UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/077
Judgment No.: UNDT/2021/066
Date: 8 June 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Susan Maddox, ALD/OHR, UN Secretariat
Miryoung An, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member of the Department for General Assembly and Conference Management ("DGACM"), contests the decision to impose on her the disciplinary sanction of loss of two steps in grade, plus a written censure for having engaged in unauthorized outside activity.

2. The Respondent replies that the application is without merits.

3. A hearing was held on 16 March 2021, at which the Applicant gave testimony.

4. For the reasons set out below, the Tribunal grants the application in part and rescinds the decision to impose against the Applicant the disciplinary sanction of loss of two steps in grade but upholds the disciplinary sanction of written censure.

Facts

5. In the investigation report dated 29 December 2017, the Office of Internal Oversight Services ("OIOS") found that based on its investigation, the information indicated that the Applicant had "engaged in a range of unauthorized and outside activities", including the "alteration of a United Nations document ["the General Assembly document" (the actual reference number of the document is redacted)] to the benefit of third parties and other assistance potentially inconsistent with her obligations as an international civil servant". The OIOS specifically found that the Applicant

> (i) Was a United Nations staff member during the time relevant to this report;
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> (ii) Provided assistance to third parties outside the scope of her duties;
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> (iii) Engaged in the improper alteration of [the General Assembly document];
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> (iv) Provided an unauthorized official United Nations reference for third parties;

(v) Was actively involved in the activities of at least three [Non-Governmental Organizations ("NGOs")]/Foundations;

(vi) [Was] a trustee of [a foundation] without approval;

(vii) Sought employment for her niece with third parties she assisted;

(viii) Arranged an internship for her daughter with third parties she assisted; and,

(ix) Maintained social relations with third parties she assisted.

6. By interoffice memorandum dated 21 November 2018, Chief of the Human Resources Policy Services in the Office for Human Resources Management ("the Chief") presented the "allegations of misconduct" to the Applicant ("the allegation letter"). Before outlining any specific allegations, the Chief highlighted that "findings in the OIOS investigation report which are not specifically discussed below (e.g., [the Applicant's] alleged engagement in the re-issuance of [the General Assembly document] are not being pursued further as part of formal allegations of misconduct against [her]" (para. 3).

7. As part of the facts, in the allegation letter, it was indicated that the Applicant had known AA (name redacted) "since 2002 or 2003 and developed 'a longstanding relationship or faith and trust [*sic*]' with [AA], that or around 2005, her daughter, "worked with [AA] as an intern at the Mission of [a United Nations member state] and [AA] provided a reference for [her] daughter". It was further stated that "while knowing [AA] was acting on behalf of an [NGO]", the Applicant "assisted his business and undertook the following work for him between 2013 and 2015" (all references to footnotes omitted):

a. "By e-mail dated 7 February 2013, [AA] said to [the Applicant] that he needed to hire an assistant. In response, and by e-mail dated 8 February 2013, [the Applicant] requested [BB, name redacted], a former staff member, to send her curriculum vitae (CV) to [AA]";

b. "On or before 15 February 2013, [the Applicant] drafted [AA's] talking points for a meeting of South-South Corporation. By e-mail dated 15 February

2013, [the Applicant] sent [her] draft talking points to him. After [AA] made his statements at a lunch event on 15 February 2013, by e-mail dated February 2013, [she] forwarded to [CC, name redacted] … DGACM, [AA's] statement. [The Applicant] used [her United Nations ("UN")] e-mail [email address redacted] in [her] communication with [AA]";

c. "On or before 12 March 2013, [the Applicant] drafted, for [AA], a "short concept note" in relation to an event [name redacted] and by e-mail dated 12 March 2013, [she] sent him [her] draft. [The Applicant] used [her] UN e-mail [email address redacted] in [her] communication with [AA]";

d. "By e-mail dated 13 March 2013, [AA] forwarded [the Applicant] at [her] personal e-mail account [email address redacted] an e-mail reading: "Dear [title redacted], As per our conversation with [DD, name redacted], the company said to be included in [a project proposal, title redacted] to UN will be: Company Name: [name redacted ("the Company")]. Thank you. Please be sure to include the above mentioned company in the proposal to UN [*sic*]. [AA's] e-mail was entitled: 'Company Name'";

e. "On or before 14 March 2013, [the Applicant] drafted a letter entitled 'Letter Global Business incubator', and by e-mail dated 14 March 2013, using [her] UN e-mail … [she] sent him [her] draft. The draft was a letter, dated 14 March 2013, with a document symbol of [General Assembly document reference redacted] from [the permanent representative of a United Nations Member State, EE, name redacted] to the Secretary-General, in which [EE] stated that [the Company] had offered to host one of the first centres in the network of Global Business Incubator centres in a public-private partnership with [the NGO]";

f. By e-mail dated 16 March 2013, [AA] provided [the Applicant] with a revised version of the letter from [EE] to the Secretary-General. On or before 16 March 2013, [the Applicant] edited the draft letter and by e-mail dated 16

March 2013, [she] sent [her] edits to [AA]. By e-mail dated 17 March 2013, [the Applicant] re-sent [her] revised draft to [AA].

g. "On or before 14 May 2013, [the Applicant] revised, for [AA] [the General Assembly document] from [EE] to the Secretary-General. By e-mail dated 14 May 2013, [the Applicant] sent [her] revision to [AA]. The letter contained [EE's] statement that [the Company] had 'been appointed to serve as the representative for the implementation of the permanent for the Expo center for the country of the south with the local authority [*sic*]', and that 'this is one of the first centres in the network of incubator centres in a public-private partnership with the support of and leading partner [the NGO]'. Particularly, [the Applicant] added the following paragraphs [italics in the original]:

> *'In this regard, I am pleased to inform you that in response to the recommendation, [the Company] has welcomed the initiative and has been appointed to serve as the representative for the implementation of the permanent for the Expo Center for the country of the south with the local authority. This is one of the first centres in the network of incubator centres in a public-private partnership with the support of and leading partner [the NGO].*
>
> *As envisaged, I foresee an important role this permanent exposition centre of innovation and excellence will play in not only accelerating the development and deployment of technologies, including through South-South and triangular cooperation, but also in harnessing the potential of ICT* [unknown abbreviation] *for sustainable economic growth, investment, capacity building and job creation, particularly in developing countries. [*sic*]* '"

h. "On or before 8 July 2013, [the Applicant revised [AA's] message to [title redacted] of DGACM, inviting him to a high-level meeting in [name of city redacted]. By e-mail dated 8 July 2013, [the Applicant] sent [her] revision to [AA]";

i. "In September 2013, [AA] requested [the Applicant] to 'work on' a document regarding 'Global South-South Development Expo Center' and by e-

mail dated 1 October 2013, [she] told him that [she] had been busy with the General Assembly and [she] would need more time 'until the weekend'. On or before 6 October 2013, [the Applicant] drafted the following (italics in the original):

> *'The General Assembly, through the adoption of Resolution* [number and date redacted], *endorsed the Nairobi outcome document of the High-level United Nations Conference on South-South Cooperation. More specifically, reference is made here to* [paragraph numbers redacted]'

By e-mail dated 6 October 2013, [the Applicant] sent [AA her] draft";

j. "By e-mail dated 7 October 2013, [AA] sent [the Applicant] a document entitled [name redacted] and told [her] that he would send a final draft to [her] the next day for review".

k. "By e-mail dated 12 October 2013, [AA] sent [the Applicant] a draft letter which he indicated that he would receive from the Chairman of [the Company]. The content of the draft indicates that the Chairman would enclose a 'master plan and proposal for implementation' concerning "Permanent Expo and Meeting Center". By the same e-mail, [AA] requested [the Applicant] to review and revise the draft. On the same day, [the Applicant] revised the draft and sent [AA her] revision";

l. "On or before 15 October 2013, [the Applicant] drafted [her] 'briefbio' setting out 'her' professional achievements and work experience and by e-mail dated 15 October 2013, [she] sent [AA her] 'brief bio'. [The Applicant] stated that [AA] invited [her] to speak at an event and [she] provided him information about [her]".

8. Among the facts in the allegation letter, it was finally indicated that "[p]ursuant to [AA's] request, [the Applicant] signed a reference letter, dated 16 June 2015, in which [she] recommended [AA] and [DD] to the Property Management of [a building complex, name redacted]" ("the recommendation letter"). He also stated that "[i]n the

letter, [the Applicant] falsely stated that through [AA], [she] had interacted with [DD], and that she "used a letterhead consisting of [her] name and [her] official position as [title redacted], DGACM".

9. In a letter dated 14 June 2019, the Assistant Secretary-General for Human Resources ("the ASG") conveyed the decision of the Under-Secretary-General ("the USG") regarding imposing the disciplinary sanctions against the Applicant ("the sanction letter"). It was noted that "[u]pon a review of the dossier, I [presumably referring to the USG, although the letter was signed by the ASG] decided to drop the aspect of the allegations related to undertaking a speaking engagement for [AA], and that "[b]ased on a thorough review of the entirety of the record, including [the Applicant's] comments it has been concluded that the remaining allegations are established by clear and convincing evidence".

10. In the sanction letter, it was further stated that "[i]n reaching this conclusion, it has been considered that the documentary evidence at [*sic.*] the exhibits shown to [the Applicant] during [her] interviews with OIOS … shows that: (i) [the Applicant knew that [AA] acted as President of [the NGO]; (ii) by a number of e-mails, [AA] requested [her] to work on matters relating to his business, and [the Applicant] provided [her] work to him often using [her] UN e-mail account; and (iii) [she] signed [the recommendation letter] of 16 June 2015 for [AA] and [DD]". In addition, it was noted that "[t]he documentary evidence is consistent with [the Applicant's] statements that: (i) [she] undertook the actions as described in the allegations of misconduct; and (ii) [the Applicant] had not interacted with [DD] and [her] statement in the [recommendation] letter of 16 June 2015 was, therefore, false". Finally, it was indicated that "[n]othing in the record indicates that [the Applicant's] supervisor or any authorized official condoned or approved your working for [AA] in those respects".

Consideration

Standard of review in disciplinary cases

11. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the Dispute Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence'". See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

12. The Appeals Tribunal has, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi* 2010-UNAT-084, para. 40). In this regard, "the Dispute Tribunal is not conducting a merit-based review, but a judicial review", explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

13. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal has stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

14. Specifically regarding disciplinary matters, the Appeals Tribunal has held that the Administration enjoys a "broad discretion … with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi*, at para. 40, "[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

Whether the facts on which the sanction was based have been established and if the Applicant was afforded due process?

15. The Applicant has admitted to most of the Administration's findings of facts in her pleadings before the Tribunal, including at the hearing held on 16 March 2021. In the Applicant's response of 26 October 2020 to Order No. 133 (NY/2020) dated 3 September 2020, she, however, submits that her assistance with editing and reviewing the General Assembly document should not be considered because (emphasis omitted) "[a] charge that has been dropped by the Administration cannot legally be a ground for the sanction as by its own reckoning, the evidence was not deemed sufficient". In the Applicant's final observations to the Respondent's closing statement dated 22 April 2021, she adds that had she "understood that the charges of editing and reviewing documents including [the General Assembly document] were going to be pursued further, [she] would have not limited [her]self to give a brief response in one paragraph".

16. The Respondent contends that "[t]here is no dispute as to the material facts", including that "the Applicant edited and reviewed various documents, including [the General Assembly document]". The Applicant was "informed of the allegations of misconduct against her and she had ample opportunity to make representations before the disciplinary action was taken against her". The allegation letter "referred to the Applicant's editing of [the General Assembly document] as part of the facts", and her

"reliance" on its para. 3 is "misplaced". The Applicant's editing of the General Assembly document "was discussed in detail" (see quotation in para. 7 above). Further, "the facts section was structured in a way to demonstrate that [the General Assembly document] was not discussed in isolation but was part of the many documents that the Applicant edited and reviewed for [AA]". Finally, "during the disciplinary process, the Applicant put forward her defense on the allegations relating to [the General Assembly document] and therefore "suffered no prejudice in this regard".

17. The Tribunal notes that a very basic tenet of due process in a disciplinary case is that each of the relevant facts and allegations of misconduct must be presented to the accused person in such manner that s/he can easily understand them and is thereby afforded a fair and just opportunity to defend herself/himself. If not, the Administration cannot subsequently sanction a staff member against the backdrop of any such fact and/or allegation (in line herewith, see ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), in particular para. 8.3). Further, this is a matter of access to justice, which not only relates to the involved staff member's right to defend herself/himself, but also to the Tribunals' ability to undertake a proper judicial review as per *Sanwidi* in order to assess of "whether relevant matters have been ignored and irrelevant matters considered".

18. When describing the facts on which the allegations of misconduct are grounded, the Administration must therefore do so in writing and in a structured, concise and precise manner. Normally, at minimum, this would require the Administration to make clear and specific references to dates and events and list these in an appropriate order (chronological, prioritized or otherwise) to describe what was relevant and, if necessary, what was irrelevant. In line herewith, see *Sanwidi* as quoted above, and para. 4 of ST/AI/371 and ST/AI/371/Amend 1 (Revised disciplinary measures and procedures). Similar minimum standards would also apply to the subsequent disciplinary decision as per para. 9.3 of ST/AI/2017/1. The Tribunal notes that pursuant to para. 13.2 of ST/AI/2017/1, this is the applicable Administrative Instruction in the present case, contrary to what the Respondent submits. The disciplinary process was

initiated after the entry into force ST/AI/2017/1 and para. 13.2 only states that "investigations *and* disciplinary processes initiated prior to the entry into force of the present instruction shall continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1" (italics added). ST/AI/371 and ST/AI/371/Amend.1 therefore only applies when both the investigation and the disciplinary process are both initiated before the entry into force of the ST/AI/2017/1. Otherwise, para. 13.2 should have stipulated "or" instead of "and".

19. The Tribunal notes that in the beginning of the allegation letter, it is stated that "findings in the OIOS investigation report" that were not specifically "discussed" in this letter did not form part of the "formal allegations of misconduct" and, as an example, made the specific reference to the Applicant's "alleged engagement in the re-issuance of [the General Assembly document]". Under the heading "Facts", the Administration, nevertheless, referred to the Applicant having "revised" the General Assembly document for AA and sending this "revision" to him, highlighting that she had "[p]articularly … added" two paragraphs to this document (see quotation in para. 7(g) above). Under the heading "Allegations of misconduct", some statements of the Applicant regarding the General Assembly document during the investigatory interview were also listed. However, these statements were not further elaborated on, or for that matter "discussed", by the author of the allegation letter, namely the Chief (and not the ASG, as otherwise required by ST/AI/371 and ST/AI/371/Amend.1 and ST/AI/2017/1, since the then ASG had delegated this authority in a non-public document dated 10 February 2014, to which no reference was made in the allegation letter).

20. A reader of the allegation letter could therefore have reasonably concluded that the Applicant's assistance with editing and reviewing the General Assembly document formed part of her "engagement" in its reissuance, which was excluded from the formal allegations. Moreover, the subsequent references to the issue under the headings, "Facts", and, "Allegations of misconduct", were very plain and no OIOS findings thereabout were "specifically discussed" as otherwise stated in the initial disclaimer.

21. The presentation of the formal allegations in the allegation letter is therefore, at best, bewildering. Whereas the Tribunal understands that the acts involved in editing and reviewing the General Assembly document could, in principle, be viewed distinctly and distinguishably from the act of "engagement" in its reissuance—while one act has to do with the preparing of the content of the document, the other act could theoretically be strictly limited to its publication—this is, however, not all evident from the allegation letter. The introductory open-ended and negative reference to findings that are not "discussed below", adding as an example, the "engagement in the reissuance" of the General Assembly document, simply lacks the clarity and precision that must, at minimum, be expected when conveying a matter as important as the formal allegations of misconduct to a staff member. The Applicant's assistance with editing and revising the General Assembly document could consequently very reasonably be understood as being part of her "engagement" with its reissuance.

22. The ambiguity and imprecision of the description of the "formal allegations" in the allegation letter should also have been clear to the Administration after receiving the Applicant's very comprehensive comments thereto dated 8 January 2019. In these comments, the Applicant provided her response to each of the formal allegations with much detail and clarity over 22 pages. The Applicant, however, only made a brief explanation in one paragraph as to her involvement in the editing and review of the General Assembly document. Therein, the Applicant solely stated that she had done this upon AA's request as "a representative of a Member State and not an external stakeholder, especially as [the NGO] had an official status with the United Nations". However, she made no comments regarding the actual content of her input.

23. Rather than requesting a more thorough response from the Applicant to the specific allegation regarding the General Assembly document and the facts on which it was based, the Administration, went ahead with the disciplinary process and issued the sanction letter. From this letter follows that the Applicant's alleged assistance with the General Assembly document appears to be the principal reason, or at least one of the reasons, for imposing the disciplinary sanctions against her. This issue is

highlighted as the only example of her "editing and revising document" for AA in the first paragraph of the letter, even though a number of other instances were also listed in the allegation letter. The Tribunal deliberately states "appears" because the narrative of sanction letter is so convoluted and mired with cross-references to the allegation letter that it basically makes no sense on its own terms, and it is impossible to comprehend on which exact alleged facts and allegations the disciplinary sanctions are actually grounded.

24. Accordingly, from what the Tribunal can gather from reading the allegation and sanction letters together with the OIOS investigation report, it concludes that the Applicant's inculpatory acts, to which she has also admitted, were therefore the following:

a. The Applicant's assistance to the NGO, and thereby also AA, with, occasionally using her United Nations email:

i. Recommending a former staff member as an assistant;

ii. Drafting a "short concept note" in relation to an event;

iii. Drafting and revising the letter with the title, "Letter Global Business incubator", dated 14 March 2013, from EE to the Secretary-General;

iv. Revising AA's invitation of a DGACM official to a "high-level meeting";

v. Drafting a paragraph for the document regarding "Global South-South Development Expo Center";

vi. Adding a paragraph to a document regarding "Global South-South Development Expo Center".

b. The Applicant receiving various requests for assistance from AA through her United Nations email address;

c. The Applicant's provision of the recommendation letter of 16 June 2015 for AA and DD to a building complex in which she stated her official title as a United Nations official and indicated that she knew DD through her work.

Did the Applicant's behavior amount to misconduct?

The legal provisions stated in the contested decision

25. In the sanction letter, the USG found that the Applicant's conduct was in violation of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) as well as staff rule 1.2(s). When read together as relevant to the present case, these provisions require, in essence, a staff member to seek prior approval from the Secretary-General for undertaking certain activities that falls outside her/his regular tasks and functions. Also, the USG found that the Applicant had breached ST/SGB/2004/15 (Use of information and communications technology resources and data), although no specific references to any provisions therein were provided.

The individual allegations of misconduct

26. The Applicant submits that her conduct did not amount to unlawful outside activities that would require the Secretary-General's prior approval. Without any repercussions, other United Nations staff members had previously undertaken, sometimes even been paid for, work for NGOs, whereas the Applicant was not remunerated for her activities. The Applicant further contends that the Respondent has not provided any previous examples of where a staff member has been disciplinarily sanctioned for providing a job reference, noting that even as part of the United Nations recruitment process, references are to be provided. Regarding the recommendation letter to the building complex, this was an "honest mistake and error of judgment" influenced by the "widespread acceptance of AA at the highest echelons".

27. The Applicant submits that the outside activities that she was engaged in are not only permitted but also encouraged by the Organization as per the commentary to staff rule 101.2(p) and staff regulation 1.2 (o) and (p), in particular as the Applicant was not employed by the NGO or otherwise remunerated. The Respondent has not provided any previous examples of where a staff member has been disciplinarily sanctioned for any such involvement, and the Applicant assisted an NGO and not a private consultancy firm. In addition, AA was a former diplomat of a Member State, and the Applicant's "continued interaction in the intergovernmental processes required engagement with the representatives of Member States". The Applicant "was made the victim of circumstances and the arbitrary application of rules by the Administration by making [her] the scapegoat" that related to another matter.

28. The Respondent submits that the activities in question "were not part of the Applicant's official duties" as reflected in her work plans, which the Applicant also admitted during the investigation and the disciplinary process. The Applicant could not undertake "these activities at her discretion, exempt from the requirement of prior authorization by the Secretary-General". Whereas "[p]rivate non-remunerated activities that have nothing to do with a staff member's official functions would be at the discretion of the staff member (for example, the secretary of a stamp club)", the Applicant assisted AA "in his business, including in his dealings with the United Nations", which "does not fall under the category of activities similar to being a secretary of a stamp club". Regarding the recommendation letter, the Applicant "knew that she had not interacted with [DD]", but she "falsely stated" that she had done so and "signed the statement using her UN position and title", which cannot be excused as "mistake". Rather, "it is an act of dishonesty reflecting adversely on her integrity", and "the Applicant's using her UN position in the letter addressed to a third party runs the risk of damaging the Organization's reputation". By that time, the Applicant was "a P-5 level Chief at DGACM, and she knew she was required to uphold the highest standard of integrity under staff regulation 1.2(b)".

29. The Tribunal observes that if a United Nations staff member assists a non-United Nations entity, such as an NGO, with preparing substantive input to a communication document to or about the United Nations, then, even if not remunerated, this would typically constitute an outside activity that would require the Secretary-General's prior approval in accordance with staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s). The reason is essentially that the Organization would have a direct, or at least a perceived, interest in the relevant communication document. Even if the document, as such, bears no significance to the Organization, other non-United Nations actors could be led to believe that the relevant non-United Nations person/entity has either been unduly favored or that a precedent has been created for the United Nations to provide such assistance to non-United Nations actors in the future.

30. If the assistance provided by the staff member to a non-United Nations entity, such as the NGO, is not related to or concerns the United Nations, it would instead depend on the circumstances whether this would constitute an outside activity that would require the Secretary-General's prior approval. The key question would be if the Organization could have, or even be perceived to have, an interest therein with reference to staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s).

31. In light of the established facts and also noting that the USG in the sanction letter withdrew the allegations concerning "a speaking engagement" for AA, the Tribunal's findings regarding individual allegations of misconduct—when reading the sanction letter together with the allegation letter—are the following:

a. The "short concept note". The Applicant forwarded this note to AA via her United Nations email of 12 March 2013, and it stated as follows:

> Music for Peace and development is a network of Representatives of Member States of the United Nations of the South and the organizations of the UN system, Civil Society and Academia who believe in the power of music for peace building

> and the importance of building solidarity among [artists] from areas in conflict with that of the developing countries and includes in this public-private partnership, musicians, writers, philanthropists, educational institutions and the United Nations. Music for Peace and development network will use the medium of music to generate dialogue and raise awareness on common issues affecting war-affected societies especially in the area of achieving the Millennium Development Goals.
>
> The network is expected to achieve their goal through Music Performances, Education Sponsorship for Vulnerable children and youths, Vocational training programme for Women, HIV/AIDS sensitization, Community Empowerment and Advocacy for the Rights of the Children with a focus on rights of the girl child.
>
> Music for Peace and development is a network of Representatives of Member States of the United Nations of the South and the organizations of the UN system, Civil Society and Academia who believe in the power of music for peace building and the importance of building solidarity among artistes from areas in conflict with that of the developing countries and includes in this public-private partnership, musicians, writers, philanthropists, educational institutions and the United Nations. Music for Peace and development network will use the medium of music to generate dialogue and raise awareness on common issues affecting war-affected societies especially in the area of achieving the Millennium Development Goals.
>
> The network is expected to achieve their goal through Music Performances, Education Sponsorship for Vulnerable children and youths, Vocational training programme for Women, HIV/AIDS sensitization, Community Empowerment and Advocacy for the Rights of the Children with a focus on rights of the girl child.

The note therefore indeed concerns an issue regarding the United Nations, namely the "Music for Peace and development network". In addition, the Applicant forwarded it to AA using her official United Nations email address and addressed AA by referring to his former diplomatic title. When reading the email, it could therefore appear as if the Applicant acted in her official capacity as a United Nations staff member and not as a private person. Although the description in itself appears to be uncontroversial, since the assistance provided to AA was not given as part of the Applicant's regular

work, she would therefore have needed a prior approval from the Secretary-General, and by not doing so, she overstepped the boundaries of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q), staff rule 1.2(s) and ST/SGB/2004/15. Accordingly, the USG did not exceed her authority when finding that this was an act of misconduct.

b. The draft letter on "Global Business Incubator". The Applicant forwarded a draft of this letter to AA, in which it was indicated to be from EE to the Secretary-General, and it was set on the official letter template of the General Assembly. When forwarding it, the Applicant used her official United Nations address. In the letter, reference was made to the "launching of the Global Business Incubator" explaining its functions, the Company's intended role in the project was presented, and some observations on how this would be "an important role" in relation to "development and deployment of technologies" were provided. It is from the evidence before the Tribunal, however, not evident what the Applicant's actual input was to this letter when comparing the different versions that the Applicant and AA sent to each other.

The Tribunal, nevertheless, notes that the draft letter was prepared as an official communication from a Member State to the Secretary-General through the General Assembly, and that the Applicant did not assist therewith as part of her work as a United Nations staff member. Also, the Applicant used her official United Nations email address to forward it to AA. The Applicant's assistance can be interpreted as an outside activity that required the prior approval of the Secretary-General, and by not obtaining this, she was in clear violation of her duties under staff regulations 1.2(o) and 1.2(q), staff rule 1.2(s) and ST/SGB/2004/15. Consequently, the USG acted within her discretion when finding that this amounted to misconduct, although the Administration has not formally established what the Applicant actually contributed with.

c. The Applicant's recommendation of a former United Nations staff member to work for AA. The Applicant recommended the relevant person after

AA had requested her assistance thereabout in an email of 7 February 2013 to her United Nations and private email addresses, "Dear [the Applicant's first name] How are you? I hope you are doing well. I am in need of a good assistant and I would like to know if you know some one". Using the United Nations email address, the Applicant then reached out to the relevant person, who then, according to the ensuing emails, sent her *curriculum vitae* to AA and tried to contact him via telephone after the Applicant had provided her with AA's contact details. The Applicant was not copied on any emails or participating in any conversations between AA, his staff and the relevant person.

The Tribunal finds that the Applicant reaching out to the relevant person in response to AA's search for an assistant does not entail any inculpatory action by itself under the Staff Regulations and Rules or ST/SGB/2004/15. That the Applicant used her United Nations email address to communicate AA's contact details was not fully in line with ST/SGB/2004/15, but taking into account the harmless character of the content of the correspondence, it would lead to an absurd or perverse result (with reference to *Sanwidi*) if this was to amount to an act of misconduct. Consequently, the Tribunal finds that the Administration exceeded the limits of its discretion when listing this issue as an independent act of misconduct in the allegation letter and later cross-referencing thereto in the sanction letter.

d. AA's invitation of a DGACM official to a "high-level meeting". On 8 July 2013, the Applicant sent via her United Nations email her revisions to this invitation, in which was stated:

> It is my great pleasure to invite you to participate in this high-level meeting to assist in your capacity as [title redacted, DGACM] with a focus on measures being introduced in the area of sustainability and digital inclusion. Please note that your business class airfare to Hong Kong round trip and accommodation will be covered.

The content of the email clearly involved a matter related to the United Nations and the invitation was even addressed to a staff member in DGACM where the Applicant worked. It is not clear from the email what revisions the Applicant actually undertook for AA, but by providing assistance thereto without prior approval from the Secretary-General, she also overstepped the boundaries of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q), staff rule 1.2(s) and ST/SGB/2004/15. It was therefore within the USG's scope of authority to find that this amounted to misconduct.

e. The text regarding the "Global South-South Development Expo Center". The narrative (quoted in the above) evidently concerns the United Nations and the Applicant did not act in her professional capacity. Although the Applicant's contribution appears to be relatively harmless and she sent her comments via her private email address, by not obtaining the Secretary-General's prior approval, she overstepped her duties as per staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), and 1.2(o) and staff rule 1.2(s), whereas staff regulation 1.2(q) would not be relevant as she used her private email address. The USG therefore did not exceed her authority when finding this to be misconduct.

f. The recommendation letter. In its top right corner, the Applicant indicated her name, full title, the name of department and division and the location and postal code of the United Nations Headquarters of New York. Before the Applicant's signature, she indicated as follows:

> Property Management of [the property complex]
>
> It gives me great pleasure, to introduce and recommend [diplomatic title, AA] as a professional colleague with whom I have interacted over the past decade. He has contributed tremendously to the United Nations Community at large and more specifically in his efforts on facilitating [redacted].
>
> His contributions are well known to the United Nations Community not only as a professional but also as a kind hearted, generous and genuine individual.

> Through him I have also had the opportunity to interact with [DD].
>
> I am quite certain that they will be a great addition to the community at [the property complex]

The Tribunal finds that by the different references to the United Nations in the top right corner of the recommendation letter, the Applicant gave the overall impression that this was a recommendation given on behalf of the Organization in her professional capacity as a United Nations staff member. This impression is further accentuated by the reference to her professional relationship with AA and his achievements as a diplomat to the Organization. Considering the objective of the recommendation, the Applicant should evidently have obtained the Secretary-General's approval before providing the recommendation letter, or perhaps even more appropriately, instead have given it in her own personal and private capacity. As a senior and longstanding staff member, this should have been clear to the Applicant and her error of judgment is not justified or excused by the circumstances. Rather, the fact that the Applicant misrepresented her association with DD is an aggravating factor. Accordingly, the Administration was within its discretion when finding that the Applicant giving the recommendation letter was an act of misconduct under the Staff Regulations and Rules.

g. The Applicant's receipt of requests for assistance from AA. The sole fact that the Applicant received various such requests on her United Nations email address cannot by itself amount to misconduct, unless these requests, directly or implicitly, can be found to have been solicited by the Applicant. Although the Applicant and AA evidently had a close working relationship, it has not been shown by the Respondent that the Applicant had ever solicited any of these requests from AA. Accordingly, the Tribunal finds that the Applicant's receipt of these requests cannot be attributed to her as misconduct.

The Applicant's pattern of behavior

32. The Respondent further submits that "the record depicts a pattern of behavior on the Applicant's part—engaging in activities furthering the interest of [AA], including in the context of his dealings with the United Nations". The Tribunal notes that nowhere in the sanction letter is reference made to that the Applicant's activities as a pattern of behavior constituting misconduct, and the Respondent's submission is therefore rejected.

Were the sanctions proportionate to the offences?

33. The Applicant submits that, even based "on the examples shared by the Administration", the imposed sanctions were "excessive and arbitrary". The administration also "ignored" her "performance and record of exemplary service" and thereby "den[ied her] the same opportunity that was given to other staff whose long service and acknowledgement of a genuine mistake constituted mitigating factors", including one who had also assisted with the reissuance of the General Assembly document.

34. The Respondent contends that "[t]he sanction imposed on the Applicant was neither blatantly illegal, arbitrary or discriminatory nor otherwise abusive or excessive", but "in line with the past practice in comparable disciplinary cases involving unauthorized outside activities". The Applicant was not "singled out" in being sanctioned, but "held accountable for her own conduct", and "evidence on the record has no indication that other staff members were also involved in the same conduct as the Applicant—editing and reviewing documents for [AA] and assisting him in finding employees and signing a false statement for [him] and his business partner". Whether "a staff member has ever been sanctioned for engaging with an NGO is not relevant". In determining the appropriate sanction, "considerations were given to all relevant circumstances including aggravating and mitigating factors", and by the sanction letter, the Applicant "was informed of the Administration's considerations given to her claimed mitigating factors". Contrary to the Applicant's contention, "there

were no exceptional circumstances in this case warranting rescission of the sanction". Rather, the record "demonstrates that when interacting with the Applicant, [AA] was not acting on behalf of [a Member State], but as President of [the NGO], and "the mere customary title used by former diplomats such as [AA] does not justify the Applicant's professed belief that his requests were from or for the Member States".

35. The Respondent contends that the Applicant's "purported positive performance was not considered as a mitigating factor because her offence exhibited dishonesty and a lapse of integrity", and "no admission of guilt was present in this case that could amount to a mitigating factor" as "[d]uring the investigation and the disciplinary process, the Applicant did not accept responsibility for her conduct". Even "in the face of incontestable forensic evidence, [the Applicant] continues to deny any wrongdoing downplaying her offence as a 'mistake' that according to her, should have been pardoned".

36. The Tribunal observes that the Appeals Tribunal held in *Samandarov* 2018-UNAT-859, para 23, 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", that "[t]he 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", and that "[t]he essential elements of proportionality are balance, necessity and suitability".

37. The Tribunal takes note of a previous disciplinary case from the "Compendium for disciplinary measures" from 1 July 2009 to 31 December 2017, prepared by the Office of Human Resources, to which the Respondent makes specific comparison in his closing statement. In this case, "[w]ithout the approval of the Secretary-General, a staff member engaged in outside activities by editing and reviewing documents for a private consulting firm managed by another staff member, and failed to report the other staff member's possible misconduct". Although finding mitigating circumstances were present, the relevant staff member was imposed the same disciplinary sanction of loss

of two steps in grade together with a written censure. It does not follow from the case summary whether the relevant staff member was remunerated for her/his services or what the mitigating circumstances were.

38. The present case distinguishes itself in several ways from this other case, because:

a. The Applicant did not breach her duty to report another staff member for possible misconduct;

b. Where the other staff member undertook work for a private consulting firm, the Applicant assisted an NGO. While none of such entities are related to the United Nations, one is work for profit, where the other one typically has an altruistic objective, which the NGO in the present case, in principle (not taking into account any criminal charges), also had;

c. The Applicant received no payment for her assistance. It is not known whether the other staff member did so. However, absent a clarification from the Respondent, since this person worked for a private consulting firm, this can reasonably be assumed.

39. In the present case, the USG accepted two mitigating factors in the sanction letter, namely that (a) "it took a relatively long period of time to resolve the matter" and that (b) "the record contains no evidence of [the Applicant] receiving remuneration". All other mitigating circumstances claimed by the Applicant were rejected: (a) the Applicant making "an honest mistake"; (b) that the Applicant's interactions with AA related to interactions with Member States; and (c) the Applicant's "positive performance" in recent years.

40. With reference to the Tribunal's findings in the above, it is further noted that only 5 out of 12 activities that were listed as the Applicant having provided "work for [AA]" in the allegation letter under the headline, "Facts" have been found to be in breach of her duties as a United Nations staff member, namely the Applicant's

activities regarding the "short concept note", the draft letter on "Global Business Incubator", the email invitation to a DGACM staff member, the paragraph for the document regarding "Global South-South Development Expo Center and the recommendation letter. When reading the sanction letter, it is not clear how and/or with what the Applicant actually contributed to the various documents/communications and some input is also of a rather trivial nature. Further, as also stated above, the only activity regarding "editing and reviewing" documents for AA that was explicitly mentioned in the sanction letter, was the Applicant's work on the General Assembly document despite this allegation having been effectively been withdrawn in the allegation letter.

41. Considering the Administration's previous practice and that the Tribunal has rejected the majority of the misconduct allegations on which the disciplinary sanctions were grounded, including what appears to be the most serious one, the Tribunal finds that the sanctions were disproportionate to the established offences in accordance with *Samandarov*.

42. The Tribunal also notes that aside from generally condemning the Applicant's behavior under the Staff Regulations and Rules, the Administration has failed to convincingly explain how the interests of the Organization (or anyone else) were, as a matter of fact, harmed or otherwise affected by any established accounts of misconduct. Whereas the Tribunal recognizes that some of the offences could, in principle, be of a serious nature, due to the insufficient particulars and the failures to appropriately notify the Applicant thereof in the allegation and sanction letters, the Tribunal is left with no other options than concluding that the Applicant's inculpatory acts belong to the lightest end of the scale of sanctionable disciplinary offences.

Remedies

Rescission of the contested decision

43. The Applicant requests that the contested decision be rescinded under art. 10.5(a) of the Dispute Tribunal's Statute as "the circumstances were exceptional, [she] was made the victim of circumstances and the arbitrary application of rules by the Administration" and made a "scapegoat", and "on the basis of disproportionality, bias, bad faith, concealing and misrepresenting facts". She also refers to *Samandarov* (citing *Sanwidi* 2010-UNAT-084).

44. The Respondent submits that "[i]n determining the appropriate sanction, considerations were given to all relevant circumstances including aggravating and mitigating factors". By the sanction letter, the Applicant was "informed of the Administration's considerations given to her claimed mitigating factors", and contrary to the Applicant's contention, "there were no exceptional circumstances in this case warranting rescission of the sanction". The record demonstrates that when interacting with the Applicant, AA "was not acting on behalf of [a Member State], but as President of [the NGO]", and the "mere customary title used by former diplomats such as [AA] does not justify the Applicant's professed belief that his requests were from or for the Member States". The Applicant's "purported positive performance was not considered as a mitigating factor because her offence exhibited dishonesty and a lapse of integrity". Furthermore, "no admission of guilt was present in this case that could amount to a mitigating factor", as during the investigation and the disciplinary process, the Applicant "did not accept responsibility for her conduct". Even "in the face of incontestable forensic evidence, she continues to deny any wrongdoing downplaying her offence as a 'mistake' that according to her, should have been pardoned".

45. The Tribunal observes that in *Samandarov*, para. 25, the Appeals Tribunal described the test for determining whether a disciplinary sanction is excessive as follows:

> … Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" or to be obviously absurd or flagrantly arbitrary [*Sanwidi*, paras 39-40]. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

46. The Tribunal notes that it has been established that the USG acted within her scope of discretion when finding that four activities of the Applicant amounted to misconduct, but that the imposed sanctions were disproportionate to the offences because the foundation on which these had been established is much more limited in scope than what was stated in the sanction letter. The question is therefore what sanction(s) would fall within the USG's authority to impose.

47. In the hierarchy of disciplinary measures stated in staff rule 10.2, written censure is the lowest ranking sanction and loss of one or more steps in grade is ranked as the second lowest sanction out of an exhaustive list of nine measures. The actual impact of losing two steps might, nevertheless, be financially very burdensome if a staff member is on one of the lower steps within the relevant grade as it may take many years for the person to reach the upper ceiling of steps. In the present case, for instance, the Applicant notes in her application that she served at the P-5 level, step 4, at this point in time. The Tribunal can therefore deduce that it will take the Applicant years to recuperate the imposed loss in steps, and with reference to the current salary scale, notes that the difference in the pensionable remuneration between the step 4 and step 6 on the P-5 level, for instance, is USD7,473 per year.

48. Consequently, in light of the errors committed by the Administration in the allegation and sanction letters, the practices of the Administration when imposing

disciplinary measures as outlined in its various compendiums and the relatively minor degree of gravity of the Applicant's offences, the Tribunal finds that the decision to impose against her the disciplinary sanction of loss of two steps is disproportionate and therefore to be rescinded, but considering the established accounts of misconduct, also decides that the disciplinary sanction of written censure is to remain (similarly, see *Samandarov*, para. 27).

Compensation for harm

49. The Applicant requests compensation for harm under art. 10.5(b) of the Statute, referring to "the duration of this case (1863 days) and the moral harm that it has caused as it has impacted [her] health and general well-being" and the "moral injury, stigmatization, reputational damage, stress, anxiety and detrimental impact on [her] health and general wellbeing". This is demonstrated by the "extensive medical record that [she] shared in [her] application, its annexes and in [her] application for confidentiality". Also, she feels "ashamed to divulge this outcome in [her] application for upward mobility, despite [her] excellent work record and commitment to the Organization. She requests "679 days of full pay … based on sufficient evidence of the agony and injustice that [she] was singled out for and suffered for 1885 days, till today".

50. The Respondent, in essence, submits that there was no delay in resolving the matter and that she failed to submit evidence of any harm allegedly suffered by her to merit the claimed compensation.

51. The Tribunal notes that any such "[c]ompensation for harm" must be "supported by evidence" under art. 10.5(b) of the Dispute Tribunal's Statute. Also, the Appeals Tribunal held in *Kebede* 2018-UNAT-874, para 20, that "compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both". It is therefore "not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on

a cause-effect lien". If "one of these three elements is not established, compensation cannot be awarded", and the harm must "be shown to be directly caused by the administrative decision in question".

52. When assessing the evidence provided by the Applicant, the Tribunal finds that it does not show a direct causal link between the excessive disciplinary sanction and the medical issues that she was experiencing. The medical report dated 15 November 2018 refers to "an event in the workplace on November 2nd", but both the allegation and sanction letters were of a later date (21 November 2018 and 14 June 2019, respectively).

53. Accordingly, the Applicant's request for compensation for harm is rejected.

Conclusion

54. The Tribunal DECIDES that the application is granted in part:

a. The decision to impose on the Applicant the disciplinary measure of loss of two steps is rescinded;

b. The decision to impose on the Applicant the disciplinary sanction of written censure is upheld;

c. The Applicant's request for compensation for harm is rejected.

55. As a result of rescission of the decision to impose on the Applicant the disciplinary measure of loss of two steps is rescinded, the Organization shall:

a. Retroactively place the Applicant at the step she should have been prior to the imposition of the rescinded disciplinary measure;

b. Recalculate the Applicant's step increments accordingly; and

c. Pay the Applicant the loss of salary that she suffered as a result of the loss in steps, with interest on that amount at the current US Prime Rate.

56. If payment of the above amount, namely loss of salary with interest, is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment.

(Signed)
Judge Joelle Adda
Dated this 8th day of June 2021

Entered in the Register on this 8th day of June 2021
(Signed)
Nerea Suero Fontecha, Registrar, New York