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Case No.: UNDT/GVA/2017/095
Judgment No.: UNDT/2018/009
Date: 22 January 2018

Introduction

1. By application filed on 6 November 2017, the Applicant contests the decision to place him on administrative leave without pay (“ALWOP”), notified to him on 27 July 2017 by the Under-Secretary-General for Field Support.
2. The application was served on the Respondent, who filed his reply on 22 November 2017.

Facts

3. The Applicant is currently employed on a fixed-term contract as P-3 Logistics Officer at the United Nations Global Service Centre (“UNGSC”), Brindisi, Italy. Previously, he worked as a P-2 Supply Officer at the United Nations Operation in Ivory Coast (“UNOCI”) in Dalao, Ivory Coast.
4. While employed with UNOCI, the Applicant was the subject of an investigation in connection with allegations of misconduct. On 30 oaj 15.7189rej 51.98399353.c - 35.1

revealed that there is an audio recording of the alleged victim providing information about your alleged sexual contact, and evidence of settlement discussions that you had with the family subsequent to the alleged sexual contact. Your continued service, pending the conclusion of the disciplinary process, would create an unacceptable risk to

13. On 2 December 2017, the Respondent filed a motion requesting leave to file further submissions, which were already attached to the motion, arguing that the Applicant had, *inter alia*, impermissibly expanded the scope of the application and misstated the applicable legal standards and mischaracterized the evidence on record. Furthermore, both parties informed the Tribunal about their availability for a hearing on the merits in December 2017.

14. By Order No. 241 (GVA/2017) of 5 December 2017, the Tribunal ordered the Respondent to file contemporaneous written evidence showing that, and how, the Secretary-General made a decision that exceptional circumstances existed warranting the placement of the staff member on administrative leave without pay. The Order further convoked the parties to a hearing, which took place on 21 December 2017. The Respondent filed additional documents pursuant to Order No. 241 (GVA/2017) on 11 December 2017, placing them *ex parte*. The Tribunal decided that the documents be shared with the Applicant on an under seal status.

15. At the hearing, the Tribunal ordered the Respondent to file evidence of the Applicant's request and the Administration's approval for him to leave Brindisi, on 31 July 2017. The Respondent filed the relevant documents on the same day.

Parties' submissions

16. The Applicant's principal contentions are:

- a. The decision to place him on ALWOP is without foundation; the charges are based upon rumour and speculation and the Respondent was not able to produce any concrete evidence; there is no clear and convincing evidence that the alleged misconduct occurred; he has steadfastly denied the allegations;

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transmittable diseases and none were found; the diagnosis after the medical examination was that she had Malaria;

c. In light of the evidence, OIOS finding that there was a “reasonable
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e. The decision was made following the conclusion of an investigation report of the Office of Internal Oversight Services (“OIOS”) finding sufficient evidence that the Applicant had had sexual relations with a 16-year old Ivorian girl while serving at UNOCI; the allegations, which, if established, would constitute serious misconduct;

f. In light of the allegations and charges of serious misconduct levelled against the Applicant, the decision was reasonable and constitutes a lawful exercise of discretion on behalf of the Respondent;

g. It was taken in accordance with the applicable legal framework;

h. Exceptional circumstances existed warranting the placement of the Applicant on administrative leave *without* pay—the allegations against the Applicant are “egregious” and of a most serious nature; the most

appropriate to place a staff member on administrative leave without pay; in

administrative leave be *without* pay, but also his placement on administrative leave itself.

20. Administrative leave pending investigation and the disciplinary process is regulated by staff rule 10.4, which reads as follows:

Staff Rule 10.4

Administrative leave pending investigation and the disciplinary process

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave may continue throughout an investigation and until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.

(c) Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

21. Further, administrative instruction ST/AI/371, as amended, applicable at the time of the contested decision, provides in its section 4 that:

If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general rule, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

Administrative leave

22. The Tribunal first

avoid any reputational risk to the Organization. The Tribunal also considers

Case No. UNDT/GVA/2017/095

Judgment No. UNDT/2018/009

32. In a recent decision, the Tribunal further held that “placement on [administrative leave without pay] requires more than a reasonable

35. The Tribunal recalls that ST/AI/2017/1 was not in force at the time of the contested decision. It also notes that in an early decision, the Tribunal ruled that the nature and gravity of the findings and allegations against a staff member do not constitute, in themselves, exceptional circumstances warranting such an exceptional measure as to deprive a staff member of his salaries during administrative leave (*Calvani* UNDT/2009/092).

36. According to the Respondent, in the case at hand, exceptional circumstances warranting the placement of the Applicant on ALWOP were found to exist, namely:

- a. the fact that the allegations against the Applicant—namely that he had sexual relations with a 16-year-old Ivorian girl—were “egregious” and of a most serious nature;
- b. there were reasonable grounds to believe (probable cause) that the Applicant engaged in this misconduct, as made out by the evidence—both direct and circumstantial—resulting from the completed OIOS investigation.

37. In the absence of a legal provision stipulating otherwise, the Tribunal is concerned that in referring to the egregious character of the alleged misconduct, and a standard of proof of “probable cause”, the Administration has prejudged the Applicant’s case, at a time at which he had not yet been provided with the possibility to provide comments on the allegations levelled against him (i.e. prior to the receipt of the charge letter). Although the Administration stresses that the placement on ALWOP is not a sanction, it is the Tribunal’s view that the presumption of findingsboth000122

the misconduct occurred. Placement on ALWOP under such circumstances would however be no predetermination of the final outcome of the matter at the end of the disciplinary process.

38. In light of the foregoing, the Tribunal is concerned that in the case at hand, upon the completion of the investigation report, the quality of the available evidence and the conclusions of the investigation report are questionable and allow very weak inferences to be drawn. To the Tribunal, the evidence available at the time leaves serious doubts as to what actually occurred, and when. For example, while initially it had been reported that the Applicant had “sometime in 2015” had a sexual relationship with a 16-year old Ivorian girl, the report concluded that “a reasonable inference can be drawn that, sometime in 2014, [the Applicant] sexually abused V01, a minor” (emphasis added). The report also states that “[o]ther than V01’s complaint to her mother and to OIOS there is no physical or other evidence to corroborate the reported sexual abuse of V01”, and that although he had attended a meeting knowing that the subject of ~~the~~ Tj 4 12.-1 00011 0 Td (of)Tj 9.99597168 0 Td ()Tj 41633004

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Case No. UNDT/GVA/2017/095

Judgment No. UNDT/2018/009

administrative leave to be without pay, for the purpose of staff rule 10.4(c)64sseuTm 0 g (Pag47145 (1

Conclusion

42. In view of the foregoing, the Tribunal DECIDES:

- a. The decision of 27 July 2017 to place the Applicant on administrative leave *without pay* is