



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2018/063
UNDT/NY/2018/064
Judgment No.: UNDT/2020/096
Date: 23 June 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

HAMMOND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, ALD/OHR, UN Secretariat
Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. This judgment relates to two applications dated 4 February 2018 and 28 November 2018 respectively, filed by the Applicant, an Administrative Management Officer at the P-4 level serving with the African Union-United Nations Mission in Darfur (“UNAMID”) contesting the Applicant’s 2016/2017 performance appraisal rating and narrative. The Applicant requests, *inter alia*, “a roll back or revision” of his performance evaluation for the period 1 April 2016 to 30 March 2017. The Applicant further challenges the lawfulness of the decision to convert the P-4 level post he encumbered to an FS-6 level post.

Procedural history

2. The cases were filed with the Nairobi Registry.

3. On 7 May 2018, the Respondent filed his reply to Case No. UNDT/NY/2018/063 submitting that, *inter alia*, the application is not receivable *ratione materiae* as the performance appraisal rating and narrative is not a contestable administrative decision within the meaning of art. 2(1)(a) of the Dispute Tribunal’s Statute and no administrative decision was taken on the basis of any final rating resulting from the performance appraisal. The Respondent further submitted that should the Dispute Tribunal find that the application is receivable, the Administration has complied with ST/AI/2010/5 on the Performance Management and Development System (“PMDS”).

4. On 4 June 2018, the Respondent filed his reply to Case No. UNDT/NY/2018/064 reiterating that the Applicant’s performance appraisal rating and narrative do not constitute a reviewable administrative decision and therefore the Applicant’s claim is not receivable. The Respondent contended that the Applicant’s further challenges to the outcome of his request for management evaluation and to the

General Assembly's decision to convert the post that he previously encumbered from a P-4 to an FS-6 are not receivable *ratione materiae*. The Respondent further submitted that should the Tribunal find that the Applicant's claims are receivable, the Administration's actions were lawful.

5. On 16 November 2018, the cases were transferred to the New York Registry and on 1 April 2020, the cases were assigned to the undersigned Judge.

6. On 15 April 2020, by Order No. 67 (NY/2020), the two cases were consolidated into one combined proceeding. In the Order, the Tribunal stated that, upon review of the parties' submissions, the Tribunal considered that the matter will be decided on the papers before it once the parties have filed their closing submissions.

7. Pursuant to Order No. 67 (NY/2020), on 27 April 2020, the Applicant filed his closing submission; on 1 May 2020, the Respondent filed his closing statement and on 4 May 2020, the Applicant filed his final submission responding to the Respondent's closing submission.

8. For the reasons stated below, the application is rejected.

Facts

9. The Applicant served as an Administrative Officer at the P-4 level in the UNAMID Communication and Public Information Section ("CPIS") on a fixed-term appointment.

Facts relevant to the Applicant's 2016/2017 performance appraisal

10. On 15 June 2017, the Applicant's electronic performance appraisal system report ("ePAS") for the 2016-2017 performance cycle was concluded. The Applicant's first reporting officer ("FRO"), UNAMID Chief of Communications and Public Information, gave him an overall end-of-cycle rating of "partially meets expectations".

11. On 29 June 2017, the Applicant rebutted his 2016-2017 performance appraisal.

12. On 10 July 2017, UNAMID's Officer-in-Charge of Mission Support Division ("OiC/MSD") convened a rebuttal panel.

13. On 4 October 2017, the Panel recommended that the FRO's rating be changed from "partially meets expectations" to "successfully meets expectations". On 8 October 2017, the OiC/MSD sent the Applicant a copy of the Panel's report and informed him that it would be placed in his official status file as an attachment to his 2016-2017 performance appraisal.

Facts relevant to the decision to convert the P-4 post the Applicant encumbered to an FS-6 post

14. On 18 May 2017, the Chairperson of the African Union and the Secretary-General submitted a special report on the strategic review of UNAMID to the United Nations Security Council and the UNAMID Peace and Security Council. The report recommended a comprehensive civilian staffing review ("CSR") to ensure UNAMID staffing levels were adjusted to implement the revised mission mandate.

15. The draft CSR reports dated 18 August 2017 and 25 September 2017 stated that it was proposed to convert one Administrative Officer post at the P-4 level ("the Post") to an Administrative Officer post at the FS-6 level in CPIS. The final CSR report dated 19 October 2017 reiterated the proposal to convert the Post to the FS-6 level.

16. On 22 September 2017, the Applicant requested management evaluation of the proposal to convert the Post to the FS-6 level.

17. On 28 September 2017, UNAMID requested the Organizational Design and Classification Unit ("ODCU") of Field Personnel Division in the Department of Field

Support to classify the Post from the Professional category at the P-4 level to the Field Service category at the FS-6 level.

18. On 4 October 2017, the Management Evaluation Unit (“MEU”) determined that the Applicant’s 22 September 2017 request was not receivable because the proposal to convert the Post was not a final administrative decision.

19. The Secretary-General’s revised UNAMID 2017/2018 budget of 31 October 2017 proposed the conversion of the Post, effective 31 December 2017.

20. By email dated 24 November 2017, UNAMID informed the Applicant that the Under-Secretary-General for Management (“USG/DM”) had decided to terminate his fixed-term appointment, effective 31 December 2017.

21. On 8 December 2017, the Advisory Committee on Administrative and Budgetary Questions approved the proposed staffing changes and recommended to the General Assembly further reductions in UNAMID’s budget.

22. On 15 December 2017, the Applicant requested management evaluation and suspension of the implementation of the termination decision. On 19 December 2017, the MEU informed the Applicant that the termination decision was suspended pending the outcome of his request for management evaluation.

23. On 24 December 2017, the General Assembly approved the proposal to convert the Post to the FS-6 level.

24. On 8 January 2018, UNAMID informed the Applicant that because the General Assembly had approved the conversion of the Post to the FS-6 level, he was placed against another P-4 level post for administrative purposes. The Post was no longer available to finance the Applicant’s appointment once the new budget became effective on 31 December 2017.

25. On 13 March 2018, the MEU informed the Applicant that his 15 December 2017 request for management evaluation was considered moot because his fixed-term appointment was renewed until 30 June 2018.

26. On 23 April 2018, UNAMID informed the Applicant that his fixed-term appointment would not be renewed beyond its 30 June 2018 expiration due to the reclassification of the Post. The notice informed the Applicant that UNAMID did not have a vacant position to match with his qualifications and experience.

27. On 9 May 2018, ODCU approved the classification of the Post to the FS-6 level.

Consideration

The issues in the present case

28. The key issues to be determined in the present case are as follows:

- a. Whether the Applicant is entitled to a roll back or revision of his performance evaluation for the period 1 April 2016-30 March 2017?
- b. Whether the decision to convert the Post, encumbered by the Applicant, to an FS-6 level post was lawful?

Whether the Applicant is entitled to a roll back or revision of his performance evaluation for the period 1 April 2016-30 March 2017?

29. The Applicant challenges the outcome of his performance evaluation for the period 1 April 2016 to 30 March 2017. He contends that the Administration unlawfully failed to roll-back or revise the rating and narrative of his 2016-2017 ePAS to reflect the findings of the Rebuttal Panel who recommended that the FRO's rating be changed from "partially meets expectations" to "successfully meets expectations".

30. The Respondent states that the Applicant's claim is not receivable as a performance appraisal rating and narrative are not reviewable administrative decisions within the meaning of art. 2.1(a) of the Dispute Tribunal's Statute. The Respondent further submits that no administrative decision was taken on the basis of any final rating resulting from his 2016/2017 performance appraisal.

31. The governing issuance in respect of performance evaluations is ST/AI/2010/5, PMDS. Under section 15.1 thereof, staff members having received the rating of 'successfully meets performance expectations' cannot initiate a rebuttal under the procedures outlined in ST/AI/2010/5. The Tribunal notes that it is settled case law of the Appeals Tribunal that "a comment made in a satisfactory appraisal" is not a "final administrative decision" if it does "not detract from the overall satisfactory performance appraisal and [has] no direct legal consequences for [the staff member's] terms of appointment (see *Ngokeng* 2014-UNAT-460, as affirmed in *Staedtler* 2015-UNAT-546).

32. The Applicant therefore needs to show that the failure to revise the rating and narrative of his 2016-2017 ePAS had a direct and negative impact on his conditions of service. In this regard, the Applicant claims that the failure to revise the rating and narrative of his 2016-2017 ePAS to reflect the findings of the Rebuttal Panel has an adverse impact on his terms of employment. He states that the ePAS remains the same with the overall end-of-cycle rating of "partially meets expectations" and therefore is "not presentable or useful" even with a cover note of the Rebuttal Panel report. The Respondent contends that the Administration properly followed the applicable procedures and that the contested decision had no negative effects on the Applicant's terms of employment.

33. In the present case, following the Applicant's rebuttal of his 2016-2017 performance appraisal on 10 July 2017, UNAMID convened a rebuttal panel in

accordance with sec. 15 of ST/AI/2010/5, (PMDS). Section 15 of ST/AI/2010/5 provides (*emphasis added*):

Section 15

Rebuttal process

15.1 Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets performance expectations” cannot initiate a rebuttal.

...

15.4 The rebuttal panel shall prepare, within 14 days after the review of the case, a brief report setting forth the reasons why the original rating should or should not be maintained. In the event that an overall rating should not be maintained, the rebuttal panel should designate the new rating on performance evaluation. *The report of the rebuttal panel shall be placed in the staff member’s official status file as an attachment to the completed e-PAS or e-performance document and also communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.*

...

15.7 The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

34. On 4 October 2017, following the Rebuttal Panel’s review of the Applicant’s performance during the 2016-2017 cycle, the Panel found that the FRO’s negative rating of “partially meets expectations” should not be maintained. The Rebuttal Panel designated a new rating of “successfully meets expectations”. On 8 October 2017, the

OiC/MSD sent the Applicant a copy of the Panel's report and informed him that it would be placed in his official status file as an attachment to his 2016-2017 performance appraisal in accordance with sec. 15.4 of ST/AI/2010/5.

35. Based on the record, the Tribunal finds that the Administration duly complied with the requirements of ST/AI/2010/5. The Applicant essentially submits that a further step should have been taken after the Rebuttal Process was complete which was to revise his underlying 2016-2017 ePAS. Although the Tribunal understands the Applicant's request for a revision of an ePAS that was found to be incorrect by a Rebuttal Panel, there is currently no right for such a revision in ST/AI/2010/5. Rather, sec. 15.4 requires that a copy of the Panel Report be placed with the original performance appraisal in a staff member's official status file so that the two documents may be read in conjunction with each other. Furthermore, the Appeals Tribunal has held that it is "mandatory for the Administration to keep in the personnel file both the impugned appraisal and reports, and the rebuttal outcome". For instance, in *Oummih* 2014-UNAT-420, the Appeals Tribunal stated at paras. 17 and 18:

In most cases, the rebuttal conclusions or administrative decisions amending the previous erroneous appraisals will not be comprehensible if they cannot be read together with the impugned evaluations. [...] The placement on the [official status file] of impugned evaluations which are subsequently declared illegal or vacated cannot harm a staff member, since the corrective and complementary rebuttal report is simultaneously filed.

36. It would therefore follow that the negative rating and adverse comments in the Applicant's 2016-2017 ePAS would be read in light of the Rebuttal Report which found the rating and comments to be without merit and designated a new rating of "successfully meets expectations". To this end, the rationale behind sec. 15.4 of ST/AI/2010/5 must be that any purported harm caused to the Applicant by the 2016-2017 ePAS would be mitigated by the corrective positive finding of the Rebuttal Panel. Therefore, the Tribunal finds the Applicant's challenge is not receivable because the

revision of his performance evaluation for the period 1 April 2016 - 30 March 2017 had no direct and negative impact on the Applicant's terms of employment.

37. However, the Tribunal considers the Applicant's request for a revised 2016-2017 ePAS to be reasonable in the circumstances. Under the provisions of ST/AI/2010/5, a staff member has an inherent right to receive fair performance appraisal. The importance of fairness, transparency and accountability in the performance appraisal is accentuated by the requirement that whenever a staff member submits a job application through the United Nations Secretariat's online jobsite, Inspira, s/he should attach her/his two latest performance appraisals, if available. The the narrative of the performance appraisal and its final grade may influence the job applicant's prospects of being selected for a new job and therefore also for her/his career aspirations. Although the Rebuttal Report may mitigate the damage done to the Applicant by the flawed ePAS, the flawed ePAS remains on the Applicant's record and the Applicant does not have the benefit of a corrected 2016-2017 ePAS which he could provide to potential employers, in and out of the Organization.. The mistakes made by the Applicant's FRO should not have to burden the Applicant in his career pursuits. The Tribunal therefore finds it appropriate to make a recommendation to UNAMID to provide the Applicant a corrected 2016-2017 ePAS reflecting the Rebuttal Panel's findings and rating of "successfully meets expectations" for the purpose of future employment and, for the sake of transparency, to fully correct the existing record.

Whether the decision to convert the Post, encumbered by the Applicant, to the FS-6 level was lawful?

38. The Applicant submits that the decision to convert the Post, encumbered by the Applicant, to the FS-6 level was unlawful. He claims that it was tainted by extraneous factors, namely that the decision was related to the Applicant's negative 2016-2017 ePAS and the Applicant's subsequent complaint of retaliation and abuse against his FRO.

39. The Respondent states that the Applicant's challenge is not receivable *ratione materiae*. The Applicant never requested management evaluation of the decision of the General Assembly dated 24 December 2017 to convert the Post, encumbered by the Applicant, to the FS-6 level. Furthermore, the decision was taken by the General Assembly, and the Dispute Tribunal lacks jurisdiction under art. 2.1(c) of its Statute to review General Assembly decisions.

40. Should the Tribunal find the claim receivable, the Respondent submits that the decision was lawful and not tainted by extraneous factors. The Respondent states that UNAMID lawfully restructured the work of the mission in light of the recommendations from the Security Council and a civilian staffing review to align staffing with the revised mission mandate.

41. Upon review of the record, the Tribunal finds that the Applicant filed a request for management evaluation of the proposal to convert the Post on 22 September 2017. On 4 October 2017, the MEU informed the Applicant that his request for management evaluation of the proposal to convert the Post was premature because the proposal was still being considered in UN Headquarters and was still subject to General Assembly approval.

42. In these circumstances, the Tribunal finds the claim to not be receivable. Even if the Tribunal could consider the 22 September 2017 request as requesting evaluation of the General Assembly's decision, the application is time-barred. The Applicant was required to file his challenge before the Dispute Tribunal within the 90-day period prescribed under art. 8.1(d)(i)(a) of its Statute after his receipt of the management evaluation. The Applicant did not file an application within 90 days of receiving the 4 October 2017 management evaluation outcome of his 22 September 2017 request. In this regard, the Applicant filed the application regarding the decision to convert the Post (Case No. UNDT/NY/2018/064) on 4 April 2018, being some months after the prescribed 90-day deadline.

43. As a final matter, the Tribunal notes that in his application, the Applicant appears to challenge the 13 March 2017 outcome of his 15 December 2017 request for management evaluation relating to the decision to terminate his fixed-term appointment, effective 31 December 2017. The MEU informed the Applicant that his request was considered moot because his fixed-term appointment was renewed until 30 June 2018. In this regard, the Tribunal does not have jurisdiction to review the 13 March 2017 management evaluation outcome as it does not constitute a reviewable administrative decision under art. 2(1)(a) of the Dispute Tribunal's Statute. In *Kalashnik*, UNDT/2015/087, affirmed by the Appeals Tribunal in 2016-UNAT-661, the Dispute Tribunal held that it lacks jurisdiction to review the outcome of a request for management evaluation.

Conclusion

44. In light of the foregoing, the application is dismissed.

45. In accordance with the Tribunal's observations in para. 37 above, the Tribunal recommends that UNAMID provide the Applicant a corrected ePAS for the period 1 April 2016 to 30 March 2017 reflecting the Rebuttal Panel's findings and rating of "successfully meets expectations".

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 23rd day of June 2020

Entered in the Register on this 23rd day of June 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York