

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**V.**  
**v.**  
**FAO**

**124th Session**

**Judgment No. 3880**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. F. M. V. against the Food and Agriculture Organization of the United Nations (FAO) on 26 July 2014, the FAO's reply of 5 January 2015, the complainant's rejoinder of 14 April and the FAO's surrejoinder of 4 August 2015;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the FAO Director-General's finding of misconduct and the imposition of the disciplinary measure of suspension without pay for two weeks, and claims excessive delay in the disciplinary and internal appeal proceedings.

The complainant joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in 2005 as Programme Officer at grade P-4. At the material time he was Head of the Goma Sub-Office in the Democratic Republic of the Congo and Deputy Area Coordinator.

By a letter of 13 May 2011 the complainant was informed that WFP had decided to conduct an investigation into allegations of improper conduct on his part. Pursuant to Staff Rule 303.0.3 he was suspended with pay until 31 July 2011, pending the completion of the investigation.

The letter stated that his suspension with pay was subject to possible extensions “based on the need for further investigation or any ensuing administrative process”. Indeed his suspension was subsequently extended until 30 September.

In its report of 30 August 2011 the Office of Inspections and Investigations (OSI) recommended that WFP take appropriate administrative or disciplinary action against the complainant based on a number of charges including violating security norms by breaching the applicable curfew on some occasions, gross negligence in the discharge of his managerial duties by failing to take action regarding reports of short-deliveries and potential food diversions, and bringing WFP into disrepute both internally and vis-à-vis the international community.

By a letter of 30 September 2011 the complainant was informed that the investigation had been completed and that its findings as well as WFP’s position thereon would soon be shared with him. Meanwhile, in order to provide the Administration adequate time to review his case and to afford him due process, his suspension with pay would be extended for a further two months. His suspension was subsequently further extended.

By a memorandum of 21 February 2012 the complainant was informed that, based on the findings of the OSI investigation, his repeated violations of curfew regulations, his grossly negligent conduct and the fact that he had exposed WFP to reputational risk amounted to unsatisfactory conduct and the disciplinary measure of suspension without pay for three weeks was therefore being considered. On 11 March the complainant submitted his response, in which he denied all charges. On 29 May 2012 he was notified that his suspension with pay was lifted.

By a memorandum of 27 July 2012 the complainant was informed of the Administration’s findings that there was “sufficient evidence to conclude that [he had] violated existing security norms, policies and instructions in place in Goma at the time, by repeatedly violating curfew regulations” and that he had engaged in conduct which had exposed WFP to reputational risk. In light of these findings the Administration decided to impose the disciplinary measure of suspension without pay for two weeks, the charge of gross negligence having been set aside on account of insufficient evidence.

On 8 October the complainant lodged an appeal with the Executive Director of WFP challenging the decision to suspend him for two weeks without pay. He also objected to his prolonged suspension with pay pending the investigation of his conduct and the delay in arriving at a decision, and he requested substantial moral damages. His appeal was rejected on 6 December 2012 as unfounded.

The complainant appealed against that decision before the Appeals Committee on 29 January 2013. In its report of 12 November 2013, the Appeals Committee found that it had been appropriate for WFP to impose a disciplinary sanction on the complainant for curfew violations, but recommended that the decision to impose a disciplinary sanction for misconduct be partially set aside, as it considered that there was no clear evidence to substantiate the charge that the complainant had exposed WFP to a reputational risk. Consequently, it recommended that one week of the disciplinary suspension be cancelled, but that his claim for moral damages be rejected on the ground that he was paid during the period of suspension which started on 13 May 2011 and that the previous recommendation constituted appropriate compensation for any injury he might have suffered as a result of the delays in the process.

By a decision of 17 April 2014 the complainant was informed that the FAO's Director-General had decided to dismiss his appeal as unfounded, on the ground that there was sufficient evidence to support the findings that he had exposed WFP to a reputational risk as well as violated curfew regulations. As a result, the Director-General considered that the disciplinary measure of two weeks' suspension without pay was justified. That is the impugned decision.

The complainant asks the Tribunal to quash the decision of 17 April 2014. He claims damages for the initial period of suspension with pay from 13 May to 31 July 2011 and additional damages for its extension until 29 May 2012. He seeks damages for the excessive delay in concluding the disciplinary proceedings and for the Director-General's delay in issuing his final decision. He also claims 7,000 euros in costs for the proceedings before the Tribunal as well as for the internal appeal and disciplinary proceedings.

The FAO asks the Tribunal to dismiss the complaint in its entirety.

## CONSIDERATIONS

1. On 13 May 2011, the WFP Administration advised the complainant that he was the subject of an investigation into allegations of improper conduct and he was placed on non-disciplinary suspension with pay. On 27 July 2012, the Acting Director, Human Resources Division (HRD), informed the complainant of the Administration's conclusion that "[he had] engaged in misconduct warranting the imposition of the reduced disciplinary measure of 'Suspension without Pay for 2 weeks' in accordance with WFP/FAO HR Manual Section 330.2.2". The sanction was imposed in relation to two findings of misconduct. The Administration concluded that the complainant "violated existing security norms, policies and instructions in place in Goma at the time, by repeatedly violating curfew regulations"; and "engaged in conduct which exposed [WFP] to reputational risk, both internally and vis-à-vis the local community in Goma." The latter finding of misconduct was based on an incident that allegedly occurred in April 2008 involving a late-night fight outside a nightclub in Goma. The WFP Executive Director dismissed the complainant's appeal from the findings of misconduct, the imposition of the disciplinary measure and the non-disciplinary suspension with pay. The complainant filed an appeal with the Appeals Committee against this decision. In that appeal, the complainant also claimed excessive delay in the disciplinary process.

2. The Appeals Committee found that "violations of security norms, policies and instructions" constituted conduct that is incompatible with the standards required of an international civil servant. The Appeals Committee observed that the only issue was "whether the curfew in place in Goma at the time of the events was applicable only to [the United Nations Organization Mission in the Democratic Republic of the Congo's (MONUC)] staff, or whether it was a security rule covered by the general provisions" found in the Standards of Conduct for the International Civil Service, the UN Field Security Handbook, and successive WFP Circulars on security since 2003 and, therefore, would be binding on the complainant. Based on its review of the documentation,

the Appeals Committee was unable to find any provision stating that the MONUC curfew was binding on all UN staff members.

3. The Appeals Committee also reviewed the transcripts of the OSI's interviews with Mr T., a WFP Security Officer, and Mr M., a United Nations Department of Safety and Security (UNDSS) Security Assistant. In this regard, the Appeals Committee's report states:

*"In response to the question 'what are the measures that you took to insure that the curfews were respected (...)?', Mr [T.] – while explaining that UNDSS and the military police made patrols – stated that 'we security officers, we move (...) [a]nd if anybody around we tell them to go home, but it's no big issue'. To the question 's'il y a quelqu'un, quelques membres du staff qui ne respectent pas le couvre-feu, c'est quelque chose que vous pensez que vous devriez signaler, ou non?'"*, Mr [M.] replied, *'On n'a pas de mesures contraignantes'"*. Mr [M.] however also stated, *'[à] la limite, à la limite, peut-être ce que moi je n'ai pas fait, c'est quand par hasard je trouve que il ne respecte pas, c'est l'apporter au chef de bureau de cette agence-là. Et ça je reconnais que je l'ai pas fait'"*."

4. The Appeals Committee expressed surprised that the security officers did not seem to perceive a curfew breach as a serious matter and that curfew enforcement appeared to have been weak. The Appeals Committee concluded:

*"Nevertheless, the Committee found clear from these same statements that it was understood that the curfew was a security regulation and that it was binding, which the [complainant], being Head of the Sub-Office, and then the Deputy Area Coordinator could not ignore. The Committee also found relevant to note that the [complainant] had had regular meetings on the security situation in Goma.*

[...]

*The Committee concluded that it had been appropriate for the [WFP] to impose a disciplinary sanction upon the [complainant] for curfew violations."*

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\* Registry's translation: "If there's someone, some members of staff not respecting the curfew, is that something you think you should report?"

\*\* Registry's translation: "There are no binding measures."

\*\*\* Registry's translation: "Maybe what I didn't do, I guess, when by chance I came across someone who wasn't respecting it, was to take them to the head of the agency. I admit I didn't do that."

5. The Appeals Committee then considered the finding of misconduct in relation to the late-night fight outside a club in Goma in April 2008. The Appeals Committee concluded that “irrespective of the standard of proof used, there was clearly insufficient evidence to support this charge, and that it should therefore be set aside”.

6. In the impugned decision, the FAO Director-General endorsed the Appeals Committee’s finding of misconduct for the curfew violations but rejected its conclusion that there was insufficient evidence to support a finding of misconduct arising from the late-night fight. The Director-General stated:

“The evidence shows, however, that you acknowledged that you were involved in a late-night altercation outside of a nightclub. In your interview, you also acknowledged that, in connection with that incident, you were arrested by the police and taken to the police station and that the UN Department of Safety and Security (UNDSS) Field Security Coordination Officer came to the police station to intervene. Your admitted involvement in a dispute outside of a nightclub that resulted in you being taken to the police station and necessitated the intervention of a senior UNDSS Officer, after curfew – even if you did not engage in a physical fight – is sufficient to support the finding that your conduct created a risk to WFP’s reputation, especially in view of your senior position as Head of Sub-Office in Goma and Deputy Coordinator in Kivus and Maniema Area Office.”

7. The central issue in this case concerns the applicable standard of proof in a case of alleged misconduct. In the internal appeal, the complainant submitted that WFP had to prove the allegations of misconduct “beyond a reasonable doubt”. WFP disputed this position and contended that the standard of “beyond a reasonable doubt” was not applicable in the complainant’s case as the Tribunal has only applied this standard in cases of dismissal or demotion. WFP added that in the complainant’s case there was “sufficient evidence to conclude” that he had engaged in the alleged misconduct. The Appeals Committee did not deal with the question of the applicable standard of proof in its report nor did the FAO Director-General consider the question in the impugned decision. In its reply and surrejoinder in the present complaint, the FAO does not make any submissions regarding the applicable standard of proof.

8. It is “well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed” (Judgment 3649, under 14). It is also well established that a staff member accused of misconduct is presumed to be innocent (Judgment 2879, under 11) and is to be given the benefit of the doubt (Judgment 2849, under 16). It is observed that the FAO did not cite nor is there any support in the case law for its position before the Appeals Committee that the “beyond a reasonable doubt” standard did not apply in this case. Moreover, it conflates two distinct parts of the misconduct process: the finding of misconduct (if proven beyond a reasonable doubt) and the subsequent imposition of an appropriate sanction for the misconduct.

9. Based on a reading of the Appeals Committee’s report and the Director-General’s impugned decision, it appears that in each instance the standard of proof applied was whether there was sufficient evidence to support the finding of misconduct. Whether there is sufficient evidence to support a finding of misconduct is a far less onerous evidentiary burden than the requisite “beyond a reasonable doubt” standard of proof. The application of the incorrect standard of proof is a fundamental error of law and requires, on this ground alone, that the impugned decision be set aside.

10. However, this is not the only ground on which the impugned decision must be set aside. At this juncture, an overview of the curfews in force at the material time in Goma is useful. On 7 December 2005, in response to the October 2003 UN Secretary-General’s Bulletin on Special Measures for Protection from Sexual Exploitation and Abuse, Mr S., Special Representative of the Secretary-General at MONUC, issued an interoffice memorandum to “International civilian MONUC staff, MONUC police, MONUC military staff officers and military observers, MONUC Contractors and Consultants”. Among other measures, the memorandum established a curfew (“MONUC curfew”). Relevantly, the memorandum states:

“(a) Curfew: As before, the Area Security Co-ordinator will continue to determine the applicable curfew for considerations of safety and security.

In the absence of any or a more restrictive safety and security curfew being in force, the following revised restrictions are to be implemented with immediate effect:

- (i) MONUC Personnel Curfew: All MONUC personnel (except military members of national Contingents and members of Formed Police Units for which categories of personnel other measures are applicable) are subject to a curfew between the hours of 00h00 and 05h45 on Sundays to Thursdays, and between the hours of 02h00 and 05h45 on Fridays and Saturdays. This restriction does not apply to personnel on duty or involved in other official and/or operational activities.”

It is not disputed that the above curfew provisions were in effect throughout the material time.

11. During times of heightened security risk, the Integrated Area Security Management Team’s Crisis Management Team (CMT) promulgated restriction of movement curfews. For example, on 5 November 2009, the CMT adopted a restriction of movement at 21h00 for “UN staff members” to be imposed province wide. This curfew was lifted on 10 November 2009. There was also a third curfew in place at the material time. It is found in a document issued by the UNDSS, Democratic Republic of the Congo (DRC) entitled “Security advice for New Arrivals in North Kivu”. It states that a “curfew is in force in Goma 0:00 to 5:30 on weekdays and from 02:00 to 5:30 weekends” (“UNDSS curfew”).

12. The complainant’s main defence in response to the allegations of the curfew violations was that one of the two curfews in place in Goma at the material time, the MONUC curfew, did not apply to him. He does not deny that the “restriction on movement” curfews implemented at various times applied to him, however, he argues that there is no evidence that he ever violated this curfew.

13. The FAO submits that there was one curfew applicable to “all UN staff members” at the time the complainant was assigned to Goma. This curfew was in effect between 00h00 and 5h45 Sunday to Thursday and between 02h00 and 05h45 on Fridays and Saturdays. The FAO points to various memoranda on MONUC letterhead addressed to

“UN staff members” in support of this position. The FAO also points out that during the investigation, the UNDSS Field Coordination Officer and WFP’s Security Officer confirmed that a curfew applicable to all UN staff was in force during the complainant’s assignment in Goma.

14. Both of these positions are factually incorrect. Contrary to the complainant’s assertion, there was also the UNDSS curfew in place in Goma in addition to the two curfews he identified. According to the FAO’s submission the MONUC curfew is the same curfew that the UNDSS Field Coordination Officer identified during the investigation. However, according to the investigation report, the UNDSS Field Coordination Officer stated that the curfew in Goma was from midnight to 5h30 am during week days and from 2h00 am until 5h30 am during weekends and he forwarded a copy of the UNDSS curfew to the investigators.

15. A review of the evidence also shows significant confusion between the MONUC and the UNDSS curfews. In the Acting Director of HRD’s 21 February 2012 memorandum to the complainant informing him of the charges of misconduct, it is alleged that the complainant violated the UNDSS curfew. Similarly, in her 27 July 2012 decision she found that the complainant had violated the UNDSS curfew. However, in the Executive Director’s 6 December 2012 decision, he appears to refer to the MONUC curfew.

16. In its submissions to the Appeals Committee, the WFP Administration took the position that the complainant had breached the UNDSS curfew. However, as noted above, the Appeals Committee framed the issue in connection with the curfew violation as “whether the curfew in place in Goma at the time of the events was applicable only to MONUC staff” which, in the context of the Appeals Committee’s observations, is a clear reference to the MONUC curfew. In the impugned decision, the FAO Director-General accepted the Appeals Committee’s finding and did not specifically identify the curfew.

17. For a finding of misconduct to withstand scrutiny, each of the elements of the alleged misconduct must be proved beyond a reasonable

doubt. As a starting point, in the case of an alleged curfew violation, the organization bears the burden of proving the existence of the curfew that was allegedly violated and that the curfew applied to the staff member. In the present case, it is clear that there were three curfews in place in Goma at the material time, although one was only in force intermittently. The key issue was whether the curfew the complainant allegedly violated applied to him. The resolution of this issue is contingent on first establishing which curfew it is that the complainant allegedly breached. Given the confusion and the shifting that occurred in relation to the specific curfew allegedly breached, this was not established. Based on the evidence, there is a case to be made that the MONUC curfew did not apply to the complainant. There is also a case to be made that the UNDSS curfew did apply to the complainant. In these circumstances a finding of misconduct could not properly be made.

18. Turning to the charge that the complainant engaged in conduct which exposed WFP to reputational risk, as noted above the Appeals Committee concluded that there was clearly insufficient evidence to support the charge in connection with the late-night altercation outside a club in Goma. In reaching this conclusion, the Appeals Committee stated:

“In conclusion, the Committee could not find any testimony corroborating, or evidence substantiating, the story reported by Mr [M.]; it considered the [complainant’s] story as plausible as Mr [M.]’s story; and it underlined that, irrespective of his credibility or good faith, Mr [M.]’s own statements (i.e. that he did not know what had happened; that he does not do reports on things he has not seen, and that although he believed the police in this specific case, he sometimes finds out that incidents reported to him are not true) weakened the credibility of the story. [...] The Committee found that the investigation of this incident – entirely [...] based on hearsay – had been of poor quality. It pointed out in particular that OSI seemed not to have interviewed Mr [H.], despite the [complainant’s] request in this regard, and that it had not asked the [complainant] for Mr [D.]’s contact details. Furthermore, the Committee noted that OSI had indicated in its report that the [complainant] had ‘*admitted that the Congolese police had to intervene in a fight (...) in front of the [night club]*’, however the [complainant] specifically denied that the incident happened at the [night club].”

19. In rejecting the Appeals Committee's recommendation regarding this charge as unfounded, the Director-General stated in the impugned decision that "the Committee appears to accept your account of the altercation and conclude that, in the absence of evidence that you had engaged in a physical fight, a charge of reputational risk could not be sustained." This is a mischaracterization of the Appeals Committee's assessment of the evidence. The Appeals Committee carefully considered and weighed all the evidence in arriving at its conclusion and recommendation. Having reviewed all the evidence, the Appeals Committee's finding that there was insufficient evidence to support the charge is well founded. Moreover, in light of the contradictory accounts and evidence regarding the alleged altercation there is insufficient evidence to support the FAO Director-General's findings of fact and the finding of misconduct based on those facts.

20. Turning to the non-disciplinary suspension with pay, the complainant submits that it is an interim measure that may not exceed a reasonable limit. He also maintains that Staff Rule 303.0.3 restricts the imposition of the suspension to the investigation phase of the disciplinary process. Staff Rule 303.0.3 states that: "If a charge of misconduct is made against a staff member and the Director-General so decides, the staff member may be suspended from duty, with or without pay, pending investigation, the suspension being without prejudice to the rights of the staff member." Administrative Manual paragraph 330.3.28 states: "During the course of the above procedure (Formal Action taken pursuant to paragraph 330.3.2), the staff member may be suspended from duty pending investigation, in accordance with Staff Rule 303.0.3." Contrary to the FAO's position this does not extend the duration of a non-disciplinary suspension beyond that contemplated in Staff Rule 303.0.3, it simply provides that during the course of formal action taken pursuant to paragraph 330.3.2 a staff member may be suspended from duty during the course of an investigation during that process. As the investigation into the complainant's misconduct was concluded on 30 August 2011, under Staff Rule 303.0.3 his non-disciplinary suspension could not be extended beyond that date. The complainant is entitled to moral damages for the unlawful extension of his suspension.

21. Turning to the duration of the disciplinary process, the complainant submits that there was an unjustified delay in the disciplinary proceedings between 30 August 2011, the date of the completion of the OSI investigation, and 27 July 2012, the date on which the complainant was informed of the decision to impose a sanction for misconduct. The FAO submits that the eleven-month duration of the disciplinary proceedings was reasonable having regard to the complexity of a case involving multiple allegations of misconduct. The FAO points out that the complainant's submission of new evidence requiring a reconsideration of one of the charges contributed to the duration of the disciplinary process. As well, the complainant's request for the opportunity to review and comment on the transcript of his interviews made on 24 October 2011 and 27 November 2011 coupled with his request to review the recordings of the interviews which were all granted added to the duration of the process.

22. Although the disciplinary process itself was lengthy, given the complexity of the case, the time necessary to properly respond to the complainant's numerous requests and the time necessary to assess the evidence and to determine what charges, if any, should be made, it cannot be said that there was inordinate delay in the disciplinary proceedings. The Tribunal also concludes that there was no unreasonable delay in the internal appeal procedure.

23. In conclusion, the FAO Director-General's 17 April 2014 decision will be set aside, as will be the WFP Executive Director's decision of 6 December 2012 and the Acting Director, HRD's decision of 27 July 2012. The complainant is entitled to an award of material damages in an amount equal to the deductions made as a result of the imposition of the disciplinary measure of a two-week suspension without pay. He is also entitled to an award of moral damages in the amount of 10,000 euros and costs in the amount of 7,000 euros.

DECISION

For the above reasons,

1. The FAO Director-General's 17 April 2014 decision is set aside, as are the WFP Executive Director's decision of 6 December 2012 and the Acting Director, HRD's decision of 27 July 2012.
2. The FAO shall pay the complainant material damages in an amount equal to the deductions made as a result of the imposition of the disciplinary measure of a two-week suspension without pay.
3. The FAO shall pay the complainant moral damages in the amount of 10,000 euros.
4. The FAO shall pay the complainant costs in the amount of 7,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ