



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:

Simon Buettner, UNOG

Introduction

1. The Applicant, a former staff member of the United Nations Office on Drugs and Crime (“UNODC”), challenges the finalisation of his performance appraisal, including the rebuttal process, for the period 1 April to 31 December 2011.

2. As remedies, the Applicant requests the Tribunal:

a. To declare null and void the whole performance appraisal process for the period of April to December 2011, as well as the related rebuttal process;

b. To order the Respondent to expunge all adverse material from his Official Status File (“OSF”) or from any other file;

c. Appropriate compensation for:

i. Violation of his due process rights;

ii. Damage caused to his reputation;

iii. The Administration’s failure to protect him from the unfair dealing of his supervisor;

iv. Harassment, stress, anxiety, humiliation, moral injury and inequitable treatment suffered as a consequence of the treatment by his supervisor and two officers of the Human Resources Management Service (“HRMS”)/Division for Management, United Nations Office at Vienna (“UNOV”)/UNODC.

d. A recommendation to record on the e-PAS of his supervisor his non-compliance with and misuse of the rules governing the performance appraisal system, in accordance with sec. 5.5 of administrative instruction ST/AI/2010/5 (Performance Management and Development System);

e. To refer the cases of his supervisor and the two HRMS officers criticised by the Applicant (see sub-para. 2.c.iv above) to the Secretary-General for possible action to enforce accountability.

Facts

3. The Applicant joined 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 for Treaty Affairs (“DTA”), 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 and different attempts to have third parties facilitate discussions, the Applicant and his then first reporting officer never reached consensus on the terms of his workplan for the 2011-2012 performance cycle.

5. By email of 14 June 2011, the Applicant’s then first reporting officer requested him to submit a draft workplan for the 2011-2012 performance cycle. The Applicant replied questioning the applicability of ST/AI/2010/5 to his case; both the first and second reporting officers confirmed their understanding that said instruction applied to the Applicant’s case and advised him that, should he choose not to submit the requested draft, his management would establish a workplan for him as it had been the case in the previous performance cycle.

6. Since the Applicant did not submit any draft workplan, his then first reporting officer prepared a written one outside the e-PAS application without the Applicant’s involvement or agreement. This workplan reproduced the wording of that of the previous performance cycle, save for managerial duties, which were no longer reflected as being part of the Applicant’s responsibilities. On 7 July 2011, the Applicant’s second reporting officer transmitted this workplan to him via email. The Applicant did not provide any comments thereon.

7. By email dated 13 July 2011, the second reporting officer sent a Performance Improvement Plan (“PIP”) to the Applicant. He went into some

length explaining that the PIP had to be prepared without the Applicant's input due to his refusal to cooperate in spite of numerous requests.

8. On 29 July 2011, the second reporting officer informed the Applicant that the workplan had been inserted into the e-PAS format, prepared as a paper document outside the electronic application. A copy of it was sent to the Applicant; it included the workplan, as shared with him on 7 July 2011, and an explanation of the reasons for creating it without the Applicant's involvement.

9. Further to the resignation of the Applicant's then first reporting officer (i.e., the Chief, TPB), in August 2011, the Executive Director, UNODC, designated the Applicant's second reporting officer (i.e., the Director, DTA) as Officer-in-Charge ("O-i-C"), TPB, as of September 2011.

10. By email of 16 August 2011, the second reporting officer noted that the Applicant had provided no information on the progress made in implementing the PIP and his workplan on the deadlines stipulated in the PIP; anticipating that he would most likely have to do the Applicant's midpoint review, he urged him to submit, by 19 August 2011, his written explanation of his progress in achieving the goals in his workplan, as well as his explanation for his failure to respond, to that date, to the deadlines set in his PIP. He further directed the Applicant to inform him on this matter on a monthly basis.

11. On 17 August 2011, the Applicant responded that "this [was] *sub judice*" and recalled the allegations of harassment he had brought before this Tribunal. On the same day, the second reporting officer insisted on his request to the Applicant and rebutted the idea that this may be considered harassment.

12. On 19 August 2011, the Applicant provided his first and second reporting officers with written information on his professional activity. By email of 29 August 2011, the second reporting officer gave detailed feedback to the Applicant, requested additional information and set deadlines for specific tasks to be accomplished in early September 2011. The Applicant replied on 2 September 2011 in French—a language that his addressee did not understand. After having it translated, his supervisor, the Director, DTA, who had by then effectively become

O-i-C, TPB, replied on 5 September 2011, providing further comments, instructions and deadlines.

13. By email of 2 November 2011, the Applicant's supervisor emailed a document to the Applicant containing detailed comments on his midpoint review. In it, the Applicant's supervisor stressed that the Applicant had provided no information to him since 2 September 2011, and that he had also failed to meet the deadlines imparted to him by communication of 5 September 2011. The Applicant's supervisor further stated that, despite clear guidance, including through a PIP, the Applicant's performance had "gotten worse", rather than improved, with respect to the previous appraisal cycle, where he had been rated "partially meets performance expectations". He also specified that the emailed document "should be regarded as the basis for his midpoint performance review" and would be included in Part B of his PAS, and invited the Applicant to provide a "written reply in order to complete the midpoint performance review process". Finally, the Applicant's supervisor pointed out that he had decided to conduct the Applicant's midpoint review in writing to avoid possible misinterpretations, since the Applicant had several times prepared inaccurate transcripts of oral conversations.

14. On 14 November 2011, the Applicant inquired about the legal basis for the procedure announced in the 2 November 2011 communication. His supervisor referred to the relevant legal provisions cited in his statement dated 2 November 2011.

15. On 29 November 2011, the Applicant was advised that his fixed-term appointment would not be renewed beyond 31 December 2011.

16. On 5 December 2011, the Applicant's supervisor advised the Applicant that, in conjunction with the end of his contract, it was necessary to finalise his last performance appraisal and, to that end, invited him to give comments in writing on the self-assessment of his work by 16 December 2011. The Applicant did not provide his self-assessment.

17. On 12 December 2011, the Applicant requested his supervisor not to proceed in accordance with ST/AI/2010/5, as he disagreed with his supervisor's understanding of the instruction. The supervisor replied on 14 December 2011 that he intended to proceed, based on the Management Evaluation Unit and the Tribunal's finding that ST/AI/2010/5 was applicable.

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

19. On 3 January 2012, the Applicant's supervisor transmitted to the Applicant his completed PAS for the period 1 April to 31 December 2011, giving an overall rating of "partially meets performance expectations". The supervisor signed the document on 3 January 2012; he signed it twice, as he was acting as first as well as second reporting officer. The Applicant signed the PAS on the same date, with no comments.

20. On 15 January 2012, the Applicant submitted to the Director, Division for Management, UNODC, a rebuttal statement in relation to his performance appraisal for the period 1 April to 31 December 2011.

21. The Director, Division for Management, UNOV/UNODC, as well as the Applicant's supervisor, who was copied in the message, received the rebuttal statement after the Applicant re-sent it on 17 January 2012. The statement called into question the capability and motivations of the Applicant's supervisors and raised issues of procedure, notably the lack of a face-to-face midpoint discussion. It also contained the nomination of three members for the rebuttal panel, together with a claim that the panel list was invalid as incomplete since 1 January 2012.

22. By email of 3 February 2012 to the Applicant, the Chief, HRMS, pointed out that the panellists had to be at the D-2 level or above, since that was the grade of his first reporting officer for that cycle. He further stated that OHRM guidance was being sought, given that there were insufficient D-2 staff members in the panel list to constitute a three-member panel.

23. On 3 March 2012, OHRM advised to appoint additional rebuttal panel members at the D-2 level. On 12 March 2012, the Applicant was informed that the

rebuttal panellists' list would be expanded accordingly. On 19 April 2012, HRMS transmitted the expanded list to the Applicant and invited him to nominate the panel members for his panel from the revised list.

24. By email of 23 April 2012, the Applicant designated three members for the panel, while requesting at the same time that one of them recuse herself, alleging conflict of interest on the grounds that he had previously asked the Dispute Tribunal to refer her to the Secretary-General to enforce accountability and address integrity concerns. He also complained that he did not have a choice in several categories of panel members.

25. On 30 April 2012, HRMS explained in detail to the Applicant that all D-2 staff members who could plausibly sit in his panel had been included in the list. HRMS also rejected the Applicant's accusations against one of the nominated panellists, and added that said panellist had nevertheless decided to recuse herself. Given that no other D-2 staff member was eligible to replace her, further guidance was to be sought from OHRM; this was done on 8 May 2012.

26. On 6 June 2012, it was announced that a staff member already on the rebuttal panel list in the same category as the recused panellist, had been promoted to the D-2 level.

27. On 18 June 2012, HRMS informed the Applicant that OHRM advised either to seek an exception under staff rule 12.3(b) to allow the selection of a member from a different office, or to designate the panellist recently promoted to the D-2 level once his promotion became effective on 1 August 2012. HRMS therefore asked the Applicant which of these options he preferred. The Applicant rejected both options on the same day.

28. On 27 June 2012, the Applicant requested management evaluation of the decision not to proceed with his performance appraisal and filed an application with the Tribunal (registered under Case No. UNDT/GVA/2012/057). The Management Evaluation Unit ("MEU") replied on 28 June 2012, deeming that the Administration had made no final administrative decision to be contested and, on 2 July 2012, the Applicant amended his 27 June 2012 application before the

Tribunal. This application was dismissed by summary judgment of 3 July 2012 (*Gehr* UNDT/2012/103), on the grounds that the Administration's offering two options to proceed with the rebuttal did not qualify as a final decision, nor could it be considered as a decision not to proceed with the rebuttal. On 19 June 2012, the Applicant appealed against the above-mentioned summary judgment before the Appeals Tribunal ("UNAT"). On 28 March 2013, the UNAT announced from the bench that it affirmed the first instance ruling (decision couched in writing in Judgment *Gehr* 2013-UNAT-313 of 28 March 2013).

29. On 17 April 2013, HRMS informed the Applicant that a new rebuttal panel list ("the new list") had been issued upon expiry of the term of the previous one and that another panellist would be promoted to the D-2 level effective 1 May 2013. The new list was attached. The next day, the Applicant wrote back asking HRMS to elaborate on what he should do to rebut his 2011 PAS in compliance with the applicable rules, and to identify the legal basis for its advice.

30. On 22 April 2013, HRMS recalled its previous advice and stated that the Applicant could choose the three panel members from the new list. The Applicant announced that he would wait for the full written version of UNAT Judgment *Gehr* 2013-UNAT-313 to make an informed decision.

31. On 25 May 2013, after receiving the aforementioned UNAT Judgment, the Applicant selected three staff members from the new list to sit on his panel, and requested that his interview be conducted in French.

32. After the nominated panellists confirmed their availability, on 30 May 2013, the rebuttal statement was officially transmitted to the reporting officer for reply; he submitted it on the same day explaining that he had prepared the reply—dated 27 January 2012—upon first receiving the rebuttal statement (see para. 21 above). On 31 May 2013, HRMS transmitted the written reply and related documentation to the panel and to the Applicant.

33. The panel met on 18 June 2013. It interviewed the Applicant on 20 June 2013, in French, and requested additional documentation from HRMS. On

21 June 2013, the first (and also second) reporting officer was interviewed, in English.

34. In response to an HRMS inquiry on the progress made, the Chairman of the panel provided reasons, on 21 August 2013, for the time taken to finalise the review, assuring that the case had taken a great deal of attention on the part of the panel.

35. After further deliberations in written form, the panel drafted its final report, dated 22 September 2013, and transmitted it to HRMS and the Director, Division for Management, UNOV/UNODC, on 6 October 2013. HRMS transmitted the report to the Applicant on 7 October 2013.

36. The Applicant filed the present application on 5 November 2013 and the Respondent filed his reply on 9 December 2013.

37. By Order No. 23 (GVA/2015) of 30 January 2015, the Tribunal informed the parties about its intention to determine the case on the basis of the written pleadings without holding an oral hearing, and invited them to file reasoned objections to it, if any. None of the parties objected.

Parties' submissions

38. The Applicant's principal contentions are:

- a. The Administration illicitly, knowingly and wilfully finalised the performance appraisal with undue delay;
- b. The performance appraisal and the rebuttal process were initiated on the basis of ST/AI/2010/5, which was and remains not applicable, since the Applicant held an appointment of less than one year;
- c. Even if said instruction was applicable, it is illicit that the same person conducted and signed the appraisal both as first and second reporting officer;

d. The Administration wilfully failed to draw-up a list of rebuttal panel members in compliance with sec. 14 of ST/AI/2010/5, which would have allowed him to select individuals in accordance with sec. 15 of the instruction;

e. One of the panel members was not serving at the Vienna duty station;

f. The contested decision was tainted with improper motivation, particularly, bad faith and ill will against the Applicant. Proof of prejudice is rendered unnecessary when procedural requirements have not been observed.

39. The Respondent's principal contentions are:

a. No contestable decision has been identified by the Applicant. The document annexed to the application under the designation "contested decision" contains the rebuttal panel report alone; thus the impugned decision is to be determined exclusively on the basis of this document;

b. In case that what the Applicant intends to contest is the final performance rating, the rating as such is not subject to review under the formal system of administration of justice as per sec. 15.5 and 15.7 of ST/AI/2010/5; sec. 15.7, in particular, makes an express distinction between the final performance appraisal and the administrative decisions that may stem therefrom. This provision, despite its literal wording, applies to both rebutted and unrebutted appraisals. Such rating is not a decision contestable under staff rule 11.2, as it has no direct legal effect in itself;

c. No management evaluation of the impugned decision has been requested. Only decisions having been submitted for management evaluation are appealable before the Tribunal. Failing that, an application is irreceivable;

d. The rebuttal panel is not a technical body for the purposes of staff rule 11.2(b). It does not give advice on a technical matter and the knowledge required from the panellists is not technical in nature. Moreover, it does not

advice but takes itself the decision (binding on manager and staff member alike) of maintaining or reversing the initial performance rating. Finally, technical bodies have to be determined by the Secretary-General, and no such determination has been made regarding the rebuttal panels in ST/AI/2010/5 or elsewhere. Therefore, the decision could not be contested without a prior request for management evaluation. In the absence of it, the application is not receivable;

e. If the application was meant to contest the decision to place the relevant performance document into the Applicant's OSF, it is equally irreceivable due to the lack of management evaluation request in this respect;

f. Sec. 1 of ST/AI/2010/5 provides that it shall apply to all staff members who hold appointments of at least one year. The Applicant has served on a fixed-term contract for more than one year, including the entire year 2011. The Applicant continues to argue that ST/AI/2010/5 is inapplicable to him, although the Dispute Tribunal has ruled to the contrary on several occasions (see *Gehr* UNDT/2011/178, *Gehr* UNDT/2012/106);

g. The arrangement of having two different reporting officers cannot always be guaranteed, as it depends on the staffing situation. As the Applicant's immediate supervisor (D-1) had left the service, it was considered more appropriate that the latter's supervisor (D-2) carries out the Applicant's appraisal, rather than assigning this responsibility to one of the three other P-5 within the same branch. Moreover, it is highly unlikely that the performance rating would have been different had the Applicant had two different individuals as first and second reporting officers. This situation only persisted from September 2011 until the end of the year, and the rebuttal panel did not find that the Applicant's rating was unfairly affected by this arrangement. The rebuttal conducted by the rebuttal panel "healed" possible violations;

h. Out of the 19 months that the performance appraisal took after the end of the relevant cycle, the Applicant is exclusively responsible for at least 13.

The time which elapsed while it was upon the Administration to act cannot be viewed as undue delay, especially bearing in mind the complexity of the issues and the extent of the Applicant's resistance to cooperate;

i. The rebuttal panel that reviewed the PAS at issue was correctly constituted. The contention that one of the panel members was serving in UNODC from Kabul and not Vienna is unsubstantiated and without merit. Sec 14.2 of ST/AI/2010/5 states that “[i]n the event that a member of the rebuttal panel is assigned to functions *outside the department/office concerned*, he or she shall be replaced ...” (emphasis added). The concerned panel member was at all times a UNODC staff member and thus from within the office concerned. The instruction does not require staff from the same office to be from the same duty station to serve on a rebuttal panel;

j. On the remedies, not every procedural irregularity will necessarily lead to an award of compensation. The Applicant has not substantiated a causal link between the issues he raises and his performance rating, neither any economic loss or any non-pecuniary damages. Concerning in particular the claim of damage to his reputation, the Applicant separated from service before the appraisal and the rebuttal took place, and he did not adduce proof of any impact of the performance rating on a (non-)selection within or outside the Organization.

Consideration

Receivability

40. The decision constituting the subject-matter of the present case is sufficiently clear from the application. It is the appraisal of the Applicant's performance for the period 1 April to 31 December 2011, including the rebuttal process at the outcome of which the initial evaluation was upheld. This goes beyond the rating itself and has to be differentiated from the placement of the relevant PAS in the Applicant's OSF.

41. Both the Appeals and the Dispute Tribunals have accepted that decisions relating to the performance appraisal of a staff member, including its rebuttal process, are appealable (see e.g., *Gehr* 2013-UNAT-313; *Gomes da Conceição* UNDT/2012/190; *Kamanou* UNDT/2012/059).

42. Regarding the lack of management evaluation, staff rule 11.2 foresees a general obligation for any staff member intending to appeal an administrative decision to 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 ...

...

43. The Applicant did not submit the contested decision for management evaluation prior to coming before the Tribunal.

44. With respect to the crucial question whether a rebuttal panel is a “technical body” in the sense of staff rule 11.2(b)—in which case a decision based on its advice is 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*.

45. Notwithstanding the above, the Tribunal is mindful that the Applicant, in 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 was held in its Judgment No. UNDT/2013/135 issued some days before the instant application was registered, ruling on another case brought by the Applicant.

46. 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.

47. 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.

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

Merits

49. The Tribunal wishes to recall, at the outset, that regarding a decision such as the one contested in the present application, 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).

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

Applicability of ST/AI/2010/5

51. According to staff rule 1.3, titled “Performance of staff”,

(a) Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member’s compliance with the standards set out in the Staff Regulations and Staff Rules for purposes of accountability.

...

(c) Performance reports shall be prepared regularly for all staff members, including at the Assistant Secretary-General level and above, in accordance with procedures promulgated by the Secretary-General.

52. In furtherance to this rule, the Secretary-General has promulgated a number of performance assessment mechanisms and procedures. ST/AI/2010/5 enacted the most widespread of such procedures currently in force.

53. Sec. 1 of ST/AI/2010/5 defines the scope of application of this instruction, as follows:

The present instruction shall apply to all staff members who hold appointments of at least one year ... The present instruction does not apply to staff holding temporary appointments.

54. Based on this provision, the Applicant argues that the above-referred instruction does not govern his performance evaluation from 1 April to 31 December 2011, since he was on a fixed-term appointment of less than one year. As a matter of fact, at the material time he held, indeed, a fixed-term appointment for 11 months.

55. The above-quoted sec. 1 does not render mandatory the application of the administrative instruction to staff holding appointments of less than one year. However, unlike what is the case for staff on temporary appointments, said section does not exclude staff members holding a fixed-term appointment of less than one year from the administrative instruction’s scope of application.

56. The Tribunal thus infers that, although not bound to do so, the Administration was entitled to apply the regime laid down in ST/AI/2010/5 to the Applicant, as a holder of an 11-month fixed-term appointment. This interpretation is in line with *Eldam* UNDT/2010/133, where the Tribunal admitted the applicability of ST/AI/2002/3 (the previous administrative instruction on performance evaluation in force until the promulgation of ST/AI/2010/5) to a staff member holding a six-month fixed-term contract at the management's discretion.

57. Further, the Tribunal is of the view that, by choosing to apply the said regime, the Administration did not bring any tort to the Applicant. On the contrary, of the various existing performance assessment regimes, ST/AI/2010/5 contains the most protective one from a staff member's perspective. Indeed, ST/AI/2010/5 establishes a set of guarantees and procedural rights that are considerably more complete and far-reaching than other performance appraisal mechanisms, with safeguards such as a right to rebuttal and a duty to conduct a midpoint review. This is particularly notorious when compared with the mechanism foreseen for the evaluation of performance of staff on temporary appointments in ST/AI/2010/4/Rev.1 (Administration of temporary appointments).

58. In fact, the Administration, which, under staff rule 1.3, has to assess all staff members and prepare regular performance reports for all of them, granted the Applicant the most favourable procedure to that effect, although it was not obliged to do so. In view of the foregoing, it cannot be sustained that the Administration breached the Applicant's terms of employment.

Same staff member performing first and second reporting officer roles

59. Sec. 5 of ST/AI/2010/5 provides that a "first reporting officer shall be designated for each staff member at the beginning of the performance cycle", and that there will be a second reporting officer as well, "who shall be the first reporting officer's supervisor or equivalent".

60. Said provision also spells out the tasks for which each of the reporting officers is responsible. On the one hand, under sec. 5.1 of the instruction, the first reporting officer's tasks are:

- (a) Developing the workplan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

61. On the other hand, as per sec. 5.3 of the same instruction, the second reporting officer is responsible for:

- (a) Ensuring that the first reporting officer understands and applies the Performance Management and Development System principles and procedures;
- (b) Holding the first reporting officer accountable for developing, together with staff, workplans with fair and consistent performance expectations and ensuring linkages between department/office priorities and individual workplans;
- (c) Holding the first reporting officer accountable for the timely appraisal of the staff member's performance;
- (d) Providing ongoing feedback and evaluating the first reporting officer's ability to manage the performance of his/her supervisees;
- (e) Resolving disagreements between the staff member and the first reporting officer in the implementation of the Performance Management and Development System;
- (f) Overseeing the establishment and implementation of a performance improvement plan in case of performance

shortcomings or underperformance, as provided for in section 10 of the present instruction.

62. In addition, sec. 8.5 prescribes that “[e]valuations are reviewed by the second reporting officer, who may make comments, as appropriate”.

63. It follows from the above that, in essence, the first reporting officer is to implement, from the management side, the different procedural steps and substantive exchanges throughout the cycle, whereas the second reporting officer overviews, and if necessary rectifies or counterbalances, the first reporting officer’s intervention.

64. This scheme is clear from the distribution of tasks between the first and second reporting officers as outlined above. Additionally, it is consistent with the requirement that the second reporting officer be the supervisor of the first reporting officer.

65. The corollary is that the first and the second reporting officers must be two different individuals. Allowing the “blending” of both functions in one person would defeat the underlying purpose of having two independent minds reviewing the staff member’s performance and, ultimately, would render meaningless the system of “checks and balances” carefully established in the cited provisions. Indeed, there would be an obvious conflict of interest in having the same official carrying out, first, the substantive steps of the performance appraisal (as first reporting officer) and, then, verifying that his or her own actions and appreciations were proper (as second reporting officer).

66. In the case at hand, it is established that upon the resignation of the Applicant’s direct supervisor, and for the purpose of the 2011-2012 PAS cycle, the Director, DTA, simultaneously fulfilled both the function of first and second reporting officer of the Applicant. The Tribunal is aware that this arrangement was made because the Applicant’s immediate supervisor ceased serving the Organization, following which the Applicant’s second reporting officer was designated O-i-C, TPB. Yet, the fact that the Director, DTA, effectively ran the branch as its O-i-C did not preclude the possibility of having two different

individuals acting as first and second reporting officers. For instance, the O-i-C could have become the Applicant's first reporting officer, while another senior officer—presumably the O-i-C's supervisor—could have fulfilled the role of second reporting officer.

67. The Respondent stresses that for most of the performance cycle, the Applicant had two distinct first and second reporting officers and that the same person acted in both capacities only for four months (September to December 2011). This fact is not disputed. It remains, nonetheless, that precisely during these four months two of the main stages of the performance evaluation process took place: the midpoint review and, even more importantly, the end-of-cycle appraisal.

68. Finally, it must be clarified that the endorsement of the “single reporting officer” approach by the rebuttal panel cannot and does not cure this irregularity.

69. For all of the above, the Tribunal concludes that the fact that the Director, DTA, acted as first and as second reporting officer runs contrary to the letter and spirit of ST/AI/2010/5. In addition, it is the Tribunal's view that, the two-tier review by two distinct managers is a fundamental feature of the performance appraisal system set out in ST/AI/2010/5. It is one of the major guarantees of fairness and impartiality for any staff member being appraised. As such, failure to comply with it amounts to a fundamental breach of the instruction.

Composition of the rebuttal panel

70. The Applicant puts forward that the panel's composition was “imposed on the Applicant on the basis of an illegally produced list”. He holds that the Administration purposefully failed to draw-up a rebuttal panel list in compliance with sec. 14 of ST/AI/2010/5, which would allow him to “genuinely select individuals” in accordance with sec. 15 of the instruction. However, the Applicant gives no reasons to consider the UNOV/UNODC list to not be in compliance with the requirements of ST/AI/2010/5. Only in the rebuttal statement of his 2011-2012 PAS, one may read that, in the Applicant's opinion, the list from which he first

choose the panel members was “incomplete” since 1 January 2012, without providing any explanation as to how or why.

71. In any event, it should be recalled that the Applicant eventually nominated the members of the rebuttal panel from a list issued in April 2012. This list was issued upon the expiry of the term of the previous members and its validity has not been questioned. Therefore, any contention relating to the list of April 2011 is irrelevant as regards the lawfulness of the panel constituted to review the rebuttal of the Applicant’s 2011-2012 PAS.

72. The Applicant also claims that the rebuttal was vitiated by the fact that one of the panel members was not “serving at the duty station Vienna”. The panellist alluded to is the Regional Representative for Afghanistan and neighbouring countries, UNODC, who appears to be based in Afghanistan, although he serves with UNODC.

73. Pursuant to sec. 14.1 of ST/AI/2010/5, the list of rebuttal panel members is composed of “three groups of staff members from the *department/office/mission concerned*” (emphasis added). It follows that the determining factor is not the duty station where the staff member is based, but its institutional belonging to the department, office or mission in question. Sec. 14.2 of the same instruction reinforces this interpretation, as it requires that a panel member be replaced only in the event that he/she “is assigned to functions outside the department/office concerned”.

74. Accordingly, the staff member serving as Regional Representative for Afghanistan and neighbouring countries, UNODC, met the conditions to sit in the Applicant’s rebuttal panel despite not being based in Vienna.

75. Therefore, the Tribunal cannot but find that the rebuttal panel that reviewed the Applicant’s performance evaluation for the 2011-2012 cycle was lawfully constituted and competent to conduct the rebuttal process.

Undue delay

76. The rebuttal panel's report was transmitted to the Applicant on 7 October 2013, that is indeed "more than 19 months after the end of the evaluation cycle", which was 31 December 2011.

77. The 2011-2012 PAS was finalised and shared with the Applicant only three days after the end of the cycle, on 3 January 2012. Hence, it was the rebuttal process, initiated by the Applicant's statement dated 15 January 2012, that took nearly 19 months. However, having reviewed the chronology of this rebuttal, the Tribunal concludes that the Administration did not cause any undue delay in said process.

78. The Administration took action diligently at every stage where it fell upon it to act. The Respondent concedes that the initial panel list did not contain enough D-2 and above members for the Applicant to nominate a panel. However, the Administration issued an expanded list within two months, which can by no means be deemed an excessive delay.

79. Once constituted, it took the panel barely three weeks to conduct the interviews, and slightly more than four months to review all relevant documentation, complete its deliberations and draft its final report, rendered on 6 October 2013. This is a perfectly reasonable time considering the complexity of the issues and materials to be reviewed. Moreover, the panel informed HRMS, while its review was ongoing, of the motives for the time taken. The Applicant's supervisor provided his comments to the rebuttal on the same day the statement was officially transmitted to him. Lastly, HRMS transmitted the panel's final report to the Applicant the next day after its receipt.

80. In fact, it appears that the largest part of the 19 months in which the rebuttal was pending actually elapsed while awaiting for the Applicant to complete several steps of the process. In this connection, although the Applicant nominated three members for his rebuttal panel in January 2012, he only communicated his final nomination on 25 May 2013.

81. During this period, the Applicant first nominated three members but at the same time requested the recusal of one of them. Later, the Applicant rejected two options that were in conformity with the applicable rules proposed by HRMS to resolve the impasse—i.e., to either seek an exception to allow the nomination of a panellist from another department/office or to await until a member who had recently been promoted took up his functions at the D-2 level. From mid-June 2012 to end of May 2013, the Applicant refused to take any further action until the purported decision to not finalise his 2011-2012 performance cycle appraisal underwent management evaluation and judicial review by the Dispute Tribunal and, upon his appeal, by the Appeals Tribunals.

82. In view of the above, 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 that it did not affect the legality of the contested decision.

Ill motivation

83. In alleging that the decision was tainted with improper motivation, particularly, bad faith and ill will against him, the Applicant provides no evidence whatsoever tending to support his claim, nor does he give any related details. Instead, he puts forward that proof of prejudice is rendered unnecessary when procedural requirements have not been observed.

84. It is trite law that the Applicant alleging improper motivation bears the burden of adducing convincing evidence thereof (*Asaad* 2010-UNAT-021). In the instant case, the Applicant failed to discharge such burden.

85. The fact that the Tribunal has found a procedural flaw in the process of the Applicant's 2011-2012 performance appraisal cycle—since the same person performed the role of both first and second reporting officer—does not establish a completely different impropriety, namely alleged ill motivation.

Remedies

86. Having found that a fundamental breach of ST/AI/2010/5 occurred, and considering that the Applicant requested that the contested decision be declared

null and void, the Tribunal, pursuant to art. 10.5(a) of its Statute, hereby rescinds the appraisal of the Applicant's performance for the period 1 April 2011 to 31 December 2011 and, orders that, by way of reparation, this Judgment be placed in the Applicant's OSF.

87. The Applicant has not demonstrated that he sustained any material or moral damage stemming from the above-mentioned violation. In this respect, it is well established jurisprudence that not every procedural irregularity leads necessarily to an award of compensation (*Zhouk* 2012-UNAT-224). In the present case, it is also not self-evident that the Applicant has suffered moral damage, taking into account that most of the process, including the signing of the performance appraisal, took place after the Applicant had left the Organization. Hence, no financial compensation is warranted.

Conclusion

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

- a. The appraisal of the Applicant's performance for the period 1 April 2011 to 31 December 2011 be rescinded;
- b. This Judgment be placed in the Applicant's OSF; and
- c. All other pleas are 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