Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

ABDELLAOUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bettina Gerber, LPAS, UNOG
Jérôme Blanchard, LPAS, UNOG

Introduction

1. By application filed on 20 December 2022, the Applicant, a staff member with the Arabic Translation Section, Languages Service, Division of Conference Management, United Nations Office at Geneva ("UNOG"), seeks recission of certain comments that her Second Reporting Officer ("SRO") made in her 2021-2022 Performance Document.

2. For the reasons set forth below, the application is dismissed.

Facts and procedural history

3. In 2004, the Applicant joined the Organization as a Translator at the P-3 level. In 2011, she was promoted to the role of Reviser at the P-4 level.

4. In September 2020, the Applicant became a member of the Staff Council at the United Nations Office at Geneva Staff Union. In 2022, she headed a new list (UNison/UNissons) and gained a seat as a member of the Executive Bureau of UNOG Staff Union. In her capacity as a staff representative, the Applicant has been critical of representation provided by the Hope group of UNOG staff representatives.

5. On 1 May 2022, the Applicant received an automated Inspira notification informing her that her SRO, the Chief of the Arabic Translation Section, had endorsed the overall performance rating of "successfully meets expectations" made by the Applicant's First Reporting Officer ("FRO") for the period from 1 April 2021 to 31 March 2022.

6. The Applicant's SRO also introduced the comments below, which according to the Applicant were inconsistent with the assessment of her FRO:

> I agree on many aspects with her FRO: Naima's productivity was high, and no complaints were made regarding the quality of her work during the past cycle. Her efforts as champion of gender parity, as a member of UNOG's Multilingualism Action Team and as a staff representative wholeheartedly defending the interests of staff at ATS and beyond were indeed praiseworthy. I would however strongly encourage her to work on her communication skills and to make

> more genuine efforts to iron out her disagreements with other colleagues in a peaceful way, using a more respectful tone in her communications and refraining from making unsubstantiated but damaging accusations against her colleagues. I would be more than happy to work with her on these issues and to seek together with her FRO the best ways to help her improve on her communication skills, rebuild trust with her colleagues and solve all other outstanding issues, so that she may put her superior drafting skills and her other talents to better use.

7. On 2 May 2022, the Applicant and her FRO engaged in discussions regarding the alleged adverse comments. According to the Applicant, the comments were biased, without foundation, inconsistent with her appraisal and not permitted under the new performance rules ST/AI/2021/4 (Performance Management and Development System).

8. Following the Applicant's interaction with her FRO, her SRO agreed to retract his comments. On 11 May 2022, the SRO communicated to the Human Resources Management Service that he wanted to edit his comments in the Applicant's Performance Document and requested technical assistance in this regard.

9. By email of 14 June 2022, the SRO informed the Applicant of his decision not to change his comments in her Performance Document because of several "disruptive" emails sent by the Applicant on 26 May 2022.

10. From 24 June 2022, the Ombudsman's office became involved in a facilitated dialogue between the Applicant and her SRO regarding, *inter alia*, her Performance Document. This culminated in a first meeting with the Ombudsman on 26 September 2022.

11. On 29 June 2022, the Applicant informed the Management Evaluation Unit ("MEU") that she was attempting to resolve the situation regarding her Performance Document informally.

12. On 6 July 2022, the Applicant's SRO sent her an email that purported to explain and justify his negative comments in her Performance Document. The SRO referred to a 511-page print-out of emails but did not attach this document to his email.

13. On 13 August 2022, the Applicant requested a management evaluation of the contested decision mentioned in para. 1 above.

14. By letter of 24 August 2022, MEU found that the Applicant's request for a management evaluation was not receivable.

15. By motion filed on 7 November 2022, the Applicant sought a one-week extension of the deadline to file an application concerning comments that her SRO made in her 2021-2022 Performance Document.

16. By Order No. 107 (GVA/2022) of 10 November 2022, the Tribunal ordered that the Applicant file an application on the merits related to the above-mentioned matter by 29 November 2022, and that the application include the Applicant's arguments on its receivability.

17. On 29 November 2022, the Applicant filed her application, which is 40 pages long.

18. On 30 November 2022, the Respondent filed a motion to strike confidential statements and documents included in the application because they were pertinent to exchanges during a conflict resolution process under the auspices of the United Nations Office of the Ombudsman and Mediation Services.

19. At the same time, the Respondent submitted a motion for case management measures on the grounds that the application was 40 pages in length, well beyond the ten-page limit prescribed by the Tribunal's Practice Direction No. 4 on Filing of Applications and Replies, and that it contained a myriad of irrelevant allegations.

20. By Order No. 119 (GVA/2022) of 5 December 2022, the Tribunal:

a. Invited the Applicant to file her comments, if any, on the Respondent's motion to strike confidential statements and documents by 12 December 2022; and

b. Ordered the Applicant to refile her application, by 19 December 2022, to include a succinct statement of relevant facts and matters, and to make the application no more than 15 pages long.

21. In the same Order, the Tribunal encouraged the Applicant to seek the assistance of the Office of the Staff Legal Assistance ("OSLA").

22. On 9 December 2022, the Applicant filed a motion, requesting, *inter alia*, an extension of time to refile her application.

23. On 12 December 2022, the Applicant filed her comments on the Respondent's motion to strike confidential statements and documents pursuant to Order No. 119 (GVA/2022).

24. On 20 December 2022, the Applicant refiled her application in accordance with Order No. 119 (GVA/2022) with the assistance of an OSLA Counsel.

25. On the same day, the Applicant filed a motion for disclosure of a bundle of email communications referenced by her SRO in his email of 6 July 2022.

26. On 21 December 2022, the application was served on the Respondent with a deadline to reply set to 20 January 2023.

27. By motion of 17 January 2023, the Respondent requested an extension of time of two weeks to file his reply on grounds that the parties were then exploring the option of settling the matter informally with the assistance of the United Nations Office of the Ombudsman and Mediation Services.

28. By Order No. 5 (GVA/2023) of 18 January 2023, the Tribunal granted the Respondent's motion for an extension of time, and instructed him to file his reply by 3 February 2023, if no settlement was reached.

29. On 3 February 2023, the Respondent filed his reply. As an annex to it, he submitted the bundle of email communications mentioned in para. 25 above, rendering the Applicant's motion for disclosure moot.

30. By email of 7 February 2023, the Applicant conveyed to the Tribunal her intention to file a rejoinder.

31. By Order No. 76 (GVA/2023) of 13 July 2023, the Tribunal instructed the Applicant to file her rejoinder by 21 July 2023.

32. On 21 July 2023, the Applicant filed her rejoinder together with two annexes.

33. By Order No. 84 (GVA/2023) of 25 July 2023, the Tribunal invited the Respondent to file his comments on the Applicant's rejoinder by 2 August 2023.

34. On 31 July 2023, the Respondent filed a motion for an extension of one week, until 9 August 2023, to respond to Order No. 84 (GVA/2023), which was granted by the Tribunal on the same day.

35. On 3 August 2023, the Applicant informed the Tribunal that she would no longer be represented by an OSLA Counsel.

36. On 7 August 2023, the Applicant expressed her intention to modify her rejoinder dated 21 July 2023.

37. On the same day, the Tribunal instructed the Applicant to do so by 11 August 2023.

38. On 9 August 2023, the Respondent filed his comments on the Applicant's rejoinder pursuant to Order No. 84 (GVA/2023).

39. On 10 August 2023, the Applicant filed comments complementing her rejoinder of 21 July 2023.

40. By Order No. 100 (GVA/2023) of 16 August 2023, the Tribunal instructed the parties to file their respective closing submission, which they did on 31 August 2023.

Consideration

41. The Respondent avers that the application is not receivable. In support of his submission, he specifically argues, *inter alia*, that the inclusion of the comments in the Applicant's Performance Document is not an administrative decision and therefore cannot be properly subject to challenge before the Tribunal under art. 2(1)(a) of its Statute.

42. The Applicant submits that the application is receivable *ratione materiae* because the comments of her SRO comments are unlawful.

43. The Tribunal recalls that art. 2(1)(a) of its Statute provides that:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non- compliance [.]

44. It follows that the key characteristic of an administrative decision subject to judicial review is that the decision must: produce direct legal consequences affecting a staff member's terms and conditions of appointment and have a direct impact on the terms of appointment or contract of employment of the individual staff member (see, e.g., *Lee* 2014-UNAT-481, para. 49).

45. "What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" (*Ngokeng* 2014-UNAT-460, para. 27).

46. In the context of performance management, sec. 15.1 of ST/AI/2021/4 provides that "[s]taff members who have received the rating of 'consistently exceeds performance expectations' or 'successfully meets performance

expectations' cannot initiate a rebuttal". Sec. 15.7 of the same administrative instruction provides that:

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

47. Therefore, a performance appraisal with a good final rating does not constitute an "administrative decision" able, by itself, to have a direct and negative impact on a staff member's rights. Accordingly, there is no legal basis pursuant to art. 2(1)(a) of the Tribunal's Statute for a staff member to file an application before the Tribunal in this respect (see *Handy* 2020-UNAT-1044, para. 33; *Staedtler* 2015-UNAT-546, para. 38; *Ngokeng*, para. 31).

48. Nevertheless, "when the reasoning detracts from the overall favourable conclusion, such as to affect the terms and conditions of the staff member's contract", the decision may become a reviewable one (see *Handy*, para. 34). As such, the decisive factor in determining whether a negative comment in a positive performance appraisal constitutes a reviewable administrative decision is the "direct legal consequences" flowing from that comment (see *Handy*, para. 34, 40; *Ngokeng*, para. 31).

49. In the instant case, the Applicant submits that direct legal consequences accrue because:

a. The SRO had no mandate or authority to conduct a separate performance assessment and to make comments on performance;

b. The comments themselves do act to detract from the overall satisfactory performance appraisal;

c. The SRO's comments contravene rights regarding filing of adverse material; and

d. The SRO's comments infringe on legal rights the Applicant has regarding free speech protections for staff representatives.

50. The Tribunal finds no merit in the Applicant's submissions for the following reasons.

51. First, the Tribunal considers that it is within the discretion of the Applicant's SRO to make comments on her performance. Under sec. 2.3(e) of ST/AI/2021/4, the purpose of the Performance Management and Development System is to "improve the delivery of programmes by optimizing individual performance at all levels", which it will achieve, *inter alia*, by "[r]ecognizing successful performance and addressing underperformance fairly and equitably".

52. Therefore, "making comments in an ePAS about the need for a staff member to improve performance in certain core values and competencies is an important tool for the managers to carry out their functions in the interest of the Organization and, hence, their willingness to do so need to be supported and boosted" (see *Handy*, para. 45). It represents a legitimate exercise of administrative hierarchy evaluating employees. Accordingly, the Applicant's SRO, in his capacity as one of her managers, is not legally barred from making comments on her performance in the Performance Document.

53. Second, having reviewed the Applicant's SRO's comments, the Tribunal does not find that they detract from the overall satisfactory performance appraisal. The Applicant's 2021-2022 Performance Document shows that while acknowledging her productivity and the quality of her work, as well as praising her efforts in gender parity and staff representation, the Applicant's SRO strongly encouraged her "to work on her communication skills and to make more genuine efforts to iron out her disagreements with other colleagues in a peaceful way".

54. A plain reading of the comments at issue does not support the Applicant's assertion that they detract from the FRO's overall satisfactory rating. Rather, the comments at issue are constructive, reasonable, and have been balanced by other comments that provide a positive perspective supporting the overall rating. This is in contrast with the *Handy* case, in which most of the comments by the FRO and

SRO were "profoundly negative" with approximately 56 lines of disparaging comments versus nine lines of positive remarks, notwithstanding the rating of "successfully meets performance expectations" (see *Handy*, para. 28).

55. Third, the Tribunal is not convinced by the Applicant's submission that the comments of her SRO contravene rights regarding filing of adverse material. The Applicant's SRO's comments, which the Tribunal qualified above as "constructive", do not in themselves constitute adverse material within the meaning of sec. 2 of ST/AI/292 (Filing of Adverse Material in Personnel Records) of 15 July 1982.

56. Sec. 2 of ST/AI/292 defines adverse material as "any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member". Thus, the term "adverse material" refers to an independent document instead of a portion of it. Accordingly, as an integral part of an overall positive performance appraisal, the comments of the Applicant's SRO cannot be examined independently from the rest of the document and, as such, they cannot be characterised as stand-alone adverse material.

57. The Tribunal further wishes to highlight that "not all narrative comments in a performance appraisal necessarily need to be positive to grant a 'successfully meet expectations' rating" (see *Handy*, para. 36). Therefore, reasonable and constructive comments do not render an overall positive performance appraisal adverse material under sec. 2 of ST/AI/292 either.

58. Even assuming, *arguendo*, that the comments of the SRO amount to adverse material, sec. 5 of ST/AI/292 suggests that all performance material is a matter of record governed by the performance management and development system, which is ST/AI/2021/4 in the instant case. While sec. 2 of ST/AI/292 gives a staff member an opportunity to make comments on adverse material prior to its inclusion in the personnel file, the current performance management and development system, governed by ST/AI/2021/4, does not provide a staff member with an opportunity to make observations on the comments of an SRO in a positive performance appraisal.

59. In this respect, the Tribunal recalls the principle of *lex posterior derogat legi priori* that "should there be an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier enactment and be held to have impliedly repealed the earlier enactment to the extent of the inconsistency" (see, e.g., *Lloret Alcañiz et al.* 2018-UNAT-840, para. 81). As such, to the extent of the inconsistency, preference must be given to ST/AI/2021/4.

60. Similarly, in line with the principle of *lex specialis derogat legi generali*, any normative conflict would have to be decided in favour of ST/AI/2021/4 as *lex speciali* in relation to performance material.

61. Finally, turning to the Applicant's submissions in relation to her status as a staff representative, the Tribunal finds that she has failed to demonstrate that the comments of her SRO infringe on her legal rights as a staff representative. Contrary to the Applicant's assertion, the Tribunal finds no evidence of retaliation due to her engaging in staff representation activities. The comments at issue are not retaliatory. Also, while little reference was made to emails that the Applicant sent in her capacity as a staff representative, the comments of her SRO are largely based on her performance of the functions of the post she encumbers.

62. There is also no merit in the Applicant's contention that her FRO and SRO have no competence to evaluate her functions as a staff representative. A staff representative is "under a special obligation not to abuse his/her rights by using expressions or resorting to behaviour incompatible with the decorum appropriate to his/her status both as an international civil servant and as an elected staff representative" (see *Arvizú Trevino* 2022-UNAT-1231, para. 66). Therefore, the fact that the Applicant serves as a staff representative does not exempt her from the obligations to communicate in a manner consistent with the communication competency as set forth in her workplan. In fact, pursuant to sec. 8.3 of ST/AI/2021/4, the Applicant's FRO may comment on her self-appraisal, which includes her performance as a staff representative.

63. Accordingly, the Applicant has not established any direct legal consequences resulting from her performance appraisal in question.

64. Having found no evidence of any direct legal consequences affecting the Applicant's terms and conditions of appointment stemming from the negative comments at issue, the Tribunal concludes that the comments in question do not constitute a reviewable administrative decision. As such, the Tribunal finds that the application is not receivable *ratione materiae*.

Conclusion

65. In view of the foregoing, the Tribunal DECIDES to reject the application as not receivable.

(*Signed*)
Judge Sun Xiangzhuang
Dated this 10th day of October 2023

Entered in the Register on this 10th day of October 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva