



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/033

Judgment No.: UNDT/2019/149

Date: 11 October 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NYAWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Matthias Schuster, AAS/ALD/OHR
Susan Maddox, AAS/ALD/OHR

Introduction

1. The Applicant is a Security Officer with the United Nations Office at Nairobi (UNON).
2. In his application dated 26 March 2017, he is contesting the Under-Secretary-General for Management's (USG/DM) decision to impose on him the disciplinary measures of deferment, for a period of two years, for eligibility for consideration for promotion, together with written censure and the administrative measure of a requirement to attend a course on gender sensitivity.
3. The Respondent filed a reply to the application on 25 April 2017 in which it is argued that the application should be dismissed in its entirety.

Procedural history

4. The Tribunal heard the case from 5-7 November 2018. During the hearings, oral testimony was received from:
 - a. The Applicant;
 - b. Mr. Muloki Wako, Security Officer, UNON;
 - c. Mr. Prince Bruce, Deputy Chief of Security, UNON;
 - d. Mr. Andrew Bakhoya, Security Inspector, UNON;
 - e. Mr. Raphael Mabuyah, Security Officer, UNON;
 - f. Ms. Janet Okal, Security Inspector, UNON;
 - g. Ms. Lensah Oluoch, Security Officer, UNON; and
 - h. Ms. Carolyn Awuonda, Security Officer, UNON.
5. The parties filed their closing submissions on 17 December 2018.

Overview of facts and procedure

6. Facts described in the paragraphs following below, unless otherwise indicated, are undisputed or result unambiguously from documents.

7. The Applicant served with the UNON Security and Safety Service (UNON/SSS) from 2005 to 2007 and then again since 20 February 2009.¹ On 31 July 2014, the Applicant was selected to participate as Team Leader in a mission providing “security surge services” at the United Nations High Commissioner for Refugees (UNHCR) facility in Dadaab, Northern Kenya, as Team Leader of Surge Team XVI.²

8. During the early morning hours of 19 December 2014, Mr. Andrew Mboya, of UNON/SSS, a member of the Applicant’s team, was involved in an argument with his girlfriend in his room. During the incident, Mr. Mboya allegedly misused his service firearm by pointing it at his girlfriend and at a fellow security officer and his house-mate, Mr. Muloki, once the latter tried to intervene. Mr. Muloki called upon Duty Officer, Ms. Awuonda, and told her that in the course of an argument with his girlfriend, Mr. Mboya was brandishing his weapon. There was a parallel telephone intervention by an UNHCR security officer who was disturbed by the commotion; this intervention is irrelevant for the case. Ms. Awuonda, called upon the Applicant as Team Leader, and Ms. Oluoch as Deputy Team Leader. Eventually, all three responded at the scene. Ms. Awuonda arrived first, dissuaded the argument and secured the weapon of Mr. Mboya, which she found placed on the top of a fridge. Then arrived Ms. Oluoch, followed by the Applicant. Ms. Awuonda and Ms. Oluoch soon departed from the scene, to secure the weapon. The girlfriend was escorted to Ms. Oluoch’s house. Accounts of information that was shared by Mr. Muloki with the Applicant and Ms. Oluoch differ, as will be discussed below.

9. On the same date, Ms. Awuonda, who was finishing her shift made entry in

¹ Reply, annex 3, page 93.

² Application, annex 28 – UNON/SSS Daily Orders.

the Daily Occurrence Book (DOB) and drafted the daily report, without mentioning the firearm issue. Around 7.30 a.m., the Applicant transmitted his daily report to his immediate supervisor, Ms. Sonja Jakic, the Field Security Coordinator (FSCO). In relation to the incident involving Mr. Mboya, the report stated:

Today at around 0427hrs, the duty officer received a call from Mr. Muloki Wako of UNHCR Block A2 reporting noise from the neighbour's room. SSS duty officer went to the said house and found the occupant; Mr. Andrew Mboya, arguing with a friend but not violent. They were advised to calm down and not disturb the neighbourhood. They heeded to the advice and the area was left safe and peaceful.³

10. Later that morning Ms. Sonja Jakic demanded to see the Applicant, Mr. Mboya and Ms. Oluoch and instructed that the latter apologize to the UNHCR person and swap houses with other SSS officers. No mention was made to her about the involvement of firearms in the incident.

11. Mr. Mboya's girlfriend, in a conversation with Ms. Oluoch told her that she had been menaced with a gun. Ms. Olouch relayed this to the Applicant on a date that each of them indicate differently. The girlfriend reconciled with Mr. Mboya and returned to his house on the night 19/20 December 2014 and on 20 December 2014 left the compound.

12. The Applicant returned the service weapon to Mr. Mboya on the morning of 19 December 2014, but at the end of the shift at 6.00 p.m. the latter brought it back and requested that it be kept in the safe for the night.

13. On a date which is disputed, either 19 December or 22 December 2014, in the morning hours, the Applicant held a meeting with security officers of his team during which he received a phone call from Ms. Okal from Nairobi Headquarters, who inquired about the incident and the whereabouts of Mr. Mboya. The Applicant informed that there had been a dispute of a personal nature, which had since been resolved and confirmed that Mr. Mboya was in service and his weapon had been

³ Application, annex 4.

returned to him.

14. On 9 January 2015, UNON's Special Investigations Unit (SIU) received a report of possible misconduct implicating Mr. Mboya. Specifically, it was reported that on 19 December 2014 at around 4.30 a.m., Officer Mboya threatened his girlfriend with his service firearm Glock 19 Serial Number GRK 679; further, that on the same date and time, Mr. Mboya threatened Mr. Muloki with the same firearm.⁴

15. During the investigation, SIU detected possible misconduct implicating the Applicant.⁵

16. On 12 June 2015, SIU issued its investigation report regarding Mr. Mboya's alleged misconduct. SIU concluded that there were reasonable grounds to conclude that Mr. Mboya had failed to observe the standards of conduct required of an international civil servant and recommended that the administration should take appropriate action against him.⁶

17. By memorandum dated 1 July 2015, the Director-General/UNON (DG/UNON) referred the allegations of misconduct against Mr. Mboya to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) for consideration of possible disciplinary action pursuant to para. 3 of ST/AI/371 (Revised disciplinary measures and procedures). In the memorandum, the DG/UNON indicated that the Applicant, who was Mr. Mboya's supervisor at the time of the incident, failed to properly report the incident and take appropriate action in light of its seriousness and that, in the circumstances, she was requesting OHRM to consider whether to proceed with a disciplinary process against either or both Mr. Mboya and the Applicant.⁷

18. On 3 November 2015, the Applicant was informed that his authorization to carry a service firearm had been revoked pending the outcome of the investigation

⁴ Reply, annex 2, page 7.

⁵ Reply, annex 3, page 91.

⁶ Reply, annex 2, page 16.

⁷ Reply, annex 1, page 2.

against him.⁸

19. Following a request by the UNON Senior Legal Officer for further investigation, SIU re-interviewed the Applicant on 9 November 2015.

20. On 12 November 2015, SIU issued an addendum investigation report which concluded that the Applicant had failed to observe the standards of conduct of an international civil servant.⁹

21. On 8 February 2016, the ASG/OHRM informed the Applicant of the allegations of misconduct against him and required him to provide a response within two weeks. It was specifically alleged:

- a. he had full knowledge of the alleged incident of 19 December 2014 committed by Mr. Mboya, including the alleged misuse of his firearm;
- b. however, in his capacity as the Team Leader and Supervisor of the Security and Safety team in Dadaab, he deliberately disseminated false information relating to the incident, specifically by suppressing any mention of Mr. Mboya's alleged firearm misuse;
- c. he instructed other staff members to provide false information by (i) telling the Duty Officer to refer to the incident in the Daily Report as an argument with a girlfriend that had been settled; and (ii) directing other Security Officers not to mention Mr. Mboya's alleged firearm misuse, if asked about it; and
- d. that he failed to report and/or reported false information about the incident by (i) circulating the Daily Report, knowing that it was inaccurate; and (ii) misleading a more senior Security Officer by indicating that Mr.

⁸ Application, annex 19.

⁹ Reply, annex 3, page 90.

Mboya had a small disagreement with his girlfriend.¹⁰

22. Following an exchange of emails between the Office of Staff Legal Assistance (OSLA) and OHRM¹¹, the Applicant was granted an extension of time to file his response to the allegations of misconduct which he ultimately did on 28 March 2016.¹²

23. On 10 May 2016, SIU issued an addendum to the investigation report comprising of clarifications to questions posed by OHRM.¹³

24. On 11 May 2016, OHRM sought the Applicant's comments on the addendum report which, after an extension of time, he submitted on 8 July 2016.¹⁴

25. On 21 December 2016, Mr. Victor Kisob, Officer-in-Charge/OHRM conveyed the USG/DM's decision regarding the allegations against the Applicant. The USG/DM, having dropped the allegation that the Applicant had circulated a false Daily Report, found that the Applicant had,

deliberately disseminated false information relating to the incident, specifically by suppressing any mention of [...]] alleged firearm misuse by, during a meeting on 22 December 2014: (a) instructing other staff members to provide false information by directing them not to mention Mr. Mboya's alleged firearm misuse, if asked about it; and (b) failing to report the incident by misleading a more senior Security Officer by indicating that Mr. Mboya had a small disagreement with his girlfriend.¹⁵

The USG/DM imposed on the Applicant the disciplinary measures of deferment, for a period of two years, for eligibility for consideration for promotion, together with written censure and the administrative measure requiring the Applicant to attend a

¹⁰ Reply, annex 5, pages 137-138.

¹¹ Reply, annexes 6-11, pages 268-285.

¹² Reply, annex 12, page 288.

¹³ Reply, annex 13, page 359.

¹⁴ Reply, annex 20, page 450.

¹⁵ Application, annex 1, page 2

course on gender sensitivity.¹⁶

Evidence from witnesses

The Applicant

26. On 20 January 2015, SIU interviewed the Applicant.¹⁷ The Applicant informed SIU on the relevant points:

a. On 19 December 2014, he received a call from the Duty Officer, about a reported commotion at Mr. Mboya's room. Upon arrival, he met Officers Awuonda, Oluoch, and Muloki.

b. He asked Mr. Mboya to explain what was happening. Mr. Mboya told him that he had an argument with his girlfriend and the matter was settled.

c. Mr. Mboya's girlfriend was not at the house when he arrived. Ms. Awuonda told him that on arrival in Mr. Mboya's room, she met the girlfriend at the door exiting the room while pointing at the fridge. Ms. Awuonda checked on top of the fridge and found Mr. Mboya's weapon. Ms. Awuonda informed him that she had taken the weapon together with one magazine of 15 rounds of ammunition. She explained that she had taken it as an instinctive reaction, having sensed danger in the way Mr. Mboya's girlfriend had pointed at the fridge. He accepted the explanation and advised her to go with Ms. Oluoch to the SSS office and secure the weapon in the office safe. Ms. Oluoch had a key to the safe and they were able to secure the weapon and the ammunition.

d. Mr. Mboya appeared stable and composed. He was able to coherently explain the events that had transpired. Since the situation was under control, he told Mr. Mboya to rest and instructed Ms. Awuonda to ensure she booked the incident in the DOB. He went back to his room.

¹⁶ Ibid.

¹⁷ Reply, annex 5, page 175.

e. At about 7.30 a.m., he reported on duty at the Security office and prepared the daily DMO Report. As per established procedure, he emailed the report to the FSCO copying the Deputy Chief Security & Safety Services at UNON and other senior officials. The incident was part of the report.

f. At around 9.00 a.m., he received a call from the FSCO asking him to escort Mr. Mboya to her office. He checked the day's deployment roster and found that the officer was on break. He called Mr. Mboya to find out where he was. Mr. Mboya said he was on break and was in his room.

g. He asked the day's Duty Officer, Ms. Oluoch, to accompany him to Mr. Mboya's room where they found him dressed in the duty uniform but without his weapon since it had not yet been returned to him. He informed Mr. Mboya that they had come to escort him to the FSCO's office and he agreed to go.

h. Before they left the room, the FSCO called again and asked where he was. He told her that he was in Mr. Mboya's room. She told him to wait for her there. When she arrived, she asked Mr. Mboya what had happened. Mr. Mboya told her that he had an argument with his girlfriend and in the process, it got the attention of his neighbor, a UNHCR staff member, who came to enquire what was happening. He further stated that he spoke to the neighbor and he told him that they had already solved the matter and the neighbor left.

i. In response, the FSCO said that she was handling the matter and had reached a decision that Mr. Mboya was to swap rooms with another Security Officer. Mr. Mboya was also instructed to apologize to the neighbor.

j. He and Ms. Oluoch escorted Mr. Mboya to the office of the neighbor to make the apology but they did not find him there. Mr. Mboya promised them that he would make the apology later. With the matter resolved, he went to the SSS office and returned the weapon to Mr. Mboya who continued with normal duties.

k. At around 6.00 p.m., Mr. Mboya came to the SSS office. He confirmed that he had found the neighbor and apologized as instructed. He also requested that his weapon be kept in the safe. He said he would feel better to stay without the weapon as he thought through the incident of the previous night. He accepted, kept the weapon and Mr. Mboya picked it again the following morning; thereafter he stayed with his weapon until the end of mission. Later, he requested another Security Officer to swap rooms with Mr. Mboya, to which he agreed.

l. He did not institute further investigations into the incident because his immediate supervisor, the FSCO, had already dealt with the matter conclusively.

m. He asked Mr. Muloki about the incident. Mr. Muloki said he was disturbed by the noise from Mr. Mboya's room but did not wish to discuss any details, saying he had sorted any issues with Mr. Mboya amicably and had no complaint or report to make.

27. SIU re-interviewed the Applicant on 9 November 2015.¹⁸ In this interview the Applicant supplied:

a. When he arrived at the scene, Mr. Mboya's room was untidy and Mr. Mboya told him that he had had a quarrel with his girlfriend during which they made the room untidy. Mr. Mboya's girlfriend was not present in the room and Ms. Awuonda told him that they had taken care of her and she was in their safe custody. He told Ms. Oluoch that in case the girlfriend needed to make any report, they could escort her to his office in the morning or that either Ms. Oluoch or Ms. Awuonda could take down her report and pass it on to him.

b. Ms. Oluoch informed him that Mr. Mboya's girlfriend told her that

¹⁸ Reply, annex 3, page 105.

further to the quarrel/disturbance, Mr. Mboya had pointed his firearm at her. But when he asked Ms. Oluoch if she could make a formal report out of the information which had emerged, Ms. Oluoch said that Mr. Mboya's girlfriend did not wish to formalize the information as it had only been shared with her on a personal level, and thus she was unwilling to talk to anyone.

c. Mr. Mboya's girlfriend made up with Mr. Mboya and went back to his residence later in the day. After one or two days, she left Dadaab for Nairobi.

d. Given the fact that Ms. Awuonda found the firearm on the fridge, he thought it prudent to accept Mr. Mboya's request to secure the firearm for him that night and the following night. This transaction was not recorded. He also advised Mr. Mboya to find a more discreet place in his room for storing his firearm in future, especially when there are visitors in the house.

e. As Team Leader, he found his investigative authority limited by lack of a formal complaint from Mr. Mboya's girlfriend or from Ms. Oluoch who had direct contact and information from the lady. None of his supervisors in Dadaab or Nairobi informed him about any information about the firearm. His immediate supervisor, the FSCO, did not launch any formal investigation into the disturbance incident which investigation would have brought up the issue of the firearm misuse.

f. After the incident, he called a meeting with Mr. Mboya, Ms. Awuonda, Mr. Muloki and Ms. Oluoch. The main purpose of the meeting was to review the disturbance incident and see whether anything was missed out in the incident report raised by the Duty Officer, Ms. Awuonda. He also requested the officers to contribute in deciding whether Mr. Mboya could get back his weapon. None of the officers had any objection, so he gave Mr. Mboya his weapon and they all proceeded to normal duty. He also verbally warned Mr. Mboya not to repeat such disturbance as it caused the team embarrassment.

g. He had received a call from Ms. Okal. Without specifying, she asked him what the matter with Mr. Mboya was. He interpreted it to mean the disturbance he had reported that morning. He told her about the quarrel the officer had with his girlfriend and that the matter had been dealt with by the supervisor on the ground (the FSCO).

h. He told the officers that Ms. Okal had called him inquiring about the incident. He asked the officers if any of them had informed the Inspector about the incident but they all denied informing her or any other security official in Nairobi. He reminded them to adhere to the chain of command when passing official information.

i. While they were still meeting, Ms. Okal called again asking whether Mr. Mboya was on duty and whether he was armed, to which he answered in the affirmative. He asked her whether there was some information she needed to share with him as the supervisor on the ground, but she said there was none at that moment and that she would call later. She never called again.

28. At the hearing, the Applicant testified additionally:

a. By the time he reached Mr. Mboya's house, he did not have any information about firearm misuse. Ms. Awuonda never mentioned the firearm issue to him other than that, as she was going into Mr. Mboya's house, Mr. Mboya's girlfriend came out and was pointing a finger to the fridge.

b. He inquired about what had really happened when he saw Mr. Mboya's firearm. No one spoke.

c. The meeting and the calls from Ms. Okal happened on 19 December 2014, in the morning following the incident. After the calls from Ms. Okal, he told the other security officers to stop passing information around since he was getting calls from Nairobi. He told them to stick to the chain of command in passing information about incidents. He added that any security officer with

any information should put it in the DOB for appropriate follow up.

d. The next morning, a Saturday, at around 8.00 a.m., he went to the office and met Ms. Oluoch. She asked whether he had heard about the “loose talk” doing the rounds that Mr. Mboya had pointed his weapon at his girlfriend. She told him that Mr. Mboya’s girlfriend had told her this but wanted the information kept secret. He told Ms. Oluoch to put the information in the DOB. She said, “I have just told you. This girl spoke to me because we are from the same village. The way she put it in Luo it will be an abomination if I report this”.

e. He called Mr. Mboya to come to the office with his girlfriend. Mr. Mboya told him that his girlfriend had already left Dadaab and vehemently denied that he had pointed a weapon at her.

f. After this he went for breakfast where he met Mr. Muloki. He asked him about what had happened the night before. Mr. Muloki told him that despite the noise disturbance he had talked to Mr. Mboya and had nothing further to report.

g. The first time he came to know about the firearm issue was when OHRM asked him to respond to the charges.

h. Ms. Okal, Mr. Mboya, Ms. Oluoch and Mr. Mboya’s girlfriend are all from the same tribe and they conspired to keep the information about the firearm from him. Mr. Muloki is an unwilling participant in the conspiracy. It also served Mr. Muloki’s interest and that is why he did not report the firearm issue whilst in Dadaab.

Mr. Muloki

29. On 26 January 2015, SIU interviewed Mr. Muloki, who stated¹⁹:
- a. The incident in question was preceded by a social gathering involving Mr. Mboya, the Applicant and their girlfriends, which ended in an argument in Mr. Mboya's room.
 - b. Approximately five minutes after the Applicant and his girlfriend left, he heard some noise from Mr. Mboya's room. Shortly thereafter, Mr. Mboya's girlfriend stormed into his room and locked the door to the shared facilities. She told him that Mr. Mboya was beating her and was searching for a key to the drawer where his weapon was kept. He went to Mr. Mboya's room and found Mr. Mboya still searching for something. Mr. Mboya told him that this was a family matter and pulled his girlfriend back to his own room.
 - c. He returned to his room. Shortly after, he heard Mr. Mboya's girlfriend screaming. Once again, he went to Mr. Mboya's room and found the girlfriend kneeling on top of the bed pinned down by Mr. Mboya on the mattress with the left hand while his right hand was holding his service weapon pointed at her head at close range. He tried to grab the hand that was holding the weapon. Before he could do this, Mr. Mboya pushed his girlfriend aside and pointed his weapon at him saying, "toka toka" (get out, get out). Mr. Mboya's finger was on the trigger.
 - d. He raised his hands, moved backward and retreated to his room. He dressed up, picked up his weapon and left the room heading to the security office. On the way, he made a call to the Duty Officer, Ms. Awuonda, and informed her of the incident. As they met, Ms. Awuonda requested him to accompany her to Mr. Mboya's room. On the way, she made a call to the

¹⁹ Reply annex 2, pages 23-27.

Applicant and to Ms. Oluoch.

e. When they arrived at the house, Ms. Awuonda requested that he stand at the wall and cover her just in case something happened. She called on Mr. Mboya, who responded and opened the door. He said he was okay. Immediately, his girlfriend came out of the room crying. She explained that Mr. Mboya had beaten her up and wanted to shoot her. Mr. Mboya said she was lying but his girlfriend said “even ask Muloki, he also wanted to shoot him”. Mr. Mboya told his girlfriend to switch to her mother tongue (Luo).

f. At that point, Ms. Awuonda went inside the room. Shortly after, the Applicant and Ms. Oluoch arrived. A few minutes later, the Applicant’s girlfriend came to Mr. Mboya’s room and was requested to escort the lady to Ms. Oluoch’s room.

g. At about 10.00 a.m., Ms. Oluoch called him and told him that the FSCO had told her to inform him and Mr. Mboya to relocate to a different Block which was occupied by Officers Awuonda and Oluoch.

h. On 22 December 2014, the Applicant, Ms. Oluoch, Ms. Awuonda, Mr. Mboya and him had a meeting to discuss the incident. At the meeting, the Applicant requested them to omit the details about Mr. Mboya’s weapon should anyone ask. Whilst the Applicant was still talking, he received a call from Ms. Okal who wanted to know what had happened. The Applicant stated that in his conversation with the Inspector, she had information about what had happened. He insisted that they should not disclose the weapon issue.

30. SIU re-interviewed Mr. Muloki on 2 November 2015²⁰ and on 3 May 2016²¹ in relation to the allegations against the Applicant. Mr. Muloki stated:

a. He personally informed the Applicant about the details of the firearm

²⁰ Reply, annex 3, page 100.

²¹ Reply, annex 13, pages 370-371.

incident as soon as the Applicant arrived at the scene, as he was the first person the Applicant encountered and asked what the problem was. Earlier he had told these to Ms. Awuonda when he had met her going to the scene.

b. He informed Ms. Oluoch about the firearm incident while they were having lunch at Pumzika Restaurant on 19 December 2014.

c. The Applicant called for a meeting attended by security officers who were directly involved in the incident or who knew about the details. Those in attendance were the Applicant, Mr. Mboya, one lady officer whose name he couldn't recall and himself.

d. At the meeting, the Applicant said that they should not tell anyone the details of the incident especially regarding the firearm. During the meeting, the Applicant received a call and talked in their presence. He told the caller that Mr. Mboya had differences with his girlfriend and that there was no issue with his (Mboya's) firearm and that he was not on weapon restriction. He also explained to the caller the DMO policy on visitors.

e. Later, the Applicant told them that the caller was Inspector Okal who seemed to have full information about the firearm incident. The Applicant said that he suspected that one of them had passed details of the incident to the Inspector.

31. Before the Tribunal, Mr. Muloki largely repeated his statement from the investigation and added:

a. He felt, as the only Tanzanian among Kenyans, that something could happen to him if he revealed the true details of what had happened. The Applicant was his team leader who gave instructions and deployed him daily. He felt that he had to follow the Applicant's instructions. That is why he did not mention the weapon in a meeting with the FSCO. He told the details to Ms. Awuonda, to the Applicant and, afterwards, to Ms. Olouch, but officially

reported only after he had returned in Nairobi.

b. Regarding his multiple statements - the SIU called him on the phone when they had additional questions. He had signed all the statements, albeit one taken on 2 November 2015 he signed on 9 November 2015.

Ms. Awuonda

32. On 21 January 2015 SIU interviewed Ms. Awuonda²² whose account of how she had been called and responded at the scene of the incident are largely consistent with that of Mr. Muloki. Ms. Awuonda stated moreover:

a. When the Applicant and Ms. Oluoch arrived at the scene, she briefed the Applicant about action that she had undertaken. Mr. Mboya said that this had just been a misunderstanding between him and his girlfriend. The girlfriend however insisted that he had beaten her. She and Ms. Oluoch departed to escort the girlfriend to Ms. Oluoch's room and to place the weapon in the office safe, leaving behind the Applicant to deal with Mr. Mboya.

b. Prior to recording the incident in her handover report, Ms. Awuonda called the Applicant who instructed that it be recorded as a domestic argument which had been settled.

c. Later in the afternoon she asked Mr. Muloki "what exactly had happened", to which Mr. Muloki described his involvement in the incident along the lines of his statement to SIU.

d. Ms. Awuonda recalled meeting the FSCO, Ms. Jakic, on the morning of 19 December 2014 about swapping houses, but did not mention a meeting on either 19 or 22 December 2014 and instructions from the Applicant not to disclose that the incident involved a weapon.

²² Reply, annex 3, page 28.

33. Ms. Awuonda was re-interviewed on 9 May 2016²³ where she supplied:
- a. When the Applicant arrived at the scene she informed him that, according to Mr. Muloki, Mr. Mboya, during the quarrel with his girlfriend, pointed his gun at her and Mr. Muloki. She handed the matter to him as the supervisor. She confirmed obtaining instructions from the Applicant on what to put in the report regarding the incident.
 - b. She denied participating in a meeting where the incident was discussed.
34. Before the Tribunal Ms. Awuonda testified, *inter alia*:
- a. When she arrived at Mr. Mboya's house everything was scattered. She asked Mr. Mboya what was going on and he said nothing. At that moment, Ms. Oluoch, the Applicant and his girlfriend came in. She informed the Applicant that she had Mr. Mboya's weapon. She informed the Applicant of what Mr. Muloki had told her, that Mr. Mboya was beating up the girlfriend and had pointed his weapon at the lady. At that time Mr. Mboya denied beating up his girlfriend and pointing the weapon at her but the girlfriend insisted that he had beaten her.
 - b. Having returned to the office she called the Applicant and asked him what he had established so that she could include it in her report. He said that it was a domestic misunderstanding between Mr. Mboya and his girlfriend and that the issue had been sorted out. She did not question the Applicant's conclusion because he was her senior as Team Leader and he had all the information. She felt that she did not need to question him. She left the report on the desk for the Applicant to read, approve and send.
 - c. The next day, at lunchtime, she met Mr. Muloki at the cafeteria and asked him what had really happened. He told her the details.

²³ Ibid., page 367.

d. After lunch, she went to her room. At some point, she met with Ms. Oluoch and asked her what Mr. Mboya's girlfriend told her since she was staying in Ms. Oluoch's house. Ms. Oluoch said that she insisted that Mr. Mboya had beaten her.

e. She was in the office when the Applicant received a call from Inspector Okal. She could tell from the conversation that he was talking about the incident with Mr. Mboya. After the end of the conversation, the Applicant asked them how Inspector Okal came to know about this incident.

Ms. Olouch

35. Ms. Olouch was interviewed by SIU on 26 January 2015²⁴. She stated, *inter alia*:

a. Having been alerted about a commotion at Mr. Mboya's house by Ms. Awuonda, she informed the Applicant and they both proceeded to the scene. There, they encountered Ms. Awuonda, Mr. Muloki and Mr. Mboya's girlfriend. She escorted the girlfriend to her room and later assisted Ms. Awuonda to put Mr. Mboya's weapon in the office safe. As they returned to Mr. Mboya's house, the Applicant was still talking to Mr. Mboya who insisted he had not beaten his girlfriend; he broke into tears and fell asleep, whereupon they all left.

b. Later that day, she spoke to Mr. Mboya's girlfriend who told her that they had been at a restaurant until 3.00 a.m. and upon returning to the room they had started to argue and Mr. Mboya had slapped her. He had then started looking for the weapon, in the course of which he had broken a drawer, removed the weapon and pointed it at her. She had screamed which provoked the intervention of Mr. Muloki. Later, she spoke with Mr. Muloki who described the girlfriend kneeling, Mr. Mboya pointing his weapon at her and

²⁴ Ibid., page 181.

subsequently at him.

c. On 19 December 2014 around 0900hrs she and another security officer went to Mr. Mboya's room to check on him because he was supposed to report on duty at 0700hrs. They found him asleep, woke him up and told him to prepare for duty.

d. She left to have breakfast, during which time the Applicant called to tell her that the FSCO was requiring to see Mr. Mboya.

e. The Applicant and she waited for the FSCO in Mr. Mboya's room. When the FSCO arrived, she inquired about the incident to which Mr. Mboya replied that he had had an argument with his girlfriend. The FSCO instructed him to apologize to his UNHCR neighbor and to relocate from that room. After that she, the Applicant and Mr. Mboya went to the office where the Applicant reissued the weapon to Mr. Mboya.

36. Ms. Olouch was re-interviewed on 4 May 2016.²⁵ She stated:

a. During the day of 19 December 2014 she was duty officer and thus worked closely with the Applicant as her supervisor. At some point the Applicant asked whether she could confirm that in addition to the disturbance, it was true that Mr. Mboya had pointed his firearm at his girlfriend. She confirmed that this was what Mr. Mboya's girlfriend – who at the time was staying at her place - had told her. She understood that the Applicant was aware of the issue but did not advise her anything regarding this information.

b. Mr. Muloki told her about Mr. Mboya pointing a weapon at him on 19 December during lunch at Pumzika restaurant.

37. Ms. Oluoch's testimony before the Tribunal is summarized below.

a. On the early morning of 19 December 2014, she received a call from

²⁵ Ibid., page 364.

Ms. Awuonda, the Duty Officer, about a commotion at Mr. Mboya's house.

Ms. Awuonda told her that she hadn't managed to contact the Applicant.

b. She immediately left and proceeded to the Applicant's house. She woke him up and together they proceeded to Mr. Mboya's house.

c. Upon arrival, they found Mr. Mboya standing by the door. He was wearing only a towel and vest. His girlfriend was standing outside. Mr. Mboya was shouting, "Vicky, Vicky, have I beaten you?"

d. She left with Mr. Mboya's girlfriend and took her to her room to calm her down. She left her there and returned towards Mr. Mboya's house. On the way, she met Ms. Awuonda who had Mr. Mboya's firearm. Together they went to the office, locked the firearm before returning to Mr. Mboya's house.

e. They found Mr. Mboya with Mr. Muloki and the Applicant. Mr. Mboya became emotional, started crying then fell asleep.

f. Mr. Mboya's girlfriend stayed in her room, asked to use her phone and told her that Mr. Mboya had pointed a gun at her.

g. In the morning, as she was the Duty Officer, she went with another Security Officer to check up on Mr. Mboya in his room. They found him sleeping and woke him up. She received a call from the Applicant who told her that the FSCO wanted to discuss the incident with her and that Mr. Mboya should go apologize to the UNHCR staff member who had raised a complaint. After the meeting, Mr. Mboya went with the Applicant to retrieve his weapon and then to apologize to the UNHCR officer but he did not find him.

h. Just before the meeting with the FSCO, the Applicant asked her in Swahili whether it was true that Mr. Mboya had pointed a gun at his girlfriend. She confirmed that this was what the girlfriend had told her.

i. Mr. Muloki later narrated to her that Mr. Mboya pointed at him with a

firearm and told him not to interfere.

j. Since Ms. Awuonda was the Duty Officer when the incident took place, procedurally it was her duty to record it in the DOB. Team members had to follow instructions from the Applicant as team leader. She, however, did not receive any instructions as to how to handle information regarding the misuse of the firearm by Mr. Mboya.

Ms. Okal

38. On 2 November 2015 Ms. Okal informed SIU as follows²⁶:

a. Sometime in December 2014, she received information indicating that Mr. Mboya had a confrontation with his girlfriend in his room, during which Mr. Mboya pointed his firearm at her. The information further indicated that Mr. Muloki heard some commotion in Mr. Mboya's room and went to find out what was happening. On arrival, Mr. Mboya pointed his firearm at him.

b. She called the Applicant who was the supervisor of the Dadaab team and requested him to give more information about the incident. The Applicant told her that he, too, was informed that there was a small disagreement between Mr. Mboya and his girlfriend but denied that Mr. Mboya had pointed his firearm at his girlfriend or at Mr. Muloki. He told her that the information she had was exaggerated. She passed on this information to her supervisor, the Deputy Chief of Security.

39. Before the Tribunal, Ms. Okal testified:

a. Having heard about the incident, she called the Applicant because he was the Team Leader and asked him whether the information was true or not. The Applicant told her that it was a minor incident that had been exaggerated. However, she kept receiving more information from an informant.

²⁶ Ibid., page 102.

b. She spoke with Inspector Bakhoya and they decided to call the Applicant together. This was either on the morning after the incident or on the next day. The Applicant gave the same response that it was a minor incident. The Applicant could not have known that Inspector Bakhoya was in the next room during the phone call. She asked him about the incident and told him that she had received information about what had happened: that Mr. Muloki walked in and Mr. Mboya pointed a firearm at him and Mr. Muloki fled in fright. However, the Applicant said that this did not happen and that it was a minor incident that he had handled as the Team Leader.

c. She did not remember whether the phone was on loudspeaker but she did not exclude it. She doubted the presence of anyone else in the office at the time of the call. She conceded that she may have called the Applicant one more time.

d. She had made an error on the date of her SIU interview record, so she had corrected it.

e. Team members report to the team leader and the team leader reports to the HQ. Team leaders receive briefings at times but usually they go ahead and get a proper handover. It has not happened that team leaders would not know their responsibilities.

Mr. Bakhoya

40. Mr. Bakhoya told the SIU:

a. One day in December 2014, Inspector Janet Okal came in his office and asked whether he had information about what had happened in Dadaab. As he answered in the negative, she picked his desk phone and from his extension dialed someone who seemed to have been the Applicant. She asked several times what had happened in Dadaab and from the communications he figured out that the Applicant denied that anything had happened or had been

reported to him.

b. After the conversation was over, Ms. Okal told him that the Applicant denied that anything happened in Dadaab.

41. Mr. Bakhoya confirmed the same before the Tribunal. He added:

a. The call had been made early in the morning and that, even though the phone was not on loudspeaker, he could understand the conversation. Ms. Okal put down the phone and disclosed to him that there had been an officer who had misused his weapon.

b. He conceded that Mr. Mabuyah could have been in the office, behind a partition.

c. On the team leader issue he confirmed that because of the lack of available Security Sergeants as supervisors, they selected team leaders from among the rank of Security Officers. Team leaders are authorized to give instructions to the team members. At the time of the incident there were no briefings signed off by the team leaders.

Mr. Mabuyah

42. Mr. Mabuyah was not interviewed during the investigation. He testified before the Tribunal:

a. He used to share an office with Inspector Bakhoya, albeit separated by a glass partition. He was present on the day when Inspector Okal came to see Mr. Bakhoya. When she came in, she called the Applicant and put the conversation on speaker. The phone call was made from an extension that had been allocated to Inspector Bakhoya. This was the morning after the incident, which had taken place at night.

b. The question Inspector Okal asked the Applicant was, “can you

explain what happened at night?” He heard the response from the Applicant that he had no information about it and then Inspector Okal asked him to investigate, get the facts and report to her.

c. He came to learn about the incident later from different quarters. Soon after when talk about the incident was going around, he discussed with the Applicant and mentioned casually that he heard the conversation between him and the Inspectors.

d. He confirmed that in his experience a team leader gives binding instructions to team members even though he is not a supervisor. Having a team leader in the same rank as officers on the team has a negative impact on discipline.

Mr. Bruce

43. The Tribunal heard Mr. Bruce regarding the supervisory responsibilities of a team leader. He testified as follows.

a. A team leader is a senior security officer selected from the group to perform extra functions to lead the team. There are four teams in the Nairobi duty station, each led by a Team Leader at the supervisory rank of Lieutenant. For the assignments in Dadaab, one senior security officer is usually selected as team leader. However, it is not a question of rank but a question of function. For the assignments in Dadaab, one senior security officer is usually selected as team leader. This is made clear in the Daily Orders.

b. The team leader has the understanding that he has to give instructions to the other members of the team and ensure that they follow the rules and SOPs.

c. He has to transport firearms to the location, ensures firearms are kept in safe custody, oversees patrols and liaises with the FSCO. The obligations of

a team leader include gathering facts, sending information to his supervisor, the FSCO, and informing the senior supervisor in Nairobi. That information must also go into the daily report.

d. The team leader is responsible for finding out about an incident regardless of whether they were present or not. The team leader must enquire about what transpired, then ensure that it is properly documented.

e. He learnt about the incident in question from the FSCO, perhaps a day or two after. He told her to follow up with the team leader, the Applicant. The Applicant told her that officers involved resolved the matter and it was closed. Later, he learnt through hearsay that a firearm had been pointed at someone's head. This was after the team returned from the Dadaab assignment.

f. He was not involved until the report came to him for review. His role was to review the case file and sign off for the UNON Chief of Security and UNON management for action. He is also the second reporting officer to the SIU Officer who conducted the investigation. His referral of the matter to SIU for investigation did not mention firearm misuse because this was hearsay. He was not aware that Mr. Mboya was suspected to have misused his firearm.

Documentary evidence

44. The following documents were submitted by the parties as evidence in support of their contentions:

a. UNON/SSS Daily Orders submitted by the Applicant as proof that he was selected as Team leader only and not as a supervisor in Dadaab;²⁷

b. A Daily Report submitted by the Applicant as proof that he was obliged to report to the FSCO information which the Duty Officer recorded;²⁸

²⁷ Application, annex 28.

²⁸ Application, annex 4.

- c. Dadaab Handover Notes of 20 August 2014 submitted by the Respondent as proof that the Applicant had a duty to ensure that the Daily Report was accurate and comprehensive;²⁹
- d. SIU interview records for several witnesses, including the Applicant, relevant to the firearm incident;³⁰
- e. Unsigned SIU witness statements of Mr. Bakhoya and Mr. Muloki submitted by the Applicant in support of his contention that his due process rights were violated;³¹
- f. SIU witness statements for Ms. Okal and Mr. Muloki which show that they were interviewed at the same place and time submitted by the Applicant as proof that Mr. Muloki did not give his statement voluntarily;³²
- g. Ms. Okal's mobile telephone billing records submitted by the Respondent as proof that she called the Applicant on 22 December 2014 and that this corroborates Mr. Muloki's statement that the Applicant convened a meeting on that date;³³
- h. Ms. Okal's billing records are also submitted to support the Respondent's contention that she did not call the Applicant on 19 December 2014 as stated by him;
- i. Telephone records for Ms. Okal and Mr. Bakhoya's office landline extensions submitted by the Respondent to show that the latter's extension number was used to dial the Applicant's mobile phone number on 22 December 2014 at 7.57 a.m.;³⁴

²⁹ Reply annex 3, pages 113-116.

³⁰ Reply annexes 2, 3, 5 and 13.

³¹ Annexes 14, 15, 16 and 17 of the application.

³² Ibid.

³³ Reply, annex 13, pages 372-383.

³⁴ Reply, annex 17, pages 428-431.

j. An email dated 27 May 2016 from one of the SIU Investigators to Mr. Bruce submitted by the Applicant to support his claim that his procedural rights were violated because of the long delay in informing him of the allegations against him which meant that he could not access phone records older than six months;³⁵ and

k. Telephone records submitted by the Applicant on 9 November 2018 to prove that Ms. Oluoch telephoned Mr. Mboya on the night of 19 December 2014 and that she perjured herself before the Tribunal when she denied having done so.³⁶

Applicant's Case

45. The decision that his conduct amounted to misconduct and the consequent disciplinary measures were unlawful and/or improper because they were based on the following misleading premises:

- a. that he was the Team Leader and Supervisor of the UNON Security and Safety team in Dadaab;
- b. that he instructed other officers not to mention the alleged firearm misuse; and
- c. that he misled a more senior Security Officer (Ms. Okal) by indicating that officer Mboya had a small disagreement.

46. His procedural fairness rights were not respected:

- a. he was not informed of the offence or nature of misconduct during the investigations contrary to established rules and/or standards and as affirmed by UNDT Judgement No. UNDT/2013/080;
- b. OHRM relied on statements that were not properly obtained; and

³⁵ Application, annex 12.

³⁶ Application annex 31.

c. OHRM requested for further investigations and/or evidence after he had submitted his reply on 28 March 2016, contrary to paras. 8 and 9 of ST/AI/371.

47. The Applicant seeks the following reliefs:

a. That the Tribunal find that he was not a supervisor. Consequently, any charges and disciplinary measures based on the premise that he was a supervisor have no legal basis and should be rescinded.

b. That the Tribunal find that his conduct during the relevant period was motivated by and/or conformed to valid rules of the organization which he was obliged to obey by virtue of his employment. There was no motive or deliberate attempt on his part to disseminate false information about the incident. His conduct therefore did not amount to misconduct.

c. That the Tribunal find that his fairness rights were not respected during the investigations and the disciplinary process.

d. That the Tribunal should find that the decision to rely on Mr. Muloki's account that a meeting was held on 22 December 2014 together with any other decisions based on it are unjustified and consequently, rescind such decisions because it was the fault of the organization that he could not produce his phone records to show that a meeting took place on 19 December 2014.

e. To find that the decision to impose disciplinary measures is not justified and the disciplinary measures imposed are excessive or not justified; also to rescind the decision which required him to be trained on gender sensitivity.

f. To award him appropriate compensation for being placed on weapons restriction during the investigation without him having been told the nature of the offence he was being investigated for. As a result of this weapons

restriction, he could not be considered for missions and promotions. Further, when his contract was due for renewal, it was reduced from two years to six months' duration, denying him the opportunity to obtain any funds from loaning institutions.

g. During the entire period of the case, he has undergone untold psychological suffering and anxiety especially when he was required to perform guard duties at the entry gate points without a firearm. Consequently, he developed high blood pressure whose treatment has strained him and his family both emotionally and financially.

Respondent's Case

48. The facts are established by clear and convincing evidence.
- a. There is clear and convincing evidence that on the morning of 19 December 2014, while stationed in Dadaab, the Applicant learned that Mr. Mboya had pointed his service firearm at his girlfriend and at Mr. Muloki.
 - b. Despite this knowledge, the Applicant told Ms. Okal, on 22 December 2014, that there had only been a minor disagreement between Mr. Mboya and his girlfriend.
 - c. The Applicant also directed other Security Officers, including Mr. Muloki, not to tell anyone about the incident. At the hearing, the eye-witnesses confirmed these events.
49. The established facts amount to misconduct.
- a. By instructing other staff members to provide false information and misleading a more senior Security Officer, the Applicant violated staff regulation 1.2(b) (failure to uphold the highest standards of integrity) and staff regulation 1.2(f) (engaging in activities that are incompatible with the proper discharge of his duties with the Organization).

b. By failing to report Mr. Mboya's breach of the Organization's rules and regulations to the officials responsible for taking appropriate action, the Applicant also violated staff rule 1.2(c) (failure to report unsatisfactory conduct).

c. Even if accepted—despite the testimonies of all witnesses to the contrary—that the Applicant did not have supervisory functions, he would have still violated the above-mentioned Staff Regulations and Rules, which apply to all staff members, regardless of their rank and function.

50. The imposed sanction fell within the Administration's discretion. The sanction imposed on the Applicant was neither blatantly illegal, arbitrary or discriminatory nor otherwise abusive or excessive. It took into account the circumstances of the Applicant's misconduct and was in the lower range of the sanctions available to the Administration.

51. The Applicant was accorded due process. The Applicant's due process rights were respected throughout the investigation and disciplinary process. There is no indication that the SIU investigators were in any way biased, as alleged, without substantiation, by the Applicant. Contrary to the Applicant's assertions, the fact that OHRM sought further information after receiving the initial investigation report did not prejudice the Applicant. On the contrary, this was done to ensure that all aspects of the matter were fully explored, in particular because the initial investigation in the matter had focused on Mr. Mboya and not on the Applicant.

52. The Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

53. As well established in the UNAT jurisprudence³⁷, judicial review of a disciplinary case requires the Dispute Tribunal to examine:

³⁷ *Majut* 2018-UNAT-862, para. 48; *Ibrahim*, 2017-UNAT-776, para. 234 ; *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; and *Molari* 2011-UNAT-164, paras. 29 and 30.

- a. whether the facts on which the sanction is based have been established;
- b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and
- c. whether the sanction is proportionate to the offence.

54. Moreover, as confirmed by UNAT in *Applicant*, part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.³⁸

55. The impugned decision is challenged on all the prongs of the test. Below the Tribunal will address these issues in turn.

Whether material facts were sufficiently established

Whether the Applicant had knowledge of the weapon incident on 19 December 2014

56. The Applicant maintains that he had no knowledge of the full nature of the incident until 20 December 2014, when Ms. Oluoch told him about it. Still, this was only a rumor, upon which he had no basis to act.

57. The Respondent points out to witnesses' testimony, according to which the Applicant had been instantly informed. Besides, he avers, the Applicant's version is not credible.

58. The Tribunal shares the Applicant's observation that the witnesses who claim to have instantly reported the full nature of the incident to the Applicant, i.e., Mr. Muloki and Ms. Awuonda, supplied this information only in re-interview, after the investigation had focused on the Applicant. This alone does not render their testimony not credible. The first interview did not inquire about this factual element and, with the central role of Mr. Mboya in the case, the fact is not obvious to volunteer. At the same time, there is nothing in the initial statement that would belie

³⁸ 2012-UNAT-209, para. 36.

it. Informing the Applicant about a weapon being involved in the incident would have been an obvious thing to do, both because of the drama experienced by both Mr. Muloki and Awuonda and given that the Team Leader and his Deputy had been woken up and called to the scene at night.

59. The Tribunal, however, concedes that in the circumstances of commotion and a quick sequence of events, with many persons arriving at the scene and then departing, information may have been neither precise nor complete. Notably, Ms. Oluoch, who arrived together with the Applicant and thus had the same opportunity to hear from Mr. Muloki at the scene, maintains that she learned about the weapon only later in the morning from Mr. Mboya's girlfriend, and then during lunch with Mr. Muloki. Likewise, Ms. Awuonda, who confirms having been told by Mr. Muloki about the weapon as soon as he had called on her, still was later asking the Applicant what to record in the report and on the next day inquired from Mr. Muloki about "what had really happened". However, the Tribunal finds it improbable that the gist of the incident would not have been conveyed to the Applicant at the scene. Together with the fact that Mr. Mboya's weapon was recovered from the top of the fridge near the door and taken away from him and that his room was in disorder, even scant information about his violent behavior was serious enough to not be dismissed lightly by the Applicant and mandated verification at the nearest appropriate opportunity, that is, in the morning.

60. Indeed, according to Ms. Oluoch, in the morning the Applicant sought verification from her.

61. The Applicant's contention that he only heard the story from Ms. Oluoch on 20 December is contradicted by the testimony of Ms. Oluoch who maintains that she relayed the said information on 19 December in the morning, that is, when she was Duty Officer. Ms. Oluoch also indicates that the Applicant asked about it by way of verifying what he had already heard. Whereas the Applicant maintains that it was Ms. Oluoch who volunteered the information presenting it as rumours that were in circulation, this is implausible. Ms. Oluoch, having heard the story first hand from

Mr. Mboya's girlfriend when the latter stayed with her on the morning of 19 December, had no reason to refer to rumours. The Tribunal finds Ms. Oluoch's testimony more plausible, detailed and consistently narrated in her interviews; moreover, she had no interest in presenting the issue this way or another. Conversely, the Applicant appears to be building a scenario in which he would not have had an opportunity to inquire with Mr. Mboya's girlfriend – who left Dadaab on 20 December – about what had happened at night. In the same aspect, notably, his version that he did not find Mr. Mboya's girlfriend upon arrival at the scene contradicts the account of all the others: Mr. Muloki's, Ms. Awuonda's and Ms. Olouch's, according to whom the girlfriend was still there - thus potentially available to tell her side of the story.

62. Last, the Tribunal notes that the fact that Mr. Mboya, having regained his service weapon during the day of 19 December 2014, surrendered it again for the night to the safekeeping of the Applicant, is consistent with the Applicant's awareness of Mr. Mboya's violent behavior the night before.

63. In conclusion, by the end of 19 December 2014, the Applicant, had at least reasons to believe that misuse of the firearm had taken place in the incident This warranted reporting it to the supervisors.

Whether the Applicant had knowledge of the incident at the time he spoke with Ms. Okal

64. The Applicant does not deny that in the telephone conversation with Ms. Okal he stated that the incident involving Mr. Mboya was limited to an argument with the latter's girlfriend, without mentioning the weapon issue. The Applicant's defence is that this conversation had taken place in the morning of 19 December, before he acquired any further knowledge. With the Applicant admitting that he heard information of the misuse of weapon on 20 December (however found implausible, in favour of 19 December, as discussed above), the date of this phone call is therefore important for the determination whether the Applicant knowingly misled Ms. Okal

regarding the nature of the incident.

65. The Respondent relies on the testimony of Mr. Muloki, who maintains that the phone conversation with Ms. Okal took place on 22 December, on the testimony of Ms. Okal and Mr. Bakhoya and on their telephone records.

66. The Applicant submits that the fact of this conversation on 19 December could have been demonstrated by his official mobile phone records, which were unavailable by the time he was confronted with the charges.

67. The Tribunal accepts that the telephone records demonstrate with certainty that a phone call was made in the morning of 22 December, from Mr. Bakhoya's desk phone to the Applicant whereas no calls were made from it or from Ms. Okal's mobile phone to the Applicant on 19 December. Mr. Mabuyah's insistence that the phone call from Mr. Bakhoya's desk phone was made in the morning after the incident is baseless - being, at best, a random witness of the phone call, Mr. Mabuyah had no reason to remember the date; above all - no such call has been recorded. The Tribunal rejects as implausible the Applicant's suggestion that the phone records have been falsified.

68. The Tribunal further notes that, on the accounts of Mr. Muloki, Ms. Olouch and the Applicant, on the morning of 19 December they were occupied with waking up Mr. Mboya, meeting the FSCO, returning the weapon to Mr. Mboya, and attempting to apologize to the UNHCR neighbor. These accounts do not leave the time and opportunity for a meeting and telephone conversation with Ms. Okal; there would be, moreover, no basis yet to tell her that Mr. Mboya was in normal service and not on weapon restriction.

69. In light of the aforesaid, the Tribunal is satisfied by the testimony of Mr. Muloki, Ms. Okal and Mr. Bakhoya as to the content of the telephone conversation with the Applicant and by the evidence from phone records and the testimony of Mr. Muloki as to its date.

70. The Tribunal notes that there are divergences in the witnesses' accounts concerning the date and time of different phone calls. For example, the record shows an earlier call from the mobile phone of Ms. Okal to the Applicant, on 21 December in the afternoon. This is consistent with the undisputed fact that Ms. Okal called twice, even though both the Applicant and Ms. Okal believe that both calls were on the same morning. There is also a later, very brief, call from Ms. Okal's mobile phone on 22 December. These records, in the Tribunal's opinion, indicate that the witnesses do not remember all the calls they had between them and considers it perfectly normal and justified by vagaries of human recollection. By the same token, the Tribunal accepts that Ms. Oluoch's denial that she called Mr. Mboya on 19 December was a matter of forgetting rather than, as the Applicant avers, perjury which would disqualify her testimony.

Whether the Applicant instructed others not to reveal firearm misuse

71. This aspect of the charges is supported only by the testimony of Mr. Muloki. Neither Ms. Awuonda nor Ms. Oluoch confirm having received such instructions; the Tribunal observes that both witnesses appeared quite neutral, and did not try to either exonerate or inculcate the Applicant. The Applicant admits having cautioned against disseminating rumours and respecting the chain of command.

72. The Tribunal observes that Mr. Muloki has been found generally credible, most notably regarding the detail that the telephone conversation had been held on 22 December, which has been confirmed by the telephone records. In this case, however, the Tribunal doubts whether Mr. Muloki had correctly heard, interpreted or reported the words of the Applicant.

73. The Tribunal recalls that since the occurrence of the incident in early morning on 19 December, all three witnesses: Ms. Awuonda, Ms. Oluoch and, above all, Mr. Muloki, had had better, more direct information about the weapon issue than the Applicant. Still, none of them reported it in writing or said anything about it to Ms. Jakic, the FSCO, despite multiple occasions arising before 22 December, including

the morning of 19 December when the FSCO inquired about the incident. Mr. Muloki testified before the Tribunal that he had made a conscious decision not to report the incident as long as he stayed in Dadaab. The Applicant, notwithstanding him having reasons to believe that a misuse of firearms occurred and not reporting it, could still have been reasonably displeased at the indication that someone on his team had been informally reporting to Headquarters behind his back while not taking the responsibility of recording the incident or filing a complaint. In these circumstances, the Tribunal finds the Applicant's version more credible, in that he may well have urged the team members to either formally report or refrain from spreading rumours. This does not amount to giving instructions to conceal the true nature of the incident. Indeed, it does not seem that any member of the team member would have been influenced by instructions of this type.

74. The Tribunal is not satisfied as to the charge of instructing the team to not report the firearms misuse.

Whether the Applicant acted in a supervisory capacity

75. The Applicant's specific arguments on this score are as follows.

a. It is established practice that UNON/SSS Supervisors are of the level or rank of Security Sergeant (G-5) and above whereas his level of employment was Security Officer (G-4), a non-supervisory rank. To the extent Mr. Bruce told the Tribunal that he was regarded as a Senior Security Officer, just like the term "Team Leader", "Senior Security Officer" does not refer to any rank and is certainly not one of the supervisory ranks of UNON/SSS. According to Mr. Bruce, theoretically Senior Security Officers are at G-4 level while their juniors are at G-3 level but in reality, both grades are at the same functional level or rank (the rank of Security Officer). The distinction between G-3 and G-4 is never published or otherwise marked on their uniforms.

b. UNON/SSS rules on mission deployment make it clear that

supervisors are at the level of G-5 and above. Altogether, it transpires from UNON/SSS SOPs, supervisory authority and functions of the Team Leader over the team members (including giving them binding instructions and reprimanding them) are inherent because the Team Leader holds a supervisory rank higher than his/ her team members. He, however, while on mission in Dadaab, was not expected to serve as a UNON/SSS Supervisor. He served as a Security Officer, albeit a Team Leader.

c. He only communicated decisions or instructions from higher level officials to the team members. He had no authority to take any disciplinary actions (as would be done by a team leader of a supervisory rank). He could not even make any adverse comments in their performance appraisal (e-PAS) since he was not their Reporting Officer. Statistics show that incidence of indiscipline among the officers were more frequent when the team leader was of the same rank as the rest of the team members.

76. The Respondent's contention is that the Applicant's supervisory role as the Team Leader is evident in the record. In addition to the Dadaab handover note, indicating the supervisory responsibilities as a Team Leader, according to the Applicant, after the phone call from Ms. Okal, he "reminded [Mr. Mboya, Ms. Awuonda, Ms. Olouch, and Mr. Wako] to adhere to the chain of command when passing official information". Further, according to UNON/DSS, the Applicant was a senior Security Officer with approximately 11 years of service and it was based on this long period of service that he was appointed as a Team Leader entrusted with duties of "an immediate supervisor of the men and women working under him"³⁹. This is also consistent with the Applicant's statement in his e-PAS for 2014-2015 that he "took up greater responsibility as Team Leader for UN SSS Dadaab Field Mission", and that "[t]he managerial competencies proved useful in successfully leading my Team to achieve [the] mission objective in the field".

77. It is, therefore, not relevant whether his designation as a Team Leader was an

³⁹ Reply, para. 49.

official promotion to a “Supervisory Rank” of “Security Sergeant or higher”. It was not relevant whether the Applicant was either a first or a second reporting officer of the Security Officers involved in this case.

78. The Tribunal recalls that Staff Regulations and Rules do not define supervisors but rather describe their functions as individuals authorized to give binding instructions to subordinates⁴⁰, evaluate their performance⁴¹ and who must be notified of absences.⁴² More specifically, ST/AI/2010/5 (Performance Management and Development System) describes the roles of supervisors vis-à-vis the staff members they are supervising in relation to performance management. Whereas the ST/AI does not define “supervisor”, and does not explicitly require a higher rank, it has clearly identifiable roles of supervisor as a first reporting officer (FRO) or a second reporting officer (SRO).⁴³ In the present case, the Applicant cannot be described as a supervisor in the sense that the term is applicable in the United Nations staff legal framework as he was neither an FRO or SRO to any of the team members with whom he was working in Dadaab.

79. The UNON/DSS SOPs – to the extent they were made available to the Tribunal – refer to supervisors on numerous occasions, e.g., in relation to the authority to issue instructions⁴⁴, receive reports of incidents⁴⁵, obligation to alert the chain of command to grounds for weapon restriction.⁴⁶ Moreover, the UNDSS Manual of Instruction on Use of Force Equipment Including Firearms mandates security supervisors to report prohibited conduct and policy breaches.⁴⁷ They, again do not define supervisors. The SOP No 13 on mission deployment, however, distinguishes between supervisors (ranking G5-G7) and Security Officers (G3/G4). It further states “Supervisors will go on missions as supervisors not as security officers

⁴⁰ ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations), staff rule 1.2(a).

⁴¹ Ibid., staff rule 3.3(a).

⁴² Ibid., staff rule 6.2(f).

⁴³ ST/AI/2001/5, section 5.

⁴⁴ Reply, annex 9, page 334.

⁴⁵ Ibid., SOP 1.17.1

⁴⁶ Reply, annex 5, page 213, SOP 21 Weapons Carry Policy.

⁴⁷ Reply, annex 2, page 69, para. 4.46.

and vice versa.”⁴⁸

80. The Applicant did not fall under the category of “supervisor “as per UNON/SSS SOP No 13. Undisputedly though, the Applicant carried out team leader functions and the UNON/SSS Daily Orders which assigned the Applicant to provide “security surge services” at the UNHCR facility in Dadaab indicate clearly his designation as such.⁴⁹ “Team leader” is not a term used in the Staff Regulations and Rules; the UNON/DSS SOPs at the time of the incident did not relate to it either, be it in relation to a supervisory function or otherwise. This designation, therefore, does not legally amount to the Applicant having the power to exercise supervisory functions over the other staff members in his team.⁵⁰

81. The Tribunal notes that the UNON/DSS SOPs, in turn, refer to “Shift Platoon Leaders” who are charged with the responsibility of ensuring that personnel enter all information required in the DOB and the Service Registers and that they are correctly accounted for at all times. The Shift Platoon Leaders are responsible for ensuring that all incidents are recorded and the DOB is current and up to date; they may also be entrusted with access to armory and tasked with recording entries in firearm control register.⁵¹ The analogy with Team Leaders on mission is obvious in this respect but is likewise limited.

82. The Tribunal agrees, therefore, that the position of team leader was not autonomously defined in the controlling legal instruments, probably due to the assumption that team leaders are higher ranking security officers and thus supervisors. This function was, however, sufficiently established in practical terms and delineated discrete obligations in ensuring that the team carries out the responsibilities such as might be spelt out in the Daily Orders. The handover notes dated 20 August 2014 are addressed to the Applicant in his capacity as the Officer-in-Charge of UN/SSS Surge XVI and Incoming Team Leader. They describe his

⁴⁸ Reply, annex 12, page 356, SOP No 13 of 24 February 2012 at section C para. 3.

⁴⁹ Application, annex 28.

⁵⁰ The Tribunal understands that rules have been amended after the incident in question.

⁵¹ Reply annex 12, page 326 - UNON/DSS SOP# OPS 9: Service Register, 26 May 2012, para. 3.

responsibilities as Team Leader as follows:⁵²

On each day, one SSS officer is designated as the duty officer for a period of 24hrs (0630hrs - 0630hrs). During silent hours (night and weekends/ holidays) the duty officer maintains SSS functions over the G4S guard force and monitors police presence and patrols. He/She is the custodian of the duty phone and responds to all calls as appropriate, in consultation with the Team Leader. Every night, one other SSS uniformed officer assists the duty officer at the Main Entry Gate from 1800hrs to 2200hrs. This is to ensure that curfew rules are strictly implemented at the gate. Every morning the duty officer prepares the daily report. The Team Leader ensures the report is accurate and comprehensive, and then sends it to the UNDSS senior official on the ground. Every week (Monday to Sunday) a group of at least four officers remain on standby, ready to back up the duty officer for quick response to any emergency. For purposes of response to major emergencies, SSS officers have been assigned to particular zones where they will assist the warden (s) in staff evacuation procedures. Daily Radio Checks are conducted from 2000hrs and all officers must respond.

83. It is thus clear that, at minimum, designating duty officers, stand-by shifts, oversight of the G4S Security personnel, enforcing the curfew, responding to calls and proper reporting were the obligations of the Team Leader and in this respect the Applicant could give binding instructions to the team members. In addition, as transpires from the oral and documentary evidence, the Applicant exercised *a de facto* commanding role over the other Security Officers in his team in the following aspects:

- a. he was called by the Duty Officer to the scene of the firearm incident to take charge of the situation;
- b. he followed up about the incident with the other Security Officers such as Ms. Oluoch and Mr. Mboya;
- c. he was called by Ms. Okal, a senior Security Officer based in Nairobi, in relation to the incident in his capacity as “the supervisor on the ground”;

⁵² Reply annex 3, pages 113-115.

- d. Mr. Mboya surrendered his weapon to him for safekeeping;
- e. he summoned the other Security Officers to meetings, whether on 19 or 22 December 2014; and
- f. he admitted that it was his duty to ensure that the daily incident report was accurate, comprehensive and to then transmit it to the FSCO and to UNON/UNDSS.

84. In light of the above, the Tribunal accepts that as Team Leader the Applicant had the responsibility and the commanding role in regard to two functions that are relevant for the case, that is, responding to calls and reporting.

Whether the Applicant's due process rights were observed

85. Regarding the Applicant's averment that he was not informed of the offence or nature of misconduct during the investigations contrary to established rules and standards, the Respondent's position is that SIU/SOP No. 7, which required giving a sort of "Miranda warning" to persons subject to investigation, did not create any substantive rights and was in direct contravention of the obligation of staff members to "cooperate with duly authorized audits and investigations" under Staff Rule 1.2.(c) and to uphold the highest standards of integrity under Staff Regulation 1.2.b.⁵³

86. The Tribunal notes that the issue may be more complex than what the Respondent avers. First, any SOP which contradicts the staff rules and regulations should not have been issued or should have been immediately withdrawn; such an SOP, indeed, would be incapable of creating rights, be it substantive or procedural. There is a question, however, whether there is a genuine contradiction. In this case, it is not obvious that the SOPs which provided for additional procedural guarantees contradicted the staff rules and regulations: without more, the obligation to cooperate with the investigation does not automatically denote an obligation to provide self-

⁵³ Reply, para. 62, citing to the Decision letter dated 21 December 2016 which is at annex 1 to the application.

detrimental statements; avoiding self-detrimental statements, on the other hand, especially when encouraged by an SOP, cannot be seen as contradicting the highest standards of integrity. Altogether, while the SOP does not create *substantive* rights, it may legitimately create expectations as to procedural standards by which the SIU abide, and the Respondent, being the author of the SOP, cannot simply brush it off when it fits him better (at the same time, it may be recalled, the Respondent holds the Applicant accountable as supervisor according to the SOPs). The unqualified obligation of the staff member to provide information has only been articulated recently, in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which is a welcome development in providing clarity.

87. This said, the Tribunal notes that while the SOP foresaw giving the warning to the interviewee being suspected of misconduct, there were no corresponding rules, on any level, for disqualification/inadmissibility of statements obtained without such warning. To the extent the Applicant argues that such result should be interpreted from a general fairness standard, the Tribunal observes that this would be the fairness standard in criminal proceedings, but not in disciplinary cases. Therefore, on the basis of the SOP the Applicant may impugn the Respondent's inconsistency but not the violation of overriding standards. The Applicant, in any event, does not point to any material information that he would have withheld having been warned as per the SOP. Neither did this Tribunal rely substantively to the detriment of the Applicant on any information that he had supplied prior to the receipt of the charging letter. The Applicant's argument on this score is, therefore, rejected.

88. Regarding the Applicant's contention about irregularities in the collection of witness statements in the investigation, the Tribunal concurs with the Respondent that neither multiple interviews nor the lack of signature on each page of some of the written records would disqualify the statements *a limine* as inadmissible. The Tribunal undertook to hear all the material witnesses directly under oath. The witnesses confirmed both the authenticity of their signatures and the veracity of their statements. The Tribunal assessed the witnesses' credibility, including the fact that

they had been interviewed multiple times.

89. Lastly, the Tribunal sees no violation of the Applicant's rights in the Respondent's seeking to supplement the investigation. The Applicant was provided additional opportunity to comment on its results. The Applicant does not invoke any actual prejudice to his defence that this additional investigation would have entailed. The Tribunal finds also that no such prejudice would normally result.

90. In conclusion, the Tribunal finds no violation of due process in the investigation.

Whether the established facts qualify as misconduct

91. The Tribunal is satisfied that by failing to report Mr. Mboya's breach of the Organization's rules and regulations to the officials responsible for taking appropriate action, the Applicant violated staff rule 1.2(c) (failure to report unsatisfactory conduct). The Applicant also violated staff regulation 1.2(b) (failure to uphold the highest standards of integrity). The Applicant committed this misconduct having had supervisory responsibility in terms of responding to incidents and reporting them.

92. On the evidence before it, as discussed above, the Tribunal is not satisfied that the Applicant would have instructed other staff members to provide false information.

Whether the sanction is proportionate to the offence

93. It is recalled that the Appeals Tribunal pronounced that "[t]he proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance,

necessity and suitability.”⁵⁴ The Appeals Tribunal, thus, recognizes that a less onerous sanction is preferred where it would be equally effective. This marks a shift or paradigm compared with the previous position, that the Tribunals intervene in the disciplinary measures only where they would be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in severity.⁵⁵

94. The Tribunal finds that the sanction of deferment, for a period of two years, for eligibility for consideration for promotion and the administrative measure requiring the Applicant to attend a course on gender sensitivity, are both reasonable and not disproportionate, given the seriousness of the principal offence which was unreported and that it involved violence against a woman. The Applicant’s conduct demonstrated lack of appreciation of either feature of the incident. The Respondent correctly identified as mitigating circumstances: that the failure to report misconduct had not impeded investigation into the principal offence, that the Applicant had no experience in supervisory functions; the Applicant’s prior conduct and lack of disciplinary violations. The lack of clarity as to the extent of supervisory role of the Applicant as Team Leader was not taken into consideration, but, given that the Applicant’s commanding function was sufficiently clear in the relevant area, the Tribunal finds that the lack of the formal designation as supervisor had no bearing on the reasonableness of the sanction of deferment for eligibility for promotion.

95. The Tribunal, on the other hand, fails to see any purpose of combining the measure of deferment for eligibility for promotion with a written censure. As demonstrated by the systemic reading of staff rule 10.2, written censure is the most lenient of all the disciplinary measures. Its purpose is exhausted by stigmatizing the impugned conduct, creating a record of disciplinary violation of the staff member for the future and fostering correction of behavior, without, however, resorting to financial sanction and/or loss of employment. The retributive and preventive effect of a written censure is inherent to, and thus subsumed by, any other, more onerous

⁵⁴ *Samandarov* 2018-UNAT-859.

⁵⁵ E.g., *Portillo Moya* 2015-UNAT-523 at para. 21.

disciplinary measure, all of whom stigmatize and create a record of misconduct in addition to more severe financial and/or status-related consequences that they entail. Cumulative application, therefore, of written censure with any other disciplinary measure does not contribute in any way to the “desired end” and, as such, is unreasonable. The impugned decision is thus amended accordingly.

Conclusion

96. The application is granted in part, in that
- a. the charge that the Applicant would have instructed other staff members to provide false information is dismissed;
 - b. the disciplinary measure of written censure is rescinded; and
 - c. all other pleas are rejected.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 11th day of October 2019

Entered in the Register on this 11th day of October 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi