



IN THE MATTER OF:

*Y.J., Applicant*

v.

*Chairperson of the African Union Commission, Respondent*

FOR APPLICANT: *Pro se*

FOR RESPONDENT: Gloria Kankindi, Legal Officer, African Union Commission

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 19 August, 30 September, 1 October 2020

JUDGMENT

*Procedural and Factual History*

1. On 17 November 2019, Applicant, former Deputy Clerk (for Finance, Administration and Human Resources) of the Pan African Parliament (PAP), filed this application contesting the decision to dismiss him for misconduct.
2. On 4 February 2020, Respondent submitted his Answer. Applicant submitted his Observations to Respondent's Answer on 12 February 2020, together with a request that his application be considered on expedited basis.
3. During the February 2020 Session, the Tribunal granted the request for expedited consideration and on 16 March 2020, Respondent was required to submit the reports and evidence pertaining to Applicant's disciplinary proceedings. Respondent filed the required documents on 7 April 2020, which were in turn forwarded to Applicant. Applicant submitted his response on 1 May 2020. Respondent submitted his rebuttal on 25 June 2020.
4. The Tribunal believes the facts and issues have been presented adequately in the pleadings and determines this matter without the need to invite the parties for oral hearing.
5. The facts of the case are summarized as follows.
6. Applicant joined the PAP as a Deputy Clerk (for Finance, Administration and Human Resources) on 13 May 2015, after having previously served with various international organizations including the World Bank Group. In 2008, Applicant was appointed Acting Clerk of PAP, making him the top administrative, finance and human resources officer of PAP until his suspension in May 2019.
7. On 17 May 2019, the President of PAP ("President") sent a memorandum advising Applicant that he was under investigation for alleged financial and managerial misconduct, and that effective 20 May 2019, he would be placed on suspension with pay pending conclusion of the investigation within a period of not more than three months. The President explained that these actions were in accordance with the findings of the African Union Board of External Auditors (BOEA) and the Committee for Audit and Public Accounts (CAPA).

8. On 21 May 2019, Applicant wrote back to the President, rejecting the suspension and asking him to rescind it. This memorandum was copied to the Chairperson, the Deputy Chairperson and other officials of the African Union Commission and PAP.
9. In apparent reaction to Applicant's letter, on 13 June 2019, Respondent's Counsel issued an opinion letter addressed to the Chairperson, which stated "the suspension of [Applicant] by the President of PAP is in violation of the [Fin. Rule 38.4] and [Staff rule 58(iv)] abuse of power and recommendation (d) of CAPA Report. Additionally [,] based on the general principles of natural law, the suspension of the [Applicant] by the President was not done in good faith." However, the opinion letter ultimately advised the Chairperson "not to reverse the suspension of [Applicant] as the issue at hand is related to financial matters."
10. There is no evidence in the record whether the Chairperson took any action in relation to the matter, and the investigation against Applicant by the Office of Internal Audit (OIA/PAP) proceeded to conclusion. On 7 August 2019, the head of Administration and Human Resources (AHR) served Applicant with the investigation report and asked him to reply within five (5) calendar days.
11. In lieu of addressing the investigation report, Applicant, through counsel, sent a letter on 13 August 2020 again claiming that his suspension was unlawful, as conceded by the Office of Legal Counsel, and protesting that the investigation was conducted in unlawful manner. On 19 August 2020, PAP responded by rejecting these claims.
12. On 19 August 2019, the Head of AHR served Applicant with a statement of charges and asked him to file his reply within twenty (20) working days. The charges against Applicant were: (a) negligence or omission to perform duties causing financial loss; (b) fraud, dishonesty, forgery, misappropriation or misuse of official funds; (c) misrepresentation or false certification in connection with any claim; (d) misuse of office and/or abuse of authority; (e) allocation and use of an asset of the Union for personal purposes; (f) unlawful transportation of Union cash; (g) disobedience to lawful and reasonable orders; (h) refusal to carry out lawful instructions; (i) willfully or negligently exposing others to psychological or physical danger, injury or torture; (j) negligence or omission to perform duties causing damage to the Union's property or reputation; and (k) neglect of duty exposing the institution to legal risk.
13. Applicant did not submit a reply as invited.
14. By a separate memorandum dated 19 August 2020, the President notified Applicant that his suspension under Staff rule 61.3(j) had been extended by sixty (60) days effective 20 August 2019 in order to allow the disciplinary proceedings to conclude. The President explained sufficient grounds existed for Applicant's continued suspension throughout the misconduct proceedings.
15. On 19 September 2019, the secretary of the disciplinary board sent Applicant a notice informing him that his disciplinary hearing has been scheduled for 4 to 6 October 2019. In the same memorandum, Applicant was notified of the composition of a five-member (voting) disciplinary board chaired by the President of the African Court on Human and Peoples' Rights (ACHPR) and included two members representing the Staff Union.
16. Applicant, through counsel, confirmed to PAP on 20 September 2019 that he planned to appear before the disciplinary board, despite his view that the process was a "witch-hunt mainly intended to smear him and destroy his career, and to divert attention away from the more serious offenses of abuse of power and sexual harassment [by the President]." Applicant also identified several supposed flaws in the investigation conducted against him. In the same correspondence, he sought access to his office from 1 to 3 October 2019 in order to prepare his defense. Upon request, Applicant was allowed access to his office for a day prior to the scheduled hearings.
17. Applicant's disciplinary hearings were conducted over a period of three days, 4-6 October 2019, wherein Applicant appeared with his legal counsel. The board heard the testimony of multiple witnesses, and in a report issued on 8 October 2019, the disciplinary board found Applicant guilty on all but the charge of willful or negligent exposure of others to psychological or physical danger, injury or torture. The board recommended the sanction of immediate dismissal and the recovery of sums of money misappropriated by Applicant by way of deducting the same from his terminal entitlements.
18. On 15 October 2019, PAP's Bureau considered and adopted the recommendations of the disciplinary board. On 18 October 2019, the President notified Applicant of his immediate dismissal for gross misconduct, and that he must reimburse PAP the misappropriated sum of \$51,767.08.

19. On 22 October 2019, Applicant wrote to the President and PAP Bureau seeking reconsideration of the decision to dismiss him for misconduct. He dispatched a similar request to the Chairperson. Neither request was granted. This application followed.
20. In addition to the rescission of his dismissal and clearing of the charges from his personnel record, Applicant prays for reinstatement in his former or commensurate post; the charges of misconduct to be struck out as unfounded; the release of the recording of the disciplinary proceedings and the board's report; payment of damages and costs, including attorney's fees; and further and/or alternative relief.
21. In his reply, Respondent maintains that Applicant failed to demonstrate specific breaches of the Staff Regulations and Rules in the course of disciplining him. Respondent argues that his suspension and subsequent investigation was lawful in light of the President's authority under Staff rule 61.3(j). Contrary to Applicant's contentions, the disciplinary board was impaneled in accordance with Staff rule 57.1. To the extent there were irregularities in the process, the irregularities were not substantial enough to vitiate the entire proceedings. Respondent asks the Tribunal to dismiss Applicant's claims.
22. In his Observations to Respondent's Answer, Applicant submits that Respondent failed to address the irregularities in the disciplinary proceedings in his Answer, where two of his direct reports were allowed to sit as members of the disciplinary board and the President of ACHPR improperly chaired the proceedings. He also claimed that he was improperly kept on suspension longer than permitted under Staff rule 60. Applicant further pointed out that Counsel for Respondent had, in her memorandum of 13 June 2019, conceded that his suspension and investigation was unlawful.
23. On 1 May 2020, Applicant submitted supplemental arguments and evidence, followed by Respondent's replying submissions of 25 June 2020.

#### *Discussion*

24. In a disciplinary case, the Tribunal's role is to determine if: (a) the disciplinary proceedings were conducted in accordance with principles of due process; (b) whether the factual basis for the alleged act(s) of misconduct had been properly established, and (c) whether the sanction imposed is proportionate to the misconduct.<sup>1</sup> The Organization bears the burden of proving the alleged misconduct(s) by a preponderance of the evidence.<sup>2</sup> Where the charged misconduct is potentially sanctionable by dismissal, the quantum of proof is heightened to clear and convincing evidence.<sup>3</sup>
25. Applicant bases his complaints on procedural and substantive challenges both in relation to the predicate investigation and the disciplinary proceedings that followed. As a preliminary contention, Applicant asserts that his suspension under Staff rule 61.3(j) and the investigation process were in retaliation of his testimony against the President in a separate process, which considered charges of sexual assault against the President. The Tribunal considered Counsel for Respondent's own opinion that Applicant's suspension and investigation were "not done in good faith," and represented "an abuse of power," and "done in ill-faith." Additionally, upon careful review of the record, the President appears to have engaged in, authorized or otherwise tolerated many of the irregularities uncovered against Applicant and some of these practices may have been widespread at PAP.<sup>4</sup> However, the Tribunal must remind Applicant that even where other staff members may have been involved in similar conduct, it does not relieve him of his own responsibilities under the regulations and rules of the Union.
26. Accordingly, while the Tribunal accepts Applicant's contention that the investigation against him was motivated, in part, by the President's apparent personal animus, the Tribunal does not agree that this alone would vitiate the entire disciplinary proceedings. The record before the Tribunal contains audit reports and an Executive Council decision recommending investigation followed by appropriate measures.<sup>5</sup> The CAPA report, for instance, identified multiple acts of financial mismanagement in Applicant's office. In the circumstances, his investigation was otherwise justified under those audit recommendations and the Executive Council decision independent of the President's own motivations. Therefore, the Tribunal rejects Applicant's claim that his investigation was fatally tainted.

---

<sup>1</sup> See, *Nadasan*, 2019-UNAT-918; *Hua Du*, Decision No. 101 (ADBAT, 2013); *B.M.*, Judgment No. 133 (AfDBAT, 2020)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Given his seniority and responsibilities as the top administrative, financial and human resources officer of PAP, the Tribunal is not terribly troubled if Applicant has in fact been prioritized for discipline over similar malfeasants.

<sup>5</sup> EX.CL.Dec 1031(February 2019) in which the Executive Council requested the African Union Commission to take "disciplinary and legal actions against the persons responsible for illegal payments including allowance, as per AU Financial Rules and Regulations and AU Staff Regulations and Rules."

27. In relation to the composition of the disciplinary board, Applicant complains that the President of ACHPR, being an elected official, could not properly sit in disciplinary proceedings much less chair. The Tribunal does not accept this contention. Staff rule 57.1 does not make any distinction between “elected officials” or “staff members” in their ability to sit in a disciplinary board. Applicant has not shown any concrete basis against the President of ACHPR’s membership in the board. Certainly, it is the Tribunal’s position that the ACHPR President’s membership, following consultations with the Staff Union, in all likelihood enhanced the independence and impartiality of the disciplinary board.
28. Similarly, with respect to Applicant’s objection to the two staff members below his own salary grade, the Tribunal concurs that their inclusion in the disciplinary board does not literally comport with Staff rule 57.1. However, this alone, without more, is not a sufficient ground to nullify the proceedings. Applicant has not demonstrated, other than objecting to their membership on account of their status as his direct reports, that either member’s independence or impartiality was tainted by personal bias against him.
29. Applicant complains that his suspension with pay was unlawfully extended beyond the three months permitted under Staff rule 61.3(j). In the second suspension memorandum, dated 19 August 2019, the President explained in detail the reasons for the extension. Given the nature, seriousness and extent of the misconducts involved, the Tribunal finds that the two-month extension was not unwarranted under the circumstances.
30. Applicant’s final procedural contention is that Respondent did not provide him with all the documents presented to the disciplinary board until after the hearings had commenced, thereby infringing his due process rights. Respondent explains that the bundle which was shared with him on the day of the hearing was only an organized form of documents already in the possession of Applicant. The Tribunal considered that Applicant was provided with the investigation report and a 66-page statement of charges several weeks prior to the commencement of the disciplinary hearings. Applicant was also allowed access to his office at PAP to enable him prepare his defense. In consequence, the Tribunal finds Applicant’s claims of procedural prejudice to be unfounded.
31. Next, the Tribunal considers the factual contentions raised by Applicant in relation to the ten charges of misconduct that he was found guilty of. The Tribunal has carefully reviewed the disciplinary board’s abbreviated and full reports, and the documentary, testimonial and recorded evidence relied upon by the disciplinary board.
32. Significant to the Tribunal’s consideration of the issue of whether the Organization met its burden of proof are Applicant’s own admissions in respect to the following: (a) procuring accommodation and transportation services without following established procurement rules during official travel to Mauritania in June 2018, and similar violations during an official travel to Dakar in June 2018, as well as to Abidjan in November 2016, (b) indebtedness to PAP in the amount of \$6,000 due to an overpayment to Applicant after an official travel to Mauritania in June 2018; (c) purchasing wheeled bags using Union funds and failing to ensure their entry into PAP’s asset registry; (d) failing to account for \$14,000 in imprest advance provided to Applicant in respect to travels to Senegal and Gambia in February 2018; (e) issuing a fraudulent letter of appointment and cover letter in January 2019 to enable a seconded personnel from the Kingdom of Morocco to inappropriately obtain an African Union diplomatic travel document; (f) transporting Union cash on multiple occasions in excess of the established limit of \$10,000; (g) violating the terms of his suspension under Staff rule 61.3(j) by accessing PAP premises and refusing to hand over to an officer appointed to carry out his functions during the suspension; and (h) binding the Union in legal agreements without appropriate clearance or authorization during official travels to Banjul and Dakar in April 2018, Abidjan in November 2016, Nouakchott in June 2018, and Abuja in March/April 2019.
33. The Tribunal notes that these admissions were made during open disciplinary hearings where Applicant was represented by counsel and the admissions were not countervailed in Applicant’s pleadings before the Tribunal. In light of the admissions to multiple acts of misconduct, the Tribunal does not find it necessary to address each factual contention pressed by Applicant as it is clear that the ten charges of which Applicant was found guilty would be sufficiently sustained on the strength of his own admissions alone.
34. Additionally, the Tribunal has thoroughly reviewed the minutes of the disciplinary proceedings, the board’s very detailed reports, and the documentary evidence contained in the disciplinary dossier and finds no fault in the board’s assessment of the evidence against Applicant. Therefore, given Applicant’s admission that he repeatedly flouted procurement, financial and other rules of the Union, and substantial documentary and testimonial evidence presented against him, the Tribunal finds that the Organization met its burden of proof.
35. Turning to the issue of proportionality, the disciplinary board properly considered that Applicant’s misconducts, extended over a period of two years, were carried out in a “systematic and widespread” manner. In weighing the appropriateness of dismissal, the board properly considered Applicant’s professional training and qualifications, his seniority and administrative and financial responsibilities, which undoubtedly required a heightened level of trust, integrity and probity.

Finally, given the extent of the violations, the board properly considered that no extenuating circumstances existed. In the circumstances, the Tribunal finds no reason to disturb the President's adoption of the board's recommended sanction of dismissal. The sanction of dismissal was not disproportionate.

36. Applicant claims and the Tribunal notes that PAP is currently withholding Applicant's separation entitlements. PAP shall release these entitlements without delay after deducting, under Staff rule 61.3(d), monies established to be owed to PAP under the disciplinary board's findings.

***Order***

37. Accordingly, the Tribunal DENIES the application.

Date: 13 October 2020

*/signed/*

---

SYLVESTER MAINGA, PRESIDENT  
JAMILA B. SEDQI  
PAULO D. COMOANE

Secretary: \_\_\_\_\_

*Paulo D. Comoane*