Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Peter A. Gallo, Esq.

Counsel for Respondent:
Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. On 19 March 2019, the Applicant filed the application in which he contests the decision to terminate his continuing appointment as an Investigator at the P-4 level with the Office of Internal Oversight Services ("OIOS") on 10 December 2018.

2. On 18 April 2019, the Respondent filed his reply in which he contends that the application is without merit, arguing that the Applicant's continuing appointment had been properly terminated for unsatisfactory service.

3. Following various case management steps, in Order No. 169 (NY/2019) dated 29 November 2019, the Tribunal ordered the parties to file their closing statements. The time limits for doing so were, however, postponed in Order No. 184 (NY/2019) dated 26 December 2019 as a result of the Applicant's failing to comply with the initial deadline stipulated in Order No. 169 (NY/169). Subsequently, the Applicant filed his closing statement on 2 January 2020 and the Respondent filed his closing statement responding thereto on 16 January 2020. In Order No. 184 (NY/2019), the Applicant was also ordered to file his final observation to the Respondent's closing statements by 22 January 2020. However, the Applicant did not file anything, not even after the deadline expired, and not to waste any further time and judicial resources, also in light of his previous failure to comply with the Tribunal's orders, the Tribunal has decided to proceed with adjudicating the present matter, noting that the Respondent presented no new submissions in his closing statement, which the Applicant has previously had the opportunity to comment on.

Facts

4. For the performance period from 1 April 2016 to 31 March 2017, the Applicant's electronic performance assessment system report was completed by his

First Reporting Officer ("FRO") on 10 May 2017, by his Second Reporting Officer ("SRO") on 28 May 2017 and by himself on 31 May 2017.

5. The FRO rated the Applicant's overall rating as "Partially meets expectations" (the second lowest out of four ratings). The individual scores on the set core values and competencies were the following:

a. "Fully competent" (the second highest rating out of four ratings) in the core values of (i) integrity and (ii) respect for diversity/gender;

b. "Requires development" (the second lowest out of four ratings) in professionalism (a core value) and in (i) teamwork, (ii) creativity, (iii) client orientation (all core competencies) and (iv) leadership (a managerial competency).

6. In the FRO's narrative comments, detailed appraisals were given, which, in general, appropriately reflected the ratings that he had provided to the Applicant. In the FRO's overall comments, he stated that:

> During the mandatory end of cycle meeting with [the Applicant], which took place on 24 April 2017, in presence of ID Director [presumably, the Director of the Investigations Division, namely the SRO], I discussed with [the Applicant] his performance during the reporting cycle 2016-2017.
>
> [The Applicant] acknowledged that he had received all support he needed from me and colleagues in Unit 5 during the reporting cycle. He also acknowledged that I, as his FRO, always accommodated his requests for assistance. I also pointed out in the discussion that I had approved for [the Applicant] rather broad flexible work arrangement (a combination of two day work from home arrangement and a compressed time off) to assist him with his performance, but it clearly did not work. After I outlined in detail my assessment of [the Applicant's] work, he responded that his poor health also impacted on his performance.
>
> I responded that I have always had due consideration to [the Applicant's] health issues and that I was always flexible with his

requests to approve leave, change days off in the [flexible work arrangements] and that I shall continue to do so since the health of my staff has always been my paramount consideration. [The Applicant] acknowledged that I have always had accommodating attitude. I also encouraged [the Applicant] to approach me when he needs assistance. Considering the performance results as stated in this report and the discussed during the meeting, I concluded [the Applicant] failed to perform the tasks he had set for himself in his Work Plan.

In accordance with ST/AI/2010/5 [Performance Management and Development System] I evaluated his performance as "partially meets performance expectations".

With the assistance of SRO, it was arranged that [the Applicant] would be temporarily reassigned to the Office of the Under-Secretary-General ["OUSG"]. This arrangement was made in accordance with the provisions of ST/A1/2010/5. It should assist [the Applicant] to get back on track with his performance. [The Applicant] accepted this offer and he shall be back in Unit 5 in July 2017.

Finally it is noted that [the Applicant] did not provide his self evaluation even though he had asked for additional time before the mandatory meeting with FRO and SRO. The requested time was provided, as requested, but to date [the Applicant] did not provide his self evaluation.

In accordance with ST/A1/2010/5 Section 10, 10.2, Personal Improvement Plan for the duration of six months will be implemented upon [the Applicant's] return to Unit 5, The [personal improvement plan] should assist [the Applicant] to meet performance expectations during the next reporting cycle.

7. The SRO endorsed the FRO's appraisal, stating that:

[T]his performance document is very clear, very well evidenced and quite frankly a compelling indictment of [the Applicant's] appalling lack of any meaningful contribution to the work and development of the Division over the last 12 months. As a result and in order to help [the Applicant], [he] have been placed on [a performance improvement plan] as a means of providing [him] closer support and guidance, have had [his] existing workload trimmed right down to a minimum, to remove some of the stress [he] were obviously suffering and have been given two months in the OUSG to help clear [his] head and help [him] to deal with some of [his] medical issues. [The SRO] hope with appropriate levels of support and guidance, plus the short

> break from investigations, [the Applicant] will be able "recalibrate" [himself] and make a greater, more meaningful contribution to the work of the Division over the next performance cycle. [The SRO] look forward to seeing the improvement.

8. In the Applicant's final comments, he stated that the FRO's assessment was "news to [him], as no perceived shortcoming was identified at the midpoint review, and [his] FRO did not communicate any perceived shortcoming before the end of the appraisal cycle". The Applicant explained that the office environment in which he worked was toxic, dysfunctional and dominated by cliques and that the comments of the FRO and SRO were a reflection thereon and inappropriately biased against him. The Applicant, however, "acknowledge[d] that [his] performance was not optimal this year" but also stated that "some of [his] accomplishments were overlooked and [his] serious health problems were not taken into consideration by [his] FRO and [his] SRO".

9. For the period from 8 May 2017 to 31 March 2018, the Applicant's FRO and SRO launched a performance improvement plan, which set out four targets, and aside from "Target 4", which was not considered upon the Applicant's request, the Applicant's performance on these targets was appraised in detail. The gist of the assessments was that the Applicant's performance had not adequately improved. The performance improvement plan was signed by the FRO and SRO on 29 June 2018, but not by the Applicant.

10. On 29 June 2018, the FRO and SRO also signed the Applicant's "Manual Appraisal Form" for the performance period from 1 April 2017 to 31 March 2018. The form was signed by the Applicant's Additional Supervisor on 28 June 2018, but it was not signed by the Applicant.

11. As an introduction to the Additional Supervisor's comments was stated (emphasis omitted): "In order to assist [the Applicant] to recover from a long-term illness, FRO and SRO together with the Under-Secretary-General, OIOS arranged a

temporary assignment (light administrative duties) for [the Applicant] in the Office of [the] Under-Secretary-General (OUSG). During the temporary assignment, [the Applicant] was supervised by [the Additional Supervisor]". The Additional Supervisor gave a detailed appraisal of the Applicant's performance and generally noted that, "[the Applicant] submitted weekly progress reports/updates to me on the status of his work. He satisfactorily met the goals set for this assignment, his work was thorough".

12. The FRO, however, rated the Applicant's overall performance as "Does not meet expectations", which is the lowest of four ratings. The individual ratings that the Applicant's performance received for the set core values and core competencies of his job were:

a. "Fully competent" (the second highest rating out of four ratings) in the core values of (i) integrity and (ii) respect for diversity/gender;

b. "Requires development" (the second lowest out of four ratings) in commitment to continuous learning (a core competency);

c. "Unsatisfactory" (the lowest of four ratings), in (i) professionalism (a core value), (ii) communication, (iii) teamwork, (iv) accountability and (v) client orientation (all core competencies).

13. In the narrative comments, the FRO gave a detailed assessment of the Applicant's performance, which generally reflected the various performance ratings. In his overall comments, the FRO indicated that, "As outlined in [the performance improvement plan] and assessment and in his e-Performance report [the Applicant] did not meet the defined success criteria and performance expectations for the majority of the goals and he did not demonstrate willingness and ability to develop required skills". In the SRO's overall comments, he stated that, "[The Applicant's] appraisal is an appalling indictment of [his] lack of application to [his] duties in the

last 12 months. [The Applicant is] a senior P-4 investigator whose performance has been and remains sub-optimal. [The Applicant's] contribution to the Division's outputs [is] non-existent. [The Applicant's] non-compliance with the e-Performance procedures and [the performance improvement plan] put in place to help and guide [him], is indicative of [his] attitude towards [his] work and towards those who supervise [him] ... This document is entirely fair and accurate and the ratings appropriately derived … Based on [the Applicant's] closely and carefully documented performance of the last two years, [the SRO] will be seeking the advice of [the Office of Human Resource Services Management] as to the appropriate action to be taken in line with Section 10 of ST/AI/2010/5".

14. By interoffice memorandum dated 2 November 2018 from the SRO to the Executive Office of OIOS, the SRO requested that the Applicant's continuing appointment "be terminated for unsatisfactory performance". In the memorandum, as reason for the request, the SRO mainly referred to the Applicant's "poor performance over the last two years", "the 2016/2017 annual performance appraisal cycle [that] was judged as 'partially meets expectations' and in the 2017/2018 cycle [that was rated] as 'fails to meet expectations'" and the performance improvement plan.

15. By interoffice memorandum dated 6 November 2018 from the Executive Officer of OIOS to the Assistant Secretary-General of the Office of Human Resources Management ("ASG/OHRM"), copying the Assistant Secretary-General of OIOS, the SRO's request for termination of the Applicant's continuing appointment was shared, indicating that "OIOS supports the proposed termination of appointment of Mr. Nadeau, which complies with Section 10 of ST/AI/2010/5". As reason, a reference was made to the Applicant's perceived unsatisfactory service as stated in his performance appraisal reports and the alleged attempts to accommodate him:

> As indicated in the attached memorandum, Mr. Nadeau's performance was assessed as "partially meeting expectations" and "not meeting expectations" for the 15/16 and 16/17 performance cycles

> respectively. Various attempts were made to accommodate the staff member, including two assignments of temporary nature (with the OUSG/OIOS for a period of two months from 8 May 2017 and for six months with the Inspection and Evaluation Division from 1 May 2018). OIOS is not in a posit[i]on to permanently reassign him internally to other more suitable functions.

16. By interoffice memorandum dated 30 November 2018 from the ASG/OHRM to the Under-Secretary-General of (the Department of) Management ("USG/DM"), the ASG/OHRM sought "approval to proceed with the termination of the [Applicant's] continuing appointment effective upon your approval". As reason, the ASG/OHRM referred to the Applicant's "performance shortcomings", which stated to have been "reflected in both the 2015/2016 and 2016/2017 performance appraisal cycles during which he received ratings of 'partially meeting expectations' and 'not meeting expectations' respectively". The USG/DM countersigned the memorandum on 7 December 2018 and gave his approval.

17. By letter dated 10 December 2018, the Assistant Secretary-General and Officer-in-charge of OIOS informed the Applicant that the Secretary-General had decided to terminate his continuing appointment with the United Nations in accordance with staff regulation 9.3(a)(ii) due to "unsatisfactory service". The Applicant was further informed that the termination was effective 10 December 2018 at the close of business and that the letter constituted a formal notice of the termination of his continuing appointment. Finally, the Applicant was apprised that the Secretary-General had decided to pay him three months' compensation in lieu of notice as stipulated in staff rule 9.7(d) and that he would be paid a termination indemnity of 5.5 months in accordance with Annex III(a)(c) of the Staff Regulations.

18. By request for management evaluation dated 19 December 2018, the Applicant challenged, "The Secretary-General's alleged decision to terminate my continuing appointment with the Investigations Division of the Office of Internal Oversight Services ("OIOS/ID")".

Consideration

Case management

The Applicant's request for a suspension of the execution of Order No. 184 (NY/2020)

19. In a "Notice of Appeal" dated 21 January 2020, Counsel for the Applicant "advises [the Tribunal] that an Appeal against Order 184 (NY/2019) dated 26 December has been filed with the UN Appeals Tribunal" and that "[u]nder Article 7(5) of the Statute of the Appeals Tribunal, this has the effect of suspending the execution of the order being contested".

20. The Tribunal notes that art. 7.5 of the Appeals Tribunal's Statute provides that: "The filing of appeals shall have the effect of suspending the execution of the judgement or order contested". The Tribunal observes that the inclusion of the word, "order", was made in art. 7.5 following General Assembly resolution 69/203 (Administration of Justice) dated 18 December 2014 in which, in para. 39, the General Assembly also decided to amend art. 11.3 of the Dispute Tribunal's Statute "by adding, at the end of the paragraph at h, a sentence reading 'Case management orders or directives shall be executable immediately'".

21. The Tribunal notes that under art. 2.1 of the Appeals Tribunal's Statute, "The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal …".

22. Subsequent to General Assembly resolution 69/203, the Appeals Tribunal has held that "under Article 2(1) of our Statute, 'only final judgments of [the Dispute Tribunal] are appealable'" but "'there may be exceptions to the general rule' prohibiting appeals of interlocutory orders 'where [the Dispute Tribunal] has clearly exceeded its jurisdiction or competence'". (see *Auda* 2016-UNAT-671, referring to

Siri 2016-UNAT-609). The Appeals Tribunal has further elaborated that the receivability of an appeal against an order, as opposed to a judgment, "depends on the subject-matter and the consequences of the impugned decision" (see *Siri*, para. 27). Furthermore, the Appeals Tribunal has held that, "Moreover, interlocutory orders issued by the Dispute Tribunal may be subject to judicial review if the final judgment is appealed. There is no urgency to review an interlocutory order prior to the handing-down of the judgment by [the Dispute Tribunal], as shown in the Appellant's circumstances". (see *Staedler* 2015-UNAT-560, para. 26).

23. The Tribunal notes that in Order No. 184 (NY/2019), with reference to Order No. 169 (NY/2019), the Tribunal outlined a definition of the administrative decision under appeal and delineated the pending issues. By the present Judgment, the Tribunal has now endorsed its previous preliminary findings (see below under the heading, "The issue of the present case"). In Order No. 184 (NY/2019), the Tribunal then ordered that:

> a. "All requests included in the Applicant's submission of 24 December 2019 are rejected";
>
> b. "The Applicant's request that the 'apology' of 24 December 2019 is granted an *ex parte* status is rejected". Counsel for the Applicant submitted this apology following him failing to file his closing submission in time as per Order No. 169 (NY/2019); and
>
> c. The deadlines for closing submissions as per Order No. 169 (NY/2019) were postponed following the Applicant's failure to comply therewith.

24. The Tribunal notes that Order No. 184 (NY/2019) was, for all intents and purposes, only a case management order in accordance with General Assembly resolution 69/203 and art. 11.3 of the Dispute Tribunal's Statute and therefore

immediately executable. With reference to *Siri* and *Staedler*, none of the findings made in Order No. 184 (NY/2019) were of any urgent nature and all been endorsed by the present Judgment. If the Applicant appeals this Judgment to the Appeals Tribunal, the Applicant will therefore also be appealing any order made in Order No. 184 (NY/2019).

25. The Tribunal therefore rejects the Applicant's submission of 21 January 2020 that art. 7.5 of the Statute of the Appeals Tribunal has the effect of suspending the execution of Order No. 184 (NY/2019).

Production of further evidence

26. In the Applicant's closing statement dated 2 January 2020, the Applicant submits that as a consequence of the Tribunal's "universal exclusion of material evidence which is known to exist, the Applicant cannot rely on the Tribunal reaching a reliable judgment on whether or not the impugned administrative decision was 'lawful'" and "[a]ny judgement issued will require to be appealed, which will have financial implications for both Tribunals". The Applicant states that in "deciding UNDT/NY/2015/063", the Dispute Tribunal permitted Counsel for the Respondent to submit evidence in his closing statement despite having had that evidence in his possession for a number of years. By dismissing the Applicant's request, the Applicant submits that the Tribunal is seeking to establish whether the impugned administrative decision was "lawful" while "consciously excluding evidence of an improper motive for that decision, and by dismissing the Applicant's request, which sought disclosure of information in the public domain—the Tribunal is also excluding evidence that—if the Respondent were actually able to produce it—would potentially be exculpatory in that it would suggest that OIOS actually did not [have] any such illicit motive". The Applicant contends that the Tribunal has further "knowingly excluded evidence of the Investigation Director's [assumedly, the SRO] willful blindness towards evidence of other OIOS investigators of a similar or more senior

level to the applicant, exhibiting performance shortcomings in OIOS/ID case numbers [number redacted]".

27. The Applicant submits that "[k]nowledge of the promotion of some of those staff is *prima facie* evidence of their ability to demonstrate a history of good annual appraisals, giving the Applicant more than reasonable grounds to believe that none of them received any 'needs improvement' ratings in their subsequent Annual Appraisals". The Applicant states that this must be compared to the disparate treatment experienced by him, and is further evidence of "a hostile working environment". By taking "the extraordinary step of requesting this (and other) evidence be delivered to the Tribunal on an *ex parte* basis", the Applicant states that he "was willing to forego sight of evidence that could actually disprove his assertions of disparate treatment and a hostile working environment. By dismissing the Applicant's request, which was predicated on information known personally to the Applicant and on information in a publicly available Dispute Tribunal judgment, the Applicants submits that the Tribunal is excluding evidence of: (a) "conduct that is unprofessional if not overtly misconduct" and (b) "egregiously poor basic management skills are tolerated in OIOS; thereby excluded evidence that would have (1) demonstrated OIOS's partisan and selective application of ST/AI/2010/5, (2) further proved the hostile working environment in OIOS and (3) further indicated bad faith in the impugned administrative decision to terminate the Applicant".

28. The Applicant contends that the Tribunal is "at liberty to take whatever action they deem fit and proper to determine whether the impugned decision meets the three elements required in [*Sanwidi* 2010/UNAT/084, para. 42]" but by (a) "summarily dismissing all of the Applicant's requests", (b) "excluding all of the information and arguments tendered by the Applicant", and (c) "deciding this matter without a hearing; the Tribunal has put itself in a position of being unable to establish whether the information supplied to the decision-maker in support of the decision here was 'reasonable and fair' or even complete".

29. The Applicant submits that "[w]ithout consideration of the actions of all the individuals involved in the preparatory steps that lead up to the recommendation that the [A]pplicant be terminated, and without some analysis of how they treated the Applicant compared to other staff members, the Applicant submits that the Tribunal cannot determine whether the decision was legally and procedurally correct and to do so "without regard for the quality and the reliability of the information that the decision maker relied upon will permit decisions to be upheld as 'legal' on the basis of the proper procedure having been followed, despite the decision being based on information containing falsehoods and half truths, and being offered in bad faith and for an improper and unlawful motive".

30. The Tribunal notes that in his application, the Applicant made no requests for production of further, neither written nor oral, evidence. Subsequently, in various motions, the Applicant, however, made different requests for production of further evidence, including the testimonies of 37 witnesses. In Orders No. 169 (NY/2019), 184 (NY/2019) and 2 (NY/2020), the Tribunal rejected all these requests essentially finding that: (a) the Applicant had not been able to clarify why any of this evidence would be relevant to the determination of the present case as the only substantive issue is the termination of his continuing appointment and not his performance appraisals, (b) the request for production of some evidence was made at the state of closing submissions for which reason new submissions and/or evidence may only be accepted in exceptional circumstances, and the Applicant provided no adequate and convincing reason why the requests had not been made earlier in the process; and (c) the case was, in any event, fully briefed for the Tribunal to adjudicate the only pending question on the merits.

31. After closely reading the parties' closing statements, and with reference to its findings below, the Tribunal maintains its earlier orders and, for the same reasons, rejects the Applicant's request for production of further evidence made in his closing statement. The Tribunal advises Counsel for the Applicant of the Code of Conduct for

legal representatives and litigants in person appearing before the Dispute and Appeals Tribunals, adopted as an appendix to General Assembly resolution 71/266 on 23 December 2016, which in art. 4.2 provides that, "Legal representatives … shall act diligently and efficiently and shall avoid unnecessary delay in the conduct of proceedings", and in art 8.1 states that, "Legal representatives … shall assist the Tribunals in maintaining the dignity and decorum of proceedings and avoiding disorder and disruption".

The issue of the present case

32. It is the consistent jurisprudence of the Appeals Tribunal that an applicant must identify an administrative decision capable of being reviewed (see, for instance, *Planas* 2010-UNAT-049, *Reid* 2014-UNAT-419 and *Haydar* 2018-UNAT-821). At the same time, the Appeals Tribunal has allowed the Dispute Tribunal to define the administrative decision(s) and issue(s) under review by taking into account the entire application and all the various submissions made therein (see, for instance, *Hassanin* 2017-UNAT-759, *Zachariah* 2017-UNAT-764, *Smith* 2017-UNAT-768, *Fasanella* 2017-UNAT-765, *Cardwell* 2018-UNAT-876 and *Farzin* 2019-UNAT-917). However, an applicant cannot reopen an old separate issue in a new case (see, for instance, *Santos* 2014-UNAT-415, para. 27, and *Luvia* 2014-UNAT-417, para. 28).

33. In the application, as the only decision under review, the Applicant identifies the decision to terminate his continuing appointment and all the requested remedies relate only to this decision. This is also confirmed in the Applicant's request for management evaluation dated 19 December 2018 in which he only identifies this as the disputed decision and not any decisions relating to the performance appraisal process. However, when arguing that this termination decision was unlawful, the Applicant contends that it was based on a flawed performance appraisal process and makes various submissions in this regard.

34. The Tribunal notes that albeit interrelated, the decision to terminate the Applicant is an entirely different and independent decision from any decision taken in the context of the performance appraisal process. For instance, the respective decisions are governed by different legal provisions and administrative issuances and therefore also defined by different sets of facts. Accordingly, as the Applicant has not challenged any decisions concerning the performance appraisal in the present case, the Tribunal cannot undertake a judicial review of any such decisions in this context.

35. The sole issues of the present case are therefore, with reference to Orders No. 169 and 184 (NY/2019):

a. Whether the decision to terminate the Applicant's continuing appointment was lawful?

b. If not, what remedies is the Applicant entitled to?

Was the Applicant's continuing appointment lawfully terminated?

Did the USG/DM have proper authority to terminate the Applicant's continuing appointment?

36. The Applicant contends that ST/SGB/2015/1 does not supersede General Assembly resolutions 48/218B, 54/244 (paras. 18 and 19), 59/270 (para. 5) and 59/272 (para. 6) all of which stress the importance of "the operational independence aspect" of OIOS's mandate. While it may be the case that successive Under-Secretary-Generals of OIOS have, whether through "ignorance, subterfuge or weak moral character, allowed themselves to be manipulated by other senior officials of the Organization; such informal abdication of their legal responsibilities does not constitute a lawful delegation of authority conferred by the General Assembly". An ASG/OHRM may advise OIOS in order to ensure consistency in human resources policies throughout the Organization; but "allowing anyone outside of OIOS to

decide on the termination of an OIOS staff member violates the principle of 'operational independence' in the OIOS mandate". The General Assembly decided that "OIOS be operationally independent for a reason; specifically so [United Nations] staff who might be investigated for misconduct have no control over the investigation". Allowing this to happen gives rise to "the *quid pro quo* indebtedness that is the essence of corruption in the [United Nations] Secretariat, and explains why the Organization has been so tolerant of the hostile working environment in OIOS and of OIOS' s practice of promoting staff who may be inept, but will not object to being asked to carry out investigations that are either unwarranted or retaliatory as per the misconduct complaints against both [the ASG/OIOS] and [the SRO]".

37. The Tribunal notes that the Applicant's submissions regarding the alleged lack of competence of the USG/DM to terminate the Applicant continuing appointment was only made in his closing statement and that none of these arguments has been raised in any previous submissions before the Tribunal, including in the application. Furthermore, in the Applicant's closing statement, he made no mention thereof and/or requested leave to present any new submissions. This was despite that when ordering the parties to file their closing statement in Orders No. 169 and 184 (NY/2019), the Tribunal highlighted that: "Any new submissions … will be struck from the record" (see paras. 13-15 and 26, respectively).

38. Accordingly, the Applicant's submissions regarding the USG/DM's alleged lack of authority to terminate his continuing appointment are struck from record. Furthermore, the Tribunal advises Counsel for the Applicant that Code of Conduct for legal representatives and litigants in person provides in art. 8.2 that, "Legal representatives … shall be diligent in complying with the statutes, rules of procedure, practice directions and orders, rulings or directions that may be issued by the Tribunals".

39. Even if the Applicant's submissions were allowed, the Tribunal finds that they are without merit and must therefore be rejected. Pursuant to staff rule 9.6(c), the Secretary-General may terminate the appointment of a staff member who, like the Applicant, holds a continuing appointment in accordance with the terms of the appointment on the grounds of "unsatisfactory service". The Secretary-General has delegated this authority to the USG/DM according to annex IV on delegation of human resources authorities to ST/SGB/2019/2 regarding delegation of authority in the administration of the Staff Regulations and Rules (see p. 21). No exception to this delegation of authority is made anywhere in the legal framework governing human resources at the United Nations Secretariat with regard to staff in OIOS, including the resolutions of the General Assembly to which the Applicant refers.

40. Consequently, the USG/DM did possess the authority to terminate the Applicant's continuing appointment.

Was proper procedure followed when the Applicant's continuing appointment was terminated?

41. The Applicant submits that, with reference to ST/SGB/2015/1, para 2.5, in determining whether or not that authority was "correctly applied", the preparatory steps that lead to that "administrative decision" must be considered, regardless of whether or not those preparatory steps are a "decision" in their own right. Even if responsibility for the decision rests with the USG/DM, that decision was not taken without preparatory steps being taken by OIOS, specifically by: (a) the SRO; (b) the acting head of OIOS at the material time, the ASG/OIOS; (c) the FRO, (d) the Executive Officer of the OIOS. Considering whether or not the USG/DM's authority under ST/SGB/2015/1 was correctly applied requires consideration of: (a) whether the Applicant's performance appraisals on which the "unsatisfactory performance" argument rests, were made objectively and in good faith; (b) whether the USG/DM was personally satisfied with those preparatory steps being made objectively and in

good faith; (3) whether the USG/DM was provided with all of the relevant facts to support the recommendation, specifically including the facts relating to the Applicant's performance when temporarily assigned to OUSG/OIOS and working under the supervision of the Applicant's Additional Supervisor and to the Inspection and Evaluation Division of OIOS under the supervision of another staff member; (d) whether the USG/DM was made aware of the mid-point review the Applicant had received on 1 November 2018 from the staff member from the Inspection and Evaluation Division of OIOS; and (e) whether the USG/DM was provided with all the mitigating information of the Applicant's medical condition.

42. The Respondent submits that the contested decision was procedurally fair. The Applicant was aware of the performance standards that he was required to meet as an Investigator at the P-4 level, a position that he had held in various duty stations since 2005. The procedures under ST/AI/2010/5 were followed to evaluate the Applicant's performance against the required performance standards. The 2016-2017 and 2017-2018 performance records show that the required steps were implemented during each performance cycle: workplan, midpoint review and a final performance appraisal.

43. The Tribunal notes that under staff rule 9.6(c), the USG/DM, on behalf of the Secretary-General, may, "giving the reasons therefor, terminate the appointment of a staff member who holds … continuing appointment". Among the reasons mentioned, is "[u]nsatisfactory service". From the facts follow that in all recommendations from the SRO, OIOS and the ASG/OHRM to terminate the Applicant's continuing appointment, the reason provided was the same, namely the Applicant's perceived unsatisfactory service. This was eventually also the reason given in the termination letter. When reviewing the Applicant's previous two performance appraisals, the Tribunal finds that the conclusion that the Applicant's performance was unsatisfactory had appropriately been documented both in the FRO's ratings and narrative comments of the FRO and SRO for two consecutive performance cycles

(2016-17 and 2017-18). Therefore, only after having established that the Applicant performance amounted to unsatisfactory service (although his Additional Supervisor actually found that the Applicant's performance had been adequate in the 2017-18 performance appraisal) was the decision to terminate his continuing appointment taken.

44. In this regard, it follows from the case file that the Applicant did not even try to rebut any of these two performance appraisals. With reference to the Appeals Tribunal's jurisprudence in *Santos* and *Luvia*, the Applicant therefore cannot now initiate a judicial review of any of these performance decisions within the scope of the present case, because, in the present case, the Applicant has only challenged the administrative decision regarding the termination of his continuing appointment, which follows both from the application and request for management evaluation (according to staff rule 11.2, such request would have been mandatory if the Applicant wished to challenge a performance decision). The Tribunal further notes that sec. 15.7 of ST/AI/2010/5 provides that "[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed". As such—since the Applicant has never contested any decisions regarding the performance appraisals—the Tribunal is now bound by the findings and conclusions made therein. As also stated in Orders No. 107 and 169 (NY/2019), based on the application and the Applicant's management evaluation request, the only decision under review in the present case is the decision to terminate his continuing appointment—albeit interrelated, any decision taken in the context of the performance appraisal process is an entirely different and independent decision. Should the Applicant have wished to challenge any of performance decisions, he should have done so by following the mandatory procedures for appealing such a specific decision—he cannot now circumvent these statutory requirements by challenging them within the scope of the present case, which concern an entirely different legal framework and set of facts.

45. Accordingly, the Tribunal finds that the termination of the Applicant's continuing appointment followed proper procedure.

Was the decision to terminate the Applicant's continuing appointment tainted by ulterior motives?

46. As already referred to above regarding the Applicant's request for production of further evidence, the Applicant argues that some OIOS staff members' "history of good annual appraisals" is *prima facie* evidence of "the disparate treatment" experienced by him and "a hostile working environment". The Applicant also contends that it was "questionable" whether to terminate his continuing appointment with less than a two-hour notice of termination was "proportionate", or even necessary, particularly when the Applicant was being told that a performance improvement plan was being imposed under ST/AI/2010/5, after his satisfactory mid-point review.

47. The Respondent submits that the performance-related reason for the contested decision is supported by the evidence. The USG/DM properly accepted the ASG/OHRM's written and reasoned recommendation to terminate the Applicant's appointment for unsatisfactory performance. The ASG/OHRM's recommendation was supported by documented proof of the Applicant's unsatisfactory performance in the 2016-2017 and 2017-2018 performance cycles. The Applicant did not rebut the overall performance ratings at the end of the cycles under sec. 15 of ST/AI/2010/5. The final and uncontested performance ratings demonstrate that the Applicant's performance was unsatisfactory. Given the extent of the Applicant's performance shortcomings and the length of time over which they persisted, the termination of the Applicant's appointment was an appropriate action and the contested decision is reasonable.

48. The Tribunal notes that under the consistent jurisprudence of the Appeals Tribunal (see, for instance, *Parker* 2010-UNAT-012 and *El Sadek* 2019-UNAT-900),

it is for the Applicant to prove that improper motivation influenced the decision-maker.

49. In the present case, the decision to terminate the Applicant's continuing appointment was taken by the USG/DM, the administrative head of the Department of Management. All the other staff members, who were involved in the termination decision process—namely, SRO, the Executive Officer and the ASG/OIOS—solely provided recommendations. In this regard, the Tribunal notes that all these staff members ranked lower than the USG/DM and worked in OIOS, which is a department of the United Nations Secretariat that is entirely independent of and different from DM. The design of this system of checks-and-balances was evidently established to ensure that ulterior motives would not inappropriately influence important personnel decisions such as, for instance, a termination of a continuing appointment.

50. The Tribunal further finds that no information and/or documentation in the case file indicate that the USG/DM was influenced by improper motivation when deciding to terminate the Applicant's continuing appointment. Rather, the USG/DM acted on the documentation before her, which showed that the Applicant's "unsatisfactory service" had been appropriately established—as already stated above, since the Applicant did not challenge any decision(s) related to the performance appraisals on which this determination was based, the conclusion therefore became final and the process complete. In addition, none of the additional evidence that the Applicant requested to be produced concerned the USG/DM's affairs; rather, it all concerned internal circumstances in OIOS. Furthermore, even if the FRO, SRO, the Executive Officer and/or the ASG/OIOS had held an unlawful bias against the Applicant, no information and/or documentation in the case file, or somehow indicated in the Applicant's requests for production of further evidence, suggest even by implication that any OIOS staff member somehow inappropriately tried to influence the USG/DM's decision.

51. Accordingly, the Tribunal finds that the Applicant has failed to substantiate that the decision to terminate his continuing appointment was tainted by ulterior motives.

Conclusion

52. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 27th day of January 2020

Entered in the Register on this 27th day of January 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York