is that the evidence of misconduct must be unequivocal and manifest and “convincing” requires that this clear evidence must be persuasive to a high degree, appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance as set out in *Negussie*<sup>24</sup>.

67. But, in the present case, we find the UNRWA DT made fundamental errors of fact resulting in a manifestly unreasonable decision, namely in assessing the credibility of the Complainant’s and Appellant’s evidence and dismissing the Complainant’s retraction without supporting evidence.

68. Therefore, we find that the high evidential standards required have not been met to support the finding that there is clear and convincing evidence that establishes to a high degree of probability that the alleged misconduct had occurred.

*Due Process in the Disciplinary and Investigative Process*

69. The Appellant says that the UNRWA DT erred in fact and law when it concluded that the Appellant’s due process rights had been respected during the investigative process despite the Agency failing to procebe by <</MC (ef9 (e)-3.2 ( P)15.2 (AR)-1.6 ( a)17.9 (n)7 (d)0.9 ( th)8.9 (e)-3.2 (f)9->

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should have considered this in determining whether the Appellant's due process rights were respected in the disciplinary process.

75. In conclusion, we remand the matter to the UNRWA DT for a rehearing of the matter and additional findings of fact pursuant to Articles 3 and 4(b) of the Appeals Tribunal Statute. Given the subjective assessment of the evidence in the impugned Judgment, the rehearing should be before a different judge.

