



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2024-UNAT-1494/Corr.1

Zafarkhon Sheralov

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

Judgment

Before: Judge Gao Xiaoli, Presiding
Judge Kanwaldeep Sandhu
Judge Abdelmohsen Sheha

Case No.: 2023-1879

Date of Decision: 25 October 2024

Date of Publication: 5 December 2024

Registrar: Juliet E. Johnson

Counsel for Appellant: Viacheslav Mysak

Counsel for Respondent: Francisca Lagos Pola & Agnieszka Martin

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Zafarkhon Sheralov (Mr. Sheralov), a former staff member of the United Nations Department for Safety and Security (UNDSS), appeals Judgment No. UNDT/2023/116 (impugned Judgment), in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed his application.¹
2. In his application before the UNDT, Mr. Sheralov had challenged the disciplinary decision of separation from service with compensation in lieu of notice and with termination indemnity (contested decision). Mr. Sheralov was disciplined for assaulting an unarmed security guard near the Social Centre inside the compound of United Nations Assistance Mission in Afghanistan (UNAMA) in Kabul, Afghanistan.² The UNDT upheld the contested decision.
3. For the reasons set out herein, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

4. Mr. Sheralov joined the Organization in 2002, and prior to his separation on 21 October 2022, he was serving as a Security Coordination Officer at the P-4 level with UNDSS within the United Nations Integrated Security Workforce – Afghanistan in Kabul.
5. On 17 April 2020, at 00:20 in the morning, an unarmed guard (the Complainant) employed by the IDG security company which provides security services to UNAMA on a contractual basis, stated that Mr. Sheralov approached his security post in the UNAMA compound, near the Social Centre, and struck him for no reason.
6. More specifically, the Complainant stated that Mr. Sheralov came within 10 meters of him, and then beckoned him to come closer. The Complainant answered by saying “Corona, two meters”, due to the Covid-19 social distancing guidelines. Nonetheless, Mr. Sheralov advanced towards the Complainant, grabbed his UN ID card, damaging it in the process, and then raised his

¹ *Sheralov v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/116 (31 October 2023).

² The compound is also referred to as the UNOCA Compound because it is named after the United Nations Regional Office for Central Africa (UNOCA), even though that entity is based in Libreville, Gabon.

right hand and struck the Complainant with an open palm on the left side of his head.³ Mr. Sheralov then entered the security booth.

7. The Complainant radioed the IDG Team Leader on duty, Mr. A.S., and reported Mr. Sheralov's actions. Mr. A.S. reported the issue to Mr. S.S., the Shift Supervisor for the UNAMA Guard Force Unit (GFU).

8. Mr. A.S. confirmed that the Complainant told him that he had been struck by Mr. Sheralov, and Mr. A.S. then called Mr. Sheralov on the landline inside the security booth. Mr. A.S. stated that Mr. Sheralov introduced himself as being "Zafar" and that he was a "terrorist".

9. For his own part, Mr. Sheralov called Mr. S.B., his supervisor and the Chief of Operations, Integrated Security Workforce, UNDSS. Mr. S.B. stated that Mr. Sheralov had talked incoherently of an "exercise" as well as referring to a "terrorist attack".⁴

10. Mr. A.S. and Mr. S.S. arrived at the scene, and they reported that the Complainant said Mr. Sheralov attacked him. Mr. S.S. said that Mr. Sheralov told them that he was a Mujahedeen and that he was the commander of an "exercise". Mr. S.S. called Mr. W.P. of the GFU to come to the scene as well.⁵

11. Mr. W.P. and Mr. G.D., Deputy Chief, GFU, arrived at the security booth. Mr. W.P. stated that Mr. Sheralov was clearly displaying behaviour of someone under the influence of alcohol or narcotics. Mr. W.P. took a short video clip of Mr. Sheralov's condition on his mobile phone.⁶

12. Mr. W.P. and Mr. G.D. stated that Mr. Sheralov explained that he was conducting a training exercise and testing the operational tactical responses of the security guards. Mr. W.P. and Mr. G.D. asked Mr. Sheralov to return to his accommodation, but he spoke to them at length with stories about his career at different duty stations, and only went back to his accommodation at 02:00 am.⁷

³ Allegations Memorandum, para. 8.

⁴ Sanction Letter, para. 4(f).

⁵ *Ibid.*, para. 4(c).

⁶ Impugned Judgment, para. 57.

⁷ Sanction Letter, paras. 4(d) and (e).

13. The next morning, Mr. G.D. sent an e-mail to the Chief of the GFU, stating the following: “we had a drunk problem last night with Zafar he actually hit one of our brownshirt and pushed our blue shirt supervisor. Me and [W.P.] got there at 0020 and calmed him down after 30 minutes of him being aggressive. [Chief] this incident must go to [the Principal Security Advisor (PSA)] he cannot go around hitting national guards.”⁸

14. The Chief of the GFU reported the incident to the PSA, who subsequently directed the Special Investigations Unit (SIU) of UNAMA to prepare a preliminary fact-finding report.⁹

15. The SIU interviewed seven persons, including the Complainant, Mr. Sheralov, and Messrs. A.S., S.S., S.B., W.P., and G.D., who had been involved in the incident.

16. For his part, Mr. Sheralov stated that around 22:00-23:00, he had gone to the Social Centre to order some food for takeaway and had two beers while waiting for his food. He said that while walking past the nearby security post, he observed the Complainant sleeping and that he smelled hashish in the security booth. He stated that he woke up the Complainant, yelling that he should not be sleeping, and that the Complainant started to curse him in Farsi. He said he spoke to the Complainant’s supervisor (Mr. A.S.) and told him that the Complainant had been sleeping. He also said he called Mr. S.B. and told him that the Complainant had been sleeping, and that as a joke, he said he was conducting an “exercise”. Mr. Sheralov stated that he then started demonstrating some martial arts moves in front of the Complainant, but that there was no actual physical contact of any kind. Mr. Sheralov stated that only Mr. G.D. came on the scene, and after speaking briefly, Mr. Sheralov left five minutes later for his accommodation. Later, Mr. Sheralov returned to the security post and brought the Complainant some drinks, to show him that there were no hard feelings.¹⁰

17. On 30 April 2020, the SIU transmitted their investigation report to the Chief Security Officer, UNAMA. The report concluded, in relevant part:¹¹

The investigation concluded that the [*sic*] neither of the contradicting accounts provided by Mr. Sheralov and [the Complainant] could be conclusively verified through witness testimonies, as no direct witnesses were reportedly present in the area during the subject interaction.

⁸ 17 April 2020 e-mail, re: FW: 16-04-2020_Night Shift-Team D Security HO report.

⁹ Impugned Judgment, para. 5.

¹⁰ Investigation Report, Annex “B-6”, Statement of Mr. Zafarkhon Sheralov.

¹¹ Investigation Report, REF: SIU/KAB/047/20, Section 6 (Conclusions).

(...) It was also concluded that during the night in question, Mr. Sheralov did not report to any of the GFU response personnel or anyone else that he found [the Complainant] sleeping on duty or that he smelled hashish in his security boot (...) The fact that Mr. Sheralov did not report any of that to GFU response personnel (...) gives reason to question the veracity of his allegations that he found the guard sleeping and smelled hashish in his security booth.

The investigation concluded by invalidating Mr. Sheralov's testimony that he ordered and collected a meal for takeaway from the nearby Social Centre just before he engaged in interaction with [the Complainant] (...) because it was confirmed that the cut-off time for meal orders in the Social Centre was 21:15 hrs. ...

...

The investigation disproved the testimony of Mr. Sheralov that Mr. [G.D.] was the only Guard Force Unit personnel who arrived at [the security post] (...)

...

Mr. Sheralov's testimony that upon the arrival of GFU Officer Mr. [G.D.] at the scene the two of them briefly conversed for some 5 minutes (...) was disproved by several GFU response personnel, who reported that Mr. Sheralov was not cooperative, did not comply with [instructions] (...) and eventually left the scene but only after some 45 minutes.

...

The investigation concluded that, even though there were no witnesses to the subject interaction between Mr. Sheralov and [the Complainant] there were no findings to refute the allegation of [the Complainant] that he was physically assaulted by Mr. Sheralov. Also, the account of [the Complainant] was consistent with the testimonies of GFU response personnel and the reporting timeline of the incident.

The investigation concluded that there was no evidence found to support the allegation of Mr. Sheralov that he found [the Complainant] sleeping on duty and that [the Complainant] then fabricated the assault allegation against him, in order to deflect the attention from that issue. Therefore, these allegations of Mr. Sheralov were not substantiated.

18. On 3 May 2020, the Chief Security Advisor for UNAMA informed the PSA that he concurred with the findings and conclusions of the SIU investigation report.

19. On 5 May 2020, the PSA informed the Integrated Conduct and Discipline Unit (ICDU) of the complaint against Mr. Sheralov and provided a copy of the SIU investigation report.

20. ICDU referred the matter to the Investigations Division of the Office of Internal Oversight Services (OIOS).

21. After an initial assessment, OIOS considered that the matter would be best handled by UNAMA and referred the matter to the responsible official for appropriate action, in accordance with Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).¹²

22. The responsible official, the Head of UNAMA, requested ICDU to review the SIU investigation report. ICDU staff noted that the SIU had not informed Mr. Sheralov of his right to have an observer present during his interview. ICDU asked the SIU to advise him of the right and to retake his statement if necessary. ICDU provided a revised statement from Mr. Sheralov, with a waiver of his right to have an observer present, on 18 November 2020.¹³

23. On 18 December 2020, the Head of UNAMA sent a Code Cable to the Assistant Secretary-General (ASG), Department of Management Strategy, Policy and Compliance (DMSPC), referring the allegations of misconduct against Mr. Sheralov.

24. The Code Cable concluded, in relevant part:¹⁴

Having reviewed all the available evidence, I am confident that the allegation does not necessarily lack support in terms of corroboration, given the description of events, the consistency of the statements provided by the [C]omplainant and the multiple GFU personnel who arrived at the scene shortly after, the video recorded by the International supervisor of the GFU while at the scene, the destroyed strap of the [C]omplainant's UN ID card, all provide clear and convincing proof that the subject had physically assaulted or attempted to assault the [C]omplainant. Based on the totality of the evidence adduced, I find the allegation of assault to be credible and substantiated by clear and convincing evidence.

25. By memorandum dated 28 February 2022 (Allegations Memorandum), the Office of Human Resources (OHR) informed Mr. Sheralov of the allegations of misconduct on account of him having physically assaulted [the Complainant].¹⁵

26. On 12 April 2022, Mr. Sheralov submitted his comments on the Allegations Memorandum.

¹² Impugned Judgment, para. 11.

¹³ *Ibid.*, paras. 12-13.

¹⁴ 18 December 2020 Code Cable, Re: UNAMA-20200505-153 (ID Case No. 0521/20) – Allegation of Possible Misconduct implicating a United Nations Department of Safety and Security (UNDSS) staff member in Afghanistan [UNAMA], para. 4.

¹⁵ Impugned Judgment, para. 15.

27. On 19 October 2022, the Under-Secretary-General, DMSPC (USG/DMSPC) informed Mr. Sheralov that she had concluded that it had been “established by clear and convincing evidence that on 17 April 2020, at around 00:20, Mr. Sheralov physically assaulted [the Complainant], an unarmed IDG security guard, by striking him on the face with his hand, near the Social Centre inside the UNOCA compound”.¹⁶

28. Mr. Sheralov was found to have committed serious misconduct as he violated Staff Regulations 1.2(a), (b) and (f), and Staff Rule 1.2(f).¹⁷

29. The USG/DMSPC reviewed the Organization’s past practice with respect to disciplinary measures imposed for physical assault of security personnel. The USG/DMSPC considered as aggravating factors that the assault of the Complainant occurred while the Complainant was performing his duties, that Mr. Sheralov refused to comply with instructions of responding security personnel, and that as a security officer himself, Mr. Sheralov had an increased obligation to protect United Nations personnel from harm.¹⁸

30. The USG/DMSPC also considered as mitigating factors that Mr. Sheralov had over twenty years of service in the Organization, including in hardship duty stations, with positive performance evaluations. In addition, because the Complainant moved his head, Mr. Sheralov’s strike was not particularly strong, and the Complainant did not require medical attention afterwards.¹⁹

31. In light of these considerations, the USG/DMSPC imposed the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.²⁰

Dispute Tribunal proceedings

32. On 28 October 2022, Mr. Sheralov filed an application challenging the contested decision with the Dispute Tribunal.

33. At a Case Management Discussion (CMD), Mr. Sheralov was asked whether he disputed the facts and whether he wished to have an oral hearing. Although he disputed the facts underlying the contested decision, Mr. Sheralov’s counsel advised that Mr. Sheralov was ready to proceed

¹⁶ Sanction Letter, Annex, para. 3.

¹⁷ *Ibid.*, para. 10.

¹⁸ *Ibid.*, paras. 19-20.

¹⁹ *Ibid.*, para. 21.

²⁰ *Ibid.*, para. 23.

without a hearing and indicated that he did not have any witnesses to call. In addition, his counsel stated that Mr. Sheralov's only request was to supplement the written record with additional documents. Having heard from the parties and reviewed the evidence on record, the UNDT found that an oral hearing on the merits would not add further value to its assessment of the matter.²¹ The UNDT invited the parties to make their closing submissions in writing.

34. In the impugned Judgment, the UNDT first examined whether the facts on which the disciplinary measure was based had been established to the clear and convincing evidence standard. Those facts were: "on 17 April 2020, at around [0.20] [a.m.], [Mr. Sheralov] physically assaulted (...) an unarmed IDG security guard, by striking him on the face with his hand, near the Social Centre inside the "UNOCA" compound."²²

35. The UNDT acknowledged that Mr. Sheralov disputed these facts, and that he alleged this was a story fabricated by the Complainant to cover up the fact that the Complainant had been sleeping on duty and smelled like hashish. Mr. Sheralov also contends that there were no eyewitnesses to the alleged physical assault and no CCTV camera record of the incident.

36. The UNDT recognized that there were no eyewitnesses or video recording of the incident, and as such, a determination of whether the physical assault occurred depended on the credibility of Mr. Sheralov and the witnesses who provided statements to the SIU in the investigation report.²³

37. After considering the totality of the evidence, the UNDT found the Complainant's evidence credible. Specifically, the UNDT observed that Mr. A.S. and Mr. S.S. corroborated that the Complainant had told them both that he had been attacked by Mr. Sheralov, and when they arrived at the scene, they took a photograph of the Complainant's broken UN ID card case, which corroborated the Complainant's account.²⁴

38. The UNDT also found that Mr. Sheralov's contemporaneous behaviour of bringing soft drinks to the Complainant at 4 a.m. had the appearance of an apology to the Complainant, rather than, as he claimed, that he wanted to show that there were "no hard feelings".²⁵

²¹ *Sheralov v. Secretary-General of the United Nations*, Order No. 125 (GVA/2023), paras. 9-11.

²² Impugned Judgment, para. 43.

²³ *Ibid.*, paras. 44 and 46.

²⁴ *Ibid.*, paras. 51-52.

²⁵ *Ibid.*, para. 54.

39. The UNDT credited the other witnesses' statements about Mr. Sheralov's incoherent statements about conducting an "exercise" and his physical instability, which was also captured on video after the fact.²⁶

40. The UNDT did not find consequential the alleged discrepancy about whether Mr. Sheralov struck the Complainant's face or head.²⁷ Mr. Sheralov alleged that the Complainant's hat should have fallen off if indeed he had hit him; but the UNDT noted that the Complainant wore a beanie that would not appear to fall easily, and in any event, the Complainant stated that he moved his head a bit so that he was not struck as hard as he might have been otherwise.²⁸

41. The UNDT found the Complainant's testimony "coherent, credible and reliable" and that there was no inconsistency to undermine it.²⁹

42. Turning to Mr. Sheralov's credibility, the UNDT noted that his account was not consistent with other evidence in the record. For example, his story that he had gone to the Social Centre to pick up food was rebutted by the fact that the Social Centre kitchen had closed at this time. Moreover, the CCTV screenshots of individuals going into and out of the Social Centre did not show Mr. Sheralov.³⁰

43. The UNDT also noted discrepancies between Mr. Sheralov's initial interview before the SIU, and the comments he submitted to OHR, regarding whom of them (if any) had initiated a conversation about martial arts and doing a demonstration of some moves.³¹

44. With regard to Mr. Sheralov's claim that the Complainant fabricated the assault to cover up that he had been sleeping on duty and smelling like hashish, and that the IDG and GFU officers colluded to cover this up, the UNDT found that there was no evidence to support this.³²

45. The UNDT noted that Mr. Sheralov did not make this allegation until the afternoon following the incident, and that he did not say this to any of the witnesses who arrived on the scene in the early morning of 17 April 2020. Moreover, the IDG guards and the GFU officers, having arrived one after another in rapid succession, did not have time to fabricate a story to implicate

²⁶ *Ibid.*, paras. 56-57.

²⁷ *Ibid.*, paras. 59-60.

²⁸ *Ibid.*, para. 63.

²⁹ *Ibid.*, para. 64.

³⁰ *Ibid.*, para. 67.

³¹ *Ibid.*, para. 70.

³² *Ibid.*, para. 74.

Mr. Sheralov. There also was no motive for the Complainant to fabricate this allegation, as he had never met Mr. Sheralov. The UNDT thus rejected this theory and found that it undermined Mr. Sheralov's credibility.³³

46. The UNDT concluded that the Complainant's testimony was coherent and corroborated by several witnesses' testimonies, whereas Mr. Sheralov's evidence lacked credibility and reliability. Accordingly, the UNDT was satisfied that the Administration had established the facts by clear and convincing evidence.³⁴

47. The UNDT noted that it was uncontested by Mr. Sheralov that if established, physically assaulting another person, constitutes serious misconduct. He was found to have violated Staff Regulation 1.2(a), (b), and (f), and Staff Rule 1.2(f).³⁵

48. The UNDT concluded that in imposing the disciplinary measure of separation from service, the Administration had carefully considered the nature and gravity of the conduct in question, the past practice of the Organization in comparable cases, as well as mitigating and aggravating factors. Moreover, Mr. Sheralov did not contest the proportionality of the sanction if the physical assault was proven.³⁶

49. The UNDT rejected Mr. Sheralov's claim that he was not properly informed that he was the subject of an investigation because this was clearly stated at the beginning of his SIU interview.³⁷

50. In relation to the fact that he did not have an observer at the interview, the UNDT noted that the text of Section 6.10(a) of ST/AI/2017/1, read literally, places the burden on the staff member to make such a request. In any event, a supplemental statement signed by Mr. Sheralov waived the right to the observer.³⁸

51. The UNDT rejected Mr. Sheralov's claim that his allegation that the Complainant had been sleeping or had smoked hashish had not been adequately investigated. The UNDT said

³³ *Ibid.*, paras. 76-77.

³⁴ *Ibid.*, paras. 79-80.

³⁵ *Ibid.*, paras. 83 and 86.

³⁶ *Ibid.*, paras. 90-91.

³⁷ *Ibid.*, para. 106.

³⁸ *Ibid.*, paras. 107 - 108.

these allegations only came up the following afternoon and there were insufficient grounds to investigate it.³⁹

52. The UNDT found no merit to Mr. Sheralov's contention that the SIU relied only on synopses of interviews of the IDG and GFU personnel, finding that the record also contained e-mail correspondence, photographs, sketch plans, and screenshots of the video clip, all of which was provided to Mr. Sheralov.

53. The UNDT also found that Mr. Sheralov's allegation that he had been denied CCTV footage by the Administration was without merit. The UNDT reviewed the photographs of the exterior of the security post in question and saw no evidence that there was a camera installed nearby and accordingly, CCTV footage did not exist.

54. In sum, the UNDT concluded that Mr. Sheralov failed to substantiate any procedural irregularities, or how they could have negatively impacted his case.⁴⁰

55. On 23 December 2023, Mr. Sheralov filed an appeal of the impugned Judgment with the Appeals Tribunal. The Secretary-General submitted his answer on 8 March 2024.

Submissions

Mr. Sheralov's Appeal

56. Mr. Sheralov requests that the Appeals Tribunal rescind the contested decision and order his reinstatement with the Organization and award moral damages. In the alternative, he prays that the Appeals Tribunal rescind the contested decision and replace the disciplinary measure with a milder measure, and to also award him moral damages due to the impacts on his health and well-being.

57. Mr. Sheralov argues that the UNDT erred on a question of procedure and on evaluation of evidence, resulting in a manifestly unreasonable decision.

58. Mr. Sheralov submits that the UNDT did not answer whether the SIU was the appropriate authority to investigate his case and whether this was a violation of his due process rights.

³⁹ *Ibid.*, para. 109.

⁴⁰ *Ibid.*, para. 115.

59. Mr. Sheralov claims that for the UNDT to decide between two conflicting versions of events and with contradictory testimonial evidence, the UNDT should have considered the conflict-of-interest issues and credibility of the persons concerned, namely, himself with 22 years of service in the Organization and contracted IDG security guards.

60. Mr. Sheralov submits that the allegations against him were not established to the clear and convincing evidence standard. He points out that the investigation report states that there were no witnesses when the incident occurred, and that neither of the contradicting accounts could be conclusively verified through witness testimonies as there were no direct witnesses. There was also no CCTV record of the alleged physical assault.

61. Mr. Sheralov submits that none of the witness statements in the investigation report stated that he had engaged in a physical altercation with the Complainant.

62. Mr. Sheralov claims that the investigation relied only on synopses of interviews, and these witnesses were protecting their own staff and their respective interests. He alleges that the story of the assault was fabricated by the Complainant to cover up that he was sleeping and smelled of hashish. As a security officer with supervisory roles and responsibilities, Mr. Sheralov states that he had a responsibility to wake him up and make sure he executed his duties properly.

63. Mr. Sheralov alleges that if he had actually assaulted the Complainant then the GFU personnel would have arrived immediately, rather than calling him on the landline in the security booth.

64. Mr. Sheralov submits that it was not in the interest of the IDG and GFU personnel to look into whether the Complainant was sleeping or smelling of hashish in the security booth, because this would reflect negatively on them. Mr. Sheralov further contends that the SIU violated his due process rights by not investigating this.

65. Mr. Sheralov avers that he was not informed in writing or verbally prior to the start of the interview that he was the subject of an investigation. If he had been, he would have requested a face-to-face meeting with the IDG and GFU personnel who arrived at the scene to “clarify (...) what had transpired in reality”.

66. Mr. Sheralov argues that the GFU is in control of CCTV footage and that they “probably intentionally had not provided CCTV recordings” of the area around the security booth. There was no explanation why there was no footage.

67. Mr. Sheralov contends that he did not learn until nearly two years after the incident that he was the subject of allegations of misconduct when he received the Allegations Memorandum from OHR. He also alleges that he was not informed of the name of the investigator in writing before the beginning of the interview. Mr. Sheralov submits that this was in violation of Section 6.10 of ST/AI/2017/1.

68. Mr. Sheralov submits that the UNDT was misguided in not recognizing that pursuant to ST/AI/2017/1, OIOS should have been notified before the preliminary investigation was undertaken by the SIU. Violating this procedure, the SIU investigation report was first submitted to ICDU and then to OIOS.

69. Mr. Sheralov also avers that the Head of UNAMA is not the “responsible official” as that term is used in Section 2.1 of ST/AI/2017/1. Mr. Sheralov was a staff member of UNDSS and the Department of Field Support did not administer him, and he was not in a peacekeeping mission or special political mission. Considering these facts, the Head of UNAMA could not be the “responsible official” for the purpose of this Administrative Instruction, and this was a significant procedural irregularity that violated his due process rights.

70. Mr. Sheralov submits that in violation of Section 6.4 of ST/AI/2017/1, the responsible official should have appointed an investigative panel, and appointed staff of UNDSS at a higher level than himself to that panel. Instead, only the SIU was involved in the handling of Mr. Sheralov’s case. The Administration failed to respond to his request for reasons regarding the variation from the panel composition.

71. Mr. Sheralov submits that pursuant to the United Nations Secretariat Safety and Security Integration Project (UNSS SIP) document on “Transitioning to Secretariat Appointments, Disciplinary Process & Appeals in the UN Common System” a report on potential misconduct should have been made to the Under-Secretary-General for UNDSS, and then OIOS should have assessed the report and determined who would conduct the investigation. Instead in his case, the SIU conducted a preliminary investigation, which was submitted to ICDU. The investigation

should have been initiated by the Head of UNDSS or OIOS, not the SIU. This violated his due process rights.

72. Mr. Sheralov submits that pursuant to Section 5.3 of ST/AI/2017/1, the responsible official should have forwarded the information on unsatisfactory conduct to OIOS, and OIOS would have determined how to handle the matter. Instead, violating this procedure, a preliminary investigation was undertaken by the SIU before OIOS had determined what to do with his case. This was a substantial procedural irregularity.

73. Mr. Sheralov also claims that it was a violation of Section 6.1 of ST/AI/2017/1 that the investigator did not pursue all lines of inquiry, namely that the investigator did not pursue his allegation that the Complainant was asleep and under the influence of drugs. This shows that the investigation was one-sided and persecuted Mr. Sheralov.

74. Mr. Sheralov avers that there was a substantial procedural irregularity in the investigation because there was no involvement of the UNDSS Executive Office or UNDSS HR Conduct and Discipline Office.

75. Mr. Sheralov submits that there was no breach of trust in the relationship between him and the Organization after these events. The complaint was made in April 2020, and on 15 June 2022, he was appointed to a more senior position as UNDSS Area Security Advisor for the Central Region – Afghanistan. From this point until he was sent the Allegations Memorandum, the GFU from the UNAMA compound reported to him.

76. Mr. Sheralov requests that the UNAT review the case and find that there was not sufficient evidence to support the finding that the incident occurred as described by the Complainant. The UNDT should have examined whether there was clear and convincing evidence to support that he used physical force against the Complainant.

77. Mr. Sheralov submits that since there were doubts about whether he assaulted the Complainant, the UNDT should have carefully examined whether the imposed sanction was proportionate. Mr. Sheralov requests that the UNAT reverse the impugned Judgment and remand the case to the UNDT for adjudication.

The Secretary-General's Answer

78. The Secretary-General submits that the UNDT correctly determined that the imposed disciplinary sanction was lawful and requests the UNAT to dismiss the appeal.

79. The Secretary-General avers that there was clear and convincing evidence that Mr. Sheralov physically assaulted the Complainant. The Complainant's testimony was corroborated by five witnesses' testimonies, the video recorded right after the fact which showed Mr. Sheralov's physical instability, most probably due to alcohol consumption, and his incoherent comments. Mr. Sheralov's account was uncorroborated and was in conflict with the evidence of other witnesses.

80. The Secretary-General submits that the UNDT correctly found that the established facts constituted misconduct.

81. The Secretary-General submits that the UNDT rightly found that separation from service in cases of physical assault was consistent with the past practice of the Organization. The Secretary-General also points out that the Appeals Tribunal has upheld the imposition of separation from service in such cases, as in *Ali Halidou*.⁴¹

82. The Secretary-General avers that with regard to Mr. Sheralov's due process rights, the Appeals Tribunal has held that during the preliminary investigation stage, only limited due process rights apply, and during the investigation, the subject needs to be informed of the allegations and given an opportunity to respond.⁴² Moreover, the Appeals Tribunal has held that the essential question of procedural fairness is whether the staff member is fully informed of the charges, knows the identity of his accusers and their testimony, and is able to mount a defence and call into question their statements.⁴³

83. The Secretary-General points out that Mr. Sheralov was informed of the launch of the investigation on 17 April 2020, he was interviewed by the SIU ten days later, and on 18 November 2020 he was provided with the written record of his interview and invited to make any corrections. The record of the SIU interview makes clear that he was told that he was considered the "alleged offender" in connection with a physical assault at 00:20 on

⁴¹ *Ali Halidou v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1070, para. 28.

⁴² *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295, para. 24.

⁴³ *Andry Adriantseheno v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1146/Corr. 1, para. 57.

17 April 2020. He was also informed of the name of the investigator, which appears in the record of the interview.

84. The Secretary-General further submits that on 28 February 2022, Mr. Sheralov was formally notified of the misconduct allegations in the Allegations Memorandum, and with the assistance of counsel he commented on them. All comments were considered by the USG/DMSPC in the contested decision. Based on the foregoing, the UNDT correctly concluded that Mr. Sheralov's due process rights had been respected.

85. The Secretary-General submits that there is no merit to Mr. Sheralov's complaints about the investigation. OIOS is not the only entity that can conduct investigations, they can also be referred to the responsible official, who can appoint an investigative panel or refer to another investigative entity. Here, the SIU was the investigating entity that conducted the investigation.

86. The Secretary-General submits that the fact that the SIU investigation took place before OIOS had referred the matter back to UNAMA did not mean that his due process rights were not respected. During the SIU investigation he was informed of the allegations, he was given an opportunity to provide his statement, and to review and amend his statement. In any event, even if the UNAT were to conclude that the timing of the SIU investigation was a procedural irregularity, the disciplinary measure should remain, because under UNAT jurisprudence, only substantial procedural irregularities will render a disciplinary measure unlawful.⁴⁴

87. The Secretary-General claims that all documents that were required to be disclosed to Mr. Sheralov pursuant to ST/AI/2017/1 were disclosed. The Secretary-General states that it is unclear what other documents Mr. Sheralov wanted.

88. The Secretary-General submits that Mr. Sheralov is misguided in thinking that he should have been investigated by an investigative panel composed of staff members of the same or higher rank than his. Under Section 6.3 of ST/AI/2017/1, the responsible official had a choice of whether to appoint an investigative panel or use an investigative entity other OIOS. Here, the responsible official had the SIU investigate, thus the provisions about the composition of the investigative panel do not apply to Mr. Sheralov's case.

⁴⁴ *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 79.

89. The Secretary-General avers that there is no provision in ST/AI/2017/1 that requires a UNDSS staff member to have been a part of the investigation into Mr. Sheralov's misconduct. While Mr. Sheralov was a UNDSS staff member, he was assigned to UNAMA and fell under the authority of UNAMA. The incident also occurred in the UNAMA compound in Afghanistan and was perpetrated against an unarmed security guard that worked for IDG which reported to UNAMA.

90. The Secretary-General submits that Mr. Sheralov's argument that the head of UNAMA could not have been the designated "responsible official" also fails. There is no provision of ST/AI/2017/1 which provides that OIOS had to refer the matter to the Under-Secretary-General for UNDSS instead of UNAMA. Mr. Sheralov was assigned to UNAMA, a special political mission, and therefore fell under the authority of the Head of UNAMA. OIOS duly considered, after consultation with UNDSS, that the matter would be best handled by UNAMA and referred it to the Special Representative of the Secretary-General (SRSG) of UNAMA. This did not violate the procedure set out in Section 5.1 of ST/AI/2017/1.

91. The Secretary-General rejects Mr. Sheralov's reliance on certain UNSS-SIP Guidelines, a document issued in 2018 when all UNDSS staff were transitioned into appointments with the Secretariat. This document is a guidance document, and not a duly issued administrative instruction like ST/AI/2017/1.

92. The Secretary-General submits that the UNDT did consider why the Complainant was not investigated for allegedly sleeping on the job and smelling like hashish.⁴⁵ Regardless, whether the Complainant was investigated or not, this was irrelevant to the contested decision, which relates to the allegations of physical assault against Mr. Sheralov. The burden to prove bias or irregularity in the investigation lies with Mr. Sheralov, and he did not adduce any such evidence.

93. The Secretary-General avers that the UNDT duly considered the credibility and reliability of both the Complainant and Mr. Sheralov. In this case, all the written witness statements corroborated the Complainant's account and not Mr. Sheralov's account, which was inconsistent.

⁴⁵ Impugned Judgment, para. 109.

94. The Secretary-General submits that the fact that Mr. Sheralov had long service with the Organization, and the Complainant was a contractual employee, does not impact the credibility or reliability of their respective testimonies.

95. The Secretary-General contends that the UNDT did consider Mr. Sheralov's argument that there was a conflict of interest and found that there was none.⁴⁶ The SIU reasonably interviewed the GFU and IDG personnel who were at the scene, the investigators also spoke to Mr. Sheralov's supervisor in UNDSS, Mr. S.B. (who was not supportive of his account), and other individuals could have been interviewed, but Mr. Sheralov proposed no one else.

96. The Secretary-General counters that contrary to Mr. Sheralov's claim, the UNDT did consider his allegation that the GFU deliberately withheld CCTV video of the incident and dismissed it as speculative.⁴⁷

97. The Secretary-General submits that the UNDT did not fail to consider the absence of an eyewitness or a video recording at the time of the assault. Because these did not exist, the UNDT considered the other evidence in the record and the credibility and reliability of Mr. Sheralov's and the Complainant's evidence.⁴⁸ The Appeals Tribunal has affirmed that clear and convincing evidence can be evidential inferences properly drawn from other direct evidence.

98. The Secretary-General submits that there was direct evidence from the Complainant, which was supported by the four witnesses that were present or called in the aftermath of the incident. Mr. Sheralov's account denying the assault was uncorroborated and in conflict with the evidence of other witnesses, as well as the video of Mr. Sheralov after the incident and the photographs of the entry and exit from the Social Centre. Mr. Sheralov also gave inconsistent testimony, stating at first that he had two beers at the Social Centre, and then later denying having drunk alcohol. Accordingly, his testimony is unreliable.

99. For all of the foregoing reasons, the Secretary-General requests that the UNAT dismiss the appeal and affirm the impugned Judgment.

⁴⁶ *Ibid.*, paras. 113-114.

⁴⁷ *Ibid.*

⁴⁸ *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

Considerations

Request for an oral hearing

100. On appeal, Mr. Sheralov requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules).

101. Specifically, Article 8(3) of the Statute provides: “The judges assigned to a case will determine whether to hold oral proceedings.”

102. Article 18(1) of the Rules stipulates: “The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case.”

103. Pursuant to the above provisions, it lies within the prerogative of the Judges assigned to a case to decide whether to hold oral proceedings.⁴⁹ As this Tribunal has stressed before, it is only before the court of first instance that oral hearings form a common part of the proceedings while the Appeals Tribunal will hold hearings only under exceptional circumstances. In the present case, there is no need for, or added value to, further clarification as the factual and legal issues arising from this appeal have been clearly defined by the parties.⁵⁰

104. Therefore, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”. Mr. Sheralov’s request for an oral hearing is denied.

105. When reviewing an appeal, the role of the UNAT is not to re-decide the case that was before the UNDT using the same tests. Rather, our task is to determine whether the UNDT did not apply the correct tests and whether the Dispute Tribunal could reasonably have reached the decisions it did about what happened.⁵¹

106. In disciplinary cases, our jurisprudence requires that the UNDT shall examine the following: i) whether the facts on which the disciplinary measure is based have been established, where termination is a possible sanction, the facts must be established by clear

⁴⁹ *Jenbere v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-935, para. 23.

⁵⁰ *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 30.

⁵¹ *Sisay Negussie* Judgment, *op. cit.*, para. 48.

and convincing evidence; ii) whether the established facts amount to misconduct under the applicable legal framework; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.⁵²

Were the facts on which the disciplinary measure was based established to the clear and convincing evidence standard?

107. Mr. Sheralov submits that the allegations against him were not established by clear and convincing evidence. He claims that there was no evidence to prove that he physically assaulted the Complainant. To be specific, he claims that the UNDT failed to consider the absence of eyewitness or video recording at the time of the assault.⁵³

108. We consider that this argument has no merit. In fact, the Administration and the UNDT did note that no direct witnesses were present in the area during the incident and no recording was available of the incident in question as there was no surveillance camera around the security post. However, it does not mean that the fact could not be established to the standard of clear and convincing evidence.

109. We recall that our jurisprudence has consistently held that clear and convincing evidence of misconduct imports two high evidential standards. The first ("clear") is that the evidence of misconduct must be unequivocal and manifest. And the second standard ("convincing") requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be evidential inferences that can be properly drawn from other direct evidence.⁵⁴

110. When the only persons involved are the perpetrator and the victim and there is no third-party witness, typically seen in sexual assault and harassment cases and as in the present case of physical assault, credibility findings with regard to the two parties involved are essential to the trial judge's conclusion on the facts. In this context, judges often face two conflicting versions of events, and in order to come to a reasoned conclusion on the disputed facts, they

⁵² *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 48; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15.

⁵³ Appeal brief, pages 3-4, and 10.

⁵⁴ *Sisay Negussie* Judgment, *op. cit.*, para. 45.

must satisfy themselves on the credibility and reliability of persons concerned and provide cogent reasons for those findings.⁵⁵

111. In such cases, an oral hearing of witnesses may be quite useful for reaching these determinations. While Article 16(2) of the Dispute Tribunal Rules of Procedure provides that the UNDT will *normally* hold an oral hearing in disciplinary cases, it is not mandatory and it falls to the Dispute Tribunal Judge's discretion to determine, after hearing from the parties including on whether they seek to call or have called any witness, whether an oral hearing is required.

112. In the disciplinary process, an investigation report prepared will contain largely hearsay evidence as it contains evidence not tendered by a witness at the proceedings before the UNDT but reported on by an investigator. The UNDT, as the first instance tribunal, may consider it inadmissible, or it may give it less weight than direct evidence given by a witness before the UNDT as the first instance tribunal. What weight will be given to the investigation report and whether an oral hearing will be ordered will depend on the circumstances of the case and on an assessment of the totality of evidence. This includes whether there exist material factual disputes on key issues; any admissions made by the accused staff member; whether independent and directly material corroborating evidence such as audio, video or documentary evidence exists; whether significant due process violations have occurred during the investigation that have impacted the outcome; and the severity of the sanction imposed. Thus, while hearsay evidence has its intrinsic limitations and drawbacks by virtue of its nature, it nevertheless can be admissible and relied upon in appropriate circumstances as long as the Dispute Tribunal Judge understands those limitations and ensures that it is considered with caution.⁵⁶

113. However, as we discussed in *AAK*, "in seeking to overturn in its entirety the UNDT's Judgment" Mr. Sheralov "faces an obstacle for which he must be held responsible in significant part".⁵⁷ In the present case, Mr. Sheralov, represented by counsel, agreed during the case management process that he had no direct evidence to present in an oral hearing and encouraged the Dispute Tribunal to rely on the investigation report and written material before it to decide the issues before it (including his complete denial of a physical assault against the Complainant). He did not request an oral hearing to contest or cross-examine relevant witnesses or to provide his

⁵⁵ *AAE Judgment, op. cit.*, paras. 103-104.

⁵⁶ *Humphreys Timothy Shumba v. Secretary-General of the United Nations*, Judgment No 2023-UNAT-1384, para. 74.

⁵⁷ *AAK v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1348, para. 69.

own evidence of the incident in question. The Respondent agreed with this approach. Accordingly, as in *AAK*, the Dispute Tribunal had little alternative but to decide the issues and assess credibility based on the investigation report and written material including whether the facts underlying the misconduct have been established through clear and convincing evidence including the question of whether Mr. Sheralov committed the physical assault. We further note that on appeal, Mr. Sheralov has not raised as an error of law or fact that there was no hearing of witnesses.

114. Given the parties' agreement that the UNDT would consider Mr. Sheralov's application based on the written record, the UNDT Judge completed a careful examination of all the witnesses' statements and other evidence in reaching its findings. Contrary to Mr. Sheralov's claims that the UNDT did not consider conflict of interest issues and the credibility of Mr. Sheralov and the Complainant,⁵⁸ the UNDT did consider both things.

115. According to the record of the Complainant's statement under Oath, which was "I solemnly declare upon my honor and conscience that I will speak the truth, the whole truth and nothing but the truth", the following events transpired:⁵⁹

Around 00:20 hrs (...) one international male person (...) came from the Transport Workshop side. (...) he gestured to me with his hand to come closer to him. I approached him, but I stopped at some 2 m distance from him, as the social distancing measures were in effect due to Covid-19. (...) He had harsh facial expression and appeared angry. (...) I showed number 2 with my fingers and said to him: '*Corrona, 2 meters*'. (...)

[T]he man advanced towards me quickly, grabbed my UNID card strip by his left hand and while holding it, raised his right hand and with open palm hit me on the left side of the head. I managed to move my head a little when the blow came, so his blow grazed the back of my head, hitting me less than he intended. (...)

After this hit, I managed to pull away from his attack and I ran towards the security boot. The man came after me, but he was walking slowly. (...) [H]e did not appear to be stable on his feet. I (...) stopped behind the boot (...) he entered the boot. (...)

I immediately called my IDG Team Leader on duty Mr. [A.S.] by radio (...)

Then maybe 3-4 minutes later, IDG TL Mr. [A.S.] and GFU TL Mr. [S.S.] arrived with vehicle (...) Mr. [S.S.] called GFU international officer by mobile. (...) [T]he man inside the boot stood up and (...) in confrontational manner (...) told [Mr. S.S.] *I am Security*

⁵⁸ Appeal Brief, page 1.

⁵⁹ Investigation Report, Annex "B-1", Statement of [Complainant].

Officer and I am conducting an exercise.' (...) Two international GFU officers, Mr. [G.D.] and Mr. [W.P.], arrived some 5-10 minutes later. (...)

Some 5 minutes later, IDG TL Mr. [A.S.] sent me to another post at the south gate. (...)

The hit that I earlier received did not hurt me much and I did not need or asked for medical attention. However, this experience was very stressful.

116. Although Mr. A.S. did not witness the event, he received a phone call from the Complainant almost immediately after the incident describing the assault. We note that reports of such spontaneous statements made by a person who is still under stress from a startling event are exceptions to the rule against hearsay and considered likely to be trustworthy because they are unlikely to be premeditated. The record of the statement of Mr. A.S., also under Oath as a witness during the SIU investigation, corroborated the Complainant's account. Mr. A.S. reported that:⁶⁰

Around 00:20 hrs, I received a radio call from IDG guard [Complainant], who was stationed at the Security Post QS 1.1, near Social Centre in UNOCA compound. He told me over the radio that one man attacked him at his post. I told him to stay near the post and that I was coming.

(...)

I informed my supervisor Mr. [S.S.], who was UNAMA GFU Team Leader for the shift, about what transpired to that point. Then two of us boarded UNAMA GFU vehicle at the South gate and drove to the Security Post QS 1.1.

(...)

Mr. [S.S.] then called GFU international staff and reported what was happening. Shortly after that, GFU officers Mr. [G.D.] and Mr. [W.P.] arrived to the scene on foot. Before they arrived, Mr. [Sheralov] ... told Mr. [S.S.] '*This is exercise*'.

(...)

My observation of Mr. [Sheralov] was that he was unstable on his feet and may have been drunk.

⁶⁰ *Ibid.*, Annex "B-3", Statement of Mr. [A.S.].

117. The record of the witness statement of Mr. S.S., also under Oath, corroborated the statement of Mr. A.S. that:⁶¹

Around 00:20 hrs, I received a call on my DECT phone from IDG Team Leader Mr. [A.S.]. He told me that there was a situation at the Security Post QS 11 near Social Centre, where one drunk international male staff attacked IDG guard manning that post. As we were both at the South gate at that time, Mr. [A.S.] and I then boarded a vehicle and drove to the QS 11 post.

(...)

(...) I asked the international staff what happened. He said only ‘*Exercise*’. I asked him what exercise (...) He said: ‘*I am the commander of the exercise*’. He did not explain any further. Also, as I noticed that this man appeared drunk, because (...) he was unstable on his feet. Also, those few words he said to me, we[re] said in slurred and unclear speech.

I then called GFU officer Mr. [W.P.] and reported to him what was happening. (...)

When the two international GFU officers, Mr. [G.D.] and Mr. [W.P.], arrived some 5 minutes later, they took over the situation and spoke to the international man. (...) I did not see this man physically advancing or threatening towards anyone. However, he was all ex[c]ited and appeared upset, repeating that it was exercises and he was the commander of that exercise.

I noted that Mr. [G.D.] repeatedly asked this man to leave and go to his accommodation, but he did not comply and kept complaining and questioning (...)

118. The record of the sworn witness statements of Mr. W.P. and Mr. G.D., who arrived together at the scene shortly after the incident, also confirmed that when questioned, Mr. Sheralov provided incoherent responses, and that he claimed he was testing the operational tactical response of the national guards in some kind of “exercise”.⁶² They were informed by the others already there that Mr. Sheralov had attacked the Complainant and were shown his ID badge that was reportedly damaged in the assault. They both stated that Mr. Sheralov was disoriented and/or appeared under the influence of an unknown controlled or other substance. Mr. W.P. made a video of the scene, which was introduced into the record.⁶³

⁶¹ *Ibid.*, Annex “B-2”, Statement of Mr. [S.S.].

⁶² *Ibid.*, Annex “B-4”, Statement of Mr. [G.D.] and Annex “B-5”, Statement of Mr. [W.P.].

⁶³ Video clip submitted with the answer.

119. By contrast, Mr. Sheralov provided quite a different story to the SIU investigators twelve days later, on 28 April 2020. He claimed that:⁶⁴

On 16 April 2020, in the evening (...) it was late maybe 22:00-23:00 hrs. (...) I went to the Social Centre, where I ordered some food for takeaway. I waited for some time for the food to be prepared, collected it and walked out of the Social Centre heading to my accommodation that was nearby.

As I was walking past the security boot in front of the Social Centre, I observed that IDG security guard [Complainant] manning that post was sitting in the chair inside the Security boot and sleeping. (...) As I came at the door, I smelled hashish inside the boot. Then I woke up security guard and told him '(...) you should not sleeping.' Then the guard told me in Farsi (...) something like 'Fuck you. (...)'. (...) There was no physical contact of any kind between us, neither from my side or his.

I continued talking to this IDG guard, as I speak Farsi, telling him how important it was for him to be alert, asking about his background and about martial arts. As we spoke about martial arts, I assumed attack position (...) mimicking delivering controlled punches (...) It was just a mimic, no actual contact. (...)

Then some 15 minutes after I woke up this guard and while still talking to him, Mr. [G.D.] ...came to the post. I do not know who called him and for what. He is the only one who came from GFU, no one else.

(...)

I had two beers before this incident.

(...)

(...) immediately after I went to my accommodation [] I took some soft drinks and brought them to the IDG guard whom I caught sleeping earlier. I wanted to show him that there were no hard feelings and that's why I did that. (...)

120. As the UNDT correctly found, the credibility of Mr. Sheralov was undermined by the fact that "the cut off time or the last call to order food in Social Centre is 9:15 PM seven days a week".⁶⁵ And the CCTV screenshots of all individuals entering and exiting the Social Centre between 20:00 and 2:00 hrs on 17 April 2020 did not show Mr. Sheralov had appeared there.

⁶⁴ Investigation Report, Annex "B-6", Statement of Mr. Zafarkhon Sheralov.

⁶⁵ *Ibid.*, Annex "F", Email exchange with the Social Centre Manager.

This is the first discrepancy between Mr. Sheralov's statement to the SIU and other evidence in the record.

121. According to the record of the sworn witness statement of Mr. S.B., he confirmed what Mr. W.P. and Mr. G.D. heard from Mr. Sheralov. Mr. S.B. reported that he received a telephone call from Mr. Sheralov at 00:25, and he was speaking about conducting an "exercise" but was otherwise mumbling and did not mention any incident. Only the following afternoon, at 15:50 on 17 April, when Mr. S.B. met Mr. Sheralov, did Mr. Sheralov say that he had an invitation inside the compound, and while returning to his accommodation, he saw the Complainant sleeping inside the guard booth. Mr. Sheralov also admitted to having had a little wine.⁶⁶

122. Mr. S.B.'s statement showed that: 1) Mr. Sheralov did not report the incident in his midnight telephone call to Mr. S.B., who was his supervisor. It was only almost 15 hours after the incident that Mr. Sheralov claimed that the Complainant had been sleeping. Mr. Sheralov's mentioning that he had "an invitation inside the compound" is a second discrepancy with his later statement under Oath that he had ordered food for takeaway. A third discrepancy arises between his saying that he had a little wine, and then later under Oath that he had had "two beers before this incident". All of these discrepancies cast grave doubt on Mr. Sheralov's credibility, as compared to the accounts of the Complainant and the other witnesses.

123. Mr. Sheralov argues that there was a conflict of interest on the part of the IDG and UNAMA GUF. He points out that the investigation relied only on synopses of the interviews of the witnesses representing IDG security company and UNAMA GFU who were protecting their own staff and their respective interests.

124. This argument cannot stand. Firstly, it is obvious that Mr. S.B. did not have such conflict of interest. Secondly, the telephone video taken by Mr. W.P. just after the incident corroborated the statements of the Complainant, Mr. A.S., Mr. S.S., Mr. W.P., and Mr. G.D. that Mr. Sheralov appeared unstable on his feet. Moreover, Mr. Sheralov did not mention the issue of the guard "sleeping" or smelling of "hashish" to anyone who came to the scene at the time, which therefore does not support his version of the story. Thirdly, the photo of the damaged UN ID Badge of the Complainant⁶⁷ can corroborate the statements of the

⁶⁶ *Ibid.*, Annex "B-7", Statement of Mr. [S.B.].

⁶⁷ *Ibid.*, Annex "D", Photograph of the broken ID holder of the IDG guard.

Complainant, Mr. W.P., and Mr. G.D., even if the damaged badge was not an element of the Sanction Letter.

125. Turning to the credibility and reliability of Mr. Sheralov, the UNDT analyzed Mr. Sheralov's account of the circumstances leading to the alleged incident, as well as the account of the incident itself, and found his account either contradictory to other evidence on record or containing internal discrepancies that could not be reasonably explained. As such, the UNDT reasonably concluded that Mr. Sheralov's evidence in relation to the incident in question lacked credibility and reliability.⁶⁸ As for the credibility and reliability of the Complainant, the UNDT found that his account of the incident in question was not only corroborated by five witnesses' testimonies and the documentary evidence, but also supported by Mr. Sheralov's contemporaneous behaviour after the assault, including bringing soft drinks to the Complainant as if in apology for his conduct. In addition, the two alleged inconsistencies in the Administration's reports were carefully examined and resolved by the UNDT in its Judgment.⁶⁹ Accordingly, the UNDT found that the Complainant's testimony regarding the physical assault in question was "coherent, credible, and reliable, and there is no inconsistency that could have undermined its credibility and reliability."⁷⁰ To bolster his own credibility, Mr. Sheralov argues that he had 22 years of service with the Organization, while the Complainant was a contracted worker. We agree with the Secretary-General that this point has no bearing on the credibility of relevant persons. The employment relationship or length of service with the Organization does not make the employee more credible or reliable than the non-staff member with respect to an individual incident.

126. Mr. Sheralov also raises other issues in relation to the evidence and the underlying facts, such as the UNAMA GFU purportedly intentionally not providing a CCTV recording of the security boot where the Complainant was stationed; the time stamp on the recordings of the CCTV screenshots of all individuals entering/exiting the Social Centre, etc. These issues were submitted to and properly dealt with by the UNDT. As this Tribunal has pointed out consistently, it is not sufficient for an appellant to state that he or she disagrees with the findings of fact or to repeat the arguments submitted before the UNDT. The appellant must

⁶⁸ Impugned Judgment, paras. 65-79.

⁶⁹ *Ibid.*, paras. 47-63.

⁷⁰ *Ibid.*, para. 64.

satisfy this Tribunal that the finding of fact was not supported by the evidence or that it was unreasonable.⁷¹ Mr. Sheralov has failed to do so.

127. “Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.”⁷² In light of the foregoing, even though without the direct evidence, we find that there is a high probability that Mr. Sheralov assaulted the Complainant, an unarmed security guard, at the compound. The facts are thus established by clear and convincing evidence. Mr. Sheralov’s appeal with regard to the alleged factual errors made by the UNDT must fail.

Whether the established facts amount to misconduct

128. We note that although Mr. Sheralov contends that his action did not constitute serious misconduct in violation of Staff Regulation 1.2(a), (b) and (f) and Staff Rule 1.2(f), his contention is grounded on the precondition that the allegations against him were not established by clear and convincing evidence.⁷³ Since we have concluded that there is no error in the UNDT’s finding that the facts underlying the sanction were established by clear and convincing evidence, we agree with the conclusion of the UNDT that the established facts amounted to misconduct on the part of Mr. Sheralov under the Staff Regulations and Rules.⁷⁴

Was the disciplinary measure of separation from service proportionate to the misconduct?

129. When it comes to the proportionality of the disciplinary measure, Staff Rule 10.3(b) requires that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

130. In deciding whether a specific sanction is proportionate to the nature and gravity of the staff member’s misconduct, we have elaborated comprehensively in the case of *Portillo Moya* as follows:⁷⁵

... (...) the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to

⁷¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

⁷² *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

⁷³ Appeal brief, page 2.

⁷⁴ Impugned Judgment, para. 86.

⁷⁵ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 19-21.

the circumstances of the case and to the actions and behaviour of the staff member involved.

... This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration which carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures: a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc.

... That is why only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one).

131. In the present case, we find that the UNDT correctly considered the nature and gravity of Mr. Sheralov's misconduct, the past practice of the Organization in matters of comparable conduct, as well as mitigating and aggravating factors before it came to the conclusion that the sanction of separation was proportionate to Mr. Sheralov's misconduct.

132. Mr. Sheralov actually does not challenge the UNDT's findings in relation to the proportionality aspect of his disciplinary case. Instead, he mentions that he was appointed to a more senior position with more responsibilities on 15 June 2022, which in his view, indicates that even if established, the alleged misconduct did not impact the trust of the employer in him and did not render intolerable the continuation of the employment relationship.⁷⁶ He requests that the UNAT impose a milder measure.

133. It is a well-established principle in administrative law that the Organization bears the burden of proof, and the staff member is innocent until proven to have committed the misconduct. Therefore, the Organization cannot punish a staff member before a formal administrative decision is made in a sanction letter or memorandum. The fact that Mr. Sheralov continued doing his job or even was given more responsibilities after the incident in question cannot justify his contention that his misconduct did not impact the trust between him and the Organization. Mr. Sheralov's appeal in this regard cannot be supported.

⁷⁶ Appeal brief, pages 10-11.

Were the due process rights of Mr. Sheralov respected?

134. Staff Rule 10.3(a), which deals with due process in the disciplinary process, provides:

The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

135. It is clear from this provision that the investigation phase is not included in a disciplinary proceeding, which is only initiated after the completion of the investigation.⁷⁷ Our jurisprudence remains that due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated.⁷⁸ During the preliminary investigation stage, only limited due process rights apply.⁷⁹

136. Mr. Sheralov raises a litany of irregularities that we analyze as follows.

a) Was the SIU the appropriate entity to conduct the investigation? Was there an error in identifying the head of UNAMA as the “responsible official” instead of an officer from UNDSS?

137. Concerning the appropriate investigation authority, the applicable legal framework ST/AI/2017/1 provides:

5.1 OIOS retains the ultimate authority to decide which cases it will consider and shall determine whether the information of unsatisfactory conduct received merits any action, and if so, is better handled by the responsible official or by OIOS. OIOS may at any time decide that a case is better handled by it.

5.2 If OIOS decides to investigate the unsatisfactory conduct, the responsible official will defer to OIOS and cease all involvement in the matter.

5.3 If OIOS determines that the matter is better handled by the responsible official, it shall send the matter back to the responsible official, who shall conduct a preliminary assessment to determine whether an investigation is warranted.

⁷⁷ *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-776, para. 26.

⁷⁸ *Akelo v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-336, para. 36.

⁷⁹ *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295, para. 24.

138. In the present case, the record shows that on 17 April 2020 after the incident was reported, the PSA directed the SIU to investigate the incident and prepare a report for UNDSS. The SIU's investigation report was sent to the ICDU of UNAMA, which referred it to OIOS. On 17 June 2020, OIOS considered that the matter would be best handled by UNAMA and, after consultation with UNDSS, referred the matter to the responsible official, the Head of UNAMA. The Head of UNAMA then requested ICDU to assess the SIU investigation report. We do not find any violation of ST/AI/2017/1 in the above process.

139. Mr. Sheralov argues that the Head of the UNAMA could not have been the "responsible official", because he was not staff "administered by the Department of Field Support".

140. It is true that Mr. Sheralov was a UNDSS staff member, which is why the PSA instructed the SIU to investigate the incident so that a report could be submitted to UNDSS. Nonetheless, Mr. Sheralov was assigned to UNAMA, a special political mission, and fell under the authority of the Head of UNAMA. The incident occurred in a UNAMA compound and was perpetrated against an unarmed security guard who worked for IDG which reported to UNAMA.⁸⁰ OIOS's determination to send the matter back to the Head of UNAMA was a reasonable decision. In any event, OIOS, by its mandate and functions, has the authority to decide what actions should be taken after receiving the investigation report from the SIU. Pursuant to Section 5.1 of ST/AI/2017/1, it is OIOS who enjoys the "ultimate authority to decide" whether a case will be handled by itself or by the responsible official, and in this case, OIOS elected the latter option and referred the matter back to the Head of UNAMA.

141. Besides, we agree with the Secretary-General that the UNSS SIP document which Mr. Sheralov relied on is a guidance document issued in 2018 when all UNDSS staff were transitioned into appointments with the Secretariat. The content of such a guidance document cannot be contrary to ST/AI/2017/1. Therefore, Mr. Sheralov's argument that the appropriate authority to conduct an investigation should be UNDSS is misguided.

⁸⁰ Answer brief, para. 46.

b) *Was there an error because there was no “investigative panel” and no one from UNDSS participated in such a panel?*

142. ST/AI/2017/1 further prescribes:

6.3 Following a decision to initiate an investigation, the responsible official shall appoint an investigative panel or an investigating entity other than OIOS.

6.4 When setting up an investigative panel, the responsible official should normally appoint at least two individuals who have been trained and/or are experienced in conducting workplace investigations. If one or more of them are serving staff members, the responsible official should make efforts to appoint at least one member who is at the same or a higher functional level than the subject of the investigation. In the event that the composition of the panel varies from the foregoing criteria, reasons therefore should be recorded in writing.

In the present case, the responsible official, i.e. the Head of UNAMA, did not appoint an investigative panel because it selected the second option in Section 6.3 above. The responsible official chose an investigating entity, i.e. the SIU, to proceed with the investigation, and as such, the SIU acquired the mandate to investigate the case of Mr. Sheralov. In addition, ICDO requested the SIU to provide the subject with the information concerning his right to have an observer present at the interview and to retake his statement, if necessary. This proceeding was in compliance with Section 6.10 of ST/AI/2017/1.

143. Mr. Sheralov asserts that appointing the SIU to investigate violates Section 6.4 of ST/AI/2017/1, because SIU staff are not “at the same or a higher functional level than the subject of the investigation”. Section 6.4 applies to the situation where an investigative panel was established, which is not the case here. There was no ground to require someone from UNDSS to be part of the investigation.

144. The investigation was not *ultra vires*. Mr. Sheralov’s arguments about the composition of the investigative panel are irrelevant.

c) *Was there a violation in the timing of the investigation?*

145. Mr. Sheralov objects to the SIU investigation being relied upon, when this work preceded the formal referral for investigation by OIOS.

146. In our view, there is not a one-size-fits-all approach to various investigations that may be conducted in multiple types of misconduct. In some cases, there is a preliminary fact-finding process and a formal investigation at a later stage based on the preliminary fact-finding. Nevertheless, it may not be necessary or very difficult in other cases to separate or distinguish the two. As we have stated in *Sall*, there is no legal or administrative provision obliging the Administration to re-interview a staff member subject to a disciplinary investigation after each statement obtained.⁸¹ In the present case, as we have elaborated above, after assessment by ICDU, the responsible official deemed it unnecessary to reconduct an investigation from scratch, since the SIU had interviewed all the persons involved in the incident, and had done so close in time to the incident. The SIU's investigation report, after being commented on, revised and signed by Mr. Sheralov, thus became the official investigation report that formed the basis for the Administration to make formal charges against Mr. Sheralov.

147. Following OIOS's decision to refer it to the responsible official, the responsible official and ICDU did further reviews of the SIU investigation report. In our view, these further reviews cure the timing issue. Mr. Sheralov's argument cannot succeed.

d) Was there a failure to inform Mr. Sheralov that he was the subject of an investigation and who the investigators were?

148. The record makes clear that, at the very beginning of the SIU investigation, Mr. Sheralov was told the name of the investigator, who is the Supervisor of the UNAMA SIU, and was told the purpose of the investigation, which was:⁸²

The interview is in connection to the incident report submitted to UN Security by the IDG security guard who was posted at security post QS 1.1 near the Social Centre in UNOCA during the night between 16 and 17 April 2020. In this report, the IDG guard in question alleged that around 00:20 hrs of the 17 April 2020, you approached him at his post and physically assaulted him. You are invited for this interview was an alleged offender, in order to respond to the allegation and provide your account of the pertinent events.

⁸¹ *Sall* Judgment, *op. cit.*, para. 36.

⁸² Investigation Report, Annex "B-6", Statement of Mr. Zafarkhon Sheralov.

149. Mr. Sheralov’s assertion is therefore meritless, as he simply repeats his failed argument before the UNDT.

e) Was there an error because the SIU did not investigate Mr. Sheralov’s allegation that the Complainant was sleeping on the job and smelled of hashish?

150. Mr. Sheralov repeatedly argues that the SIU did not investigate his allegation that the Complainant was sleeping on duty and smelled hashish in the security booth. However, the investigation concluded that “there was no evidence found to support the allegation of Mr. Sheralov that he found [the Complainant] sleeping on duty and that [the Complainant] then fabricated the assault allegation against him, in order to deflect the attention from that issue. Therefore, these allegations of Mr. Sheralov were not substantiated.” Accordingly, to the extent that these after-the-fact claims warranted review, they were considered.

151. Last but not least, this Tribunal reiterates that when reviewing due process rights issues in disciplinary cases, we should bear in mind that procedural fairness is a highly variable concept and is context specific.⁸³ The essential question regarding procedural fairness is well summarized in *Andry Adriantseheno*, which stated:⁸⁴

... The essential question regarding procedural fairness is whether a staff member was adequately apprised of any allegations of misconduct and had a reasonable opportunity to make representations before action was taken against him. The Tribunal is generally satisfied that the key elements of the rights of due process are met when the staff member was fully informed of the charges against him, the identity of his accusers and their testimony and as such, was able to mount a defense and to call into question the veracity of their statements.

152. In conclusion, we find that during the investigation, Mr. Sheralov was informed about the nature of the allegations against him and the purpose of his interview, as well as the name of the investigator, of his right to an observer, and given the opportunity during the interview to provide his version of the events. During the disciplinary process, Mr. Sheralov was thoroughly notified of the charges against him, provided with the chance to address the allegations, and informed of his right to seek legal counsel for his defense. Therefore, the UNDT did not err in concluding that Mr. Sheralov’s due process rights were respected.

⁸³ *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 56.

⁸⁴ *Andry Adriantseheno* Judgment, *op. cit.*, para. 57.

Remedy

153. Having considered all of Mr. Sheralov's submissions, the Appeals Tribunal finds that he has failed to demonstrate that the UNDT committed any error of law, fact or procedure in reaching its decision and thus his appeal fails. His requests for relief in terms of reinstatement or replacing the contested sanction with a milder measure and being compensated for moral damages are therefore denied.

Judgment

154. Mr. Sheralov's appeal is dismissed, and Judgment No. UNDT/2023/116 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 25th day of October 2024 in New York, United States.

(Signed)

Judge Gao, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Sheha

Judgment published and entered into the Register on this 5th day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar