UNITED NATIONS DISPUTE TRIBUNAL

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| Case No.: | UNDT/GVA/2013/006 |
| Judgment No.: | UNDT/2015/018 |
| Date: | 20 February 2015 |
| Original: | English |


**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

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:**
Jérôme Blanchard, UNOG

**Introduction**

1. The Applicant, a former staff member of the United Nations Office on Drugs and Crime ("UNODC"), contests the "findings of the rebuttal panel" ("rebuttal panel" or "panel") constituted to review the rebuttal of his 2010-2011 Performance Appraisal System ("PAS").

2. By way of remedy, he requests:

a. Rescission of the contested decision and expunction of all performance appraisal records for the 2010-2011 PAS cycle from the United Nations files;

b. Appropriate compensation for:

i. the moral injury suffered as a consequence of the delay in the rebuttal process;

ii. the damage caused to his reputation;

iii. the breach of trust in the United Nations as a model employer and its breach of due process;

iv. the refusal of the rebuttal panel members to conduct the meeting with the Applicant in French;

c. A recommendation to record on the e-PAS of his first and second reporting officers respectively, their non-compliance with and misuse of the rules governing the performance appraisal system.

**Facts**

3. The Applicant joined the UNODC in Vienna in 2002; in 2007, he was appointed as a Crime Prevention and Criminal Justice Officer at the Terrorism Prevention Branch ("TPB"), Division of Treaty Affairs, at the P-5 level. His

fixed-term appointment was extended several times until 31 December 2011, when he was separated from service.

4. Despite numerous exchanges on the matter, the Applicant and his first reporting officer never reached consensus on the terms of his workplan covering the period from 1 April 2010 to 31 March 2011.

5. On 8 and 18 October 2010, the Applicant and his first reporting officer held meetings regarding the Applicant's performance. It is disputed whether these meetings constituted the midpoint review.

6. On 7 February 2011, the Applicant's first reporting officer established a workplan for the Applicant's 2010-2011 PAS cycle. The Applicant did not sign off on the workplan, nor did he provide comments on it.

7. The first reporting officer signed off the midpoint review on 11 February 2011, with no change to the plan. She introduced comments mentioning performance deficits and recorded that a Performance Improvement Plan was appropriate.

8. The Applicant's 2010-2011 PAS was signed off on 23 June 2011 by his first reporting officer and on 28 June 2011 by his second reporting officer. The Applicant was given an overall rating of "Partially meets performance expectations". He was rated "Developing" in two out of three core values, namely integrity and professionalism, "Fully competent" in eleven and "Developing" in ten of the competencies appraised. The PAS narrative elaborated on the Applicant's performance, which was described as "mixed"; it acknowledged "substantive contributions" and "high quality outputs" in certain areas, while also pointing out "serious shortcomings", which the first and second reporting officers attributed mainly to problems of "attitude".

9. The Applicant signed this PAS on 22 July 2011, without making comments to the end of cycle appraisal nor a self-appraisal. At the time, the rebuttal of his 2009-2010 PAS was pending.

10. By email of 29 July 2011 to the Human Resources Management Service ("HRMS"), Division for Management, United Nations Office at Vienna ("UNOV")/UNODC, the Applicant announced his intention to rebut his performance appraisal for the 2010-2011 cycle and sought confirmation concerning the list of staff members from which he should choose the three members he wished to put forward for the rebuttal panel.

11. By email of 5 August 2011, the Applicant submitted a rebuttal statement regarding his PAS for the 2010-2011 cycle, together with a longer brief further elaborating on the three reasons for his rebuttal, namely that:

a. the comments in the PAS constituted a breach of contract;

b. he had been subjected to prohibited conduct by his reporting officers; and

c. there were procedural flaws in the appraisal.

12. In his email, the Applicant nominated three members to constitute the rebuttal panel, while noting that the list of potential members was "incomplete" and that, after excluding those members lacking the requirements to sit in his panel, he was left with only one possible member in the category of chairpersons. The chairman nominated by the Applicant was the same who chaired at the material time the rebuttal panel of his 2009-2010 PAS, i.e., Mr. T. D..

13. By email of 10 August 2011, the Chief, HRMS, confirmed the list from which the panel members should be nominated and , despite not sharing the Applicant's position that only one potential chairman from the list was eligible, offered to seek an exception from Headquarters ("UNHQ") to the requirement in sec. 15.2 of administrative instruction ST/AI/2010/5 (Performance Management and Development System) that the three panel members be "equal in grade or higher than the reporting officer whose evaluation or comments are being rebutted", thereby widening the pool of eligible staff members.

14. The Applicant replied on 16 August 2011 inquiring about the legal basis for such an exception. On 18 August 2011, HRMS responded that sec. 15.2 of

ST/AI/2010/5 does not leave room for discretion, hence, in order to seek an exception, UNHQ should be involved, and for that purpose, in line with the jurisprudence *Hastings*, the agreement of the staff member directly affected was required. The Applicant was advised that, to avoid delays, management would be requested to reply to his rebuttal.

15. On 18 August 2011, the Applicant's rebuttal statement was transmitted to his first and second reporting officers for their comments, which they provided by a joint written statement on 29 August 2011.

16. On 31 August 2011, HRMS informed the Applicant that the reply to his rebuttal was ready to be transmitted to him, and asked him to clarify if he wished to reconfirm the three members he had initially nominated or if he agreed that an exception to sec. 15.2 of ST/AI/2010/5 be sought.

17. On 1 September 2011, the Applicant disagreed with the request for an exception to ST/AI/2010/5 and did not confirm his panel nominations, on the grounds that the panel list was not constituted in accordance with sec. 14 of said administrative instruction, and that he was not left with a choice as to the chairperson once the requirement under sec. 15.2 of the instruction was enforced. On the same day, HRMS reiterated the offer to seek an exception and noted that the Applicant did not want to nominate as chair of his 2010-2011 rebuttal panel the same staff member he had chosen for the panel reviewing his 2009-2010 PAS.

18. On 2 September 2011, the Applicant answered that he wished to proceed with the rebuttal of his 2010-2011 performance appraisal, while insisting on his right to choose a chairperson for the panel on the basis of a "properly constituted" list.

19. On 13 September 2011, HRMS replied to the Applicant that the Administration's position in this regard had already been communicated to him.

20. On 5 October 2011, HRMS advised the Applicant of a change in the rebuttal panel list further to the resignation of one of its members (who happened to be the Applicant's first reporting officer). He responded on 8 October 2011, that he was

as a result left with no choice regarding another category of panel members, i.e., those designated by the Executive-Director, UNODC.

21. By email of 21 October 2011, the Chief, HRMS, reiterated the Administration's position that the list of potential rebuttal panel members had been constituted in line with sec. 14 of ST/AI/2010/5. He stated that, in the Administration's view, two persons where validly available in the list to be nominated as chair of the panel. He also held that, even if in the circumstances of his particular case, the Applicant was not left with an actual choice between several persons in certain categories of the panel members, he did have an option to constitute a complete panel from the aforementioned list. He recalled that, in a good faith effort to address his concerns, the Administration had offered him to request an exception, offer that he had rejected. Lastly, the Applicant was asked if he wished to proceed with selecting members from the existing list or not to proceed with his rebuttal.

22. In his reply dated 24 October 2011, the Applicant, while reiterating his stance that the UNOV/UNODC list was not properly constituted, nominated three members for his rebuttal panel, stressing that he did so for the sole purpose of preserving his rights. Additionally, he requested to be interviewed by the panel in French.

23. On 1 November 2011, HRMS requested the three nominated staff members to confirm their availability to sit in the Panel. Two of them confirmed, whereas Mr. T. D. declined on the basis that the same person should not serve in the second rebuttal by the same petitioner for the sake of avoiding prejudice.

24. On 28 November 2011, the Applicant was informed that his fixed-term appointment, due to expire on 31 December 2011, would not be further extended.

25. On 22 December 2011, HRMS informed the Applicant of Mr. T. D.'s recusal as chairman, and asked him if he wished to nominate "the only other remaining chairperson of the rebuttal panel who [could] be nominated", that is, Mr. V. G.

26. On 28 December 2011, the Applicant queried about the motives for Mr. T. D. to recuse himself and expressed reserves regarding Mr. V. G. as alternative chairman, as the latter's wife worked in the TPB under the supervision of the Applicant's second reporting officer. He sought an explanation as to why he was the only remaining chairperson of the panel list who could be nominated.

27. On 31 December 2011, the Applicant was separated from service.

28. In late 2011 and early 2012, HRMS conveyed to Mr. T. D. the position of the Office of Human Resources Management ("OHRM") that there was no legal impediment for him to sit in the panel set up for the Applicant's second rebuttal, and made attempts to have him reconsider his recusal. Nevertheless, on 6 March 2012, he confirmed his recusal.

29. In response to HRMS request for guidance as to how to solve the impasse, on 3 March 2012, OHRM suggested to expand the existing rebuttal list.

30. On 12 March 2012, HRMS informed the Applicant thereof and shared Mr. T. D.'s motives. Also, the Applicant was advised of the decision to add members to the rebuttal panel list, an expansion of membership intended to facilitate the review of his rebuttal.

31. On 15 March 2012, the Applicant advised HRMS that he refused to accept Mr. T. D.'s recusal.

32. On 23 March 2012, the rebuttal panel constituted to review the rebuttal of the Applicant's 2009-2010 PAS rendered its report. On 28 March 2012, the Applicant filed an application with the Tribunal, registered under Case No. UNDT/GVA/2012/024, contesting the outcome of the 2009-2010 PAS rebuttal.

33. On 18 April 2012, the expanded rebuttal panel list was announced to UNOV/UNODC staff at large and shared with the Applicant by email.

34. By email of 25 April 2012 to HRMS, the Applicant insisted that Mr. T. D. had been properly selected as chairman and was under an obligation to serve.

35. On 26 April 2012, HRMS requested the Applicant to select a chair from the new panel list, which had been expanded to address his situation.

36. On 2 May 2012, the Applicant put forward that the Administration, in accepting Mr. T. D.'s recusal, had acted *ultra vires*.

37. On 8 May 2012, HRMS sought guidance from OHRM. By email dated 15 May 2012, OHRM suggested to re-discuss with the Applicant the possibility to make an exception to sec. 14.3 of ST/AI/2010/5, which could lawfully be made under staff rule 12.3(b), to allow him to choose a panellist from a list of a nearby duty station.

38. On 14 June 2012, HRMS reiterated its 26 April 2012 request.

39. On 15 June 2012, the Applicant emailed Mr. T. D. reiterating that he had to serve in the panel and that, if he was not biased against him when serving in the 2009-2010 panel, nothing prevented him from chairing the 2010-2011 panel.

40. On 2 July 2012, the Applicant wrote to the Chief, HRMS, that in order "not to give the Administration a pretext not [to] proceed with the rebuttal" he nominated Mr. V. G. as Chairman of the rebuttal panel "while at the same time asking to recuse himself". On the same day, the Applicant wrote to Mr. V. G. asking if he would recuse himself and for what reasons. Mr. V. G. replied that he would not serve in the panel for reasons already well known to the Applicant.

41. By email of 3 July 2012, the Chief, HRMS, recalled to the Applicant that the rebuttal panel membership had been expanded in April 2012 to include other potential panel members who met the requirements of sec. 15.2 of ST/AI/2010/5.

42. Later on the same day, the Applicant nominated another staff member from the expanded list of potential panellists to chair the panel.

43. On 17 July 2012, HRMS transmitted to the Applicant the 29 August 2011 joint written statement of his reporting officers in reply to his rebuttal.

44. A rebuttal panel entrusted with considering the Applicant's rebuttal was formed on 24 July 2012, composed by a chairman at the D-2 level and two

members at the D-1 level. The documentation pertaining to the rebuttal was made available to its members. The Respondent submits that, on that same day, the panel's chairman informed HRMS orally that the case was complex and would require additional time. The panel subsequently requested further documents.

45. The rebuttal panel met six times between 3 September 2012 and late January 2013. It interviewed the Applicant and his second reporting officer on 5 December 2012, and the first reporting officer on 13 December 2012.

46. On 1 November 2012, the chairman of the panel wrote to HRMS advising that given the complexity of the case and the large volume of documentation to be considered, the rebuttal process had been delayed, and that he would convey the panel's time estimation for the completion of its task.

47. The Panel submitted its report on 29 January 2013 to HRMS, which transmitted it to the Applicant and his reporting officers on 30 January 2013. The report concluded that the original rating given to the Applicant in the 2010-2011 PAS should be maintained.

**Procedural History**

48. The application at hand was filed on 17 February 2013.

49. On 25 March 2013, the Respondent filed his reply to the application, raising, *inter alia*, that the application was irreceivable as no management evaluation of the impugned decision had been requested.

50. On 29 March 2013, the Applicant requested management evaluation of the contested decision. On 21 July 2013, he filed a motion explaining that he submitted this request "for the sole purpose of defeating the Respondent's argument" on receivability.

51. By Order No. 171 (GVA/2013) of 4 November 2013, the Tribunal informed the parties of its view that the matter could be determined on the written pleadings without holding a hearing, and invited them to file reasoned objections, if any, to that effect. None of the parties expressed any objection.

**Parties' submissions**

52. The Applicant's principal contentions are:

a. The rebuttal took one year, five months and 25 days, even though, according to para. 5.3 of the Guidelines for e-PAS/e-Performance Rebuttal Panels ("Guidelines"), the overall process of rebuttal should normally not exceed six weeks. Inordinate delays can inflict unnecessary anxiety and suffering to the concerned staff member (*Charles* 2012-UNAT-242). In addition, there is no evidence that the panel complied with the requirements of para. 5.3 of the Guidelines that its chairperson set out the achievements of the panel and the anticipated timeframe for finishing the process;

b. The rebuttal panel list from which the Applicant was asked to choose the members was not properly established. Under sec. 14 of ST/AI/2010/5, rebuttal panel members must be chosen from amongst staff members from the department/office/mission concerned; only where it is not possible to constitute a list from that office, the list may include staff members from other offices at the same duty station. The UNOV/UNODC issued a new list of rebuttal panel members on 21 April 2011 containing the name of a member who was not eligible, since she was not serving in Vienna at the time the list was issued; rather, she took up her functions at UNODC only on 3 June 2011;

c. Furthermore, already in the context of his 2009-2010 PAS rebuttal, one of the panel members on the relevant list recused himself from sitting in the panel reviewing said rebuttal, and another one—who chaired said 2009-2010 rebuttal panel—was supervised by a senior staff member against whom the Applicant had brought allegations in prior cases before this Tribunal. This precedent, combined with the recusal of two chairmen nominated for his 2010-2011 PAS rebuttal panel, left the Applicant with no actual choice in two of the three categories of panel members (chairpersons and members designated by the Executive Director, UNODC) for the nomination of his 2010-2011 PAS rebuttal panel members;

d. None of the answers provided by the Applicant and his reporting officers to the panel's questions have been reflected in its findings. As a matter of fact, there is no evidence that the reporting officers have answered these and other questions at all;

e. The panel failed to address the Applicant's claim that the performance appraisal was carried out in bad faith by his first and second reporting officers, despite the Appeals Tribunal (*Gehr* 2012-UNAT-253) having noted their bad faith in appraising, during a previous cycle, facts that became the subject of the 2010-2011 cycle;

f. According to its report, the panel held meetings before it was convened on 24 July 2012, which would constitute a procedural flaw. If, rather, the stated dates contain typos, that would be an indication of lack of rigour and diligence by the Administration in the appraisal process (as was pointed out already in *Gehr* UNDT/2011/211). In any case, there is no verifiable evidence that the panel met at all, save for the interview with the Applicant on 5 December 2012. Overall, the procedure appears flawed and subject to arbitrariness, as further corroborated by the panel's unwillingness to reflect the inordinate delay of the rebuttal process;

g. The panel did not take duly into account that the midpoint review in his 2010-2011 PAS was signed off four days after the workplan was established. This made the whole performance appraisal process profoundly flawed. Generally, his first and second reporting officer showed a profound contempt for the procedure laid down in ST/AI/2010/5;

h. The Applicant would have preferred to be interviewed by the panel in French, as encouraged by ST/SGB/212 (Use of Working Languages of the Secretariat). He requested so as early as 24 October 2011 and neither HRMS nor the panel members objected, until the very day of his interview—5 December 2012, when the panel members claimed not to be sufficiently fluent in French to follow the Applicant's statements. By not giving him any warning, albeit he had made his request 13 months before the interview, the Administration placed the Applicant deliberately at a disadvantage.

53. The Respondent's principal contentions are:

a. A rebuttal panel is not a technical body within the meaning of staff rule 11.2(b), which exempts decisions taken pursuant to advice obtained from technical bodies from the requirement of requesting management evaluation. A rebuttal panel does not advice on technical matters, i.e., matters on which management does not have the required expertise, and it does not give advice on whether a performance rating should be maintained or not, but takes the decision itself. Therefore, the Applicant was obliged to request management evaluation and, as he did not do so, the application is irreceivable;

b. There is no merit in the allegation that because the midpoint review was signed off four days after the establishment of the Applicant's workplan, the performance appraisal process is profoundly flawed, and that because the panel allegedly did not note this circumstance, its report is based on a misrepresentation of facts rendering the rebuttal process illegal. The delay in the finalization of the workplan and its entry into the PAS document were entirely attributable to the Applicant's refusal, for the second performance cycle in a row, to engage constructively in the creation of a workplan, in noncompliance with sec. 4.1(c) and (d), 4.2 and 6.3 of ST/AI/2010/5, and to utilize the PAS application;

c. The Applicant chose the three members of the panel from the list lawfully established in April 2012. Any issues raised concerning the list of April 2011 are not pertinent;

d. Regarding the Applicant's assertion that the panel met before it was constituted, the reference in the panel's report to meetings on 17 and 24 January 2012 (instead of 2013) is obviously a typo. Also, while he further avers that, save for his own interview, there is no evidence that the panel met at all, the Applicant offers no evidence to support that three senior (D-1 and D-2) officials would prepare and tender a false document. Moreover, according to the Applicant, balance of evidence suggests that the procedure was flawed and arbitrary, based only on the claim that the panel

did not reflect on the inordinate delay of the rebuttal process. However, the facts demonstrate that such delay was largely attributable to him and, in any case, outside the control of management;

e. The Applicant does not substantiate his allegations that the panel did not take into account all answers given by him and his reporting officers during interviews, consciously failed to take into account his reporting officers' bad faith, as noted in UNAT Judgment *Gehr* 2012-UNAT-253, and abused its discretionary power in assessing the information made available to it;

f. The aforementioned UNAT Judgment did not mention any *mala fides*; it rather found that the Applicant did not put forward any argument warranting consideration of the allegation that the contested decision in that case was based on ill will or bad faith towards him or an intention to harass him. Further, this Tribunal has rejected all the Applicant's successive assertions of bad faith, harassment, arbitrariness and similar managerial wrongdoing. In addition, the panel is under no obligation to address in its finding all answers received during the interviews conducted. It is within the panel's discretionary power to decide the information it deems relevant and on which it relies upon for its conclusions, and such discretion is not to be lightly interfered with by the Tribunal;

g. It cannot be deduced from the fact that the panel's report does not expressly record answers to questions, that the reporting officers did not respond to the questions. The panel addressed extensively, in writing, the issues on which the concerned reporting officers were questioned. Moreover, the panel specifically stated that it did not learn from the answers in the interviews any new substantive information that was not already available in the extensive written material, and also that "the information available to the panel, the written submissions and the interviews" confirmed the reporting officers evaluations and rating;

h. The delay in completing the rebuttal process can be entirely attributed to the Applicant's uncooperative behaviour. Between August and October

2011 he delayed the setting up of the panel by not taking a decision on whether he would nominate three panellists from the existing list or agree to seek an exception allowing to choose panellists of a lower grade than the first reporting officer. From November 2011 to the beginning of July 2012, he kept insisting that the chairman he appointed and who recused himself, should be forced to serve. Only in late July 2012 did he nominate the three panellists, after which the process proceeded in an orderly manner. Once the review was concluded, the panel drafted its report in five days only, that is, far less than the two weeks preconized in para. 15.4 of ST/AI/2010/5. Given the complexity of the case and the extensive documentation submitted, the time taken to review the case was not excessive. Also, the Guidelines provide that the overall process should "*normally* not exceed six weeks" (emphasis added), though the rebuttal at issue fell out of the normal scope in every respect; moreover, the panel did keep HRMS abreast of its achievements and anticipated timeframe to complete the report. Lastly, the Applicant has not substantiated his claim that he suffered anxiety due to the length of the rebuttal process and, even if he did, it was caused by himself;

i. The panel was not legally required to conduct the Applicant's interview in French. According to sec. 5 of Secretary-General's bulletin ST/SGB/212 (Use of working language of the Secretariat), each staff member should be able to use either English or French in his/her written communications (as opposed to oral communications). The Applicant was given this opportunity, which he did not use. The Applicant is perfectly able to communicate in English, as demonstrated by the fact that all his oral and written communications in his various cases have been in English;

j. The Tribunal is requested to award costs against the Applicant, under art. 10.6 of its Statute, as he manifestly abused the proceedings.

**Consideration**

*Receivability*

54. Staff rule 11.2 foresees a general obligation for any staff member intending to appeal an administrative decision to first request its management evaluation, with certain exceptions thereto, and sets out the applicable time lines as follows:

> **Management evaluation**
>
> (a) A staff member wishing to formally contest an administrative decision … shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
>
> (b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General … is not required to request a management evaluation.
>
> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested …
>
> …

55. The Applicant did not submit the contested decision for management evaluation prior to coming before the Tribunal, relying on the view that the findings of the rebuttal panel constituted a decision taken upon the advice of a technical body. However, once the issue of receivability was raised by the Respondent in his reply to the present application, the Applicant filed a request for management evaluation, on 29 March 2013, that is, within 60 days from the date he received the report of the rebuttal panel, although well after he had filed the present application.

56. The Appeals Tribunal ruled in *Servas* 2013-UNAT-349, that staff rule 11.2 unambiguously requires that the request for management evaluation must be submitted "as a first step", hence, *before* an application is filed with the Dispute Tribunal. Accordingly, an application filed without previously seeking management evaluation—like the one at hand—cannot be cured by an ulterior

request for management evaluation, even if this request still falls within the requisite 60-day time limit.

57. With respect to the crucial question whether a rebuttal panel is a "technical body" within the meaning of staff rule 11.2(b)—in which case a decision based on its advice would be exempt from the requirement to seek management evaluation—UNAT has clearly determined in its recent ruling *Gehr* 2014-UNAT-479 that a rebuttal panel is not such a technical body. Therefore, this Tribunal cannot but follow UNAT clear-cut determination and conclude, accordingly, that the application at hand does not fall within the aforementioned exception to the management evaluation requirement. Pursuant to this jurisprudence, the present application should be considered irreceivable *ratione materiae*.

58. Notwithstanding the above, the Tribunal is mindful that the Applicant, in initially omitting the request for management evaluation, could have relied on the Dispute Tribunal's position that a rebuttal panel was a technical body for the purpose of the exception laid down in staff rule 11.2(b). The Tribunal's view, held in its Judgment No. UNDT/2013/135—issued some nine months after the instant case was registered—had been shared with the parties in the course of a case management hearing held on 18 April 2012, that is, prior to the filing of the present application. As a matter of fact, the Applicant in the present application expressly indicated that no management evaluation had been submitted because it was "unnecessary" according to the Tribunal.

59. In this regard, it is pertinent to recall Judgment *Jansen* UNDT/2014/115, where the applicant had been misled by clear advice from the Management Evaluation Unit ("MEU") that a confirmatory communication of a previously made decision amounted to a new administrative decision requiring a fresh request for management evaluation to pursue its formal contestation. In that case, the Tribunal considered that the applicant could in good faith rely on the erroneous advice received and, on this ground, declared the application receivable.

60. The Tribunal had already taken a similar stance in *Farraj* UNDT/2010/070, where the applicant had also missed the review deadline following the advice of competent officials within the internal justice system.

61. Considering this jurisprudence and acknowledging that the Applicant could have acted in reliance of the Tribunal's expressed oral opinion, the Tribunal deems it fair to examine the merits of the instant application.

*Merits*

62. It should be recalled, at the outset, that regarding a decision such as the contested one, it is not for the Tribunal to substitute its judgment to that of the Administration. That having been said, managerial discretion is not unfettered and an administrative decision may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or flawed by procedural irregularity or error of law (see e.g., *Adbullah* 2012-UNAT-482).

63. The various issues raised by the Applicant will be examined in turn.

List of panellists

64. The Applicant takes issue with the fact that one of the panel members in the rebuttal panel list of UNOV/UNODC was appointed to her current position with the Organization in Vienna, but had, strictly speaking, not taken up such functions at the moment she was included in said list for the first time, in April 2011. According to the Applicant, this invalidated the entire list.

65. The Tribunal considers this contention irrelevant. Indeed, UNOV/UNODC issued a new list of rebuttal panel members in April 2012 and, at that point, every staff member contained on said list was working at UNOV. The April 2012 list is the one from which the Applicant choose the members of the panel entrusted with reviewing his 2010-2011 PAS. Therefore, the Tribunal is satisfied that the panel was constituted from a properly established list.

66. Additionally, the Applicant stressed that two chairmen from that list recused themselves after being nominated to chair his panel, and that he had been left with only one choice as regards two of the three categories of panel members.

67. The Tribunal observes that given the size of the staff based in Vienna, the UNOV/UNODC rebuttal panel list comprised more than the nine individuals that

sec. 14.1 requires for large departments/offices. Hence, no fault of the Administration may be found in this respect. As a matter of fact, whilst the Applicant's choice was indeed narrowed, there was still at least one eligible staff member in each category.

68. Also, the fact that a number of actual or perceived conflicts of interest prevented certain members from sitting in the Applicant's panel is an unforeseeable circumstance. Moreover, the Organization cannot be blamed—rather the contrary—for taking seriously and cutting short to impartiality issues potentially affecting rebuttal panels.

69. Lastly, the fact that the combined effect of several factors (such as conflicts of interest and the high grade of the first reporting officer) *de facto* restricted the Applicant's choice, cannot trigger the Administration's responsibility, all the more since the latter deployed considerable efforts to address the situation, including offering to seek an exception to the requirements of grade and duty station of the panel members.

70. In any event, the situation described by the Applicant was corrected through the issuance of the April 2012 list, which, as a side note, was prompted primarily to address the Applicant's reserves.

Panel meetings

71. The rebuttal panel was formed on 24 July 2012. Its report stated that it met on "3 September, 10 September, 5 December, 13 December 2012 and 17 January and 24 January 201**2**" (emphasis added).

72. On this statement, the Applicant builds an argument that the panel met before it was constituted, thereby overstepping its mandate and authority. He even goes further averring that there is no evidence that the panel ever met, except for his interview.

73. Having reviewed the panel's report and the rest of the communications and materials in relation with the panel's activities, it is obvious to the Tribunal that

the statement cited above contains a simple clerical mistake and that it was meant to read "… 17 January and 24 January 201**3**".

74. In addition, the Tribunal has before it a ten-page report describing in some detail the work, analysis and conclusions of the panel, which records six meetings, whereas the Applicant presents no evidence whatsoever—let alone clear and convincing—of the panel's alleged failure to meet, to carry out the interviews or the deliberations that its mandate entailed.

Answers to interviews questions

75. The Applicant complains that the rebuttal panel's report does not reflect the answers to the questions put to him, on the one hand, and to his first and second reporting officers, on the other hand, during their respective interviews.

76. Suffice it to recall that neither ST/AI/2010/5 nor the Guidelines stipulate an obligation for the panel to transcribe or even refer individually to the responses provided by the persons interviewed in the course of a rebuttal process. The panel has a large discretion to decide which information gathered is relevant and bears enough importance to be included in its report.

77. Furthermore, the report does specify that the oral answers to the panel's questions did not add any information to that in the written submissions and materials made available to it. This offers a plausible explanation as to why the report does not highlight any of the interviewees' oral statements. Moreover, the report does deal with, and reaches conclusions on, the issues that were the subject-matter of the questions asked.

Panel's failure to address the Applicant's submissions

78. Firstly, according to the Applicant, the panel did not duly take into account that only four days elapsed between his supervisor introducing his workplan in the PAS document and the midpoint review, which in his view showed that the entire appraisal process was profoundly flawed.

79. Nothing in the panel's analysis and findings allows the Tribunal to conclude that the short gap between the signing of the workplan and the stated date of the midpoint review, was not properly taken in consideration and given adequate weight.

80. The panel was fully aware that the exchanges between the Applicant and his first reporting officer took place outside the e-PAS system; hence, the dates in which each stage of the appraisal was introduced in the e-PAS application did not necessarily correspond to the actual chronology of the exchanges.

81. Secondly, the Applicant claims that the panel did not consider his contention that his reporting officers appraised his performance in bad faith, despite UNAT having noted that they had shown *mala fides* in assessing the same issues in a previous cycle.

82. Contrary to what the Applicant submits, UNAT did not conclude in Judgment *Gehr* 2012-UNAT-253 that the Applicant's reporting officers showed bad faith in assessing his performance. Para. 44 of this Judgment reads:

> The Appeals Tribunal is of the opinion that while it was irregular, the initial decision made to appraise [the Applicant]'s performance beyond 31 March 2010 was not, of itself, absent any evidence of mala fides on the part of the Administration, an action that merited consideration by the UNDT in terms of a compensatory award.

83. Quite clearly, this passage does not contain or imply any finding that the appraisal was carried out *mala fides*. On the contrary, it means that the concerned performance appraisal did not warrant a compensatory award, inasmuch as there was no bad faith on the part of the Administration; the paragraph in question cannot be read otherwise.

84. More generally, while the rebuttal panel did not find that the Applicant's performance appraisal in 2010-2011 cycle was tainted with any kind of bad faith, bias or undue extraneous factor, there is nothing to support that it failed to take this allegation into consideration. In fact, the panel's report refers explicitly to the Applicant's "principal" contention that "the appraisal was predicated on

harassment, abuse of authority, unfair treatment and similar conduct", which suggests that the panel took into account this contention.

85. The Tribunal finds that the Applicant failed to substantiate his claims that the panel's conclusion in this respect were erroneous.

Delays in the rebuttal process

86. The rebuttal took nearly one and half years to be completed, from the submission of the rebuttal statement to the transmittal of the final report to the Applicant.

87. However, the sequence of events shows that the setting up of the panel took almost an entire year, thus accounting for most of the time elapsed. As the Respondent notes, between August and October 2011, the Applicant did not take a decision on whether he would nominate three panellists from the existing list or agree to seek an exception allowing to choose panellists of a lower grade than that of his first reporting officer. Subsequently, more than eight months elapsed (from November 2011 to early July 2012), as the Applicant insisted that the chairman he initially nominated be obliged to serve, despite the latter having manifested his intention to recuse himself.

88. Once constituted, the panel took slightly over six months to complete the rebuttal process. This lapse of time cannot said to be excessive in view of the complexity of the case and the extensive documentation to be reviewed. If para. 5.3 of the Guidelines provides that the overall process of rebuttal should normally not exceed six weeks, this timeframe is not an absolute mandatory limit; the use of the adverb "normally" nuances this provision so as to allow for a longer duration if warranted due to exceptional circumstances like the ones in this case.

89. In examining the available records of the panel's work, the Tribunal detected no unexplained periods of inactivity by the Administration during the procedure, nor any given step that took in itself abnormally long. Furthermore, whereas sec. 15.4 of ST/AI/2010/5/Corr.1 prescribes that the rebuttal panel shall prepare its report "within 14 days after the review of the case", the panel handed

its report on 29 January 2013, that is merely five days after its last meeting (24 January 2013).

90. As to the requirement in para. 5.3 of the Guidelines that, in case the duration of the overall process is going to exceed six weeks, the chairperson shall set out the achievements of the panel and the anticipated timeframe for completion, it is established that, by email dated 1 November 2012, the panel's chair informed HRMS of the delay occasioned by the complexity of the case and the large volume of documentation to be considered, and announced that it would provide a timeframe of the estimated date of completion of the panel's deliberations. Thus, the panel raised within reasonable time the impossibility to complete the process in six weeks, gave the reasons thereof, and communicated with the Administration about the foreseeable additional time needed.

91. For its part, HRMS displayed a responsive attitude throughout the process, as illustrated by its attempts to solve the issues affecting the nomination of the panel members—proposing to seek exceptions to the relevant rules and, eventually, issuing an expanded rebuttal panel list—and took action without undue delay at every stage of the procedure at which implementation was in its hands.

92. Therefore, the Tribunal is satisfied that the long delay between the filing of the rebuttal and the issuance of the panel's report does not constitute a procedural flaw and does not affect the legality of the contested decision.

Request to be interviewed in French

93. Sec. 5 of ST/SGB/212 prescribes that "each staff member should be free to use in his *written* communications either English or French, at his or her option" (emphasis added). Clearly, this provision does not create any right concerning oral communications.

94. The Tribunal cannot entertain the claim that, by not giving the Applicant any warning that the interview would take place in English, he was disadvantaged. The Applicant has excellent command of the English language, which not only

was a requirement for the post he encumbered, but he has also repeatedly proven before the Tribunal that he is able to understand and formulate complex arguments in English, both orally and in writing.

95. Importantly, the Applicant choose to write his rebuttal statement of 5 August 2011 in English, as well as all subsequent exchanges on the rebuttal. Moreover, he was given the opportunity to make an additional written submission in French after the interview and he did not make use of it, which shows that he considered he had conveyed everything he needed to express to make his case.

96. Thus, the fact that the Applicant was not interviewed in French does not constitute a breach of due process.

Costs

97. The Tribunal does not find the Applicant's conduct to be a manifest abuse of the proceedings warranting the award of costs against him pursuant to art. 10.6 of its Statute.

**Conclusion**

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

The application is rejected.

(*Signed*)
Judge Thomas Laker
Dated this 20th day of February 2015

Entered in the Register on this 20th day of February 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva