UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/058
Judgment No.: UNDT/2023/012
Date: 27 February 2023
Original: English

Before: Judge Francis Belle

Registry: New York

Registrar: Isaac Endeley

DRAGNEA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Michael Horn, Archer & Greiner, PC

Counsel for Respondent:
Yehuda Goor, AAS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 17 November 2021, the Applicant, a staff member of the United Nations Department for Safety and Security ("UNDSS"), contests:

a. The issuance to her of a written reprimand;

b. The placement of said reprimand in her personnel file;

c. Her placement under a performance improvement plan ("PIP"); and

d. The outcome of the Management Evaluation Unit's ("MEU") review of the above decisions.

Facts and procedural history

2. The Applicant is a Security Officer at the S-1 level with the Safety and Security Service ("SSS") at UNDSS in New York. She commenced her service with the United Nations on 6 December 2019 on a fixed-term appointment.

3. On 29 March 2021, while on duty at a security post in Headquarters, the Applicant was involved in an altercation with a fellow Security Officer.

4. On the same date, the Applicant was requested by the Officer-in-Charge, Special Investigation Unit ("SIU"), SSS, to complete an incident report.

5. On 31 March 2021, SIU interviewed the Applicant regarding the altercation.

6. On 14 April 2021, SSS issued an investigation report.

7. On 12 May 2021, the Applicant received a written reprimand by way of a memorandum titled "Notice of Reprimand Re: Unacceptable Behaviour – Incident of 29 March 2021" ("Notice of Reprimand") from the Chief, SSS, informing her of the result of SIU's investigation of the altercation. The memorandum indicated that SIU concluded that the Applicant's actions were "found to [be] disruptive to the operations of the Service, unacceptably disrespectful to a fellow officer, unprofessional in the extreme, and not representative of the standard of conduct expected of a security officer".

8. It further informed the Applicant that she would be placed on a PIP, and the written reprimand would be included in her personnel file.

9. On 5 June 2021, the Applicant received a "partially meets expectations" rating for her 2020-2021 performance evaluation, which identified serious performance shortcomings. The Applicant rebutted this evaluation, but the rebuttal panel fully upheld the rating of "partially meets expectations".

10. On 8 July 2021, the Applicant requested management evaluation of the contested decisions listed in para. 1 a, b, and c above.

11. By letter dated 20 August 2021, the Under-Secretary-General for Management Strategy, Policy and Compliance informed the Applicant of her decision to uphold the decision to issue the written reprimand, to place it in her administrative file, and to find not receivable the Applicant's challenge of the decision to place her on a PIP.

12. On 17 November 2021, the Applicant filed the application mentioned in para. 1 above. In her application, the Applicant requested, *inter alia*, an:

> a. Order for production of all evidence including a copy of all reports, CCTV recordings and telephone recordings in connection with the 29 March 2021 incident supporting the issuance of the written reprimand; and
>
> b. Oral hearing.

13. On 26 November 2021, the Respondent filed a motion requesting the Tribunal to determine receivability as a preliminary matter and suspend the deadline for the Respondent's reply.

14. By email dated 29 November 2021, the Tribunal granted the Respondent's request to suspend the deadline for his reply.

15. On 2 December 2021 and 10 December 2021, the Applicant filed her opposition and supplemental opposition to the Respondent's motion to have receivability determined as a preliminary matter.

16. On 1 July 2022, the present case was assigned to the undersigned Judge.

17. By Order No. 61 (NY/2022) of 14 July 2022, the Tribunal granted in part the Respondent's motion to have receivability determined as a preliminary matter, on grounds that it does not have jurisdiction to consider appeals against the outcome of a review of the administrative decision by MEU, thus making this aspect of the application manifestly not receivable.

18. The Tribunal further instructed the Respondent to file his reply to the application, which he did on 15 August 2022.

19. By Order No. 76 (NY/2022) of 17 August 2022, the Tribunal instructed the Respondent to file the following materials on an *ex parte* basis:

a. The investigation report (including its annexes) into the incident of 29 March 2021; and

b. The CCTV recordings of the incident of 29 March 2021.

20. On 18 August 2022, the Respondent filed the above-mentioned materials on an *ex parte* basis.

21. By Order No. 77 (NY/2022) of 23 August 2022, the Tribunal rejected the Applicant's request for an oral hearing and instructed the Respondent to redact the investigation report and its annexes and to refile them on an under-seal basis, excepting the excerpts of CCTV recordings and third parties' statements. The Tribunal further ordered the Applicant to file a rejoinder by 1 September 2022, and invited the Respondent to file his response to the Applicant's rejoinder by 9 September 2022.

22. On 31 August 2022, the Applicant filed her rejoinder.

23. On 9 September 2022, the Respondent filed his response to the Applicant's rejoinder.

24. Having reviewed the parties' submissions, the Tribunal decided to convoke the parties to a case management discussion ("CMD"), which took place, as scheduled, on 19 September 2022, with a view to explore the possibilities of referral of the case to mediation.

25. During the CMD, the Applicant expressed her consent to mediate the case whereas the Respondent's Counsel informed the Tribunal that he would have to seek approval from his senior management about entering into mediation. Moreover, the Respondent's Counsel again requested the Tribunal to determine receivability as a preliminary matter.

26. By Order No. 84 (NY/2022) of 20 September 2022, the Tribunal instructed the Respondent to inform it about his position on whether he would like to engage in mediation of the case by 26 September 2022.

27. By Judgment *Dragnea* UNDT/2022/088, dated 23 September 2022, the Tribunal decided that the challenge against the decisions to issue the Applicant a written reprimand and to place it in her personnel file was receivable, and that the challenge against the decision to place the Applicant on a PIP was not receivable.

28. On 25 September 2022, the Respondent informed the Tribunal of his agreement to mediate the present case.

29. By Order No. 88 (NY/2022) of 28 September 2022, the Tribunal referred the present case to the Mediation Division, Office of the United Nations Ombudsman and Mediation Services, and suspended the proceedings before it until 28 November 2022.

30. By email dated 28 November 2022, the Mediation Division informed the Tribunal that the parties had jointly requested an extension of time for mediation until 26 January 2023.

31. By Order No. 107 (NY/2022) of 5 December 2022, the Tribunal ordered that the proceedings before it in this matter be further suspended during the mediation process until 26 January 2023.

32. By email dated 5 January 2023, the Mediation Division informed the Tribunal that the parties had not been able to resolve the present matter.

33. By Order No. 2 (NY/2023) of 9 January 2023, the Tribunal instructed the Respondent to file redacted CCTV recordings supporting the Administration's core factual findings, which he did on 10 January 2023.

34. By the same Order, the Tribunal instructed the parties to file their respective written closing submission, which they did on 16 January 2023.

35. On 16 January 2023, the Applicant filed a motion to "expand the record" in which she asked the Tribunal to consider "recent evidence related to the deleterious consequences of the [Notice of Reprimand]".

36. On 18 January 2023, the Tribunal invited the Respondent to provide his comments on the Applicant's motion, which he did on 23 January 2023.

37. By Order No. 4 (NY/2023) of 26 January 2023, the Tribunal granted the Applicant's motion to expand the record and informed the parties that it would proceed to adjudicate the matter by Judgment.

38. On 4 February 2023, the Applicant filed a motion for a directive under Report A/73/150 of the Internal Justice Council, informing the Tribunal, *inter alia*, that she had been a victim of retaliation for seeking recourse through the internal justice system and requesting the Tribunal to address her concerns the way it deemed necessary.

39. On 8 February 2023, the Tribunal invited the Respondent to provide his comments on the Applicant's motion, which he did on 10 February 2023.

40. By Order No. 11 (NY/2023) of 15 February 2023, the Tribunal rejected the Applicant's motion on grounds that it found no *prima facie* evidence, at this stage, that litigating before the Tribunal was a contributing factor in causing the alleged retaliation. Nevertheless, it reiterated that "managers have an obligation to refrain from, and protect staff against, retaliation. Retaliation against litigants and witnesses amounts to an abuse of authority, which constitutes misconduct that must be addressed and sanctioned, in line with the relevant Staff Regulations and Rules" (see *Haroun* 2019-UNAT-909, para. 36).

Consideration

Scope of judicial review

41. The Tribunal notes that through various motions or rejoinders filed during the proceedings before it, the Applicant sought to enlarge the scope of the case by introducing new claims, including those in connection with her non-promotion, her complaints against the Organization, and her performance ratings.

42. In this respect, the Tribunal recalls its findings in *Rafii* UNDT/2012/205, at para. 35, that:

> Applications are not intended to have a snowball effect, and, after filing an initial application, applicants cannot keep adding additional matters to the same case as they arise. This would be a back-door way of bringing a substantively new cause of action even prior to the management evaluation and without the filing of a formal application on the merits. Each appeal shall be subject to the steps prescribed by the Statute, Rules of Procedure, and the Staff Rules.

43. Noting that the new issues were not submitted for management evaluation, the Tribunal recalls that staff rule 11.2(a) sets forth a general requirement that a staff member wishing to formally contest an administrative decision must submit a request for management evaluation as a first step. Therefore, the Tribunal will limit its scope of judicial review to the decisions identified in the application that were reviewed by the MEU.

44. Moreover, having decided that the challenge against the decision to place the Applicant on a PIP and the outcome of the MEU's review of the contested decisions is not receivable, the Tribunal notes that the remaining core issue before it is the lawfulness of the Administration's issuance to the Applicant of a written reprimand, and its placement in her personnel file.

45. In this respect, the Appeals Tribunal in *Yasin* 2019-UNAT-915, at para. 47, held that:

> Although the reprimand is not a disciplinary measure but an administrative one, because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of **reliable facts**, established to the **requisite standard of proof**, namely that of "preponderance of evidence", and be **reasoned** in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised (emphasis added).

46. As the Appeals Tribunal has consistently held, "[i]n exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate" and "[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* 2010-UNAT-084, para. 42; see also *Yasin*, paras. 44, 45).

47. Nevertheless, the Tribunal may determine if there was a proper investigation into the allegations (see, e.g., *Messinger* 2011 -UNAT -123, para. 27). In this regard, the Appeals Tribunal's jurisprudence has been consistent and clear since 2010 (see, e.g., *Ouriques* 2017-UNAT-745, para. 14; *Kennedy* 2021-UNAT-1184, para. 49), establishing that the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40).

48. Moreover, it is well-established jurisprudence that "in reviewing decisions imposing a sanction, be it disciplinary or administrative, the Tribunal's scope of review is limited to determining whether: an applicant's due process rights were respected, the facts underlying disciplinary or administrative measures were established, the established facts amount to the conduct foreseen in the rules provided for the applied measure, and the measure was proportionate to the offence" (see *Pakkala* UNDT/2021/076, para. 12; see also *Elobaid* UNDT/2017/054, para. 36; *Applicant* 2012-UNAT-209, para. 36).

49. Accordingly, the Tribunal will address these issues below.

Whether the facts have been established to the requisite standard

50. In relation to the written reprimand, the standard of proof to establish the facts is, as the parties acknowledged in their submissions, that of "preponderance of evidence", and such standard of proof is met where the reprimand was based on "reasonable grounds" (see *Elobaid* 2018-UNAT-822, paras. 35 and 36). Indeed, as the Appeals Tribunal highlighted, "since the imposition of administrative measures does not require any finding of misconduct or inflicting a penalty, there is no need to establish the facts justifying them on clear and convincing evidence" (see *Pakkala* 2022-UNAT-1268, para. 35).

51. In the present case, the Notice of Reprimand clearly set out the rationale for imposing the written reprimand, stating in its relevant part as follows:

> 2. On Monday, 29 March 2021, at approximately 1013 hrs., while on duty, in uniform and armed, [the Applicant was] involved in a serious verbal altercation at Post 102 with a fellow Security Officer. At the direction of the Chief of Service the matter was investigated by the Special Investigation Unit, SSS, the results of which determined the following:
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> - As [the Applicant was] about to be relieved from Post 102 [she] initiated an altercation with the relieving officer which lasted approximately 4 minutes.
>
> - CCTV footage reviewed by the investigation shows [the Applicant] as acting in a highly aggressive manner repeatedly confronting and pointing [her] finger at the relieving officer.

- The relieving officer, alarmed by [her] behaviour, attempted to record the encounter on her personal cell phone which, at one point, [the Applicant] grabbed from her hand and threw onto the X-Ray Machine, which allegedly caused damage to the device.

- [The Applicant's] action is tantamount in bringing discredit to the Security and Safety Service wherein [she] physically grabbed the relieving officer's phone and threw it in the X-ray machine thereby directly contradicting [her] own written statement, wherein [she] indicated that [she] "placed" the phone in the x-ray machine. CCTV evidence points to contrary behaviour on [her] part.

52. The Applicant strongly disputes the facts at issue and submits that the video recording does not support the facts underlying the written reprimand. In support of her submission, the Applicant specifically argues that she was not the perpetrator, and she was initially confronted by the relieving officer; that she was making hand gestures rather than being aggressive; that the video recording shows that she placed the cell phone on the X-ray machine to stop the illegal recording; and that the surveillance video shows that there was never a "serious verbal altercation". Moreover, the Applicant contends that the transcript of the recording starts in the middle of the incident and is therefore unreliable because it does not provide the entire picture.

53. The Respondent submits that the standard of proof is met in the present case, and the written reprimand was issued to the Applicant based on the unequivocal conclusions of the factual investigation of SIU.

54. Having considered both parties' submissions, the Tribunal notes that the CCTV recording corroborates the allegations made by the affected Security Officer. While it is true that the CCTV recording does not provide audio of the verbal exchange, said recording is consistent with something being said by the Applicant to her fellow Security Officer prompting the latter to begin recording the incident with her cell phone. Most importantly, the CCTV recording clearly shows that the Applicant snatched and threw her fellow Security Officer's cell phone on the X-ray machine, instead of placing it on it as she claims in her application.

55. Even though it is not possible to hear an exchange of words, it is logical to assume that taking the cell phone from the fellow Security Officer and throwing it on the Xray machine was an aggressive act done in anger. There are no circumstances either in the video or articulated by the Applicant justifying such an action. Objecting to the fellow Security Officer using her cell phone in this way does not justify the Applicant's action.

56. As such, the Tribunal also finds no merit in the Applicant's submission that there was never a "serious verbal altercation". Indeed, this fact has been established based on the CCTV recordings, the testimony of several witnesses, and the transcript of two cell phone videos that clearly depict the events at issue.

57. Accordingly, the Tribunal finds that the facts in support of the written reprimand imposed were established as per the applicable standard of proof.

Whether the established facts amount to inappropriate behaviour

58. The Notice of Reprimand states in its relevant part that:

> 3. Based upon a review of the matter [the Applicant's] behaviour has been found to disruptive (sic) to the operations of the Service, unacceptably disrespectful to a fellow officer, unprofessional in the extreme, and not representative of the standard of conduct expected of a security officer. Specifically, it is in breach Security and Safety Service standard operating procedure 25.02 (sic) which states, *"UN security personnel are expected to display the highest level of professionalism, courtesy and tact while in the performance of their duties"* (italics in the original).

59. The Applicant submits that the Administration's finding in this respect is unfounded. In her view, the CCTV recording shows that her fellow Security Officer was the aggressor and that she performed her duty by stopping the aggression.

60. The Tribunal sees no evidence on record that the fellow Security Officer was the aggressor in the encounter. The act of raising and pointing a cell phone only becomes a provocation to someone who is doing something that may be inappropriate or unlawful behaviour. Consequently, the Applicant's suggestion that she was stopping aggressive behaviour is rejected by the Tribunal.

61. The Tribunal is also satisfied that the conduct displayed in taking the cell phone from the fellow Security Officer and throwing it onto the X-ray machine was unprofessional, and not representative of the standard of conduct expected of a security officer. Indeed, the act of taking the fellow Security Officer's cell phone without permission and throwing it on the X-ray machine was unacceptable behaviour by a security officer, even if the latter thought that the other Security Officer was doing something wrong.

62. As such, the Tribunal accepts that the Applicant's behaviour would be a breach of the Standard Operating Procedures of SSS, which expect UN security personnel to "display the highest level of professionalism, courtesy and tact while in the performance of their duties".

Whether the reprimand was proportionate to the alleged conduct

63. The Applicant argues that the written reprimand constitutes a disguised disciplinary measure and that it is disproportionate to the conduct alleged. In contrast, the Respondent, repeatedly submitted that the written reprimand is a mere performance notice and not an administrative measure.

The nature of the written reprimand

64. The Tribunal first finds no merit in the Respondent's persistent submission that the written reprimand is not an administrative measure. To support his claim, he specifically argues that the written reprimand is merely a response to unsatisfactory work performance.

65. In this respect, the Appeals Tribunal explicitly clarifies that administrative measures, including written reprimands, are "not intended to be punitive in nature but are aimed at efficiency and performance management in the interests of the Organization" (see *Pakkala* 2022-UNAT-1268, para. 34). As such, the fact that a measure is a "response to unsatisfactory work performance" does not preclude it from constituting an administrative measure.

66. Moreover, the Tribunal recalls its finding in Judgment *Dragnea* UNDT/2022/088 that:

> Noting that the decision at issue is a written reprimand imposed to address a staff member's unsatisfactory conduct following an investigation of an altercation, the Tribunal considers that the decision at issue constitutes an administrative measure under sec. 2.1(d) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

67. Second, the Tribunal is similarly not convinced by the Applicant's submission that the Notice of Reprimand constitutes a disguised disciplinary measure. To support her claim, she specifically argues that she is no longer eligible for promotions and only received a shorter contractual term. In this respect, the Tribunal wishes to highlight that the fact that a written reprimand may "flag performance issues and inform decisions on recruitment or promotion" (see *Elobaid* UNDT/2017/054, para. 62) does not render it a disciplinary measure.

68. Indeed, administrative measures and disciplinary measures are different in view of their nature and consequences. Specifically, staff rule 10.2 clearly differentiates between disciplinary and administrative measures, reading as follows:

> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
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> (i) Written censure;
>
> (ii) Loss of one or more steps in grade;
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> (iii) Deferment, for a specified period, of eligibility for salary increment;
>
> (iv) Suspension without pay for a specified period;
>
> (v) Fine;
>
> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;

> (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
>
> (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
>
> (ix) Dismissal.
>
> (b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:
>
> (i) Written or oral reprimand;
>
> (ii) Recovery of monies owed to the Organization;
>
> (iii) Administrative leave with full or partial pay or without pay pursuant to staff rule 10.4.
>
> (c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

69. Thus, staff rule 10.2(b) permits the imposition of administrative measures that shall not be considered disciplinary measures.

70. Moreover, the Appeals Tribunal in *Elobaid* distinguished between disciplinary and administrative measures and held in the Judgment's relevant part (see para. 25) that:

> The consequences of a disciplinary measure are not equivalent to those of an administrative measure. Although the reprimand could have an adverse impact on the concerned staff member's career, since it is placed in his or her Official Status File, it is not comparable, by its nature, to the effects of any disciplinary measure.

71. Having reviewed the content of the written reprimand, the Tribunal considers that it is not of a punitive nature but of a preventive, corrective and cautionary nature because it seeks to bring to the Applicant's attention shortcomings in her behaviour. As such, it does not have the consequence of any disciplinary measure listed in staff

rule 10.2(a), disclosure of which is mandatory when applying for vacancies with the Organization (see, e.g., *Akyeampong* 2012-UNAT-192, paras. 30, 31).

72. Considering the nature of the written reprimand at issue and its effects, the Tribunal does not find that it amounts to a disciplinary measure.

The proportionality analysis

73. In relation to whether the written reprimand was proportionate to the alleged context, the Tribunal recalls that "Tribunals are required to act with restraint and deference in balancing the considerations at play in discipline of this kind and with appreciation for the peculiar context in which it was taken. The [Administration] has a broad discretion to implement its preferred standards". As such, as long as "[t]he decision to impose a written reprimand falls within the range of reasonable responses", "the measure [will be] proportional in the circumstances" (see *Michaud* 2017-UNAT-761, para. 61).

74. In the present case, the Tribunal is satisfied that the evidence on record shows behaviour justifying the action taken by the Administration to issue a written reprimand and to place it in the Applicant's personnel file. There was nothing done by the Applicant's fellow Security Officer, as per the CCTV recording, justifying the Applicant's behaviour and thus the reprimand imposed constituted an appropriate response to the Applicant's inappropriate behaviour.

75. Considering that the written reprimand falls within the range of reasonable responses to the inappropriate behaviour that the Applicant exhibited, the Tribunal finds that it is proportional in the circumstances.

Whether the Applicant's rights to due process were respected

76. The Applicant submits that her rights to due process were not respected. Specifically, she argues that:

> a. She was never informed in writing or verbally that she was the subject of the investigation; she was only questioned regarding the incident but was not provided with the allegations brought against her;

b. She did not receive a copy of the investigation report nor was she given the opportunity to comment on it;

c. She was not provided with an opportunity to comment on the facts and circumstances of the reprimand prior to its issuance pursuant to staff rule 10.2(c) and art. 7.5 of ST/AI/2017/1;

d. The Administration failed to consider exculpatory evidence, namely, the fact that her action was to stop an illegal recording; and

e. The weapons restriction without a time limit and without a condition upon which it could be lifted was improper punishment, resulting in her being unable to qualify for promotion.

77. The Respondent argues that the written reprimand is a mere managerial act, and that even if it were to amount to an administrative measure, the Applicant's due process rights were respected.

78. Noting that the written reprimand at issue was imposed following an investigation of an altercation to address the Applicant's inappropriate behaviour, the Tribunal considers that ST/AI/2017/1 is applicable to the present case because it sets forth rules governing investigations related to unsatisfactory conduct. SSS also has specific rules regulating the conduct of investigations into incidents occurring between staff members, including UNSSS General Order OPS 27 and OPS 12.

79. In relation to procedural fairness concerning the imposition of a written reprimand, the Appeals Tribunal in *Michaud* 2017-UNAT-761, at para. 56, held that:

> Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him.

Right to be properly informed

80. The Tribunal notes that sec. 6 of ST/AI/2017/1, titled "Investigation", provides in its relevant part that:

> 6.10 A staff member who has been identified as the subject of an investigation shall be:
>
> …
>
> (b) Informed in writing, prior to or at the start of the interview, that the staff member is the subject of an investigation and of the nature of the alleged unsatisfactory conduct.

81. Document ADMIN-18 of the General Orders of UNSSS provides in its relevant part that:

> **18.01.04 Due Process**
>
> The due process provision of Staff Rule 110.4 is not abridged as a consequence of the inherent function of a security officer. The obligation to write reports and statements during the course of duty in no way hinders the rights of an individual officer, to be informed in writing if he/she becomes the target of an investigation.

82. Accordingly, as soon as the Applicant was identified as a possible wrongdoer, she should have been notified of the allegations in writing in accordance with the principle of due process.

83. In the present case, there is some doubt that the Applicant was informed of the nature of the investigation conducted against her although the Applicant must have been aware of the incident being investigated. Indeed, the evidence on record shows that the Applicant was only questioned regarding the incident but was not provided with the allegations brought against her. Moreover, the Applicant was never informed in writing that she was the subject of an investigation.

84. Therefore, the Tribunal finds that the Administration failed to properly inform the Applicant that she was the subject of an investigation and of the nature of the alleged unsatisfactory conduct.

Access to investigation report

85. Under Document OPS 27 of the General Orders of UNSSS, a staff member is entitled to the copy of an investigation report when there is an indication that he or she has engaged in unsatisfactory conduct in which disciplinary measures might be imposed. In *Wishah* 2013-UNAT-289, the Appeals Tribunal held, at para. 32, that:

> Due process requires […] that the staff member be able to assess by himself the relevance or irrelevance of the content of the investigation report, after a direct reading of it, as the Administration's charges were mainly founded on that investigation, the characteristics and outcome of which were under discussion.

86. The evidence on record shows that the Applicant was merely interviewed but was never provided with a copy of the investigation report or given the opportunity to comment on it. As such, the Applicant did not know how the investigation was conducted and could not refute the findings or evidence contained in the investigation report. This casts doubt on the accuracy of the assessment of the incident that led to the issuance of the written reprimand.

87. It is thus the Tribunal's view that the failure to provide the Applicant with a copy of the investigation report violated her right to due process.

Alleged failure to consider exculpatory evidence

88. ST/AI/2017/1 sets forth the general obligations of investigators, providing in its relevant part that:

> **Section 6**
> **Investigations**
>
> *Purpose and scope*
>
> 6.1 The purpose of an investigation is to gather information to establish the facts that gave rise to the allegation of unsatisfactory conduct. The investigator(s) should pursue ***all*** lines of enquiry as considered appropriate and collect and record information, both inculpatory or ***exculpatory***, in order to establish the facts. The investigator(s) shall not make a legal determination about the established facts (emphasis added).

89. Accordingly, the investigators are obliged to investigate all relevant information and evidence, both inculpatory and exculpatory. All such information shall be disclosed to the subject of the investigation and to the decision-maker in line with the principles of procedural fairness and due process.

90. In the present case, the Applicant claims that the Administration failed to consider exculpatory evidence, namely, the fact that her action was to stop an illegal recording.

91. While the Tribunal has already found that taking the fellow Security Officer's cell phone from her possession and throwing it on the X-ray machine is an inappropriate behaviour, it is of the view that the investigation falls short of having been thorough and even-handed. Indeed, the Tribunal notes that it failed to consider possible factors that may have contributed to the Applicant's behaviours, e.g., the fact that the fellow Security Officer was recording the incident despite the Applicant's objection, and whether the fellow Security Officer contributed, and if so, to what extent, to the incident.

Opportunity to provide comments prior to the issuance of the reprimand

92. The procedure applicable to the issuance of administrative measures is described in staff rule 10.2(c) in a scant fashion, stating that:

> A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

93. The Tribunal notes that ST/AI/2017/1 provides in its relevant part that:

> 7.5 Where a non-OIOS investigation finds that there is a factual basis indicating that the staff member engaged in unsatisfactory conduct, but that such conduct, in the view of the responsible official, does not amount to misconduct, the responsible official shall:
>
> (a) Decide to take no further action and inform the subject in writing; or

> (b) Decide to take managerial action or administrative measures. Before the issuance of a reprimand, a staff member shall be **given an opportunity to provide comments on the facts and circumstances**, as provided for in staff rule 10.2 (c). (Emphasis added)

94. In this respect, the Tribunal recalls that the former United Nations Administrative Tribunal in its Judgment No. 1176, *Parra* (2004), at para. IV, held that:

> The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or natural justice, which implies, *inter alia*, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (*audi alteram partem*). The Tribunal notes that the letter of reprimand was issued on the same day that the Security Officer had submitted his [investigation] report. The Tribunal thus finds that such an opportunity was not extended to the Applicant prior to issuing this reprimand, thus violating this fundamental principle.

95. Moreover, the Appeals Tribunal held in *Elobaid*, at para. 26, that:

> In administrative procedures, […] as the measure e.g., reprimand, is not as consequential as a disciplinary action, the scope of the adversarial principle−while it must also respond to the needs of transparency, proportionality and fairness−is limited to informing the staff member concerned of the Administration's intention and allowing him or her the **opportunity to comment on the respective action**. (Emphasis added)

96. While the evidence on record shows that the Applicant was interviewed by SIU regarding the incident, the Tribunal finds no evidence that the Administration ever afforded the Applicant an opportunity to comment on the written reprimand after the issuance of the investigation report.

97. As such, the Tribunal finds that the Administration failed to extend to the Applicant the opportunity to be heard prior to issuing the reprimand, thus violating the fundamental principle of due process. In particular, the responsible official failed to give the Applicant an opportunity to provide comments on the facts and

circumstances prior to the issuance of the reprimand in accordance with staff rule 10.2(c) and sec. 7.5(b) of ST/AI/2017/1.

The Applicant's placement on weapons restriction

98. Turning to the Applicant's claim in relation to weapons restriction, the Tribunal wishes to point out that the Applicant cannot bypass the mandatory statutory requirement to submit a request for a management evaluation prior to filing an application against an administrative decision.

99. Nevertheless, it notes that the Notice of Temporary Firearm Restriction sent to the Applicant by the Chief, SSS, on 29 March 2021 states as follows:

> I have been advised of an incident between you and a fellow officer that occurred on the morning of 29 March 2021. Based on the initial reports, your authorization to carry a firearm is hereby temporarily restricted under the provisions of the UNDSS Manual of Instruction on Use of Force Equipment and Firearms, sec. 4.67 (m), pending a review of the incident. Your weapon has been locked in the [armoury]. It is anticipated this restriction will last 90 days.

100. As such, the placement of the Applicant on weapons restrictions is essentially an interim measure taken by the Administration pending the review of the incident. Accordingly, the Tribunal will consider the issues related to the Applicant's placement on weapons restriction only to the extent that the right to due process requires that the interim measure taken is proper. Extension of the weapons restriction, if any, falls out of the scope of the present case.

101. In this respect, the Tribunal notes that the Manual of Instruction on Use of Force Equipment Including Firearms of UNDSS ("the UNDSS Weapons MOI") provides the following so far as it is material to this case:

> **Revocation of Authorization by United Nations**
>
> 2.33 Security Officials shall adhere to the strictest practice for handling and safeguarding their issued weapons. Any breach of the United Nations Use of Force Policy, Weapons Carry Policy or unit SOP may result in the withdrawal of the [Weapons Authorization Card] by the [Chief Security Advisor/Chief of Security/Chief Security Officer]. Security Officials carry a weapon on the authority

> of the [Chief Security Advisor/Chief of Security/Chief Security Officer]. The [Chief Security Advisor/Chief of Security/Chief Security Officer] may rescind authorization to carry weapons/firearms whether on a temporary or permanent basis, by placing the Security Official on Weapons Restriction.
>
> **Weapons Restriction**
>
> 2.34 Security Officials may have restrictions placed upon their carrying a weapon by the [Chief Security Advisor/Chief of Security/Chief Security Officer]. A Weapons Restriction may be applied where the following has occurred;
>
> l. as determined by the [Chief Security Advisor/Chief of Security/Chief Security Officer] any behaviour, statement or act made by the Security Official which brings into question the Security Official's fitness to be armed.
>
> …
>
> g. Security Official is under investigation
>
> **Duration of Weapons Restrictions**
>
> 2.35 In every case where a Security Official is placed on Weapons Restriction by the Chief Security Advisor/Chief of Security/Chief Security Officer, the concerned Security Official shall be notified in writing of the expected duration.
>
> 2.36 Supervisors shall not use the duration of Weapons Restrictions as a punishment for misconduct where normal investigative or disciplinary procedures are applicable.
>
> **Long Term Withdrawal of Authorization**
>
> 2.38 In the event that a Security Official's firearms permits, either the Host Country or UN is removed [sic] with no prospect of it being reinstated or if the Security Official is judged to be unlikely for the foreseeable future to meet the fitness-for-duty requirement, the [Chief Security Advisor/Chief of Security/Chief Security Officer] shall reassign the Security Official to duties that do not require the carriage of a firearm …

102. The Tribunal does not consider inappropriate the weapons restriction placed on the Applicant pending the review of the incident. The Notice of Temporary Firearm Restriction clearly indicates the duration of and reasons for such restriction, in accordance with provisions of the UNDSS Weapons MOI. Moreover, the

Applicant's actions in a high security area while carrying a firearm, which involved taking the personal property of a fellow Security Officer, were sufficient to justify her placement on weapons restrictions pending review of the incident. The Applicant's actions could have provoked an undesirable response in circumstances where a secure area and firearms could have been compromised.

103. Accordingly, the Tribunal finds no basis to intervene with the Administration's decision to place the Applicant on weapons restriction to the extent that it constituted an interim measure pending the review of the incident.

Conclusion on the lawfulness of the contested decision at issue

104. The Tribunal recalls its findings, *inter alia*, that:

a. The Administration failed to properly inform the Applicant that she was the subject of an investigation and of the nature of the alleged unsatisfactory conduct;

b. The failure to provide the Applicant with a copy of the investigation report violated her right to due process;

c. The investigation falls short of having been thorough and even-handed; and

d. The Administration failed to give the Applicant an opportunity to provide comments on the facts and circumstances prior to the issuance of the reprimand in accordance with staff rule 10.2(c) and sec. 7.5(b) of ST/AI/2017/1.

105. As such, the Tribunal finds that the Administration failed to respect the procedural standards expected from the United Nations in proceedings leading to the imposition of a written reprimand. The above-mentioned deficiencies raise doubts about the appearance of impartiality of the investigation and the decision-making process and are thus sufficient to taint the contested decision.

106. Accordingly, the Tribunal cannot but conclude that the Administration's decision to issue to the Applicant a written reprimand and place it in her personnel file is unlawful.

Whether the Applicant is entitled to any remedies

107. In her application, the Applicant requests that the written reprimand be rescinded and removed from her file and claims moral damages in this respect in the amount of three years of her net salary. She also requests to be reinstated from S-1 to S-2 and claims related compensation. She further requests that the weapon restrictions be rescinded and claims compensation for harm caused by it. In addition, she claims reimbursement of attorney's fees and costs.

108. The Tribunal recalls that the remedies it may award are outlined in art. 10 of its Statute as follows:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant…
>
> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

<u>Rescission of the contested decision</u>

109. Having found that the Administration's decision to issue to the Applicant a written reprimand and place it in her personnel file is unlawful and noting the Respondent's persistent submission that the written reprimand is a mere performance notice instead of an administrative measure, the Tribunal finds it

appropriate to rescind the decision to issue to the Applicant a written reprimand and order the Administration to remove it from her personnel file.

Compensation for harm

110. In relation to the claim for compensation for harm, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. In this respect, the Appeals Tribunal has consistently held that "it is 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" (see *Ashour* 2019-UNAT-899, para. 31; see also *Kebede* 2018-UNAT-874, para. 20).

111. The Tribunal notes that in support of her claim for compensation for harm, the Applicant provides medical evidence dated 29 June 2022, indicating that "it is imperative for [the Applicant's] well-being to be moved to another work area where she feels safe" and suggesting that she was treated for anxiety reaction.

112. Noting that the Applicant has raised various issues that are not within the scope of the present case such as those related to her non-promotion, her complaints against the Organization, and her performance ratings, and considering that the medical evidence is dated more than a year after the written reprimand was issued to her on 12 May 2021, the Tribunal is not satisfied that the alleged harm was the result of the Administration's failure to respect her right to due process in issuing the written reprimand. Moreover, the Applicant failed to establish a causal link between the contested decision and the alleged harm.

113. Consequently, the Tribunal does not consider that compensation should be paid to the Applicant as a remedy given the circumstances of the present case, even though the written reprimand should not have been issued without granting the Applicant the benefits of full due process.

Legal fees and costs

114. The Appeals Tribunal clarified that art. 10.6 of the Tribunal's Statute "does not allow [it] to award costs to the prevailing party, as a matter of course", but rather allows it to award costs only when a party has manifestly abused the proceedings (see *Nartey* 2015-UNAT-544, para. 73).

115. In the present case, the Tribunal finds that the Applicant failed to demonstrate that certain of the Secretary-General's conduct amounted to a manifest abuse of legal proceedings. The Tribunal further finds no evidence in this respect.

116. Accordingly, the Tribunal finds no basis to reimburse the Applicant's attorney's fees and costs.

Conclusion

117. In view of the foregoing, the Tribunal DECIDES that:

a. The application succeeds in part;

b. The decision to impose a written reprimand is hereby rescinded;

c. The written reprimand is to be removed from the Applicant's personnel file; and

d. All other claims are rejected.

(*Signed*)
Judge Francis Belle
Dated this 27th day of February 2023

Entered in the Register on this 27th day of February 2023
(*Signed*)
Isaac Endeley, Registrar, New York