

Report of Possible Misconduct

Subject: Mr. Ben Swanson (Director, OIOS/ID) and others
Reference: UNDT judgement in *Nouinou* (UNDT/2018/070)
Complainant: Mr. Peter A Gallo, *Attorney on behalf of several (anonymous) UN staff members*
Date: 22 August 2018

This is a Third Party report of possible misconduct predicated on the findings of fact in UNDT judgement *Nouinou -v- Secretary-General (UNDT/2018/070)* issued on 26 June 2018.

Subjects

The primary party directly implicated in the specific Abuses of Authority indicated in *Nouinou*, contrary to ST/SGB/2008/5 is:

1. **Mr. Benjamin Gordon Robert Swanson**, Investigations Director, OIOS/ID.

Mr. Swanson cannot have perpetrated his unlawful actions and misrepresented the facts surrounding the attempt to end the staff member's career without the co-operation of the OIOS Executive Office, and his malfeasance with regard to withholding evidence from the Tribunal involved collusion with the Administrative Law Section.

The indirect assistance of a number of others who were complicit by aiding and abetting the commission of the misconduct. These are:

2. **Ms. Heidi Mendoza**, Under-Secretary-General, OIOS;
3. other parties currently unknown in OIOS;
4. **Mr. Alan Gutman**, Legal Officer, Administrative Law Section; x
5. **Mr. Alister Cumming**, Legal Officer, Administrative Law Section, and possibly
6. other parties currently unknown in the Administrative Law Section,

The Secretary-General was represented in *Nouinou* by Legal Officer Mr. Alan Gutman of the Law Section who bears responsibility for the failure to comply with UNDT Order No. 33 (NY/2017). In addition to his obligations under the UN Staff Regulations and Rules, the Statute of the UNDT and the Code of Conduct for legal counsel in the UN, Mr. Gutman is a Member of the California Bar, and is subject to their rules under UNDT Practice Direction No.2 on Legal Representation, Para 8 for failing to comply with the Order.

Mr. Gutman was assisted in his role as Counsel for the Respondent by Legal Officer Mr. Alister

Cumming, also of the Administrative Law Section.

Evidence

The evidence of this unethical and unlawful use of his position by Mr. Swanson and others to improperly influence the career of UN staff member Ms. Fatimazohra Nouinou is contained in UNDT judgement *Nouinou* and in all the uncontested pleadings of fact in that case.

Abuse of Authority

Abuse of Authority is defined in Section 1.4 of that bulletin as

“the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion.”

Guided by ST/SGB/2008/5 and General Assembly Resolution 64/259, the test for “abuse of authority” was described by Judge Deschamps in the course of her enquiry into the Child Sex Abuse scandal in the Central African Republic in 2015 at page 49, when she considered that two criteria had to be met:

- (1) there had to have been an ***improper or wrongful use of the individual’s position of authority***. That is established in the Nouinou judgement; Mr. Swanson violated Ms. Nouinou’s right to enjoy the protection conferred upon her by her contracts of employment and by the Staff Regulations and Rules.
- (2) the expression “***against another person***” requires that the position of authority has been used in a detrimental way. Mr. Swanson’s actions were clearly detrimental to Ms. Nouinou’s career and her mental health, he made those decisions and were taken in bad faith and with a detrimental intent.

This was clearly not simply an error of judgement or an innocent mistake.

- Mr. Swanson decided to abolish Ms. Nouinou’s post in June 2016, then withheld the information that he had done so. She only found out that this had been done on 7 September 2016 (para 121) because she applied to go on a Russian language course. (para 18)
- Mr. Swanson claimed that Ms. Nouinou’s post had to be cancelled in September 2016 because there was no money in the OIA account, but her post had not been funded from that account since November 2014. Mr. Swanson’s explanation for the abolition of Ms. Nouinou’s post was therefore deceptive. (Para 165)
- Mr. Swanson also failed to comply with the terms of Order No. 33 (NY/2017) in deliberately withholding financial information about that account after 30 December 2016; which is indicative of bad faith.

- Mr. Swanson treated Ms. Nouinou differently from another OIOS/ID staff member whose post was also originally funded from the OIA account. He also recruited an external candidate with no previous experience in OIOS – in preference to Ms. Nouinou who was qualified for the post.

There is evidence to indicate that the unlawful actions taken against Ms. Nouinou are attributable to ongoing culture in OIOS/ID that has been recognized as constituting a hostile working environment, and has been known as such to the Department of Management, for a period of ten years.

Aggravating Factors

Judge Deschamps also noted on page 50 that “*any finding of abuse of authority will also depend on the nature and severity of the improper use of power and of the impact on the affected persons or entities.*” The unlawful decision to abolish her post clearly had a very serious impact on Ms. Nouinou. She was on certified sick leave for approximately one year and the moral harm she suffered resulted in an award of financial compensation.

What is of more concern is that the official primarily responsible for the moral harm suffered by Ms. Nouinou was the Director of Investigations.

The integrity of the investigation of all misconduct in the United Nations relies on OIOS upholding UN Staff Regulations and Rules in accordance with *the highest standards of efficiency competence and integrity.* It is therefore particularly important that the Director of Investigations be held accountable for decisions made in the execution of his mandate.¹

The General Assembly has defined “accountability” as “*the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception*”²

The reason that this particular case cannot be overlooked was expounded in *Wasserstrom (Order 19 (NY/2010))* at para 25 when the Tribunal stated, with almost prophetic clarity:

“Retaliation against a staff member for the performance of his or her duty by another staff member is a violation of the retaliator’s fundamental obligations towards the Organization and constitutes an abuse of power requiring a stern response if the integrity of the Organization is to be maintained. As is true of almost all wrongdoing, the most effective deterrent is the assurance or, at least, the fear that it will be found out and dealt with. Unless staff members subjected to retaliatory action or the threat of it can be confident that their reports will be adequately and competently investigated and considered, it is most unlikely that those reports will be made. This applies also to staff members who are aware of other possible misconduct and fear the consequences of reporting it. Retaliation is difficult to prove, but this makes it all the more important that investigations are thorough and the Ethics Office, independent of all

1 Report of the Deschamps Independent Review. Para 2, page 49

2 A/RES/64/259, 29 March 2010, “Towards an Accountability System in the United Nations Secretariat” Para. 8

*the protagonists, ensures that its decisions are properly based. **The knowledge of the investigators that their work will be examined by an independent and critical eye will encourage thoroughness, fairness and accuracy. It will also give to staff members who fear retaliation or have suffered it, confidence that they will be protected or the situation made good and give malefactors good reason to fear that they will be found out.***” [Emphasis added]

This is clearly one such situation. The credibility of OIOS and the integrity of all investigations carried out by OIOS is at stake here. The credibility of all their investigations into Sexual Exploitation and Abuse in peacekeeping environments, as well as into complaints of sexual harassment made by women in the Organization is at stake.

Continued Hostile Working Environment in OIOS/ID

The current complaint again focuses attention on the Organization’s manifest failure to address a hostile working environment that exists in OIOS/ID and has been known to the Department of Management for a period of ten years.

Mr. Swanson has denied that this hostile working environment still subsists, but his assurances cannot be considered credible in light of the UNDT’s findings in *Nouinou*.

The cause of this hostile working environment must be related to the management of OIOS/ID over that period. There is a history of senior officials in OIOS/ID committing serious acts of misconduct but never being held accountable for those actions.

There is also a history of many of these same individuals being responsible for negligence and mismanagement in the investigation of misconduct, the result of which has been that the Organization has been forced to incur significant financial costs in settling UNDT cases predicated on flawed investigative work. The Administrative Law Section is no stranger to covering up such negligence to spare embarrassment to OIOS.

In return, actions have been taken by OIOS that raise reasonable grounds to believe that certain investigations into senior officials of the Organization have been delayed or otherwise sabotaged in order to protect the subjects from being held accountable for their misconduct. The implication is the dictionary definition of corruption.

Failure by the USG/OIOS to hold senior officials of OIOS/ID accountable for misconduct

There is ample evidence in the public domain of Ms. Mendoza failing to hold senior managers of OIOS/ID accountable for their wrongdoing:

- 1) It is understood that Ms. Mendoza failed to take appropriate action on complaints by Ms. Nouinou when she made misconduct complaints against OIOS/ID Deputy Director James Finniss and the current Director OIOS/ID Mr. Swanson, both of whom are alleged to have then

taken retaliatory action against her. (*Nouinou*. Para 12)

- 2) Ms. Mendoza failed to take any management action against OIOS/ID Deputy Director Michael Dudley and then Section Chief Suzette Schultz (since promoted to Deputy Director) following the publication of UNDT judgements in *Nguyen-Kropp & Postica* (UNDT/2013/176) in which the facts were never disputed and which showed systematic misconduct and retaliation by senior officials of OIOS/ID.
- 3) Ms. Mendoza failed to take appropriate disciplinary action on a complaint by OIOS/ID Staff Member Mr. Yves Nadeau on 6 November 2016, when he reported possible misconduct by two senior OIOS officials, Deputy Director Michael Dudley (*supra*) and Unit Chief Mr. Vlad Dzuro for openly and publicly disparaging a judge of the UN Dispute Tribunal.
- 4) Ms. Mendoza failed to take appropriate disciplinary action on a complaint by OIOS/ID Staff Member Ulf Kirchner on 9 October 2017, when he reported possible misconduct by Deputy Director James Finniss for a violation of ST/SGB/2008/5.

Investigation

The investigations of complaints of Abuse of Authority under ST/SGB/2008/5 are handled by a fact-finding panel, with the option, of course, of having the matter investigated by OIOS/ID as the Secretary-General has directed should be done in the case of complaints of sexual harassment.

Investigation by OIOS is patently not feasible here. Given Mr. Swanson's seniority and the sensitivity of his position as Investigations Director, it is reasonable to assume his superiors (*namely Assistant Secretary General David Kanja and Under-Secretary-General Heidi Mendoza*) either knew or should have known that such conduct was unlawful, abusive and should trigger accountability. They failed to take appropriate action.

For this reason, the matter is being brought to the attention of the Sixth Committee and the IAAC.
