



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/004

Judgment No.: UNDT/2011/211

Date: 14 December 2011

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Ingeborg Daamen, UNOV/UNODC

## **Introduction**

1. By an application filed on 25 January 2011 which was registered under Case No. UNDT/GVA/2011/004, the Applicant challenges a series of decisions taken in relation to his performance appraisal for the period from 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”), namely:

- a. The decision to carry out a single appraisal;
- b. The decision to take into consideration events which post-dated 31 March 2010;
- c. The failure to answer his queries concerning the applicable procedure;
- d. The decision not to allow him to rebut his performance appraisal.

2. He asks the Tribunal to rescind these decisions and to expunge his official status file from his first and second reporting officers’ appraisal as well as any adverse material. He seeks compensation for the “harassment, stress, anxiety, humiliation, the moral injury and the inequitable treatment” he suffered as a result of the contested decisions, and for the Respondent’s failure to protect him from the “unfair implementation of staff rules and regulations”. He seeks further compensation for the violation of his due process rights, the damage to his reputation and the moral injury he sustained owing to the retaliation by his reporting officers. In addition, he seeks a “recommendation that disciplinary action be taken against the individuals who ... violated [his] rights” and a further recommendation that the non-compliance with the rules governing performance appraisals be recorded in the individual performance appraisals of his reporting officers. Lastly, he seeks reimbursement of the costs incurred in relation to his health condition in the amount of EUR380.60.

## **Facts**

3. The Applicant joined the United Nations Office on Drugs and Crime (“UNODC”) in 2002 in Vienna. With effect from 1 November 2007, he was appointed under a one-year fixed-term appointment to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch (“TPB”), within the Division of Treaty Affairs (“DTA”). His functional title was changed to that of Chief of the Counter-Terrorism Legal Services Section I in April 2008.

4. With effect from 1 November 2008, the Applicant’s fixed-term appointment was extended for one year until 31 October 2009. Due to a significant reduction in the TPB funding, his appointment was further extended for three months only effective 1 November 2009. It was subsequently extended for one year effective 1 February 2010.

5. In early November 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant’s first and second reporting officers, conducted with the Applicant his mid-point review for the 2009-2010 performance cycle.

6. In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA announced to TPB staff that the Branch was to be reorganized and, on 8 December 2009, they informed the Applicant that his post would be abolished and that he would be reassigned, at the same level, to the position of Senior Legal Adviser which was to be created within the Office of the Chief of TPB.

7. On 18 January 2010, the Officer-in-Charge of DTA requested the Applicant to take action in order to finalise his mid-point performance review. Responding to this request, the Applicant pointed out that he had encountered technical problems with the electronic performance appraisal system (“e-PAS”) and that his e-PAS report contained some inaccuracies.

8. By “Special Message” dated 1 March 2010, the Chief of the Human Resources Management Service (“HRMS”) at UNODC informed staff that, in

view of the fact that the 2009-2010 performance cycle was to end on 31 March 2010, end-of-cycle appraisals ought to be completed by 16 April 2010.

9. On 25 March 2010, the Chief of TPB enquired as to the Applicant's availability to discuss his performance with a view to finalising his 2009-2010 e-PAS report. In an email sent on the same day to the Chief of HRMS, the Applicant objected to the decision to proceed with his performance appraisal, emphasising that the e-PAS only applied to staff members whose appointments were of at least one year and that the Officer-in-Charge of DTA had not been designated as his reporting officer though he had taken part in the appraisal.

10. On 15 April 2010, the Officer-in-Charge of HRMS responded to the Applicant's email of 25 March 2010, explaining that, though the policy governing the e-PAS process as set out in administrative instruction ST/AI/2002/3 (Performance Appraisal System) applied to staff holding an appointment of at least one year, the length of the Applicant's consecutive appointments amounted to one year and covered the performance cycle. He also recommended that a meeting be convened with the Applicant and his first reporting officer in order to finalise his e-PAS report.

11. An exchange of emails ensued between the Applicant and the Officer-in-Charge of HRMS, in which the former argued that ST/AI/2002/3 was not applicable to staff members who held an appointment of less than a year at the beginning of the new performance cycle or at the time of their mid-point performance review.

12. By an email of 5 May 2010, the Officer-in-Charge of HRMS advised the Applicant that, in the event he insisted to be evaluated separately for each period corresponding to extensions of his appointment, his reporting officers would proceed with his performance appraisal outside of the e-PAS. Responding to this email on 6 May, the Applicant took issue with the proposed course of action and enquired about the provisions according to which such appraisal would be conducted.

13. On 12 October 2010, the Chief of TPB wrote to the Applicant, stating that, in case he persisted not to take action to finalise his e-PAS report, she and his second reporting officer would prepare a written appraisal of his 2009-2010 performance; the document would then be shared with the Applicant and placed in his official status file. The Applicant replied on the following day, noting that he had not received any response to his query of 6 May 2010 concerning the applicable provisions.

14. By an email of 19 November 2010, the Officer-in-Charge of DTA transmitted to the Applicant a written appraisal of his 2009-2010 performance and invited him to submit his comments, if any, in written form by 30 November, after which the appraisal together with his comments would be placed in his official status file.

15. On 24 November 2010, the Applicant enquired with the Officer-in-Charge of DTA whether a rebuttal would be possible since his performance appraisal had been prepared outside of the framework of ST/AI/2002/3. The Officer-in-Charge of DTA responded on the same day that, since the Applicant had declined to use the e-PAS, his performance appraisal had indeed been prepared outside of that system and the possibility of a rebuttal did not apply.

16. By an email of 26 November 2010 to the Chief of TPB, the Officer-in-Charge of DTA and the Chief of HRMS, the Applicant proposed that his performance be appraised using the e-PAS only for the period from 1 April to 31 October 2009. He further asked which provisions would apply in the event that the proposed option was rejected.

17. On 1 December 2010, the Applicant submitted a request for management evaluation, in which he challenged a series of “decisions” taken in relation to his 2009-2010 performance appraisal, namely the decision to carry out a single appraisal, the decision to take into consideration events which post-dated 31 March 2010, the failure to answer his queries concerning the applicable provisions and the decision not to allow him to rebut his appraisal.

18. By an email of 1 December 2010, the Officer-in-Charge of DTA informed the Applicant that the option proposed in his email of 26 November had been rejected. He stated that ST/AI/2002/3 was applicable to the 2009-2010 performance cycle, that despite many requests and instructions the Applicant had repeatedly refused to use the e-PAS and that it had accordingly been decided to proceed with the written performance appraisal. He also stated that the deadline for the Applicant to submit his comments had been extended to 10 December 2010.

19. In the course of the management evaluation, the Administration of UNODC indicated in January 2011 that it would remove the written performance appraisal from the Applicant's official status file. It added that it would prepare a revised version, which would not refer to matters pertaining to the 2010-2011 performance cycle and which the Applicant would be entitled to rebut in accordance with section 15 of ST/AI/2002/3.

20. Meanwhile, on 25 January 2011, the Applicant filed the application which forms the subject of the present Judgment, noting that he had not received any response to his request for management evaluation within the prescribed 45 days.

21. By letter dated 1 February 2011, the Applicant was notified of the Secretary-General's decision to uphold the decision to carry out a single appraisal for the period from 1 April 2009 to 31 March 2010. Further, in view of the explanations provided by the Administration of UNODC in January, the Secretary-General considered that the decision to refer in the appraisal to matters post-dating the 2009-2010 performance cycle and the decision to deny the Applicant an opportunity to rebut the appraisal had become moot.

22. Shortly thereafter, the Applicant was provided with a revised written performance appraisal which bore the date of 7 February 2011, and he was invited to provide his comments, after which the documents would be placed in his official status file. He was also informed that after signing this appraisal, he would be entitled to rebut it.

23. On 9 February 2011, the Applicant was provided with another version of his revised written appraisal and, on 10 February 2011, the Officer-in-Charge of DTA asked him to provide his comments by 21 February 2011.

24. On 11 February 2011, the Chief of TPB wrote to the Applicant, explaining that she had prepared yet another version of his revised written appraisal, asking him to collect it and inviting him to a meeting to discuss his performance.

25. On 23 February 2011, a hearing was held, to which the Applicant and Counsel for the Respondent participated by videoconference.

26. By Order No. 19 (GVA/2011), the Tribunal instructed the Respondent, *inter alia*, to confirm whether a new written appraisal had been finalised and provided to the Applicant, and whether he had been invited to rebut it. Responding to the Tribunal's instructions, the Respondent submitted on 9 March 2011 copies of a revised written appraisal which both the Applicant's first and second reporting officers had signed off on 2 March 2011, giving the Applicant an overall rating of "Fully successful performance". The Respondent also submitted the email sent on the same day to the Applicant advising him that, in accordance with section 15 of ST/AI/2002/3, he could submit a written rebuttal statement in case he disagreed with the final rating given in the appraisal.

27. By an email of 15 March 2011 to the Director of the Division for Management at UNODC, the Applicant submitted a written rebuttal statement of his 2009-2010 performance appraisal. In his email, he noted however that, in his view, the procedural conditions for a proper rebuttal were not met owing to the composition of the rebuttal panel.

28. The Chief of HRMS informed the Applicant on 24 March that a new rebuttal panel would be constituted by 1 April 2011.

29. By a "Message of the day" of 21 April 2011, the Director of the Division for Management distributed to staff a list of the rebuttal panel members who had been appointed with effect from 1 April pursuant to administrative instruction ST/AI/2010/5 (Performance Management and Development System).

30. On 12 May 2011, the Applicant transmitted to the Director of the Division for Management and the Officer-in-Charge of HRMS the names of the three members whom he had selected to sit on his rebuttal panel.

### **Parties' submissions**

31. The Applicant's principal contentions are:

- a. In evaluating the Applicant's 2009-2010 performance in a single appraisal conducted outside of the e-PAS, the Administration failed to follow its own procedure;
- b. The Applicant's appointment was not governed by ST/AI/2002/3 since, at the time his mid-point performance review took place, he was serving under a three-month appointment;
- c. The Administration erred in taking into consideration matters which occurred after 1 April 2010 for the purpose of evaluating his 2009-2010 performance;
- d. Contrary to what his reporting officers stated in their exchanges with the Applicant, the latter did not refuse to participate in the e-PAS but simply insisted that the relevant procedures be followed. However, the Administration failed to respond to his queries regarding the applicable provisions;
- e. The contention that the right to rebuttal is linked to the e-PAS is untrue, and the Tribunal has stressed the importance of rebuttal procedures;
- f. Even though he received relatively positive ratings, the Respondent treated him with bad faith. The contrast between his individual and overall ratings is indicative of abuse of authority on the part of his reporting officers. They simply intended to damage the Applicant's reputation and career and the comments they made in his appraisal are unsubstantiated, arbitrary and disrespectful;



g. The Applicant has been subjected to harassment, as evidenced by the fact that his reporting officers made some remarks which were inconsistent with the ratings they gave him in the context of his 2009-2010 performance;

h. He has also been subjected to retaliation on the part of his reporting officers because he reported misconduct. He has been working in a hostile working environment, which resulted in a deterioration of his health condition;

i. In failing to respond to his request for management evaluation within the 45-day period specified in the Staff Rules, the Respondent acted in breach of relevant procedural rules.

32. The Respondent's principal contentions are:

a. During the management evaluation, the Administration removed from his official status file the written performance appraisal transmitted to the Applicant on 19 November 2010, and it deleted from that appraisal any reference to matters actually pertaining to the 2010-2011 performance cycle. It also prepared on 7 February 2011 a revised written appraisal consistent with ST/AI/2002/3, which the Applicant is entitled to rebut. Therefore, his claims in this respect are moot;

b. The fact that the Applicant's appointment was extended for three months until 31 January 2010 due to financial reasons and that it was followed by a one-year appointment did not remove him from the scope of ST/AI/2002/3. Nor did it exempt him from the requirement that his performance be evaluated for the one-year period commencing on 1 April 2009;

c. ST/AI/2002/3 does not provide for a mechanism to evaluate a staff member who, as in the present case, refuses to use the e-PAS. The Applicant's refusal to use the e-PAS did not absolve the Administration

from its responsibility under staff regulation 1.3 and staff rule 1.3 to evaluate his performance;

d. The Applicant has not substantiated his claim for reimbursement of the costs incurred in relation to his health condition and, in any event, he has failed to exhaust internal remedies as he did not follow the established procedure under appendix D to the Staff Rules.

33. The Respondent asks the Tribunal to issue an order urging the Applicant to withdraw and resubmit his claims in view of the outcome of the management evaluation and to expunge from the Applicant's submissions the e-PASes of two of his former subordinates. He also asks the Tribunal to award costs against the Applicant, taking into account his "continued misrepresentation of facts and his repeated challenge to every action taken by the Respondent".

### **Issues**

34. In his application, the Applicant contests a series of decisions most of which raise receivability issues, though on different grounds. The Tribunal will examine each decision in turn, namely the decision to carry out a single appraisal, the decision to take into consideration events post-dating 31 March 2010, the decision not to allow him to rebut his performance appraisal and the failure to answer his queries concerning the applicable procedure. It will also rule on the Applicant's allegations of bad faith, abuse of authority, harassment and retaliation. Lastly, it will address his claim that the management evaluation was procedurally flawed.

### **Consideration**

35. Article 2.1 of the Tribunal's Statute provides that it is competent to hear and pass judgment on an application filed by an individual against the Secretary-General to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment.

36. According to settled case law, an “administrative decision” is a unilateral decision taken by the Administration in a precise individual case which produces direct legal consequences to the legal order (see *Tabari* 2010-UNAT-030 and *Schook* 2010-UNAT-013, relying on Judgment No. 1157 of the former UN Administrative Tribunal in *Andronov* (2003)).

37. In cases where the Administration rescinds the contested decision during the proceedings before the Tribunal, the applicant’s allegations may become moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

38. In the instant case, although the Administration conceded that the Applicant’s 2009-2010 performance appraisal initially referred to matters post-dating 31 March 2010, it indicated in January 2011 that a revised performance appraisal would be prepared, and that this appraisal alone would be placed in his official status file. The Applicant was provided on 9 March 2011 with the revised appraisal, which does not refer to matters post-dating 31 March 2010. His claim in this respect is therefore moot and he has not explained how, in his opinion, his rights remain affected by a decision which has now been superseded, nor has he shown that he was still suffering any injury because of that decision.

39. Likewise, even though the Applicant was told on 24 November 2010 that he would not be entitled to rebut his performance appraisal, he was informed on 9 March 2011 that he could submit a rebuttal statement in accordance with section 15 of ST/AI/2002/3, which he did on 15 March 2011. His claim that he was not entitled to rebut his 2009-2010 performance appraisal is thus moot and the Applicant has not proved that he was still suffering any damage as a result of the decision.

40. At this juncture, the Tribunal notes with concern that the Applicant was provided with no less than five different versions of his performance appraisal, which highlights the lack of rigour and diligence displayed by the Administration in the appraisal process. However, the Applicant has not shown that this had

caused him any injury and the Tribunal recalls that, as per article 10.7 of its Statute, it may not award punitive or exemplary damages.

41. The Applicant argues that the Administration erred in evaluating his 2009-2010 performance in a single appraisal and in applying ST/AI/2002/3 to this appraisal.

42. In the opinion of the Tribunal, it would be inconsistent with its standard of review to allow the Tribunal to interfere with the review of a performance appraisal before a final rating resulting from the rebuttal process has been given. In view of the fact that the appraisal of a staff member's performance is a matter for which the Administration enjoys discretion (see *Mandol* UNDT/2011/013), in exercising judicial review the Dispute Tribunal must determine "if the decision under challenge is reasonable and fair, legally and *procedurally correct*, and proportionate" (see *Sanwidi* 2010-UNAT-084, emphasis added). Bearing in mind these considerations, the Tribunal held in *Gehr* UNDT/2011/178 that preliminary decisions such as the choice of an appropriate basis for a staff member's performance appraisal can only be reviewed within the context of the assessment of the final decision, that is, the outcome of the staff member's performance appraisal.

43. In the present case, the rebuttal process regarding the Applicant's performance appraisal is still pending. Therefore, his performance rating cannot be considered as final.

44. Consequently, without it being necessary to rule on the merits of the decision to apply ST/AI/2002/3 with a view to appraising the Applicant's 2009-2010 performance, the Applicant's claims concerning this decision and the decision to carry out a single appraisal are irreceivable as premature.

45. The above is without prejudice to the Applicant's right to file at a later stage a new application to challenge the basis for or the outcome of the rebuttal process or to seek compensation for the delay in finalising the process once its outcome is known.

46. Lastly, the Tribunal observes that the documents on file show that, contrary to the Applicant's contentions, he was informed in sufficiently clear terms, at the latest on 15 April 2010, that ST/AI/2002/3 would be applied with a view to appraising his 2009-2010 performance. This clarification was reiterated in the email sent to him on 1 December 2010 as well as in the email of 9 March 2011. Accordingly, his claim that the Administration failed to answer his queries concerning the applicable procedure is unsubstantiated and must be rejected.

47. Turning to the Applicant's allegations of bad faith, abuse of authority, harassment and retaliation, in *Gehr* UNDT/2011/142, the Tribunal took note of the Applicant's contention that the inconsistency between the remarks made by his reporting officers in his 2009-2010 performance appraisal and the ratings he received showed that he had been subjected to harassment. It however decided in the interest of judicial economy to defer consideration of this issue to its examination of the instant case.

48. In alleging bad faith, abuse of authority, harassment and retaliation on the part of his reporting officers, the Applicant refers to the comments made in the 2009-2010 written performance appraisal he received on 19 November 2010 following his mid-point review. He also refers to the contrast between the individual ratings—in particular the rating given for the core value "professionalism"—and the overall rating he received in the 19 November 2010 appraisal. Additionally, in a submission dated 10 February 2011, the Applicant makes mention of the fact that he was only informed on that day that he could provide comments on the 9 February 2011 performance appraisal.

49. The Tribunal first notes that these claims are based on performance appraisals which have now been superseded. They are therefore moot.

50. Subsidiarily, the Tribunal considers that, for the reasons explained above (see paras. 42 to 43), absent a final performance rating, the Applicant may not challenge the comments made or individual ratings given by his reporting officers in support of an overall rating which might be modified as a result of the rebuttal process.

51. Finally, the Applicant submits that the Respondent acted in breach of the relevant procedural rules as he failed to respond to his request for management evaluation within the 45-day period specified in the Staff Rules.

52. It is true that staff rule 11.2(d) provides that “[t]he Secretary-General’s response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member ... within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York”. However, it is equally true that article 8.1(d)(i)(b) of the Tribunal’s Statute expressly provides for the situation where no response to the request for management evaluation is provided. Thus, according to article 8.1(d)(i)(b), the Administration’s non-compliance with the 45-day period does not affect an applicant’s right to seize the Tribunal.

53. The Applicant submits that the late response to his request for management evaluation “would constitute an obstacle to the fair and expeditious disposal of the case and be unjust [because it] would require [him] to file an appeal in the context of a case which has already been submitted to the Tribunal”. This, in the view of the Tribunal, demonstrates a deep misunderstanding of the management evaluation function. As was held in *Solanki* UNDT/2010/180, “the management evaluation function provided for in the Staff Rules is a procedure by which the Administration is able to correct its own mistakes if necessary”. Regardless of when the Administration decides to correct such mistakes, it is certainly in the interest of fairness and judicial economy not to allow them to persist. Furthermore, the delay in the response to his request for management evaluation did not cause the Applicant any prejudice.

54. The Respondent requested the Tribunal to award costs against the Applicant, on the grounds of his “continued misrepresentation of facts and his repeated challenge to every action taken by the Respondent”.

55. In accordance with article 10.6 of its Statute, the Tribunal may only award costs against a party that has manifestly abused the proceedings before it. In the view of the Tribunal, no such abuse has occurred in the present proceedings and therefore the Respondent’s request cannot be granted.

**Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 14<sup>th</sup> day of December 2011

Entered in the Register on this 14<sup>th</sup> day of December 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry