



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/019

Judgment No.: UNDT/2012/084

Date: 4 June 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Ingeborg Daamen-Mayerl, UNOV/UNODC

Introduction

1. By an application filed on 4 March 2012 registered under Case No. UNDT/GVA/2012/019, the Applicant challenges the decision not to finalize his performance appraisal for the period from 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”).

2. By way of relief, he seeks compensation for the Administration’s bad faith and the denial of justice he endured. He also seeks compensation for the violation of his due process rights and the moral injury he suffered, and he asks the Tribunal to order that his performance appraisals be expunged from his personnel file and that he be reimbursed of the expenses incurred as a result of his hospitalisation. Lastly, he asks that the case of those responsible for the delays in finalizing his performance appraisal be referred to the Secretary-General for possible action to enforce accountability.

Facts

3. The Applicant joined the United Nations Office on Drugs and Crime (“UNODC”) in Vienna in 2002 and, in 2007, he was appointed in the Terrorism Prevention Branch (“TPB”), within the Division of Treaty Affairs (“DTA”). His fixed-term appointment was extended several times until 31 December 2011, when he was separated from service.

4. In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant’s first and second reporting officers, informed him 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.

5. From then, the relation between the Applicant and UNODC management deteriorated and he submitted a series of informal and formal complaints (see Judgments *Gehr* UNDT/2011/142, UNDT/2011/150, UNDT/2011/178, UNDT/2011/211, UNDT/2012/069, UNDT/2012/070 and UNDT/2012/071).

6. In early November 2009, the Chief of TPB and the Officer-in-Charge of DTA conducted with the Applicant his midpoint review in relation to his 2009-2010 performance appraisal.

7. On 18 January 2010, the Officer-in-Charge of DTA requested the Applicant to take action in the electronic performance appraisal system (“e-PAS”) with a view to finalising his midpoint performance review. A series of exchanges ensued between the Applicant, his first and second reporting officers, and the Chief of HRMS, in which the former objected to the decision to proceed with his appraisal, arguing that administrative instruction ST/AI/2002/3 (Performance Appraisal System) was not applicable to him.

8. The Applicant’s reporting officers eventually decided to proceed with his appraisal outside of the e-PAS and prepared a written appraisal. This appraisal was revised several times and the Applicant was provided with a final version thereof on 9 March 2011. In the appraisal, he was given the overall rating of “Fully successful performance”.

9. On 15 March 2011, the Applicant submitted a rebuttal statement. The Chief of TPB and the Officer-in-Charge of DTA submitted a statement in reply to the rebuttal statement on 15 June 2011.

10. The rebuttal panel convened on 20 September, 12 October and 5 December 2011, and on 23 January, 21 February and 23 March 2012. It interviewed the Applicant on 13 December 2011 and his second reporting officer on 31 January 2012.

11. Meanwhile, on 4 March 2012, the Applicant filed with the Tribunal the application which forms the subject of the present judgment.

12. In its report dated 23 March 2012, the rebuttal panel found, *inter alia*, that there was no meaningful discrepancy between the Applicant’s overall rating and the comments made in his 2009-2010 performance appraisal and that the original rating should be maintained.

13. On 28 March 2012, the Applicant filed with the Tribunal another application, in which he challenged the outcome of the rebuttal process and complained of the excessive delay in finalizing his 2009-2010 performance appraisal. His application was registered under Case No. UNDT/GVA/2012/024.

14. A directions hearing was held on 18 April 2012, which the Applicant and Counsel for the Respondent attended by videoconference.

Parties' submissions

15. The Applicant's principal contentions are:

a. The Applicant's reporting officers misrepresented facts and this had a negative impact on his 2009-2010 performance appraisal;

b. The fact that, in Judgment UNDT/2011/211, the Tribunal held that the Applicant could seek compensation for the delay in finalising the rebuttal process led the Administration not to finalize the process;

c. Once the procedures are triggered, they must be followed through. In the instant case, the Administration chose to apply administrative instruction ST/AI/2002/3 (Performance Appraisal System), which provides in section 15.3 that the rebuttal panel must "prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained". Yet, it took the Respondent almost a year to complete the rebuttal process;

d. The failure to complete the rebuttal process timely caused emotional distress to the Applicant. It resulted in his being hospitalized in early 2011 and he should be compensated for the expenses he incurred in relation to this hospitalization;

e. By not proceeding with the finalization of his 2009-2010 and 2010-2011 performance appraisals, the Administration unlawfully denied him a step increment;

f. The fact that the Applicant's performance appraisal for the period from 1 April to 31 December 2011 is tainted by irregularities is further evidence of the Administration's unwillingness to provide him with a lawful appraisal.

16. The Respondent's principal contentions are:

a. It results from staff rule 11.2 and article 8 of the Statute of the Tribunal that a staff member who wishes to contest an administrative decision must, as a first step, submit the contested decision for management evaluation. As the Applicant failed to request management evaluation of the contested decision in this case, his application is not receivable;

b. After the rebuttal panel issued its report, the Applicant filed with the Tribunal the second application (Case No. UNDT/GVA/2012/024), which largely reiterates arguments made in the first application. Thus, the latter case should be seen as superseding Case No. UNDT/GVA/2012/019.

Consideration

17. The Applicant challenges the decision not to finalize his 2009-2010 performance appraisal. However, after he filed this application with the Tribunal, the rebuttal panel issued its report, whereby it decided to maintain the original rating, which has accordingly become final. The Applicant subsequently filed another application to challenge that outcome and complain about the delay in finalizing his 2009-2010 performance appraisal.

18. In *Gehr* UNDT/2011/211, as reiterated in *Mirkovic* UNDT/2012/030 and *Gehr* UNDT/2012/069, the Tribunal held that, where the alleged unlawfulness is eliminated during the proceedings before it, the case should be considered moot unless the applicant can prove that he or she still sustains an injury for which it can award relief.

19. Having noted that the pleas put forward in the second application include those made in the first one and that the decision contested in the first application

has been superseded by the issuance of the rebuttal panel's report, the Tribunal is of the view that the application which forms the subject of the present Judgment is moot.

20. At the hearing, the Applicant requested that this and Case No. UNDT/GVA/2012/024 be joined.

21. According to article 19 of its Rules of Procedure, the Tribunal "may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties".

22. In *Gehr* UNDT/2012/069, the Tribunal considered that a joinder of two cases was not appropriate, noting that one of them was irreceivable. Similarly, the Tribunal does not consider that a joinder with Case No. UNDT/GVA/2012/024 is appropriate for the fair and expeditious disposal of this case since the application in Case No. UNDT/GVA/2012/019 is irreceivable. The Applicant's request is accordingly rejected.

23. As for the contentions made by the Applicant in relation to his performance appraisals for the periods 2010-2011 and 1 April-31 December 2011, they fall outside the scope of this case and, therefore, will not be entertained by the Tribunal.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 4th day of June 2012

Entered in the Register on this 4th day of June 2012

(Signed)

René M. Vargas M., Registrar, Geneva